IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-797
[2017] NZHC 2234

UNDER	the New Zealand Bill of Rights Act 1990 and the Declaratory Judgments Act 1908
IN THE MATTER	of an unreasonable search and public compensation in the manner of Baigent damages
BETWEEN	ARTHUR WILLIAM TAYLOR First Plaintiff
	PHILLIP JOHN SMITH Second Plaintiff
AND	THE ATTORNEY-GENERAL ON BEHALF OF THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing:	On the papers
Counsel:	PJ Gunn for the defendant
Appearances:	AW Taylor and PJ Smith, plaintiffs in person
Judgment:	15 September 2017

JUDGMENT OF FITZGERALD J
[As to mode and costs of appearance]

This judgment was delivered by me on 15 September 2017 at 9 am,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Introduction

[1] Messrs Smith and Taylor are sentenced prisoners. They have commenced civil proceedings alleging that on 21 October 2016, the Department of Corrections carried out unlawful strip searches at Auckland Prison. They seek *Baigent's* damages and declarations that the strip searches were in breach of the Corrections Act 2004 and the New Zealand Bill of Rights Act 1990.

[2] A three-day substantive hearing is set down to begin on 19 March 2018. The plaintiffs will represent themselves. They wish to appear at the hearing in person, rather than by Audio Visual Link ("AVL") from their prisons. In effect, this would require the Court to make an "order to produce" pursuant s 65(3) of the Corrections Act 2004, directing the Managers of the respective prisons in which they are held to arrange for their attendance at court.

[3] The defendant, the Attorney-General for the Department of Corrections, submits that it is preferable and appropriate that the plaintiffs appear at the substantive hearing by way of AVL.

Submissions

[4] In short, the plaintiffs say it would be unfair and contrary to the interests of justice to compel them to appear by AVL. They note the serious public law allegations behind their claim, and say that natural justice requires that they appear on equal terms with the defendant. They also rely on factual and practical matters to support their position:

(a) Both plaintiffs propose to give evidence and will need to examine and cross-examine witnesses. This will inevitably involve the need to refer to and produce documents. The plaintiffs submit that this will be extremely difficult to do via AVL, and could prejudice their case.

(b) The hearing is scheduled for three days. The plaintiffs say it would not be humane, comfortable or practicable for them to use AVL suites for such a long period. The suites are said by the plaintiffs to be

poorly ventilated, have inadequate toilet facilities, and have inadequate table space for the plaintiffs properly to organise their documents and exhibits.

(c) The AVL audio quality can be poor and there can a lot of background noise.

(d) The plaintiffs are lay litigants, and the proceeding is likely to be more smooth and efficient if they appear in person.

(e) The plaintiffs do not consent to appearing by AVL.

(f) The plaintiffs' witnesses include other prisoners at Auckland Prison, who will need to give evidence by AVL. The plaintiffs say it would be impractical for both themselves and their witnesses to appear by AVL.

(g) Although both plaintiffs have histories of escape, they say their current escape risk is low to medium, as reflected by their present security classifications. Any risk of escape is said to be further mitigated by security arrangements and the evidence of their good institutional conduct.

[5] I note that the plaintiffs initially proceeded on the basis that the Crown would require them to share an AVL suite at Auckland Prison. Mr Smith, however, has now been moved to a different facility. Although this means both plaintiffs could now use separate AVL suites, they consider that such an arrangement would prejudice their ability to confer with each other during the course of the hearing. They also say it could also cause problems as to how they would produce documents into evidence and refer witnesses to documents.

[6] To support their submission, the plaintiffs also rely on *Taylor v Manager of Auckland Prison*, where Duffy J considered the fair-trial implications of AVL appearances, particularly in public law proceedings.[1]

[7] The defendant opposes the plaintiffs appearing in person at the hearing. Mr Gunn, counsel for the defendant, submits that the plaintiffs' particular security risks, combined with the likely length of the hearing, make AVL appropriate. He further relies on the decision *Harriman v Attorney-General*, in which Simon France J appears to adopt a different approach to that of Duffy J in *Taylor*.[2] Mr Gunn says the *Harriman* approach should be preferred, and that the Court can and should, of its own motion, compel the plaintiffs to appear by AVL.

[8] The defendant has also provided an affidavit from Mr Andrew Langley, the director of Auckland Prison. Mr Langley deposes that the transportation of prisoners to and from court, and their appearances in court, increases their opportunities of escape, and also to obtain and pass on contraband. He notes Mr Taylor has seven convictions for escaping from custody, the latest being in 2005 while being transported to a Family Court conference. Mr Smith also escaped (by way of failing to return from a supervised temporary release from custody) in 2014, leaving New Zealand for Brazil.

[9] Mr Langley says this history is highly relevant, and he considers it likely that both plaintiffs continue to have the resources and networks to effect an escape. He says the busy courtroom environment will likely make security more difficult, and that in addition to the usual two Corrections escorts per prisoner, an additional staff member at the level of Principal Corrections Officer would be required for each hearing day. He estimates that the total cost for security is likely to be $5,874 in salary costs alone, with additional petrol and staff expenses likely to be incurred.

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1 *Taylor v Manager of Auckland Prison* [2012] NZHC 1241.
2 *Harriman v Attorney-General* [2015] NZHC 3196.

Relevant statutory provisions

[10] Sections 65 of the Corrections Act 2004 empowers a Judge to direct that a prisoner appear before the court in person where the interests of justice require the prisoner's attendance for judicial purposes:

> **65 Removal of prisoner for judicial purposes**
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> …
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> (2) Subsection (3) applies if—
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> (a) a prisoner is charged with an offence, not being the offence for which the prisoner is in custody; or
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> (ab) a prisoner is the subject of an application under Part 1A of the Parole Act 2002 for an extended supervision order; or
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> (ac) a prisoner is the subject of an application for a public protection order under the Public Safety (Public Protection Orders) Act 2014; or
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> (b) **in any other case, the interests of justice require the attendance for judicial purposes of a prisoner.**
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> (3) If this subsection applies**, any court or Judge or Registrar may, by order in writing, direct the manager of the prison in which the prisoner is detained to bring the prisoner, or to ensure that the prisoner is brought, before the court** or, as the case may require, to arrange the attendance of the prisoner for those judicial purposes, as often as is necessary, and the manager must obey the order.
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> [Emphasis added]

[11] The defendant, however, relies on s 7 of the Courts (Remote Participation) Act 2010, which provides that AVL may be used in a civil proceeding where a Judge allows. A determination under that provision may be made on the application of a "participant", or on the Judge's own motion:

> **7 Use of audio-visual links in civil proceedings**
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> (1) AVL may be used in a civil proceeding for the appearance of a participant in the proceeding if a judicial officer or Registrar determines to allow its use for the appearance of that participant.
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> (2) A judicial officer or Registrar may make a determination under subsection (1)—
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> (a) on his or her own motion; or
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> (b) on the application of any participant in the proceeding.

(3) A determination under subsection (1) must—

(a) be made in accordance with the criteria in section 5; and

(b) take into account whether or not the parties consent to the use of AVL for the appearance of the participant.

[12] As per subs 3(a), s 5 of the Act sets out the criteria which a Judge must consider when deciding whether AVL should be used in any proceeding (though it does not limit the criteria that the Judge may take into account):

5 General criteria for allowing use of audio-visual links

A judicial officer or Registrar must consider the following criteria when he or she is making a determination under this Act whether or not to allow the use of AVL for the appearance of any participant in a proceeding:

(a) the nature of the proceeding:

(b) the availability and quality of the technology that is to be used:

(c) the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including—

(i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and

(ii) the level of contact with other participants:

(d) any other relevant matters.

Authorities

[13] As noted, the plaintiffs rely on the approach set out by Duffy J in *Taylor v Manager of Auckland Prison*.[3] That substantive proceeding was similar to the present one, in that it involved a self-represented litigant in a civil proceeding of a public-law nature.[4] There, the Crown had sought an order under the Courts (Remote Participation) Act that Mr Taylor appear by AVL. But Mr Taylor wished to appear in person.

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3 *Taylor v Manager of Auckland Prison* [2012] NZHC 1241.

4 Mr Taylor's challenge in that case concerned a prisoner smoking ban.

[14] In considering the Crown's application, Duffy J comprehensively set out the history and purpose of the Courts (Remote Participation) Act. She noted that the Act distinguished between criminal and civil proceedings when considering the use of AVL in court proceedings. Duffy J also noted that the Act's legislative history (and Act itself) did not go on to distinguish between private and public law civil proceedings. She described "private" civil proceedings as involving "private law disputes between private persons".[5] She considered civil proceedings involving public law issues might engender different considerations, insofar as determining the proper mode of appearance.[6] This was particularly given the right to natural justice and a fair hearing enshrined in s 27 of the New Zealand Bill of Rights Act 1990:

> [47] The right to a fair hearing is usually understood to mean the right to be heard before anyone can be punished or prejudiced in his or her person or property by any judicial or quasi-judicial proceeding. In such circumstances, he or she must first be given an adequate opportunity of being heard. However, the principle of audi alteram partem, which forms part of the rules of natural justice, encapsulates the idea of hearing both sides. In the past, there would be few occasions where it might be thought that the party bringing a legal proceeding might not have a fair opportunity to be heard. **But the potential for plaintiffs to find themselves compelled to participate in the trial of their civil proceeding by AVL raises the question of whether in such circumstances they would be receiving a fair and adequate opportunity to be heard.**
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> [Emphasis added]

[15] Duffy J noted her reservations as to whether a party who is compelled to participate in a court hearing by AVL will receive an adequate opportunity to be heard, to have access to the court in a real sense, and to be treated on equal terms with the opposing party.[7] She also raised concerns about the quality of AVL and the additional stresses and burdens it can place on an AVL participant.[8]

[16] Accordingly, Duffy J's overall conclusion was that s 7 of the Courts (Remote Participation) Act goes no further than allowing any participant who wants to appear by AVL to apply to the court for that outcome.[9] She noted that Mr Taylor did not consent to appearing by AVL in that case, and that while his criminal history and previous escape attempts made him a potentially difficult prisoner to manage, her

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5 At [27].
6 At [26]-[29].
7 At [52].
8 At [54]-[59].
9 At [63].

overall impression was that Mr Taylor could be safely and successfully transported between prison and the court (albeit at a cost). Therefore, the latent concerns about his security could not outweigh the fundamental rights concerns identified.[10] Mr Taylor was therefore allowed to appear in person.[11]

[17] The plaintiffs note that Brown J approved Duffy J's reasoning in *R v NRS*.[12] This decision was made in the context of a pre-trial criminal proceeding, and so involved different statutory provisions.[13] However the decision remains relevant insofar as it involved an allegation that the prisoner would be an escape risk if they appeared in person. In this context, Brown J said the following:

> [23] I accept that the Crown's concerns about the defendant's intentions and the risk of his escaping are genuinely held and are not to be lightly rejected. However, they are concerns which will necessarily have to be addressed in connection with the defendant's trial. It must follow that the same procedures to mitigate the risk of escape should be available for the purposes of the pre-trial hearing, if other factors weigh in favour of AVL technology not being approved.
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> [24] I am required to take into account that the defendant does not consent to the use of AVL: s 9(1)(b).
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> [25] **In my view the nature of the hearing, involving oral evidence and cross-examination of several witnesses, the significance of the outcome of the hearing for the nature of the evidence ultimately to be led at trial, and the potentially complicated mode of obtaining instructions, with potential disruption for the hearing, weighs quite heavily against the use of AVL for this particular pre-trial hearing.**
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> [26] **Those considerations, together with the fact that the defendant does not consent, outweigh the Police's concern referred to above.** Consequently I am not persuaded that it is appropriate or desirable to allow (indeed to impose) the use of AVL for the appearance of the defendant in this matter.
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> [27] The Crown's application under s 9(1) for a determination to allow the use of AVL is declined.
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> [Emphasis added]

[18] I also note that Wylie J agreed with and adopted Duffy J's reasoning (in respect of the practical implications of the use of AVL in certain civil proceedings),

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10 At [70].
11 At [74].
12 *R v NRS* [2015] NZHC 47 at [7].
13 Section 9(1) of the Courts (Remote Participation Act) provides that AVL must not be used in criminal substantive matters unless a Judge allows its use.

in a pre-trial minute in *Smith v Attorney-General*.[14] That proceeding was in a similar context to the present one, in that it involved public law issues as well as the examination of witnesses. Wylie J said:

> [10] In my view Mr Smith's appearance is required. He is entitled to a fair hearing and an adequate opportunity to be heard. Relevantly, Mr Smith is the plaintiff. He has sought leave to cross-examine a deponent. **Cross-examination can take place via an AVL link but experience suggests that a face-to-face hearing is preferable where there is cross-examination, particularly by lay person. Further, the matter is set down for two days. An AVL suite is unlikely to be particularly comfortable for a hearing of that length. If Mr Smith is in Court, the hearing is likely to proceed more smoothly and efficiently. I agree with the reasoning of Duffy J in *Taylor v Manager of Auckland Prison* in this regard and I do not consider that an appearance by Mr Smith using AVL link would be in the interests of justice.** Accordingly I make an order under s 65(3) of the Corrections Act directing the Manager of Auckland Prison to arrange for Mr Smith's attendance in the Court for the hearing on 6 and 7 March 2017.
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> [Emphasis added]

[19] Mr Gunn, however, submits that the court should adopt the approach set out by Simon France J in *Harriman v Attorney-General*.[15] Mr Gunn says *Harriman* is comparable to the present case in that it also involved an application by the prisoner seeking to appear, unlike *Taylor*, which involved an application by the Crown to compel an AVL appearance. Mr Gunn said Simon France J appeared to differ from Duffy J in *Taylor*, in holding that s 7 of the Courts (Remote Participation) Act allows a Judge to direct, of his or her own motion, that a prisoner appear by AVL.[16]

[20] In *Harriman*, the plaintiff was challenging decisions made as to his parole eligibility. The plaintiff initially agreed to appear at a strike-out hearing by AVL, but withdrew his consent shortly beforehand. So prior to the hearing, Simon France J made an order under the Courts (Remote Participation) Act that the plaintiff participate by way of AVL. At the hearing, the plaintiff renewed his objection to appearing by AVL, contending that there was no jurisdiction for the Judge to make such an order. Simon France J rejected this and ordered the proceedings to continue by AVL. He explained his reasons for this order in a later ruling:

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[14] *Smith v Attorney-General* HC Auckland CIV-2016-404-1599, 28 February 2017 (Minute). Wylie J's substantive decision was *Smith v Attorney-General on behalf of Department of Corrections* [2017] NZHC 463, [2017] 2 NZLR 704.

[15] *Harriman v Attorney-General* [2015] NZHC 3196.

[16] *Taylor v Manager of Auckland Prison* [2012] NZHC 1241.

> [5] Mr Harriman referred me at the time to *Taylor v Manager of Auckland Prison*. I did not have access to it at the time of making my decision, but have read it since. In that case Duffy J analysed various authorities and concluded a narrow approach to s 7 was appropriate. Her Honour doubted that the Act intended to authorise a court to compel a party to a civil proceeding to attend by AVL.
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> [6] That case involved an application by the other party for an order so it may be the circumstances are different. Since the reality is that I have already declined Mr Harriman's application for an OTP, confirmed the AVL hearing, and directed the proceeding to proceed, it does not seem appropriate at this stage to engage in any detailed way with the *Taylor* judgment.
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> [7] Instead, this ruling confirms for the record that I declined an OTP which was essential for Mr Harriman to attend in person. I made an AVL order under the Courts (Remote Participation) Act, and I directed on the day that the proceeding continue. My original ruling does not touch on jurisdiction so I briefly set out my reasons. At the time of making it, I noted that s 7 of the Act allows the court "of its own motion" to make such an order. I placed weight on s 7(3) which makes the consent of the parties a relevant but, as I read it, not a determinative factor, and on s 3 which defines participant to include party. The section therefore appears to authorise a court of its own motion to direct a participant (which includes a party) to appear by AVL. The reasons why I considered an order appropriate in this case were contained in my original ruling, and it is not appropriate at this point to expand on them by addressing other factors identified as relevant by Duffy J in her ruling.

Discussion

[21] I do not consider that *Harriman* is particularly instructive to the present application. Simon France J's order was made in the context of a disruptive hearing, and because of that fact, he did not engage with Duffy J's reasoning in *Taylor* – as he explicitly noted.

[22] I also see no reason to distinguish *Taylor* solely on the basis that it involved an application by one party to compel an appearance of another party by AVL, rather than an application by the prisoner seeking to appear in person under the Corrections Act. In my view, the defendant's opposition to Messrs Smith and Taylor's appearance in person, and the defendant's reliance on the court's power to compel them to appear by AVL by its own motion, is effectively seeking the same outcome sought by the Crown by way of its application in *Taylor*.

[23] I find Duffy J's reasoning in *Taylor* to be persuasive, in terms of her conclusion that "participant" in s 7(2)(b) ought to be read in a narrow way (namely

that any person who meets the definition of a "participant" can apply for an order to appear by way of AVL, but only in relation to his or her own participation in the proceeding), and the practical and factual issues that can arise in the context of appearance by way of AVL, and their impact on the right to a fair hearing.

[24] I observe, however, that Duffy J appeared to go further than the aforementioned narrow reading of the word "participant" in s 7(2)(b), to a narrow reading of s 7 *as a whole*.[17] It is not clear whether that was intended.[18] The reading of s 7 advanced by the defendant in that case hinged on the defendant's submission as to the proper interpretation of "participant" in s 7(2)(b).[19] Duffy J did not expressly address the wording of s 7(2)(a), which contemplates a determination of appearance by way of AVL on the court's own motion (i.e. rather than on a participant's application). Nor was she required to address this, as the matter before her had come by way of an application by the defendant in that case. In *Harriman,* it was s 7(2)(a) which led Simon France J to conclude that, in an appropriate case, the court may of its own motion direct a participant to appear by AVL.

[25] I do not need to reach a concluded view on a conflict, if there is any, between the approaches of Duffy J and Simon France J. This is because even if there is power for the court (of its own motion) to compel a prisoner to appear by AVL (pursuant to s 7(2)(a) of the Act), I do not consider it would be appropriate to exercise that power in the present case.

[26] I accept that transportation to and accommodation of the plaintiffs at court during the substantive hearing involves security risks, particularly given the plaintiffs' prior escape histories. Messrs Taylor and Smith each chose to escape from custody (or, in the case of Mr Smith, to fail to return from a temporary release from custody). Nevertheless, Mr Taylor's last conviction for escape is now some 12 years

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17 See the opening words to [45], the opening sentence of [62] and [63].

18 For example, at [62] Duffy J referred to the Explanatory Note to the Act and the report in Hansard as revealing that the implications of "the unqualified reference to 'participant' in s 7(2)(b)" passed unnoticed. Similarly, at [63] she observed that reading the Act "as the defendant would have me read it" would result in an overriding of established rights and principles.

19 At [44].

ago. Moreover, I am informed that both now have low to medium security classifications.

[27] This case involves an important public law issue. It will require examination and cross-examination of a number of witnesses and making submissions over, potentially, three days. I accept that appearing for that length of time by way of AVL is unlikely to be comfortable, and may well be quite uncomfortable. These issues are exacerbated when Messrs Taylor and Smith are acting for themselves, such that their appearance by way of AVL will involve all of the usual activities of counsel, as well as parties.

[28] I do not consider that the progression of this proceeding, including the examination, cross-examination and re-examination of witnesses, is likely to run smoothly from a remote location, let alone with the plaintiffs operating from two separate AVL suites. And given the length of the hearing, the fact that the plaintiffs would be appearing from two separate AVL suites will also prejudice their ability to confer during the course of the hearing. It is also likely to lead to practical difficulties with the production of exhibits and other documents. It is also not clear how each of the plaintiffs appearing by way of AVL would operate in practice when the plaintiffs' witnesses are also to appear by way of AVL.

[29] For these reasons, and acknowledging the security risks and consequent costs identified by the defendant in order to manage those risks, I consider it is in the interests of justice that the plaintiffs are able to present their case in person. Accordingly, I make an order under s 65(3) of the Corrections Act directing the Managers of each of the prisons at which each of Mr Taylor and Mr Smith are accommodated at the time of the hearing to arrange for Messrs Smith and Taylor's attendance in court for the hearing on 19, 20 and 21 March 2018.

[30] For the avoidance of doubt, my conclusion above does not preclude that in other cases, it may be appropriate for a prisoner to appear by way of AVL (for example, in proceedings involving shorter hearings, or where only legal submissions are to be addressed to the court). Each case will, of course, need to be considered on its own facts.

Costs of appearance

[31] Mr Gunn submits that if the Court does order that the plaintiffs be produced to appear in person, then the Court ought to require the plaintiffs to pay the costs of doing so.

[32] This is provided for in s 65(4) of the Corrections Act, which requires that if the matter is a civil proceeding, the prisoner must deposit a sum sufficient to meet the expenses of appearing before the court. But if the matter is "any other proceeding", the court has a discretion to order such a deposit:

> (4) The court or Judge or Registrar making any order under subsection (3) **must, if the order is made in a civil proceeding, and may, if it is made in any other proceeding, require any person applying for the order to deposit a sum sufficient to pay the expenses of bringing the prisoner before the court** or, as the case may require, arranging the attendance of the prisoner for judicial purposes, and returning the prisoner to the prison in which he or she is required by law to be detained.
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> [Emphasis added]

[33] Wylie J considered this provision in a pre-trial minute for *Smith v Attorney-General*.[20] He noted the Supreme Court and the Court of Appeal's conclusions that proceedings against the Crown seeking damages for breaches of the New Zealand Bill of Rights Act are not to be regarded as actions in tort, but are sui generis public law actions.[21] He noted that if "civil proceedings" is given a wide interpretation, sentenced prisoners could be denied the right to attend and present their case in court if they did not have the financial means to pay for their attendance.[22]

[34] Taking into account s 6 of the New Zealand Bill of Rights Act, which provides that a rights-consistent interpretation of an enactment should be preferred, Wylie J concluded that the term "civil proceedings" in s 65(4) does not include sui generis public law actions against the Crown. He said this interpretation would be most consistent with the rights to justice contained in s 27 of the New Zealand

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20 *Smith v Attorney-General* HC Auckland CIV-2016-404-1599, 28 February 2017 (Minute).

21 At [17], citing *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 (CA); *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

22 And although not in the context of s 65(4) of the Corrections Act, Duffy J also adopted a narrow reading of "civil proceedings" in the Courts (Remote Participation) Act; see [14] above.

Bill of Rights Act. The effect of this was that, in terms of s 65(4), sui generis public law actions against the Crown are "other proceedings". So in such cases, the Judge would have discretion as to whether a prisoner would have to deposit a sum sufficient to meet the expenses of appearing before the court in the proceeding.

[35] I respectfully agree with Wylie J's interpretation of s 65(4) and apply it in this case.

[36] Here, I do not consider it appropriate to order that the plaintiffs deposit a sum sufficient to meet the expense of their court appearance. As I outlined earlier, I consider it is in the interests of justice that they appear before the court in this proceeding. And although I have no direct evidence of their finances,[23] I am aware that both plaintiffs have been imprisoned for many years and so are likely to have limited resources to fund the costs of appearing before the court. Given the nature of the claim and the undesirability of appearing via AVL in the present circumstances, I do not consider that the cost of appearing before the court should deny the plaintiffs the ability to present their case in person.

[37] I therefore decline to make an order under s 65(4).

S Fitzgerald J

Solicitors: Crown Law, Wellington

To: AW Taylor, Auckland
PJ Smith, Auckland

[23] Although Mr Smith has deposed that he is insolvent.