IN THE COURT OF APPEAL OF NEW ZEALAND

CA646/2016
[2017] NZCA 622

BETWEEN	JINYUE YOUNG Appellant
	HSIANG-FEN YING Second Appellant
AND	ZIE ZHANG Respondent

Hearing:	6 November 2017
Court:	Kós P, Courtney and Toogood JJ
Counsel:	Appellants in Person No appearance for Respondent
Judgment:	21 December 2017 at 11.00 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal against the refusal to set aside the consent order is dismissed.

C The appeal against the finding of contempt is dismissed.

D The appeal against the penalty is allowed. The penalty is quashed and a fine of $7,500 substituted.

E There is no order for costs.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] This appeal has its origins in a sale and purchase agreement that failed to settle. The vendor was King David Investments Ltd (KDIL), of which the second appellant, Ms Ying, was the sole director and shareholder. The purchaser was the respondent, Ms Zhang. The dispute was eventually settled and the terms of settlement recorded in a settlement agreement. The agreement required a consent order, which Duffy J made in a minute of 5 July 2016. The consent order required KDIL to transfer the property to Ms Zhang. Ms Ying and her husband, Mr Young, applied to set aside the consent order. By the time their application was heard KDIL had sold the property to a third party and was in liquidation.

[2] In the decision presently under appeal, Palmer J refused to set aside the consent order and imposed on Ms Ying a fine of $10,000 for contempt of court in breaching court orders.[1] Mr Young and Ms Ying appeal. The grounds of appeal against Palmer J's refusal to set aside the consent order are that the Judge erred in:

(a) disregarding the evidence that Ms Ying and Mr Young were affected by illness and exhaustion when they signed the settlement agreement;

(b) rejecting their evidence as to their misunderstanding of the settlement agreement; and

(c) treating their original defences to the claim for specific performance as having been superseded by the settlement agreement/consent order.

[3] Ms Ying's grounds of appeal against Palmer J's finding of contempt and imposition of a fine are that:

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1 *Zhang v King David Investments Ltd (in liq)* [2016] NZHC 3018 [Palmer J's judgment].

(a) Ms Ying was not bound by the order until she had been served with the sealed order and, had she been served with the order promptly, KDIL would not have sold the Hoteo Avenue property when it did;

(b) the order was ambiguous; and

(c) the penalty was inappropriate.

Background

[4] KDIL owned a residential property in Hoteo Avenue, Papatoetoe. It was subject to a mortgage in favour of Hong Kong Shanghai Banking Corporation Ltd (HSBC) as partial security for a loan of $880,000. On 14 April 2013 Ms Ying signed an agreement for sale and purchase under which KDIL agreed to sell the Hoteo Avenue property to Ms Zhang (the agreement). Mr Young also signed the agreement, although he was not a director of KDIL.

[5] Ms Ying and Mr Young regretted the decision to sell the Hoteo Avenue property and attempted to extract KDIL from the agreement. They maintain that KDIL subsequently offered to settle the sale but Ms Zhang failed to perform. That account seems unlikely because Ms Zhang eventually issued proceedings against KDIL for specific performance and against Mr Young for damages for interfering in the contract between her and KDIL. Ms Ying was not named as a party to that proceeding.

[6] KDIL was represented in the proceedings by Mr Duckworth. Mr Young, who is a practising solicitor, was unrepresented. The trial commenced on 4 July 2016. At the end of the first day Mr Duckworth was pessimistic. That night Ms Ying gave him written instructions as to the terms on which KDIL was prepared to settle, namely that it would perform the sale and purchase agreement but Ms Zhang had to pay penalty interest under the agreement and that each party would pay their own legal fees.

[7] The next day there were settlement negotiations which resulted in the parties signing a handwritten settlement agreement prepared by Ms Zhang's lawyer under which:

(a) KDIL would transfer the Hoteo Avenue property to Ms Zhang by 13 September 2016;

(b) KDIL would pay Ms Zhang $220,000 by way of set-off from the purchase price; and

(c) costs would lie where they fell.

The overall effect of the agreement was that KDIL would transfer the property in return for a net payment of $149,000 (already having received a deposit of $30,000). These terms were recorded in the consent order.

[8] For reasons that are not clear, Ms Zhang did not serve the sealed consent order on KDIL until 22 September 2016. Ms Ying and Mr Young ascribed some significance to this but, as we come to later, it is immaterial.

[9] In the months following the making of the consent order Ms Ying and Mr Young tried unsuccessfully to extract KDIL from the settlement agreement. They variously asserted that they had signed the settlement agreement in a state of illness and exhaustion, had not properly appreciated the contents of it, had been pressured, that the interpreter present had not accurately translated the document and that the terms of the agreement were not what they had agreed to. Ms Zhang did not accept that there was any ground on which to release KDIL from the agreement.

[10] On 12 July 2016 Mr Young and Ms Ying requested that the Chief High Court Judge arrange for their signatures to be withdrawn from the agreement and to continue the hearing. The Chief High Court Judge advised he could not do so.

[11] KDIL then took steps to divest itself of another property it owned, this one in Wintere Road, Papatoetoe. On 19 July 2016 it gifted that property to Ms Ying's and Mr Young's children. They, in turn, agreed to sell the property to a third party. Settlement was to be 10 October 2016.

[12] On 25 July 2016 Mr Young and KDIL applied to set aside the consent order. The application was not properly filed and so not acted on by the court.

[13] On 26 July 2016 KDIL applied for an order that the caveat initially lodged by Ms Zhang over the Hoteo Avenue property lapse. Ms Zhang, inexplicably, took no steps to oppose the application and the caveat lapsed.

[14] Having heard nothing in relation to the application to set aside the judgment, Mr Young and KDIL filed an appeal against the consent order. In a minute dated 29 August 2016 this Court advised that it did not have jurisdiction to consider the appeal and that the proper course was to apply to set the order aside.[2]

[15] The following day, 30 August 2016, KDIL sold the property to Topcut Property Ltd, a bona fide purchaser for value without notice of Ms Zhang's interest. The purchase price was $655,000 and the settlement date was 12 September 2016, the day before KDIL was required by the consent order to transfer the property to Ms Zhang. KDIL settled the sale to Topcut on 12 September 2016 and applied the proceeds to reduce the loan secured by way of the mortgage in favour of HSBC. On 13 September 2016 Ms Zhang's lawyer sent a notice to settle.

[16] On 11 November 2016 Ms Zhang applied without notice for:

(a) writs of arrest of Ms Ying and Mr Young and orders that they be held in contempt of court and be imprisoned until the proceeds of sale of the Hoteo Avenue property had been disgorged; and

(b) a freezing order over a property in Haseler Crescent, Howick, which was owned by Ms Ying's and Mr Young's trust, the Ying and Young Trust.

[17] The application was directed to be served on Mr Young and Ms Ying but they failed to appear at the call of the application on 26 September 2016. Instead, Ms Ying placed KDIL in liquidation that same day.

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2 *King David Investments Ltd v Zhang* [2016] NZCA 421.

[18] On 27 September 2017 Woodhouse J issued an interim freezing order over the Haseler Crescent property and directed Ms Ying and Mr Young to appear on 28 September 2016, otherwise writs of arrest would issue. Woodhouse J also subsequently froze KDIL's bank account.

[19] On 28 September 2016 Ms Zhang caveated the Wintere Road title. At the hearing of Ms Zhang's application for an order that the caveat not lapse, Toogood J made consent orders under which $550,000 from the proceeds of the sale of Wintere Road would be paid into Court and Ms Zhang's caveat would not lapse until she had withdrawn those funds.

[20] On 7 October 2016 Ms Ying and Mr Young applied to set aside the original consent order made by Duffy J, for leave to withdraw their consent, and to discharge the interim freezing order over the Haseler Crescent property.

The case in the High Court

[21] Ms Zhang's application for writs of arrest, a finding of contempt and a freezing order over Haseler Crescent were heard before Palmer J, together with Mr Young's and Ms Ying's application to set aside the consent order and discharge the interim freezing order over Haseler Crescent. The evidence was heard on 28 October 2016 and adjourned until 17 November 2016 for submissions.

[22] By the date of the hearing the parties were agreed that the consent order should be set aside, but for different reasons. Ms Zhang accepted that since the Hoteo Avenue property had been sold to a third party specific performance was no longer possible and it was therefore inappropriate for the consent order to remain. Ms Ying and Mr Young asserted that it should be set aside because it had been obtained improperly, when they were ill and exhausted, that the terms were contrary to the instructions given to Mr Duckworth, that the interpreter arranged by Ms Zhang had made errors, and that there were problems with the trial itself.

[23] Ms Ying and Mr Young both gave evidence. The Judge rejected all the grounds raised. Specifically, he found that:[3]

> (a) There is no independent evidence of the ill-health and exhaustion of Ms Ying and Mr Young and I do not regard their credibility as a safe basis on which to find they were sufficiently incapacitated to set aside the Consent Orders.
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> (b) There is no evidence that Ms Ying and Mr Young believed the character of what they were signing was different to what it was. Rather they appear to have been recklessly casual in signing it without ensuring they read it carefully or fully understood it. There is no evidence of duress, undue influence or unconscionability.
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> (c) Their potential defences to the original suit do not get around the fact that they agreed to the settlement, signed it and put it to the Court as the basis for Consent Orders.
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> (d) The complaints about the proceeding are not material and do not affect the validity of the Consent Orders.
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> (e) The alleged deficiencies in Ms Zhang's conduct of the proceedings, her interpreter and the Court transcript are not sufficient grounds to overturn Consent Orders.

[24] He considered that Ms Ying's and Mr Young's actions in entering into the settlement agreement and requesting orders from the High Court were casual to the point of recklessness.[4] That was particularly so in Mr Young's case as a person admitted as a barrister and solicitor. Ms Ying and Mr Young chose to enter into binding legal obligations upon which they sought the Court's agreement, only to subsequently decide they were dissatisfied with those obligations.

[25] On the issue of contempt, the Judge identified the essential elements for civil contempt: a clear and unambiguous order binding on the defendant of which the defendant had knowledge or proper notice; the defendant acted in breach of the terms of the order; and the defendant's conduct was deliberate in the sense that he or she deliberately or wilfully acted so as to breach the order.[5] The Judge concluded that:[6]

> I consider it is clear that Ms Ying committed a contempt of court. The terms of the Consent Orders which she signed required specific performance by transfer of the property by 13 September 2016. They were clear and

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3 Palmer J's judgment, above n 1, at [36].
4 At [37].
5 At [39(a)].
6 At [43].

> unambiguous and binding on Ms Ying. She certainly knew of them because she had tried to challenge them. I reject her proposition that she considered they were "pending" in some way. If she did consider that, it was not a reasonable belief to hold. Ms Ying also clearly acted in breach of the terms of the orders by selling the property to a third party so preventing herself from complying with the order. Her actions in doing so were deliberate. The elements of contempt are made out.

[26] It is evident that Ms Ying made a very poor impression on the Judge. In considering the appropriate response to Ms Ying's contempt he said:

> [52] Before the continuation of the hearing of this case on 17 November 2016 my preliminary indication was that Ms Ying's conduct did not warrant imprisonment but, rather, a warning that further contempt might do so. Her conduct at the 17 November hearing made that a close call. She has come close to talking herself into prison because of her attitude and further failing to observe my directions in addressing the Court. I do not accept her counsel, Mr Hurd's, valiant attempt to excuse her behaviour by suggesting his instructions were not clear enough.
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> [53] However, throughout all these events Ms Ying appears to have been particularly motivated by money. I consider a fine may be at least as, if not more, effective in bringing home to Ms Ying the requirement on a court order.

[27] After the trial, but before the Judge delivered his judgment, the sum of $550,000 was paid into court from the proceeds of the Wintere Road sale, as ordered by Toogood J via a minute.[7]

[28] Relevantly for present purposes, the Judge:[8]

(a) refused to set aside Duffy J's consent order but varied it to remove the obligation to transfer the Hoteo Avenue property and the associated orders relating to payment;

(b) ordered the Registry of the High Court pay Ms Zhang $506,000 from the funds paid into court at Toogood J's direction; and

(c) declared that Ms Ying had committed a contempt of court and ordered her to pay a fine of $10,000 to the High Court within 10 working days,

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7 See at [28].
8 At [54].

failing which she was to be imprisoned for 20 days or until the payment was made, whichever was earlier.

Appeal against refusal to set aside consent order

[29] Ms Ying and Mr Young devoted a substantial part of their submissions before this Court to showing that the underlying sale and purchase agreement between KDIL and Ms Zhang was invalid. However, that argument was superseded by the settlement and consent order. Only if the consent order was set aside could the validity of the original sale and purchase agreement be considered. We therefore decline to engage with the various arguments that were advanced to show that the original sale and purchase agreement was not valid. Instead, we confine ourselves to the grounds of appeal against the Judge's decision.

Finding as to ill health and exhaustion

[30] Ms Ying and Mr Young gave evidence before the Judge that they had endured a three-day delay in flying from China to Auckland, finally arriving on the night of 3 July 2016, the day before the hearing. They claimed to have been jetlagged and ill and that Mr Young was also suffering from the effects of a sleeping pill. The argument before us was that the Judge had erred in refusing to take account of the product information provided about the side effects of the sleeping pills that Mr Young had been prescribed.

[31] We do not accept that the Judge made any error in his approach to this issue. Litigants who claim to have been ill and exhausted when they executed a legal document do not have to call independent evidence to prove that fact. In the absence of such evidence, however, they are reliant entirely on whether the judge accepts the account they give. In this case, the Judge did not accept the account Mr Young and Ms Ying gave. That assessment was a matter for the Judge and there is no basis on which to interfere with it.

[32] Further, in a case of this kind one would ordinarily expect to hear evidence from the lawyer who acted for KDIL when the settlement agreement was entered into. When we raised this with Mr Young and Ms Ying they explained that they had made

unsuccessful attempts to locate Mr Duckworth. There was, however, no evidence of their efforts to locate him, not even evidence of their enquiries with the firm he was working for at the time. We are confident that if Mr Duckworth had been available and able to give helpful evidence, Mr Hurd would have ensured that he was called and if he was not available that his absence was explained. The fact that neither happened leads us to think that Mr Duckworth's account would not likely have assisted Mr Young and Ms Ying.

Settlement contrary to instructions

[33] The only difference between the instructions that Ms Ying had given to Mr Duckworth and the terms of the settlement agreement was the $220,000 described in the settlement agreement as a set-off against the purchase price. In the instructions that Ms Ying gave to Mr Duckworth she referred to the delayed settlement as being Ms Zhang's fault and "thus [Ms Zhang] should pay the … penalty". The instructions did not identify what the penalty interest amounted to. The $220,000 set off under the settlement agreement was not explicitly tagged as penalty interest and at the trial KDIL argued that on a proper interpretation of the sale and purchase agreement the purchaser could sue either for specific performance or damages in lieu but not both. It is not possible now to discern how that figure was arrived at.

[34] In any event, the real question is whether the terms of the settlement agreement were sufficiently clear that Ms Ying and Mr Young could reasonably be expected to have understood them. In argument before us they suggested that the handwritten agreement was too difficult to read and they could not understand it. They also suggested that the settlement agreement did not make it clear that the figure of $220,000 was being deducted further from the purchase price rather than added because in the handwritten agreement there was no minus sign in front of the $220,000 in the last line, making it unclear as to who should pay the $200,000.

[35] In fact, the original settlement agreement, still held on the High Court file, is not difficult to read and clearly shows a minus sign before the $220,000. Further, towards the end of the document there is a statement that makes it clear that Ms Zhang would be paying no more than $149,000 under the agreement. It is not tenable to

suggest KDIL could have misunderstood the terms of the agreement. There was no basis on which to impugn the settlement agreement itself.

Not taking account of potential defences to the original claim for specific performance

[36] Ms Ying and Mr Young argue that the Judge was wrong to ignore the defences they raised to Ms Zhang's claim for specific performance. Their submission was that the validity of the underlying sale and purchase agreement was at the core of the consent order and if that contract was not binding then nor could the settlement agreement be binding. We have already indicated our view on this. Ms Ying and Mr Young could not impugn the underlying sale and purchase agreement unless they could show that there were grounds for setting aside the consent order. Any problems in the sale and purchase agreement would have no relevance if the consent order was valid. We are satisfied that the Judge's assessment of the circumstances in which the consent order were made were correct; there are no grounds on which to impugn that order and therefore no grounds on which to reopen issues relating to the underlying sale and purchase agreement.

Appeal against finding of contempt and penalty

Grounds of appeal argued

[37] Ms Ying argued, first, that the terms of the consent order were not clear and that there was a difference between the handwritten agreement that formed the basis of the consent order and the consent order itself. We have already rejected this argument. In any event, the terms of the agreement are not relevant to the contempt issue; the terms of the consent order are completely clear and unambiguous and it is not open to a party charged with contempt to assert that the order is invalid.[9]

[38] Ms Ying's second argument was that she was not bound by the consent order when KDIL sold the Hoteo Avenue property to Topcut because she had not been served with the sealed order and because the consent order reserved leave for the parties to seek further directions. This argument is untenable. As a matter of law, orders are

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9 *Solicitor-General v Krieger* [2014] NZHC 172 at [20].

effective from the time they are made, and Ms Ying clearly had notice of the consent order.[10]

[39] However, Ms Ying's contention that she was not bound by the order is correct and this raises an issue that was not identified in argument. We address this aspect of the appeal now on a different basis.

The basis for the contempt finding and its consequences for this appeal

[40] The Judge found that Ms Ying was guilty of contempt because she had breached the consent order. But, although (as we discuss later) Ms Ying's conduct justified a finding of contempt, the factual basis relied on by the Judge was not available because the consent order bound only KDIL:

> The Court orders the first defendant to pay the plaintiff NZ$220,000 all inclusive of damages, costs and disbursements. This will be done by way of set-off meaning:
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> (a) the sale price is $399,000;
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> (b) less $30,000 deposit paid on 23 April 2013,
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> such that the amount the plaintiff will pay the first defendant on settlement of the property shall be the sum of $149,000 net (being $399,000 minus $30,000 and minus $220,000).

[41] Disobedience of a court order or undertaking by a party to litigation constitutes a civil contempt, the sanction for which is generally coercive or remedial, imposed to secure compliance with the order breached.[11] But Ms Ying was not a party to the proceeding when the consent order was made,[12] and the consent order only imposed obligations on KDIL. It was, therefore, KDIL alone that acted in breach of the consent order.

[42] Nevertheless, because Ms Ying's actions caused KDIL to breach the consent order she could still have committed a contempt, though criminal in character. Criminal contempt is any act that threatens or interferes with the administration of

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10 *Re Red Robin Milk Bar Ltd* [1968] NZLR 28 (SC) at 29.

11 *Siemer v Solicitor General* [2009] NZCA 62, [2009] 2 NZLR 556. See also *Jennison v Baker* [1972] 1 QB 52 (CA).

12 Only KDIL and Mr Young were named defendants. After Woodhouse J directed on 26 September 2016 that Ms Ying be served she appeared in the intituling as an interested party but was not joined as a party until the appeal was lodged following an order made in this Court: see *Young v Zhang* [2017] NZCA 37 at [10].

justice and the sanction is punitive, imposed without regard to whether the contemnor ultimately complies with the order.[13] A person who aids and abets the breach of a court order is guilty of criminal contempt (even though the principal contemnor would be guilty of civil contempt).[14] This includes a director not bound by an order against the company.[15]

[43] Although the Judge erroneously treated Ms Ying's conduct as a civil contempt, his finding of contempt was necessarily one of criminal contempt, that being the only form of contempt that could have resulted from Ms Ying's actions. The fact that her conduct arose in the context of the civil proceedings brought by Ms Zhang did not preclude a finding of contempt or Ms Zhang's application being used as the premise for the finding.[16] But, although the distinction between civil and criminal contempt is increasingly viewed as unsupportable given that both types of contempt are concerned with the undermining of the administration of justice,[17] the distinction is relevant in this case because it determines how this appeal should be dealt with.

[44] Under s 260 of the Criminal Procedure Act 2011 (CPA) a person found guilty of a criminal contempt may appeal against both the finding of contempt and the sentence imposed. Section 263 requires an appeal against a finding of contempt to be determined as if the finding were an appeal against conviction under the CPA. The usual procedural requirements for such appeals apply. Although Ms Ying's appeal was brought in the form of a civil appeal we nevertheless treated it as having been properly brought under the CPA.

[45] The correct approach to Ms Ying's appeal against the contempt finding is therefore that prescribed by paras 232(2)(b) and (c) of the CPA: the first appeal court must allow the appeal if it is satisfied that the judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred or that for any other reason a miscarriage has occurred. A miscarriage of justice means any error,

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13 Patricia Londono (ed) *Arlidge, Eady & Smith on Contempt* (5th ed, Sweet & Maxwell, London, 2017) at 3-1.

14 At 3-130; *Attorney-General v Newspaper Publishing plc* [1988] Ch 333 (CA); and *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191 (HL) at 217–218 per Lord Oliver.

15 Londono, above n 13, at 12-124.

16 *Taylor Bros Ltd v Taylors Textile Services (Auckland) Ltd* (1988) 1 PRNZ 495 (HC) at 505.

17 *Solicitor-General v Krieger*, above n 9, at [24]–[26]. See also Law Commission *Reforming the Law of Contempt of Court: A Modern Statute* (NZLC R140, 2017) at 5.26–5.29.

irregularity, or occurrence in or in relation to or affecting the trial that has created a real risk that the outcome of the trial was affected or that has resulted in an unfair trial or a trial that was a nullity.[18]

Error by the Judge and/or miscarriage of justice?

[46] Ms Zhang's application sought, among other things, an order that Ms Ying be imprisoned:

> That a writ of arrest issue against Mrs Hsiang-Fen (aka Murinda) Ying (director of the first defendant) and/or the second defendant and they be held in contempt of Court *and imprisoned until such time as they disgorge the proceeds of the conveyancing* in relation to the 12 September 2016 transfer instrument No. 10560349.2 conveying NA57D/560,48C Hoteo Avenue Papatoetoe from King David Investments Ltd to Topcut Property Ltd (hereinafter the "conveyance").
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> (Our emphasis.)

[47] An allegation of contempt that has the potential to lead to imprisonment engages the criminal law protections in the New Zealand Bill of Rights Act 1990 (NZBORA).[19] In this case Ms Ying was certainly exposed to that risk. Although the application only sought imprisonment "until such time as they disgorge the proceeds of the conveyancing"[20] and the proceeds of the sale of the Hoteo Avenue property were effectively disgorged through the disgorgement of the Wintere Road proceeds, Ms Ying was still at risk of being imprisoned in any event. Indeed, the order was framed so that Ms Ying would be imprisoned if she failed to pay the maximum fine.

[48] In these circumstances Ms Ying had the right to assert the privilege against self-incrimination, which attaches in cases of both civil and criminal contempt.[21] But Ms Ying was not warned of the risk of self-incrimination as required by s 62(1) of the Evidence Act 2006, even during the Judge's own questions, which were specifically

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18 Criminal Procedure Act 2011, s 232(4).

19 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [16] per McGrath J.

20 These words clearly relate to both the writ of arrest (sought under r 17 of the High Court Rules) and the order that the defendants be held in contempt of court (which would be made in exercise of the Court's inherent jurisdiction).

21 *Siemer v Stiassny* [2007] NZCA 117, [2008] 1 NZLR 150 at [11]*; Siemer v Solicitor General*, above n 19, at [33]; Londono, above n 13, at 3-39; and *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67 (CA).

directed towards her understanding of the status of the consent order and the obligation to comply with court orders.

[49] Section 62(1) does not provide any remedy for failure to give the required warning. Commentary suggests that if the privilege holder is not made aware of the privilege and its effect and proceeds to incriminate himself or herself, it is likely that in any subsequent criminal proceedings an argument could be advanced to exclude the self-incriminatory evidence as improperly obtained under s 30(5)(c).[22] However, s 30 applies only to criminal proceedings. The proceedings in which the finding of contempt here was made were civil proceedings. Nevertheless, we consider this is a case of the kind described in *Queen Street Backpackers Ltd v Commerce Commission* in which the High Court could have exercised its inherent jurisdiction to exclude the evidence as having been unfairly obtained.[23]

[50] *Queen Street Backpackers Ltd* concerned civil proceedings brought by the Commerce Commission seeking penalties for price fixing. The appellants had sought to exclude evidence of a recorded conversation on the ground it had been unfairly obtained. The Commerce Commission maintained that the proceedings were civil in nature but conceded that there was a sufficient analogy with criminal proceedings to permit the exclusion of improperly obtained evidence. Recording that concession, Casey J observed that:[24]

> We are satisfied this concession was rightly made, and that there is a discretion to exclude evidence that has been unfairly obtained, in the sense understood in criminal matters. What is unfair will depend on the circumstances of each case …

[51] Section 30 has not affected this position. Section 11(1) of the Evidence Act provides that:

> The inherent and implied powers of a court are not affected by this Act, except to the extent that this Act provides otherwise.

[52] In *Marwood v Commissioner of Police* the Supreme Court held that in civil proceedings brought by the Commissioner of Police under the Criminal Proceeds

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22 Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [EA62.01].
23 *Queen Street Backpackers Ltd v Commerce Commission* [1994] 2 HRNZ 94 (CA) at 96–97.
24 At 97.

(Recovery) Act 2009, evidence obtained in breach of the NZBORA could be excluded, notwithstanding the limited scope of s 30 of the Evidence Act.[25] Elias CJ, pointing out that s 30 does not explicitly or directly oust the powers of the court to exclude improperly obtained evidence in civil proceedings, said:

> [61] The only modification of the inherent and implied powers preserved by s 11 is that they must be exercised to "have regard to the purpose of principles set out in ss 6, 7 and 8" of the Evidence Act. The requirement to "have regard to" does not suggest that the power to exclude evidence which is relevant and not "unfairly prejudicial" is removed, as is the effect of the argument for the Commissioner. Section 6 provides that one of the purposes of the Act is that rules of evidence are to "recognise the importance of the rights affirmed by the [NZBORA]". The courts, which are bound by s 3 of the [NZBORA] to give effect to it, are not precluded from excluding evidence for breach of the [NZBORA], if that course is appropriate to meet the impropriety. …
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> [62] Exclusion of evidence, in the inherent or implied power of the courts to control its proceedings, may provide a remedy for breach to the individual rights-holder. It is also however a response that may be required by s 3 of the [NZBORA]. Whether evidence should be excluded depends on contextual assessment in the circumstances of the particular case.

[53] The evidence on the contempt issue came in the form of affidavits by Ms Zhang producing documents relating to the sale of the Hoteo Avenue property to Topcut and subsequent liquidation of KDIL and affidavits from Mr Young and Ms Ying. No issue as to exclusion arises in relation to this evidence; the production of affidavits at the pre-trial stage did not engage s 62 of the Evidence Act.

[54] In her evidence-in-chief, which was very brief, Ms Ying explained why she had resolved to put KDIL into liquidation and in doing so made inculpatory statements. She was then subjected to lengthy cross-examination by Ms Zhang's counsel, Mr Deliu. Throughout the cross-examination Ms Ying consistently denied any wrongdoing, though her explanations were wholly unconvincing to explain the coincidences of timing in relation to the making of the consent order, dismissal of her appeal, sale of the Hoteo Avenue property to Topcut and the liquidation of KDIL. It is evident from the Judge's decision that these answers, though ostensibly exculpatory, were, in fact, significantly damaging to her.

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[25] *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260.

[55] At the conclusion of cross-examination, the Judge himself embarked on a series of questions directed towards Ms Ying's understanding of the effect of the consent order. The Judge subsequently rejected the explanation she gave. Again, although apparently exculpatory, Ms Ying did herself no favours in her responses to the Judge's questioning.

[56] We do not think it necessary to embark on a minute analysis of Ms Ying's evidence in court because, even taking the most favourable view by considering the case against her without taking any of her evidence into account, we are satisfied that the Judge was right to find her in contempt.

[57] Documents produced at trial show Ms Ying to have been the sole shareholder and director of KDIL, which Ms Ying confirmed in her affidavit of 26 September 2016. Other documents make it clear that Ms Ying made the decision that KDIL would sell the Hoteo Avenue property and that she made the decision to place the company in liquidation. For example, a memorandum dated 26 September 2016 filed in the High Court proceedings and signed by Ms Ying and Mr Young personally said:

> I sold the property before I received the sealed Consent Order on 22 September 2016 and the proceeds were paid back to the bank/mortgage.
>
> Had I sold the property after receiving the sealed Consent Order, it would be interpreted as contempt of court but I sold it before receiving the sealed Order …
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> I am obliged to protect the asset of my company …
>
> I have applied to liquidate my company to stop legal proceedings under s 247 of the Company [sic] Act.

[58] These facts, Ms Ying's statement and the chronology make for the inescapable conclusion that Ms Ying deliberately sold the property to Topcut to prevent KDIL from complying with the consent order. Whether her intention was to flout the consent order or simply protect KDIL's assets does not matter. The mens rea element of criminal contempt is satisfied by proof that the defendant knowingly carried out the act or was responsible for the conduct in question.[26] It follows that, notwithstanding that Ms Ying was not warned of her right to exercise the privilege against self-

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[26] *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 55.

incrimination, no miscarriage of justice occurred. A finding of contempt would have been inevitable even if Ms Ying had exercised her right to say nothing in response to the various questions asked of her.

[59] The only remaining issue is the level of the fine imposed. The Judge did not explain how he reached the figure of $10,000. The level of fine seems somewhat high in comparison with other similar cases. Over the last decade fines imposed for contempt have generally ranged between $5,000 and $25,000 but fines in the higher range, $10,000 and above, have tended to be reserved for cases involving serious and sustained breaches of injunction.[27] Ms Ying's conduct cannot be characterised in that way. Her contempt was the single act of procuring the sale to Topcut. Her other conduct, such as the liquidation of KDIL, was not a direct breach of the consent order. We also have the impression, from the Judge's comments,[28] that Ms Ying's conduct during the course of the trial contributed to his assessment as to the level of fine imposed.

[60] For these reasons we consider that the fine should be reduced and that $7,500 is an appropriate figure.

Result

[61] The appeal against the refusal to set aside the consent order is dismissed.

[62] The appeal against the finding of contempt is dismissed.

[63] The appeal against the penalty imposed is allowed. The penalty is quashed and a fine of $7,500 substituted.

[64] Mr Young and Ms Ying were unrepresented and Ms Zhang did not take any steps in the appeal. No issue arises as to costs.

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27 See for example, *Director of the Land Transport Safety Authority v McNeil* HC Auckland M509-IM/99, 9 March 2001; and *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 16 March 2006. Compare *Bowie v Weyburne* [2013] NZHC 1728; and *Solicitor-General v Krieger*, above n 9.

28 Palmer J's judgment, above n 1, at [52].

Addendum

[65] This judgment was set down to be delivered on 21 December 2017. On 20 December the appellants filed a memorandum seeking to adduce further evidence, namely correspondence with the Court Registry regarding the hearing before Duffy J in July 2016 and statements made by Mr Duckworth and Mr Deliu during the recent hearing before the Lawyers and Conveyancers Disciplinary Tribunal regarding charges of misconduct against Mr Young. A copy of the full transcript from that hearing held was provided.

[66] It appears that the application was prompted mainly by Mr Duckworth's appearance as a witness before the Tribunal. At the hearing of the appeal, we enquired as to why Mr Duckworth had not been called to give evidence at the trial before Palmer J, since he could have been expected to have provided first hand evidence of Mr Young's and Ms Ying's physical state to support their claim of being ill and exhausted. Mr Duckworth's evidence before the Tribunal whilst fresh, is not cogent because it does not address that issue. Nor does it support their explanation that Mr Duckworth had not been called because they had been unable to locate him.

[67] To the extent that Mr Young and Ms Ying seek to make further submissions directed at impugning the settlement agreement based on other statements by Mr Duckworth and by Mr Deliu, the material does not add anything to the existing case.

[68] The application for leave to adduce further evidence is therefore declined.