CITATION:	*Registrar of the Supreme Court (NT) v Nationwide News Pty Ltd & Anor* [2018] NTSC 22
PARTIES:	THE QUEEN v NATIONWIDE NEWS PTY LTD (ABN 98 008 438 828) and CRAIG DUNLOP ON THE APPLICATION of the Registrar of the Supreme Court of the Northern Territory
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	51 of 2017 (21728844)
DELIVERED ON:	29 March 2018
DELIVERED AT:	Darwin
HEARING DATE:	30 August 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

PROCEDURE – SUPREME COURT PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION

Application by Registrar for punishment of a contempt – alleged breach of conditions imposed on the grant of access to an exhibit – a breach of prescribed judicial process may, depending upon the facts and circumstances, found a liability in contempt – the conditions on which access and copying was permitted were cast in sufficiently clear and unambiguous terms – publication as part of the subscriber-only content of the *NT News* website was in breach of those terms – no direct evidence and no inference available that second respondent involved in publication of the CCTV footage on the website – not possible to be satisfied to the requisite standard that the servant or agent of the first respondent published the material in full knowledge of the conditions – not possible to be satisfied that the actions of the servant or agent may be attributed to the first respondent – not possible to be satisfied that the second respondent's knowledge may be attributed to the first respondent – application dismissed.

Criminal Code Act (NT), s 8
Evidence Act (NT) s 57
Supreme Court Act (NT) s 72
Supreme Court Rules (NT) r 28.05, r 75.05, r 75.06, r 75.07, r 75.11, r 75.14, r 81A.09, r 81A.31, r 81A.32, r 81A.33, r 81A.39

AM v Department of Community Services (DOCS); ex parte Nationwide News Pty Ltd (2008) 6 DCLR (NSW) 329, *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342, *Attorney-General (UK) v Leveller Magazine Ltd* [1979] AC 440, *Attorney-General (UK) v News Group Newspapers plc* [1989] QB 110, *Attorney-General (UK) v Times Newspapers Ltd* [1954) AC 273, *Attorney-General (UK) v Times Newspapers Ltd* [1992] 1 AC 191, *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 107, *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483, *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 3)* (2002) FCA 609, *Australian Securities and Investments Commission v Rich* (2001) 51 NSWLR 643, *British American Tobacco Australia Services Ltd v Cowell (representing the Estate of McCabe (deceased)) (No 2)* (2003) 8 VR 571, *Brown v Health Services Union* (No 4) [2012] FCA 1376, *Caroona Coal Action Group Ltd v Coalmines Australia Ltd (No 4)* [2010] NSWLEC 91, *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375; *Construction, Forestry,*

Mining and Energy Union v Grocon [2014] VSCA 261, *David Syme & Co Ltd v General Motors Holden Ltd* [1984] NSWLR 294, *Dobson v Hastings* [1992] Ch 394, *Director of Public Prosecutions (NSW) v Chidiac* (1991) 25 NSWLR 372, *Dyers v The Queen* (2002) 210 CLR 285, *Hearne v Street* (2008) 235 CLR 125, *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118, *Herald and Weekly Times Ltd v The Magistrates Court of Victoria* (2000) 2 VR 346, *Jagelman v Sheahan (in liq of Mooge Ltd (in liq))* (2002) 41 ACSR 487, *John Fairfax Publications Pty Ltd v District Court (NSW)* (Unreported, NSWCA, 15 September 2004), *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, *Jones v Australian Competition and Consumer Commission* (2010) 189 FCR 390, *Lade & Co Pty Ltd v Black* (2006) 2 Qd R 531, *Lane v Registrar of Supreme Court (NSW)* (1981) 148 CLR 245, *Nicholson v Morgan* [2012] WASC 65, *R v Benbrika (No 26)* [2008] VSC 452, *R v Davis* [1995] FCA 1321, *R v Denbigh Justices; Ex parte Williams* [1974] QB 759, *R v Elomar (No 3)* [2008] NSWSC 1443, *R v Jovanovic* [2014] ACTSC 98, *R v LMW* [1999] NSWSC 1111, *R v Macdonald* [1994] 1 VR 414, *R v RIK* [2004] NSWSC 75, *R v Waterfield* [1975] 1 WLR 711, *R v Xu (No 1)* (2005) 152 A Crim R 17, *Robowash Pty Ltd v Robowash Finance Pty Ltd* (2000) 158 FLR 338, *RPS v The Queen* (2000) 199 CLR 620, *SmithKline Beecham Biologicals Special Advocate v Connaught Laboratories Inc* [1999] 4 All ER 498, *Trade Practices Commission v CG Smith Pty Ltd* (1978) 30 FLR 368, *Windsurfing International Inc v Sailboards Australia Pty Ltd* (1986) 19 FCR 110, *Witham v Holloway* (1995) 183 CLR 525, referred to.

REPRESENTATION:

Counsel:

Applicant:	T Anderson
Respondents:	W Roper

Solicitors:

Applicant:	Solicitor for the Northern Territory
Respondents:	HWL Ebsworth Lawyers

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Registrar of the Supreme Court (NT) v Nationwide News Pty Ltd & Anor [2018] NTSC 22
No 51 of 2017 (21728844)

BETWEEN:

THE QUEEN

AND:

NATIONWIDE NEWS PTY LTD (ABN 98 008 438 828)
First Respondent

AND:

CRAIG DUNLOP
Second Respondent

ON THE APPLICATION OF THE REGISTRAR OF THE SUPREME COURT OF THE NORTHERN TERRITORY

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 29 March 2018)

[1] This is an application made by the Registrar pursuant to Order 75 of the *Supreme Court Rules* (NT) for the punishment of a contempt.

[2] The relevant application and procedure provisions of the *Supreme Court Rules* provide:

75.05 Application

(1) This Part applies to:

(a) contempt of court committed in the face of the Court;

(b) any other contempt of the Court; and

(c) contempt of an inferior court.

(2) In the case of contempt of court committed in the face of the Court, the procedure under this Part is alternative to that under Part 2.

75.06 Procedure

(1) Application for punishment for the contempt shall be by summons or originating motion in accordance with this rule.

(2) Where the contempt is committed by a party in relation to a proceeding in the Court, the application shall be made by summons in the proceeding.

(3) Where subrule (2) does not apply, the application shall be made by originating motion which:

(a) shall be entitled "The Queen v." the respondent, "on the application of" the applicant; and

(b) shall require the respondent to attend before a Judge.

(4) The summons or originating motion shall specify the contempt with which the respondent is charged.

(5) The summons or originating motion and a copy of every affidavit shall be served personally on the respondent, unless the Court otherwise orders.

The specification of the contempt

[3] The application is made by originating motion filed on 16 June 2017.

The originating motion specifies the contempt in the following terms:

2. On 9 March 2017 the second respondent, a journalist employed by the first respondent, made an application on behalf of himself and the first respondent for access to a Court exhibit held on court file number 21655587 (*The Queen v Shane Liam Hitchcock*) pursuant to Practice Direction No 2 of 2010. The exhibit was CCTV footage of the commission of the offence before the Court.

3. The application was conditionally granted by Justice Kelly. The relevant condition was that the CCTV footage was not to be published on the internet (**the condition**).

4. Upon the acceptance of the condition by the second respondent, he was given a copy of the CCTV footage on 9 March 2017.

5. In breach of the condition, on 10 March 2017 the first respondent published the CCTV footage on the internet via the *NT News* subscriber website.

6. The second respondent aided, abetted or otherwise assisted the first respondent in its publication of the CCTV footage on the internet via the *NT News* subscriber website.

7. In all the circumstances, the breach of the condition by publication of the CCTV footage on the internet constituted an interference in the administration of justice amounting to a contempt of court.

The facts

[4] The primary facts are not in dispute, although, as is discussed further below, there is some dispute as to the inferences that may properly be drawn from the primary facts. No objection was made to the reading of the affidavits by which those primary facts were proved.[1]

[5] The matter of *The Queen v Shane Liam Hitchcock* was listed before this Court for sentence on 9 March 2017. On that day the Registrar received an application for access to CCTV footage that had been played in evidence during the course of the sentencing proceedings. That application was made by *Nine News*. The Registrar referred the application to the presiding judge's Associate.

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1 Affidavits of Sarah Jayne Milligan made on 14 June 2017 and Daniel Law McGregor made on 20 June 2017.

[6] The presiding judge authorised access by *Nine News* to the CCTV footage subject to written conditions attached to the authorisation.

[7] On the afternoon of 9 March 2017, the second respondent made an application for access to the same CCTV footage and to a photograph of the victim taken following the assault in question. That subsequent application was received by the Sheriff of the Supreme Court. The Sheriff was aware of the application previously been made by *Nine News*, and of the conditions which had been imposed on the grant of that application.

[8] On receipt of the application by the second respondent the Sheriff took it to the presiding judge's Associate. The presiding judge also authorised access by the *NT News* to the CCTV footage subject to written conditions attached to the authorisation. The application for access to the photograph of the victim was refused.

[9] At approximately 4.50 p.m. on the afternoon of 9 March 2017 the Sheriff advised the second respondent that the presiding judge had authorised access to the CCTV footage on conditions, and that the application for access to the photograph of the victim had been refused.

[10] The Sheriff showed the second respondent the document setting out the conditions on which access to the CCTV footage had been granted. The second respondent said to the Sherriff words the effect that he had not previously seen conditions imposed on the release of an exhibit.

The Sheriff requested the second respondent to sign the document acknowledging the conditions on which the CCTV footage was to be released. The second respondent read the document and signed it. The second respondent did not ask for any interpretation or clarification of the contents of the document. The second respondent's endorsement on the document was witnessed by the Sheriff.

[11] That document provided in its entirety:

> **Application to broadcast CCTV footage**
>
> Permission is granted to NT News [Craig Dunlop] to broadcast CCTV footage, Exhibit P2 in the sentencing hearing of Shane Hitchcock on the following conditions.
>
> 1. The CCTV footage may be used for print media on 10 March 2017 only.
> 2. The CCTV footage is not to be published on the internet.
> 3. Further broadcast or dissemination of this CCTV footage by NT News is prohibited without the permission of the Northern Territory Supreme Court.
> 4. The following should be broadcast with the permitted material:
>
>   "Further broadcast or dissemination of this CCTV footage by any person or organisation is prohibited without the permission of the Northern Territory Supreme Court."

[12] The Sheriff then took a photocopy of the signed document, gave the copy to the second respondent and placed the original onto the court file. A registry officer gave the second respondent a USB storage device containing a copy of the CCTV footage at 4.57 p.m. on 9 March 2017.

[13] On 10 March 2017 the Registrar was advised that the *NT News* had published the CCTV footage on its website. The Registrar and the Sheriff went to the *NT News* website. The public access content of the *NT News* website displayed a still image from the CCTV footage and part of a story concerning the sentencing proceedings from the previous day. Access to the full story and the CCTV footage was restricted by a paywall. That footage was apparently available to view within the subscriber-only content of the *NT News* website.

[14] The Registrar then logged onto the *NT News* subscriber webpage and saw that the CCTV footage was accessible in the context of a story under the byline of the second respondent. That story was titled *'Coward Punch' attack in Darwin CBD lands 'cleanskin' in gaol for nine months*. The CCTV footage was able to be played on the subscriber webpage. It comprised a 45 second clip which depicted the offender approaching a group of four people and striking the victim without warning, the victim falling to the ground and lying motionless, and the offender walking quickly away from the scene of the attack. The caption at the bottom of the footage read, "CCTV footage shows Shane Liam Hitchcock punching Rhys White on the corner of Knuckey and Smith Streets on December 3, 2016. Vision. NT Police."

[15] In addition to posting the CCTV footage on the subscriber-only website, on 10 March 2017 the print edition of the *NT News* published still images from the CCTV footage in a manner consistent with the

first condition. However, the main still image reproduced in the print edition of the newspaper was endorsed with the words "Video online ntnews.com.au". That was obviously a reference to the posting of the CCTV footage on the *NT News* website.

[16] The Registrar sent an email to the second respondent at 4.41 p.m. on 10 March 2017 requesting that the CCTV footage be removed immediately, and seeking reasons why she should not commence proceedings for contempt. The Registrar made further access to the subscriber-only content of the *NT News* website at approximately 5.30 p.m. on 10 March 2017 and confirmed that the CCTV footage had been taken down.

[17] It is common ground that the CCTV footage was posted on the *NT News* website at or about midnight on 9 March 2017 and that it was taken down at or about 5 p.m. on 10 March 2017.

[18] The Registrar received an email from the National Editorial Counsel of News Corp Australia at approximately 10 p.m. on 14 March 2017 attaching a response to the email sent to the second respondent on 10 March 2017. Omitting formal parts, that response provided:

> I am advised that upon receipt of your email my client removed from the internet the CCTV footage in question.
>
> I am advised that the decision to publish the footage was made in consideration of the following factors:
>
> - The CCTV footage was published online after Mr Hitchcock had been sentenced at a time when the sub judice period in

relation to his charges had concluded. There was no risk to Mr Hitchcock's right to a fair trial incurred by communication of the CCTV footage.

- The CCTV footage in question was tendered and played in open court and consequently comprises part of a fair and accurate report of the proceedings.
- While the CCTV footage in question was supplied to the *NT News* by the Court my client was aware that the same footage was in the possession of at least one other source other than the Court.
- *NT News* did not communicate the footage merely for the prurient interest of online readers. The assault in question concerned what has come to be described as a "coward punch", namely a blow for which the victim is an entirely unprepared. My client submits that the CCTV footage allows the public to understand why the Supreme Court takes these types of offences so seriously and how the sentencing of Mr Hitchcock in this case – a man with no prior criminal record – is entirely appropriate in the circumstances.
- As noted by Her Honour in sentencing Mr Hitchcock, coward punch assaults have become unfortunately common. Her Honour stated, inter alia, that Mr Hitchcock could not be ignorant of the injuries that single-punch attacks can cause given the attention such assaults have received in the media.
- In the last six months the *NT News* has published a number of reports about similar incidents including:
    - "Sentence Sparks outcry", 18/1/2017: a female police officer was allegedly coward punched while attending a domestic disturbance on or about 17 January 2017 by a 27-year-old man who had previously punched a male police officer;
    - "Man stabbed in arm at Darwin 'escort' lounge", 20/12/2016: on or about 18 December 2016, two men in the [sic] thirties were charged following an alleged coward punch attack outside Smith Street McDonalds in which a 39-year-old man was knocked to the ground unconscious;
    - "No bail for bash accused", 30/11/2016: in November 2016, a man attempting to break up a fight in Stuart Park was allegedly coward punched so severely that he required emergency surgery to correct bleeding on the brain; and

- “Copping it not sweet”, 30/10/2016: Constable Nick Carter was left with cuts and a black eye after allegedly being coward punched while attempting to make an arrest outside Monsoons nightclub. The force of the blow was such that the officer cannot recollect it or the seconds after the attack.

Despite this level of repeated publicity, coward punch assaults continue to occur. The CCTV footage and Mr Hitchcock’s case was a rare opportunity for *NT News* to make a complete report about the social problem and my client submits it was published entirely in the public interest.

My client, as publisher of the largest circulation newspaper in the Northern Territory, is keenly aware of the importance of reporting court matters fairly and accurately. Hundreds of court reports are published each year. We are not aware of any incident in recent years that has similarly drawn the attention of the Court.

Editorial staffers are provided with training and media law issues, including the laws of contempt, on an annual basis. As a result of this event, my client undertakes to give all reporting staff a refresher course in the laws of contempt.

In the circumstances, my client respectfully submits that the complaint should not be referred for consideration of a contempt prosecution.

Applications for access to exhibits

[19] As is apparent from those uncontested facts, this case involves an alleged breach of conditions imposed on the grant of access to an exhibit received into evidence during the course of proceedings. In order to put that allegation into context it is necessary to give some preliminary attention to the purpose for which access is granted, the considerations taken into account in determining whether or not to grant access, and the reasons why conditions or restrictions may on occasion be placed on the use to which those materials, if released, may be put.

[20] A superior court of record has power to permit members of the public and media to have access to exhibits and court records, and a duty to act judicially in determining requests for access. Without that power, and without the grant of access in appropriate circumstances, the reporting of proceedings might in some circumstances be impaired in a manner inconsistent with the principle of open justice. However, in this jurisdiction there is no common law or statutory right to such access.[2] As the United Kingdom Court of Appeal has observed concerning the traditional position at common law:

> When evidence is given orally, all in court hear what is said. When written evidence is produced it may or may not be read out. In most cases part of what is written is read out, but not the whole. When a piece of real evidence is produced a witness has to say from where it came. This having been done, the jury looks at the exhibit. Usually the judge does too and counsel in the case may do so. The exhibit, however, is not shown to other persons who may be in court. They may be able to see what the article is: it may be a pistol or a knife. Sometimes they cannot; and if what is produced is a folder containing photographs (a common form of exhibit) they will not know what the photographs show unless either the judge, counsel or a witness describes them ... The members of the public in court have no right to claim to be allowed to look at the exhibits. A film put in evidence has to be looked at by a jury and a screen and a projector are necessary to enable them to do so.

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2 Rule 28.05 of the *Supreme Court Rules* permits a party to inspect and obtain a copy of a document filed in a civil proceeding, subject to orders concerning confidentiality. Rule 81A.09 of the *Supreme Court Rules*, in conjunction with r 81A.39, permits a party to inspect and obtain a copy of a document filed in a criminal proceeding that is part of the record of proceedings of a trial. The record of the proceedings of a trial consists of the indictment, the official tape recordings of the proceedings, and the official transcript of those tape recordings. Those rules have nothing to say about exhibits tendered during the course of criminal proceedings. Rules 81A.31 81A.32 and 81A.33 of the *Supreme Court Rules* are concerned with the custody of original exhibits and dealings with original exhibits as between the court and the parties. Any submission to the effect that those rules bear on the provision of access to and inspection of exhibits to non-parties would be misconceived; and more so any submission to the effect that those rules are inconsistent with Supreme Court Practice Direction No 2 of 2010 (described further below). See also *Robowash Pty Ltd v Robowash Finance Pty Ltd* [2000] WASCA 409; (2000) 158 FLR 338 at [10]-[23].

> Members of the public in court have no more right to see a film than they have to see any other exhibit; and the circumstances may be such that it would be impracticable, even impossible, to show the film in the courtroom itself.[3]

[21] The requirement that proceedings be held in open court does not oblige the court to provide access to exhibits and court records. A proceeding is properly conducted in open court if the public has a right of admission to that court which is reasonably and conveniently exercisable. An open court does not necessarily become "closed" because there is no right to access exhibits or court records, or because a request by a member of the public or media for access to exhibits or court records is refused.[4]

[22] On the modern approach, however, different considerations may have application to materials which are pre-read by judges and relied upon in the determination of cases coming before them, without those materials ever being presented or heard in open court.[5] In such circumstances the principle of open justice gives rise to a presumption that access will be allowed unless there is good reason for refusing the

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3 *R v Waterfield* [1975] 1 WLR 711 at 714.

4 *Herald and Weekly Times Ltd v The Magistrates Court of Victoria* [2000] VSCA 242; (2000) 2 VR 346; *British American Tobacco Australia Services Ltd v Cowell (representing the Estate of McCabe (deceased)) (No 2)* [2003] VSCA 43; (2003) 8 VR 571 at [36]; *Caroona Coal Action Group Ltd v Coalmines Australia Ltd (No 4)* [2010] NSWLEC 91 at [44].

5 See, for example, *SmithKline Beecham Biologicals Special Advocate v Connaught Laboratories Inc* [1999] 4 All ER 498 at 511-2.

request or placing conditions on the release of an exhibit.[6] The modern approach also assumes that where a document has been tendered in open court inspection and access will ordinarily be permitted.[7]

[23] Access by members of the public and media to exhibits and court records are ordinarily subject to practice directions or guidelines stipulating the process or mechanism by which applications are to be made and determined. Those guidelines typically deal with such things as the manner in which an application for access to material may be made by a member of the public or media; the considerations which the court will take into account in determining whether or not access will be given; the process by which the application will be referred to the appropriate judicial officer; whether copies will be made available; and whether the court is required to give reasons for a refusal. Those guidelines may sometimes include a process whereby an aggrieved person who has been denied access to court records can be heard on the matter.[8]

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6 See, for example, *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 3)* (2002) FCA 609 at [4], [7]; *R v Benbrika (No 26)* [2008] VSC 452; *R v Elomar (No 3)* [2008] NSWSC 1443 at [44].

7 See, for example, *R v Xu (No 1)* [2005] NSWSC 73; (2005) 152 A Crim R 17 at [23]; *Nicholson v Morgan* [2012] WASC 65 at [32]; *R v LMW* [1999] NSWSC 1111; *David Syme & Co Ltd v General Motors Holden Ltd* [1984] NSWLR 294 at 310; *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; (2005) 62 NSWLR 512 at [32]; *Brown v Health Services Union* (No 4) [2012] FCA 1376 at [44]-[46]; *R v Jovanovic* [2014] ACTSC 98 at [38]-[40].

8 By way of example, Supreme Court Practice Direction No 2 of 2010 provides that a person who has been refused access to a document or court file may apply to the Court by Originating Motion for an order granting access, and that such an application shall be heard *de novo*. Most applications will be largely uncontroversial and the determination will not be subject to challenge.

[24] Supreme Court Practice Direction No 2 of 2010 draws a distinction between exhibits, which do not form part of the records of the court, and other material which may form part of the court's files. It provides relevantly:

> **Access to Exhibits**
>
> 5. Exhibits are not part of the records of the Court and are not available for inspection without the permission of the Court.
> 6. Permission to access exhibits must be sought through the Courts Liaison and Education Officer, who will convey the request to the Associate of the trial Judge or if he or she is not available to the Chief Justice's Associate.
> 7. Whether or not access will be given to exhibits is in the discretion of the Court.
> 8. In exercising this discretion, the Court will consider all of the circumstances, including:
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> (a) the public interest in granting or refusing access;
>
> (b) whether the exhibit is likely to offend public decency;
>
> (c) whether the exhibit contains material which is not able to be disclosed by reason of a statutory restriction on disclosure or a court order;
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> (d) whether the exhibit ought to remain confidential for any other reason, for example, because it may contain confidential financial information which could be used by a business competitor, or private information which could be used for an improper or illegal purpose such as identity theft;
>
> (e) whether the exhibit needs to be edited before it is released;
>
> (f) whether or not conditions should be attached to the permission to be granted and, if so, what conditions.
>
> 9. Copies of exhibits will not be made available, even if access is granted, unless the Court approves of the making of a copy or copies.
> 10. Whether or not copies will be permitted is in the discretion of the Court.

11. In exercising this discretion, the Court will consider all of the circumstances including:
    (a) whether the exhibit is subject to copyright and, if so, whether permission has been obtained from the owner of the copyright;
    (b) all of the factors relevant to the exercise of the discretion to grant access;
    (c) the cost of copying the exhibit and if the applicant is prepared to meet those costs.

[25] In the ordinary course, access to exhibits may only be granted by the presiding judge. The reason for that is clear enough. The presiding judge has control over the conduct of the proceedings, and will have read or otherwise viewed the exhibits adduced during the proceedings and be familiar with the forensic and public interest considerations involved. In dealing with a request for access those considerations will bear upon the question whether access and copying should be allowed, and whether conditions should be placed on the publication and use of any material which may be released.

[26] The practice adopted in this Court is that a non-party may apply to the presiding judge for an order permitting the copying or publication of exhibits. Media organisations do not assert, and are not accorded, any interest above and beyond that of the general public in relation to access to exhibits and court records. However, the role of the media is important to the principle of open justice. As the courts have previously observed, not every member of the public can attend court proceedings and a fair and accurate report forms an important part of

the implementation of open justice. For that reason, the media should not be discouraged from the fair and accurate reporting of proceedings.[9]

[27] The importance of that role notwithstanding, the function of the media may give rise to particular considerations as to how any material released might be published or otherwise deployed, and the restrictions which might be properly placed upon the grant of an application for access and copying. This is not to suggest that the courts do not or should not proceed on the assumption that the media will produce a fair and accurate report using the material to which access is granted.[10] It is only to say that public interest considerations will sometimes militate against release at all, and sometimes against unconditional release. As is apparent from the text of Supreme Court Practice Direction No 2 of 2010, those considerations will necessarily include such matters as:

(a) whether there is any statutory provision or prior order which imposes restrictions on release or publication;

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9 *John Fairfax Publications Pty Ltd v District Court (NSW)* (Unreported, NSWCA, Spigelman CJ, Handley JA, M W Campbell A-JA, 15 September 2004) at [20]; *R v Davis* [1995] FCA 1321; (1995) 57 FCR 512at 514; *R v Denbigh Justices; Ex parte Williams* [1974] QB 759 at 765; *R v Jovanovic* [2014] ACTSC 98 at [12]-[16].

10 See *R v Elomar (No 3)* [2008] NSWSC 1443 at [44]; *R v LMW* [1999] NSWSC 1111 at [18]; *Australian Securities and Investments Commission v Rich* [2001] NSWSC 496; (2001) 51 NSWLR 643 at [39]-[40], *Jagelman v Sheahan (in liq of Mooge Ltd (in liq))* [2002] NSWSC 419; (2002) 41 ACSR 487at [12]; *AM v Department of Community Services (DOCS); ex parte Nationwide News Pty Ltd* (2008) 6 DCLR (NSW) 329 at [6]-[9].

(b) whether the release might give rise to a possible offence to public decency;

(c) the nature of the proposed or potential publication by the applicant or another person;

(d) the nature of the document;

(e) the content of the document and whether it contains information that is private, confidential or personally or commercially sensitive;

(f) depending on the nature of the proceedings and the stage which they have reached, whether the copying for publication might have the potential to prejudice the fair trial of an accused person;

(g) the likely effect of the copying for publication on victims, the family members of a victim, the family members of an accused person, a person referred to in the document, or a person whose interests may be affected by the release of the document; and

(h) whether the document was produced in open proceedings.

[28] In the present circumstances, for example, particular regard would have been paid to the affect an unconditional release might have on the victim of the assault depicted in the footage, and the victim's family. It is understandable why, in that context, the presiding judge placed a preclusion on the publication of the CCTV footage on the internet, lest the victim and his family be tormented by its presence in that medium for some open-ended period. Particular care needs to be taken in

determining requests for access to video footage. As Refshauge J observed in *R v Jovanovic*:

> There is, it seems to me, a qualitative difference between a report in words and the publication of pictures or video, particularly where the images may be graphic. There are obvious images which should ordinarily be subject to exclusion, such as gruesome or sexual images or images of children. Care needs also to be taken to respect privacy, which may raise issues about images which include people who are no more than witnesses or are unconnected with the proceedings completely.[11]

[29] The discretion is sometimes exercised in favour of release, sometimes in favour of release on conditions, and sometimes against release. Even graphic video footage will sometimes be released in the service of public interest considerations.[12] However, the discretion whether or not to allow access and copying of exhibits is one the exercise of which falls to the presiding judge.

[30] It is necessary to consider the allegation of contempt against that background and in that context.

The conduct in question

[31] The court has received no direct evidence as to the circumstances in which the CCTV footage came to be posted on the *NT News* website. It is not apparent whether the decision was made deliberately and in full knowledge of the conditions on which it was released and the second respondent's acceptance of those conditions, or whether there was

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11 *R v Jovanovic* [2014] ACTSC 98 at [42].

12 See, for example, *R v RIK* [2004] NSWSC 75.

some error or oversight. During the interlocutory stages of these proceedings counsel for the respondents indicated they would not be adducing evidence in relation to those issues.[13] An implication which might possibly be drawn from the adoption of that position is that there was, in fact, no error, oversight or miscommunication and a deliberate decision was made to flout the condition imposed.

[32] That would appear to be consistent with the letter from the National Editorial Counsel dated 14 March 2017. As has been extracted above, that correspondence states, "I am advised that the decision to publish the footage was made in consideration of the following factors". The letter then goes on to list those factors, including consideration of the *sub judice* principle, the fact that the footage was played in open court, and the assertion that the publication was in the public interest. On one reading, the correspondence would suggest the first respondent arrogated to itself the assessment and determination of the public interest in full knowledge of the fact that the presiding judge had directed that the CCTV footage not be published on the internet. The letter also makes no reference to the interests of the victim and his family in that equation, which was clearly the primary consideration underlying the presiding judge's direction in that respect.

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13 While the first respondent was not entitled as a corporation to rely on the privilege against self-incrimination, and may have been subject to the coercive processes available by way of discovery and subpoena, an alleged contemnor cannot otherwise be compelled to give evidence: see *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 21; (2015) 256 CLR 375; *Construction, Forestry, Mining and Energy Union v Grocon* [2014] VSCA 261 at [192]-[194].

[33] A more benign, if strained, reading might be that the reference to "the decision to publish the footage" does not suggest an awareness on the part of the person who made that decision of the conditions which had been imposed by the court. On that reading, the purpose of the letter is to draw attention to the fact that the CCTV footage was removed immediately upon request by the court; that the publication was for worthy rather than prurient motives; and that the first respondent takes its legal obligations seriously and trains its staff accordingly. That reading receives some contextual support from the fact that the CCTV footage was posted on the website at or about midnight on 9 March 2017, quite possibly by a person with no knowledge of the conditions imposed by the presiding judge. The fact that the website posting attributed the "Vision" to the "NT Police" might also suggest some misunderstanding as to the source of its release.

[34] The letter also fails to acknowledge the principle identified earlier in these reasons, which is that there is no right of access to exhibits, it is a matter for the court to determine whether access is granted and on what terms, and in making that determination the court must balance the principle of open justice with matters militating against the release of the material. If, in making that determination, the court imposes conditions on the manner in which the material may be published or otherwise used, it is not properly open to a media organisation taking the benefit of the grant of access to supplant the court's determination

in that respect with its own view of what the public interest does or does not require.

[35] This observation does not misunderstand that it is ordinarily for a media organisation to determine whether or not particular material should be published and, if so, how it should be published. However, that discretion does not extend to the situation in which a court has determined in the regulation of its own proceedings to accede to a request for the release of an exhibit subject to conditions, and those conditions place express limitations on the manner of publication. There can be no doubt that the publication in breach of the condition imposed – whether deliberate or not – was improper in the circumstances, and in breach of the compact which necessarily exists between the courts and the media in the implementation of the principle of open justice. However, the matter for determination in these proceedings is whether the conduct constituted a contempt of court.

The relevant species of contempt

[36] The contempt alleged in the present case does not fall within the well-defined categories of liability. That said, the reach of the law of contempt is incapable of precise definition and classification, but always "capable of adaptation and expansion to meet fresh needs".[14] If

14 *Attorney-General (UK) v Times Newspapers Ltd* [1954) AC 273 at 302, 307; *Attorney-General (UK) v News Group Newspapers plc* [1989] QB 110 at 133.

this conduct constituted contempt, it must be on the basis that it interfered with the administration of justice by the courts in a manner traditionally categorised as "criminal contempt".[15] This conduct does not fit comfortably within that category traditionally described as "civil contempt". It does not concern the enforcement of court orders[16] and, to the extent that the second respondent's acceptance of the conditions might be said to have constituted an undertaking, it was not an undertaking given in favour of a party to proceedings of the sort with which civil contempt is ordinarily concerned.

[37] Turning then to the reasonably well-defined categories of "criminal contempt", this was not a contempt in the face of the court; it was not a contempt by publication which interfered with existing proceedings[17] or which undermined public confidence in the administration of

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15 The traditional distinction between criminal and civil contempt has been authoritatively criticised but not abolished: see *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 107; *Witham v Holloway* (1995) 183 CLR 525 at 534; *Hearne v Street* (2008) 235 CLR 125 at [2]. As is also discussed further below, the establishment of the statutory procedure under Order 75 of the *Supreme Court Rules* has rationalised the remedies available for the punishment of contempt.

16 Although the condition was imposed pursuant to a practice direction of the Court, it was not an order of the Court and did not of itself create substantive rights and liabilities. The presiding judge was clearly imposing conditions on access to the exhibit pursuant to the terms of the practice direction, and did not purport to make any order prohibiting the publication of evidence pursuant to s 57 of the *Evidence Act* (NT). In any event, the exercise of that power is limited to circumstances in which the publication of the evidence "is likely to offend against public decency" or in which the interests of justice require prohibition of the name of a participant in the proceedings. Again, any submission to the effect that s 57 of the *Evidence Act* is inconsistent with Supreme Court Practice Direction No 2 of 2010 is misconceived.

17 This was not a publication in disobedience of an order prohibiting the reporting of proceedings or the disclosure of the identity of a party or witness. There was no order in the relevant sense and, even if there had been, liability for this species of contempt is dependent on a finding that the publication has in fact interfered with the course of justice in particular proceedings: see *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342; *Attorney-General (UK) v Leveller Magazine Ltd* [1979] AC 440. No such interference may be discerned or explicitly found in these circumstances.

justice[18]; and it was not one of those miscellaneous interferences directed to preventing official participants in court proceedings from due performance of their duties, or involving the conduct of investigative proceedings which jeopardise the operation of concurrent court proceedings.

[38] While disobedience of an order or undertaking may also constitute a criminal contempt, it was previously considered that something more than a bare breach was required to attract that characterisation. The conduct had to constitute the rejection by disobedience of an important social demand so as to constitute a public wrong, or amount to a deliberate and contumacious disobedience of the court's orders.[19] Where the disobedience is said to be constituted by the breach of an undertaking, an express undertaking to the court will ordinarily be required. This is because an undertaking given in that context will have the same legal effect as an injunction and may be enforced in contempt proceedings.[20]

[39] In the present case there was no express undertaking given to the court in the ordinary sense, and the question of enforcement turns on whether

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18 There was no element of scandalisation or public defiance in the publication.

19 See, for example, *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106, 108; *Director of Public Prosecutions (NSW) v Chidiac* (1991) 25 NSWLR 372 at 376-7. For reasons discussed further below, the better view is that is no longer the case under the statutory procedure for the punishment of contempts.

20 See, for example, *Trade Practices Commission v CG Smith Pty Ltd* (1978) 30 FLR 368 at 375; *Windsurfing International Inc v Sailboards Australia Pty Ltd* (1986) 19 FCR 110 at 113.

the second respondent's acceptance of the conditions of access fixed by the presiding judge may properly be characterised as an "implied undertaking" in the relevant sense. As the law presently stands, the better view is that it may not. The application of the law of contempt to implied undertakings is limited to the implication that parties to proceedings, and their legal advisers, servants and agents, will not use documents produced under compulsion in the course of those proceedings, or generated for the purpose of those proceedings, for any collateral or ulterior purpose. This is because an implied undertaking of this sort imposes a substantive legal obligation in the same manner as an order.[21] The second respondent's acceptance of the conditions of access to the CCTV footage in this case did not impose a substantive legal obligation of that type.

[40] Having regard to those principles, counsel for the applicant properly concedes that there is no decided case which deals with an allegation of contempt in these particular circumstances. On the assertion that the respondents' conduct in posting the CCTV footage on the *NT News* website constituted a breach of the conditions on which access was granted (which matter is discussed further below), the applicant contends that conduct amounted to a contempt of court because it "impedes the administration of justice" in the manner described by the High Court in *Australasian Meat Industry Employees' Union v*

21 See, for example, *Hearne v Street* (2008) 235 CLR 125 at [105]-[108].

Mudginberri Station Pty Ltd.[22] This is no more than a statement of the basal principle that conduct constituting an interference with the administration of justice by the courts is punishable as a contempt.

[41] The impediment in this case is said to arise from the fact that "if the court could not expect and enforce compliance with conditions such as those imposed in this case, it could not grant access to the media to material considered to be in the public interest. That would be contrary to the administration of justice and the public interest because the public would have reduced access to material that assists its understanding of the Court's work." That proposition is the first question for determination.

Interference with the administration of justice

[42] In order to establish a criminal contempt there must be "an interference with the due administration of justice either in a particular case or more generally as a continuing process".[23] The applicant concedes that there was no interference with the subject criminal proceedings. Those proceedings had concluded by the time of the events in question. This is not a *Spycatcher*-type situation involving a breach which knowingly

22 (1986) 161 CLR 98 at 106.

23 *Attorney-General (UK) v Leveller Magazine Ltd* [1979] AC 440 at 449; *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106.

interferes with extant proceedings,[24] or a situation involving the breach of an order suppressing publication of the names of witnesses.[25]

[43] Counsel for the applicant pointed by way of analogy to the matter of *Dobson v Hastings*[26], in which it was said that an interference with the court's documents would constitute an act of interference with the administration of justice if it was done with knowledge that it was a contravention of the prescribed judicial process.[27] It should be understood that the case concerned one of the reasonably well-defined categories of contempt concerning interference with a court's documents.[28]

[44] The circumstances under consideration in *Dobson v Hastings*[29] involved an application by a journalist for leave to inspect the court file during the course of the case, as opposed to an application for access to exhibits following the conclusion of the case. While waiting to see the registrar in order to seek leave the journalist read the file and took notes of various documents on it. The application for leave was not subsequently pursued, and the newspaper published two articles

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24 *Attorney-General (UK) v Times Newspapers Ltd* [1992] 1 AC 191.

25 *Attorney-General (UK) v Leveller Magazine Ltd* [1979] AC 440.

26 [1992] Ch 394.

27 *Dobson v Hastings* [1992] Ch 394.

28 So, for example, destroying a document which may be required for proceedings will amount to contempt, while advising a person not to produce such a document will not: *Lane v Registrar of Supreme Court (NSW)* (1981) 148 CLR 245. Similarly, the unlawful seizure of documents in a case will amount to contempt in certain circumstances: *R v Macdonald* [1994] 1 VR 414.

29 [1992] Ch 394.

which included information obtained from the file. In the final result, the court concluded that the publication of the articles did not amount to contempt, but that any further publication would.

[45] In reaching that conclusion the court laid down the following principle of general application:

> The essential vice lies in knowingly interfering with the court's documents. This is as much an interference with the administration of justice as knowingly interfering with the court's officers. The boundary line is to be drawn at the point where there has been a taking of information from documents in the custody of the court *knowing* that leave was needed and that it had not been obtained. In such cases there is an active interference with the judicial process; there is also an intention to interfere, because the act was done with knowledge that it was a contravention of the prescribed judicial process.[30]

[46] In this case leave was sought and granted, but the publication was made in breach of a condition of that leave. It matters not that there was no interference with the court's documents as that concept is more routinely understood in the law of contempt, or that there was no formal order or ruling made in pursuance of statute or the rules of court. As the court observed in the passage extracted above, the essential vice is the contravention of the prescribed judicial process. That reflected what was said by Lord Diplock in *Attorney-General (UK) v Leveller Magazine Ltd* to the effect that the doing of an act with knowledge of a ruling and of its purpose "may constitute a contempt of

30 *Dobson v Hastings* [1992] Ch 394 at 404-5.

court, not because it is a breach of the ruling but because it interferes with the due administration of justice".[31]

[47] The process in the present case is prescribed by a practice direction made under the authority of s 72 of the *Supreme Court Act* (NT). Subject to the limitations expressed in that provision, practice directions may be promulgated under that authority stipulating the processes and procedures of the court. Even without the practice direction, the imposition of conditions on the grant of access to an exhibit was a matter of process within the power of the presiding judge.[32] A breach of those processes and procedures may, depending upon the facts and circumstances, found a liability in contempt. The contempt subsists in the interference with the prescribed judicial process, and it is only a matter of consequence that the interference may fetter the principle of open justice.

[48] In reaching its conclusion that there had been no contempt in the circumstances of that case, the court in *Dobson v Hastings*[33] made the following findings:

> On the basis of these facts, in my view [the journalist] was not guilty of contempt of court. She indulged in no trickery or dishonesty… Her impression that getting leave was no more than an administrative formality was fuelled by her being given the folders and, in effect, used as a messenger to take them to the

31 *Attorney-General (UK) v Leveller Magazine Ltd* [1979] AC 440 at 451-2.

32 See, for example, *Herald & Weekly Times Ltd & Ors v Magistrates' Court of Victoria & Ors* (2000) 2 VR 346.

33 [1992] Ch 394.

> registrar… [The journalist] can hardly be blamed for thinking that she, a total stranger and a journalist at that, would not have been trusted with those papers by the office if they were really confidential… To treat her conduct … as a contempt of court would be a harsh judgment…
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> …
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> Likewise with [the editor]. He understood that the registrar had drawn his attention to an ethical problem: publication would be embarrassing to court officials because of what had occurred. [The editor] understood further that the report was already widely available because it was available to all the creditors of Homes Assured. He did not believe there was a legal impediment to publication or that the registrar had said or suggested to the contrary. In those circumstances he is not to be regarded as having an intention to interfere with the administration of the course of justice, even though he knew that the information had been obtained without leave. The newspaper then proceeded to publish on the basis of [the editor's] state of mind.[34]

[49] There are obvious points of distinction between those circumstances and the facts of the present case. Here, leave was granted on express conditions. Nor is it suggested by the respondents that the servant or agent of the first respondent responsible for posting the CCTV footage on the internet had formed any particular view concerning legal impediment. However, the observations concerning a requisite intention to interfere with the court's processes give rise to similar considerations in the present case.

Breach of condition and liability for contempt

[50] It is then necessary to consider whether the respondents' conduct in posting the CCTV footage on the *NT News* website constituted a breach of the condition imposed on access and, if so, whether there was the

34 *Dobson v Hastings* [1992] Ch 394 at 408-9.

requisite fault element. It is not in dispute that the breach and interference, whether characterised as civil or criminal contempt, must be proved beyond reasonable doubt.[35]

[51] The first question arising in that context is whether the conditions were cast in clear and unambiguous terms. The relevant test was laid down by Barwick CJ in *Australian Consolidated Press Ltd v Morgan*[36] (concerning an interlocutory undertaking given in civil proceedings):

> I think it ought also to be satisfied that the meaning or denotation is such as the appellant might fairly be expected to have contemplated when giving the undertaking. I do not mean that the Court must be satisfied that the appellant gave the undertaking in that sense. It is sufficient that that sense is one which the appellant ought fairly to have had in view as a sense in which the undertaking could be understood.
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> …
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> But, if it bears a meaning which the Court is satisfied is one which ought fairly to have been in the contemplation of the person to whom the order was directed or who gave the undertaking as a possible meaning, the fact that that meaning results from a process of construction and involves a choice of possible meanings does not, in my opinion, preclude the Court from enforcing the order or undertaking in the sense which the Court assigns to it. If the Court is satisfied that the party said to be in contempt *bona fide* believed himself bound only by a construction which the Court thinks to be erroneous, it may for that reason, in its discretion, refuse to make an order or, if it makes an order, refuse to make an order for costs against that party. But, even in such a case, the enforcement of the plaintiff's rights must not be left out of account. A party who has *bona fide* acted on an erroneous view of an order or undertaking may, according to the circumstances, none the less be justly adjudged guilty of contempt in procedure. In my opinion, this is equally so where, because of its terms or circumstances, the order

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35 *Witham v Holloway* (1995) 183 CLR 525 at 534.

36 (1965) 112 CLR 483.

> or undertaking requires construction in order to determine its meaning and remove ambiguities patent or latent.[37]

[52] It should be noted at the outset that the respondents have not sought to lead any evidence that they *bona fide* believed themselves bound only by a construction which permitted the publication of the CCTV footage on the *NT News* website.

[53] The respondents must fairly be expected, on an objective appraisal at least, to have understood that the CCTV footage was not to be published on the internet. The second condition is in those terms. It should not be accepted that the respondents' understanding of that condition was reasonably confounded by the reference to "further broadcast or dissemination" in the third condition. While the term "broadcast" might be anomalous to the use for print media permitted by the first condition, the composite phrase "broadcast or dissemination" is reasonably understood to operate as a catch-all for both television and print news media organisations. The third condition is plainly enough a limitation on dissemination beyond the use permitted by the first condition, which was the use for print media on 10 March 2017 only. Moreover, the first respondent's action in immediately removing the CCTV footage from its website in response to the Registrar's email on the afternoon of 10 March 2017 suggests that at that point, at least,

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37 *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 491-2.

there was no misunderstanding on its part concerning the operation of the second condition.

[54] Any suggestion that the first respondent's understanding of the conditions upon which access had been granted was reasonably confounded by the broadcast of the CCTV footage on *Nine News* between 6 p.m. and 7 p.m. on the evening of 9 March 2017 should also be rejected. That *Nine News* should be permitted to broadcast the CCTV footage on the day of the sentencing proceedings could not be said to have reasonably led the first respondent into some misunderstanding of the conditions on which it had been granted access. That the first respondent might have harboured some concern that it was operating under a competitive disadvantage is quite a different matter. It should also be noted in this respect that there is a significant difference between the one-off broadcast of the CCTV footage on a television news service and the posting of the CCTV footage on the internet for an open-ended period.

[55] The respondents assert further that posting the CCTV footage on the subscriber-only domain of the *NT News* website was not in breach of the second condition. The term "published" in this context reasonably denoted issuing content to the public or any section of the public,[38] and particularly *NT News* readers, so that it could be read or viewed.

38 See, for example, *Infabrics Ltd v Jaytex Ltd* [1981] 1 All ER 1057 at 1061.

Taken to its logical and absurd conclusion, the respondents' argument in this respect is that material placed on the subscriber-only domain of the *NT News* website is not "published".

[56] Those findings go only to the question whether the conditions were cast in clear and unambiguous terms, and whether there was a breach of those terms. They do not address the fault element. The applicant contends that in order to found liability for the contempt it is unnecessary to prove anything more than knowledge of the conditions of access. It relies in that contention on the decision of the Queensland Court of Appeal in *Lade & Co Pty Ltd v Black.*[39] That case involved an allegation of contempt arising from the breach of an express undertaking. In considering the counterpart Queensland rules governing applications for the punishment of contempt, Keane JA observed:

> [67] I have been discussing the position under the general law apart from statute. Because of the provisions of r 930 of the UCPR, there is in Queensland a statutory basis for the imposition of a fine which does not require that it be established that the breach of the order was worse than "casual, accidental or unintentional". It is clear that the primary judge proceeded on this statutory basis.
>
> [68] Whether the primary judge was correct in proceeding to impose a fine on this basis turns upon the interpretation of the word "contempt" as it is used in r 900(1)(a) and r 930(1) of the UCPR. In my respectful opinion, that word cannot be understood as referring only to "criminal contempt" or to an otherwise limited class of contempts.

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39 (2006) 2 Qd R 531.

> [69] The general language in which these rules are cast does not encourage the introduction of a limitation on their operation. It is clear from the discussion above that, historically, disobedience to a court order, even if not wilful, was accurately described as a "contempt" even though it was also referred to as a civil contempt (and thus a contempt which was not apt to attract criminal punishments under the general law apart from statute).
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> [70] Furthermore, r 930 appears in the UCPR, a body of rules designed to regulate civil proceedings and, in particular, to provide generally for sanctions for disobedience to orders of the court in civil proceedings. In such a context, it is unlikely that the lawmaker intended a general reference to "contempt" to be confined to a narrow class of contempts which were traditionally described as "criminal".[40]

[57] Keane JA was not there suggesting knowledge is the only mental element in the prosecution of a criminal contempt of the type alleged in this case. In saying that it was unnecessary to establish that the breach was worse than "casual, accidental or unintentional", his Honour was speaking specifically of contempt by breach of an order or undertaking in civil proceedings, and adverting to the traditional distinction between civil and criminal contempt.

[58] Under that distinction, a civil contempt constituted by the breach of an order or undertaking was only capable of characterisation as a criminal contempt if the breach was wilful or contumacious. That characterisation was significant, because it was determinative of whether the court could make a punitive order or was limited to a coercive order directed to the vindication of the rights of the other party to the litigation. The point of his Honour's observations in this

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40 *Lade & Co Pty Ltd v Black* (2006) 2 Qd R 531 at [67]-[70].

respect was that the statutory procedure permitted the imposition of a fine even where the contempt in question might traditionally have been categorised as “civil” in nature, and even in the absence of a wilful or contumacious element previously considered necessary to enliven the power of a court to impose punitive orders.

[59] The reference to "casual, accidental or unintentional" was to examine the remedies available for the punishment of “civil” contempt under the statutory procedure, rather than to lay down a general test for determining whether the commission of a criminal contempt has been established. It may be accepted that “casual, accidental or unintentional” breaches may suffice in the establishment of “civil” contempt by the breach of an order or undertaking, and that the only mental element is that the party intended to perform the act or omission which constituted the disobedience. For the reasons already given, however, the contempt alleged in this case is “criminal” in nature, in the sense that it involves an interference with the processes of the court rather than a breach of an order or undertaking.

[60] Although the procedure by which application is made for the punishment of a contempt is now set out in the *Supreme Court Rules*, contempt of court remains the only common law crime in this jurisdiction.[41] The punitive implications of criminal contempt are such

41 *Criminal Code Act* (NT), s 8.

that a committal generally will not lie as a matter of strict liability.[42] For that reason, the better view is that liability will ordinarily carry with it a mental element.[43] In the circumstances of this case, to establish what might be described as the *actus reus*, the prosecutor must prove beyond reasonable doubt that the accused published the CCTV footage on the internet. That is admitted. In order to establish what might be described as *mens rea*,[44] the prosecutor must prove beyond reasonable doubt that the accused was aware of the obligations imposed by the conditions, and performed the act of publishing the CCTV footage on the internet knowing that to do so would be in breach of those conditions (or, at the very least, made no reasonable attempt to

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42 Although liability in contempt for interference with the exercise of a court's wardship jurisdiction was formerly strict in nature, that principle developed to incorporate a test of intention or recklessness: *Re F (otherwise A) (a minor)* [1977] Fam 58 at 88.

43 See, as to the position in Western Australia (which is also a Code jurisdiction): *R v Lovelady; Ex parte Attorney General* [1982] WAR 65, 66*; R v Minshull; Ex parte Director of Public Prosecutions for Western Australia* (Unreported, Supreme Court of Western Australia, Full Court, 21 May 1997, Library No. 970255). This is not to overlook the fact that the nature of the mental element in criminal contempt has been a matter of considerable controversy: See for example C.J. Miller, *Contempt of Court* (3rd ed. Oxford: Oxford University Press, 2000), [1.53]-[1.59], [4.108]-[4.115]; Australian Law Reform Commission, *Contempt*, Report No 35 (1987), [80], [175], [181], [502], [522]-[526].

44 The content of the fault element will vary according to the nature of the contempt alleged. So, for example, for contempt in the face of the court it may be that all that is required is that the relevant conduct is intentional, or at least reckless, and it has the objective effect of disrupting or impeding the hearing: *Ex parte Tuckerman, re Nash* [1970] 3 NSWR 23 at 28; cf *Weston v Courts Administrator of the Central Criminal Court* (1977) QB 32 at 43. For contempt arising from a publication in breach of the *sub judice* principle, the only state of mind required is intent to publish the material in question, even if the publisher did not know and had no way of knowing of the proceedings affected: *R v Pearce* (1992) 7 WAR 395 at 428-9; *R v Odhams Press Ltd; Ex parte Attorney-General* [1957] 1 QB 73. Where the contempt is alleged in respect of particular proceedings, it may be necessary to establish an intention to interfere with those proceedings: *Re JRL; Ex parte CJL* (1986) 66 ALR 239 at 244; *Registrar of the Supreme Court, Equity Division v McPherson* [1980] 1 NSWLR 688. Where the contempt involves interference with a witness, the requisite mental element has been expressed variously to be an intent to deter, implement or punish the witness; or knowledge of inherent likelihood of interference with the administration of justice: see, for example, *Re Attorney-General's Application, Attorney-General v Butterworth* [1963] 1 QB 696.

prevent such a breach).[45] It is unnecessary to prove an intention to undermine the administration of justice.[46]

[61] It may first be noticed in that respect that there is no direct evidence and no inference available that the second respondent was involved in the publication of the CCTV footage on the *NT News* website. Although counsel for the applicant did not formally concede that matter during the course of the hearing, the issue was not pressed. On the state of the evidence, it is simply not possible to make any finding of contempt against the second respondent.

[62] So far as the first respondent is concerned, the state of the evidence is such that it cannot be said which of its servants or agents was responsible for the publication of the CCTV footage on the *NT News* website; whether that servant or agent was aware of the existence of the conditions; whether the first respondent through its management personnel was instrumental in or aware of the publication; or whether the first respondent through its management personnel was in fact aware of the existence of the conditions. It is conceivable that the second respondent neglected to apprise the relevant actors of the imposition of the conditions. For the reasons that have already been

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45 Different considerations may apply to the breach of an order or undertaking in the nature of civil contempt. There, it is not sufficient to say there is no direct intention to disobey the order: see the "classic exposition" in *Stancombe v Trowbridge UDC* [1910] 2 Ch 190 at 194.

46 *Attorney-General (NSW) v Mundey* [1972] 2 NSWLR 887 at 911-2. Although the Court was there dealing with contempt in the form of scandalising the court, the same principle has application.

addressed, it is not possible to be satisfied to the requisite standard by the letter from the National Editorial Counsel that a deliberate decision was made to publish the material on the *NT News* website in full knowledge of the conditions.

[63] That then gives rise to the question whether the first respondent's decision not to call evidence in relation to these matters may give rise to adverse inferences in those respects. That matter was considered by the High Court in *RPS v The Queen*.[47] The plurality observed (footnotes omitted):

> In a civil trial there will very often be a reasonable expectation that a party would give or call relevant evidence. It will, therefore, be open in such a case to conclude that the failure of a party (or someone in that party's camp) to give evidence leads rationally to an inference that the evidence of that party or witness would not help the party's case and that:
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> > "where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference."
>
> By contrast, however, it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. The most that can be said in criminal matters is that there are some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could come only from the accused. In the absence of such evidence or explanation, the jury may more readily draw the conclusion which the prosecution seeks. As was said in *Weissensteiner v The Queen*:
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> > "[I]n a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of

47 *RPS v The Queen* (2000) 199 CLR 620.

> evidence to support them *when that evidence, if it exists at all, must be within the knowledge of the accused*." (Emphasis added)
>
> In a criminal trial, not only is an accused person not bound to give evidence, it is for the prosecution to prove its case beyond reasonable doubt. The observations by the Court in *Jones v Dunkel* must not be applied in criminal cases without taking account of those considerations.[48]

[64] This issue was given further consideration in *Dyers v The Queen*.[49]

Gaudron and Hayne JJ said in that respect (footnotes omitted):

> As was pointed out in *RPS*, it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. Not only is the accused not bound to give evidence, it is for the prosecution to prove its case beyond reasonable doubt. The mode of reasoning which is spoken of in *R v Burdett* and *Jones v Dunkel* ordinarily, therefore, cannot be applied to a defendant in a criminal trial. That mode of reasoning depends upon a premise that the person concerned not only could shed light on the subject but also would ordinarily be expected to do so. The conclusion that an accused could shed light on the subject-matter of the charge is a conclusion that would ordinarily be reached very easily. But given the accusatorial nature of a criminal trial, it cannot be said that, in such a proceeding, the accused would ordinarily be expected to give evidence. So to hold would be to deny that it is for the prosecution to prove its case beyond reasonable doubt. That is why the majority of the Court concluded, in *RPS* and in *Azzopardi*, that it is ordinarily inappropriate to tell the jury that some inference can be drawn from the fact that the accused has not given evidence. To the extent to which earlier decisions of intermediate courts held to the contrary they were overruled.
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> The reasoning which underpinned the decisions in *RPS* and in *Azzopardi* cannot be confined to the accused giving evidence personally. It applies with equal force to the accused calling other persons to give evidence. It cannot be said that it would be expected that the accused would call others to give evidence. To

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48 *RPS v The Queen* (2000) 199 CLR 620 at [26]-[28].

49 (2002) 210 CLR 285.

> form that expectation denies that it is for the prosecution to prove its case beyond reasonable doubt.[50]

[65] It was with reference to these authorities that the Full Court of the Federal Court in *Jones v Australian Competition and Consumer Commission*[51] drew the conclusion that those same principles had application to a charge of contempt.

[66] Although the first respondent's decision not to lead evidence in these respects might be characterised as tactical in nature, no conclusive and determinative inference may properly be drawn in the circumstances of this case. Such inferences would need to be drawn from the fact that the first respondent has not called evidence to establish that the second respondent did not advise it of the conditions, or that the servant or agent responsible for the publication of the footage was acting outside the course of his or her authority, or that its management personnel were unaware of the publication and/or the conditions. I do not consider that those failures lead necessarily to the conclusion that any hypotheses consistent with innocence thereby cease to be rational or reasonable. The reasons for that are plain enough. The situation presenting here may be contrasted with circumstances in which the accused is a natural person seen by witnesses to engage in conduct for which only that accused is able to give an account consistent with

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50 *Dyers v The Queen* (2002) 210 CLR 285 at [9]-[10].

51 (2010) 189 FCR 390 at [33]-[35].

innocence.[52] The result would be the same even if the requisite mental element was knowledge alone.

[67] Even if the court could be satisfied that there was the relevant *mens rea* on the part of the first respondent's servant or agent who posted the CCTV footage on the internet, it would then fall to determine whether the first respondent may be held liable for that breach of condition. There is no statutory provision which imposes vicarious liability for contempt on the first respondent for the mental state or conduct of its employees.

[68] The first means by which liability might be found is if the conduct of the first respondent's servants or agents may be attributed to it in accordance with the common law principle of personal corporate responsibility. As the Queensland Court of Appeal observed in *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)*[53], also in the context of the statutory procedure for contempt:

> [33] But the learned primary judge held the CFMEU liable because what Spinks did was in the course of his employment; there was no finding that it was actually authorised, nor was such a finding open, on the evidence. The question remains whether the judge's conclusion can be and should be upheld by a different path.
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> [34] His Honour came to the conclusion, in considering the case against Trohear, the secretary of the union, that he had failed to

52 *R v Sharmpal Singh* [1962] AC 188 at 198.

53 [2001] 2 Qd R 118.

> take proper steps to ensure compliance with the undertaking. The evidence on which his Honour based that conclusion appears to me, with respect, sufficiently to support it. Trohear is not the union, so the question is whether his neglect can be attributed to the union. In my opinion that can be done under the doctrine that in some instances the law will test a corporation's liability on the basis of acts of certain senior officers, so that their acts are treated as its acts: *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1; [1972] AC 153, *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531 at 535, 540, 541, 551 and 552. This, according to Lord Denning in *Heatons*, applies to cases of the present kind: [1973] AC at p 51. Under the *Tesco* principle, the union is liable for what its secretary Trohear did.[54]

[69] In this case there is no evidence concerning the means by which or by whom the CCTV footage was published on the website. So, even if the requisite mental element could be established on the part of that person, there is no evidentiary basis on which to attribute criminal liability for that conduct to the first respondent on the basis discussed in *Evenco*. That would require some determination to be made concerning that person's place in the organisation, the ordinary scope of their authority, and the question of actual authorisation. Although certain inferences may be drawn, they are not of sufficient strength to establish those matters beyond reasonable doubt.

[70] Counsel for the applicant submits that the other means by which liability attaches to the first respondent is by the attribution to it of the second respondent's knowledge of the conditions imposed by the presiding judge on access to the CCTV footage. The applicant says

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54 *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118 at [33]-[34].

that the second respondent's knowledge in that respect may be attributed not only to the first respondent, but also to those "involved in the publication". Reference is made to *Hamilton v Whitehead*[55] in support of that proposition. The Court there held that a corporation bore direct rather than vicarious criminal liability for breaches perpetrated by an officer characterised as "the mind of the company". This is the same principle discussed in *Evenco*. Even if the second respondent could be characterised as "the mind of the company", that principle cannot operate to attribute the second respondent's knowledge of the conditions to the servant or agent who made the publication.

[71] The circumstances in which the CCTV footage was published on the *NT News* website are inscrutable on the evidence adduced. It is not possible to conclude to the requisite standard that the person who did so had knowledge of the conditions. It is not possible to conclude that the first respondent directed or authorised the publication with knowledge of the conditions. It is not possible to conclude to the requisite standard that the act may be attributed to the first respondent. This result might be seen to derive from the first respondent's decision not to explicate by evidence the circumstances which led to the CCTV footage being posted on the *NT News* website. That was the first

55 (1988) 166 CLR 121 at 127-8. See also *Houghton v Arms* (2006) 225 CLR 553 at [44]

respondent's right in the context of proceedings brought against it for the criminal punishment of an alleged contempt.

[72] However, had the first respondent refused to remove the CCTV footage from its website when the breach was identified by the Registrar on 10 March 2017 it would have been liable in contempt for the publication after that time.

Disposition

[73] The application is dismissed.
