NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF MS S REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA610/2020
[2022] NZCA 328

BETWEEN	NEW ZEALAND POLICE Appellant
AND	FRANCISC CATALIN DELIU Respondent

Hearing: 19 October 2021

Court: Brown, Gilbert and Courtney JJ

Counsel: D J Perkins and A P Lawson for Appellant
Respondent in Person

Judgment: 22 July 2022 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The award of damages and the direction that the appellant must provide a written apology to the respondent are set aside.

C There is no order for costs.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] In 2016 the police executed a search warrant at a lawyer's office located on the same floor of a building as Mr Deliu's chambers. While the search was in progress,

Mr Deliu arrived and questioned the police about their activities. This culminated in the police first warning Mr Deliu and then directing him to refrain from obstructing the search. Duffy J upheld Mr Deliu's claim that he had been arbitrarily detained by the police in contravention of s 22 of the New Zealand Bill of Rights Act 1990 (NZBORA).[1] A declaratory order was made in the following terms:[2]

> The detention of Dr Frank C. Deliu at Level 7, 175 Queen Street, Auckland CBD, New Zealand on 31 August 2016 for a period of: 20–35 minutes was arbitrary and a breach of his human rights under s 22 of the NZBORA.

The police do not challenge that finding.

[2] The Judge awarded Mr Deliu $3,000 in public law compensation, finding that in the course of detaining Mr Deliu the police acted in a high-handed and overbearing manner.[3] The Judge ruled that there was no legal basis for reducing an entitlement to compensation based on the concept of contributory conduct.[4] In addition, the Judge directed the police to provide Mr Deliu with a written letter of apology acknowledging the breach of s 22.[5] The police appeal only from those aspects of the judgment.

The relevant facts

[3] In 2016 the New Zealand Police was investigating a complaint that real estate had been fraudulently sold without the consent of one of the owners. Legal documents transferring the complainant's ownership in the properties were purportedly executed by him in New Zealand at a time when he was abroad. Those legal documents were witnessed and certified as correct by a lawyer, Ms S, who was employed by a law firm known as Amicus Law.

[4] On various occasions the police sought to interview Ms S. However Ms S engaged Mr Deliu to act on her behalf. He advised the police that Ms S was exercising her right to silence and requested them to direct all communications relevant to the investigation to him. The police obtained a search warrant under the Search and

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1 Claims for false imprisonment and misfeasance in public office were dismissed.
2 *Deliu v New Zealand Police* [2020] NZHC 2506 at [297].
3 At [284] and [291].
4 At [277].
5 At [293].

Surveillance Act 2012 (SSA) to search the workplace of Ms S,[6] for the purpose of seizing specified conveyancing documents and associated material relevant to the transfers of the subject properties. A warrant for that purpose was granted by the District Court and a number of police officers under the command of Detective Senior Sergeant Iain Chapman went to Amicus Law to execute the warrant on 31 August 2016.

[5] Mr Deliu gave evidence that as the office space at level 7, 175 Queen Street, owned by City Q 17507 Ltd, was too large for his chambers alone, Amicus Law took a tenancy for some of the space. As the Judge explained:

> [4] Amicus Law was located on level 7 at 175 Queen Street in the Auckland Central Business District (level 7). The principal of this law firm was Richard Zhao. The owner of level 7 was a registered company, City Q 17507 Limited, of which Mr Deliu was one of two directors and his barrister's chambers, known as Justitia Law, were also located on level 7.
>
> [5] On the day of the Police search Mr Deliu and Mr Zhao arrived at level 7 when the search was in progress. By then staff at Amicus Law had already telephoned them to inform them of what was happening. Ms S was not at work that day. Mr Deliu had tried to contact her, but was unsuccessful. When he approached the Police officers he considered he had no instructions to represent Ms S in relation to the execution of the search warrant. For various reasons he was concerned about the Police presence and the search that was taking place.
>
> (Footnotes omitted).

[6] The events which followed were captured on video recordings made by both Mr Deliu and by a police officer present at the search. These were admitted into evidence by consent. A transcript of the exchange preceding and immediately following the detention is annexed to this judgment.[7]

[7] In short Mr Deliu declined to talk with the police officers and insisted on viewing the material already seized. A somewhat testy exchange followed which culminated in Mr Deliu first being warned for obstruction and then being advised that he was "detained pursuant to the search warrant". The warrant authorised the police:

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6 The warrant was issued in relation to "a place situated at Level 7, 175 Queen Street, Auckland Central, Auckland 1010".

7 Also in evidence was a video recording made subsequently by Mr Deliu following his discovery that the warrant was unlawful: see [8] below.

4.5 to detain any person at the place, for the purposes of determining whether there is any connection between that person and the object of the search, if that person:

4.5.1 is at the place at the commencement of the search; or

4.5.2 arrives at the place while the search is being carried out.

[8] Having retired to his office and undertaken research, Mr Deliu discovered that the warrant was unlawful on account of non-compliance with s 143 of the SSA. That section states:

> **143 Search warrants that extend to lawyers' premises or material held by lawyers**
>
> (1) This section applies to the execution of a search warrant that authorises the search of materials held by a lawyer relating to a client.
>
> (2) If this section applies, the search warrant may not be executed unless—
>
> (a) the lawyer is present; or
>
> (b) a representative of the lawyer is present.
>
> (3) If the person who is to execute the search warrant is unable to contact the lawyer or his or her representative, that person must instead contact the New Zealand Law Society and request that a person be appointed by the Society to represent the interests of the clients of the lawyer in relation to the search.
>
> (4) Before executing the search warrant, the person who is to execute it must give the lawyer or his or her representative, or any person appointed by the New Zealand Law Society under subsection (3),—
>
> (a) the opportunity to claim privilege on behalf of the lawyer's client; or
>
> (b) the opportunity to make an interim claim of privilege if instructions have not been obtained from the client.

[9] After alerting the police officers to this fact, Mr Deliu left the premises and made an urgent oral application to the High Court for an injunction restraining the search.[8]

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[8] This culminated in an agreement to preserve the position in the interim recorded in a minute of Edwards J dated 1 September 2016, whereby the seized material was to be filed in the High Court and held pending further order of the Court.

The High Court judgment

[10] Mr Deliu commenced proceedings claiming arbitrary detention which breached s 22 of NZBORA, false imprisonment and misfeasance in public office. He contended that the events on the morning of 31 August 2016 constituted an arbitrary detention in breach of s 22.

[11] The Judge first addressed the issue of whether the search was unlawful for failure to comply with the requirements of s 143 of the SSA. As the Judge explained:

> [113] … For arbitrary detention the immediate focus includes whether the detention itself was lawful. However, detention in the course of a lawfully executed search may be viewed differently from detention in the course of an unlawful search. The latter precludes any detention being lawful whereas the former does not. Also, the latter can be an aggravating factor in an arbitrary detention. The same applies for false imprisonment. With misfeasance in public office one of the elements of this tort is unlawful conduct by a public officer. Accordingly, I consider it appropriate to examine the question of the lawfulness of the search as a general topic, albeit one that is relevant in various ways to the separate causes of action.

[12] Having ruled that the police failed to comply with s 143, thereby rendering the search unlawful,[9] the Judge proceeded to consider the issue of the police's authority to detain persons in a search area. The Judge noted that the SSA provides specific powers to control the movements of persons in search areas in the form of s 116, which authorises the exclusion of persons from the search area, and s 118 which authorises the detention of persons.[10] Section 116 was not relied on by the police, who acknowledged that the power to detain under the warrant was not triggered by the circumstances that prevailed at the time. The Judge ruled that there was no lawful basis for Detective Senior Sergeant Chapman to order the detention of Mr Deliu.[11]

[13] On the question whether there was in fact detention of Mr Deliu, the police contended that there was nothing more than the verbal statement that he was detained. They also relied on the following:

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9 *Deliu v New Zealand Police*, above n 2, at [177].
10 At [189].
11 At [190].

(a) Mr Deliu was never physically restrained by the police;

(b) after he was told he was detained he briefly left the conference room to film from where the documents already seized had been taken and then returned to the conference room until he finally left it; and

(c) no attempt was made to stop Mr Deliu from taking this action, nor did police later follow him to his office or enter it.[12]

[14] However, the Judge concluded:

> [199] Looked at overall, I find the evidence that Mr Deliu believed he was being detained by Police order to be convincing and sufficient to satisfy me to the civil standard of proof that he genuinely believed that was the effect of the detention order, and that adverse consequences for him would follow should he ignore the order. I am also satisfied that the order had a restraining effect on Mr Deliu's liberty because it caused him to cease behaving in the fashion he had chosen to behave towards Police on his premises, and its effect was to cause him to withdraw to his office.

The Judge was satisfied there was detention in fact because Mr Deliu was no longer free to act as he wanted to act on those premises.[13] With reference to the duration of the detention, the Judge concluded:

> [214] The period between Mr Deliu receiving the direction he was detained in the conference room and his encounter with Detective Sergeant Corner seems to me to have been a period of between no more than 30 to 35 minutes and no less than 20 minutes. This is the period in which he was subject to what I have already found to be an unlawful detention.

[15] The Judge then turned to the question of whether the detention was arbitrary. The Judge noted that, while typically an unlawful detention will be an arbitrary detention for the purposes of s 22, the case law acknowledges that there may be cases where an unlawful arrest or detention and an arbitrary arrest or detention are not viewed as one and the same.[14] However she observed that the police had not raised a defence based on justification of unlawful detention that would bring the detention here within the exception recognised as a possibility in *R v Goodwin (No 2)*.[15]

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12 At [191].
13 At [201].
14 At [217].
15 *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA).

She further noted that if the police had wished to rely on the exceptional circumstances ground then that ground should have been expressly pleaded.[16]

[16] The Judge then addressed the issue of whether the nature of the constraint identified was sufficient to amount to a detention under s 22, concluding:

> [231] The detention which in fact occurred was the result of an unlawful detention order made in the context of an unlawful Police search of lawyers' premises. The illegality of the search potentially put at risk the protection of legally privileged "things". In sum, a lawyer (Mr Deliu) who occupied part of the general area where the search was happening attempted to query the search and seizure and was stopped from doing so for a period of between 20 minutes and 30–35 minutes by the making of the unlawful detention order. For that period of time his liberty to move at large on the floor where his legal premises were situated was constrained. Although no Police officer interfered with him after he was given the detention order, this was in circumstances where his conduct was compliant and therefore unlikely to trigger further interference by Police. Had Mr Deliu acted in a way the Police wanted constrained I have no doubt he would have been arrested. Insofar as Detective Senior Sergeant Chapman gave evidence to suggest the contrary I do not believe his evidence. It is not consistent with the findings I have reached. I am satisfied that what happened to Mr Deliu constituted an arbitrary detention under s 22 of the NZBORA.

[17] The Judge proceeded to consider and dismiss the claims for false imprisonment and misfeasance in public office before finally turning to address the issue of relief for the arbitrary detention. The Judge approached the question of fixing compensation by considering the contextual circumstances, explaining that an arbitrary detention in the context of an unlawful search, with the threat of possible arrest if the conduct that attracted the detention order continued, leads to a more serious breach of s 22 than would be the case of an arbitrary detention in the context of a lawful search. This was because of the more intrusive nature of the unlawful use of authority by officers of the state.[17]

[18] The Judge ruled that an appropriate sum to compensate Mr Deliu was $3,000, comprised of $2,000 as compensation for the distress and harm he suffered with an additional $1,000 to reflect his and the public's interest in the protection, promotion and vindication of the rights affirmed by s 22.[18] The Judge considered that

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16 *Deliu v New Zealand Police*, above n 2, at [218].
17 At [286].
18 At [292].

Detective Senior Sergeant Chapman acted in a high-handed and overbearing manner to the point where Mr Deliu's will to resist was overborne to such a degree that he was prepared to retreat from the search area of the legal premises to his own office in compliance with the detention order.[19]

[19] The reasons for the Judge's grant of further relief in the form of an apology are addressed in the course of our discussion of that ground of appeal below.

Scope and nature of the appeal

[20] Although the notice of appeal originally filed included a challenge to the Judge's findings in relation to s 143(2) of the SSA, shortly prior to the hearing the appeal was confined to the grant of remedies of public law compensation and the direction that an apology be provided to Mr Deliu. The finding that Mr Deliu had been detained was not in issue.

[21] For his part Mr Deliu filed a memorandum under r 33 of the Court of Appeal (Civil) Rules 2005 supporting the judgment on other grounds, namely:

> a. The Appellant failed to discharge its onus of proof that my detention was lawful, *Wright v Attorney-General* [2019] NZHC 59 at [17] and the common law's great ancient writ of habeas corpus;
>
> b. There was no or insufficient justification for any detention;
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> c. Even if the initial detention was lawful, it later became unlawful.

[22] Subsequently the parties agreed that the appeal in respect of the award of damages raises three issues:

> 1. Did the High Court err in finding that the [police's] conduct was "high-handed, overbearing and unreasonable", such that an uplift in the award of public law compensation was warranted?
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> 2. Can a plaintiff's conduct be taken into account when assessing remedies for a breach of the New Zealand Bill of Rights Act 1990?
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> 3. If the answer to [1] and/or [2] is "yes", did the High Court err in awarding [Mr Deliu] $3,000 in public law compensation?

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19 At [291].

With reference to the order to provide a letter of apology the issue is whether that is an available remedy for a breach of NZBORA?

[23] The approach of this Court on an appeal by way of rehearing was explained by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*:[20]

> [16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.
>
> (Footnote omitted.)

[24] The Court stated that in reaching a conclusion on whether the decision is wrong, no deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because credibility is important.[21] However, in this appeal the course of events was captured on video recordings which were in evidence and hence we are in an essentially equivalent position as the Judge in reaching conclusions about those events.

Public law damages

[25] The task of a court faced with a breach of NZBORA is to award an effective remedy which is both appropriate and proportionate to the circumstances. While in some cases a declaration may be sufficient to vindicate a breach, in others an award of money may also be necessary if, without it, a declaration would fall short of an appropriate effective and proportionate remedy. The question will often be whether, for the purposes of vindication or compensation, a money sum should accompany the declaration in order to make the remedy effective.[22]

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20 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
21 At [13].
22 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [300] per Tipping J.

[26] As Blanchard J explained in *Taunoa v Attorney-General*:[23]

> [255] In undertaking its task the court is not looking to punish the State or its officials. For some breaches, however, unless there is a monetary award there will be insufficient vindication and the victim will rightly be left with a feeling of injustice. In such cases the court may exercise its discretion to direct payment of a sum of monetary compensation which will further mark the breach and provide a degree of solace to the victim which would not be achieved by a declaration or other remedy alone. This is not done because a declaration is toothless; it can be expected to be salutary, effectively requiring compliance for the future and standing as a warning of the potentially more dire consequences of non-compliance. But, by itself or even with other remedies, a declaration may not adequately recognise and address the affront to the victim. Although it can be accepted that in New Zealand any government agency will immediately take steps to mend its ways in compliance with the terms of a court declaration, it is the making of a monetary award against the State and in favour of the victim which is more likely to ensure that it is brought home to officials that the conduct in question has been condemned by the court on behalf of society.
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> [256] It may be entirely unnecessary or inappropriate to award damages if the breach is relatively quite minor or the right is of a kind which is appropriately vindicated by non-monetary means, such as through the exclusion of improperly obtained evidence at a criminal trial. It may also be unnecessary if a damages award under another cause of action has adequately compensated the victim, especially so where that award has a component of aggravated damages. In such a case there is nothing to be gained by way of vindication by adding a nominal sum for the Bill of Rights breach.
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> [257] In other cases, however, non-Bill of Rights damages may not be available since the only actionable wrong done to the plaintiff is the Bill of Rights breach. Then a restrained award of damages may be required if without them other Bill of Rights remedies will not provide an effective remedy.
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> [258] When, therefore, a court concludes that the plaintiff's right as guaranteed by the Bill of Rights Act has been infringed and turns to the question of remedy, it must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances, taking into account any non-Bill of Rights damages which are concurrently being awarded to the plaintiff. It is only if the court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages. When it does address them, it should not proceed on the basis of any equivalence with the quantum of awards in tort. In this respect I would adopt the approach in *Greenfield* and *Fose*. The sum chosen must, however, be enough to provide an incentive to the defendant and other State agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach.

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[23] *Taunoa v Attorney-General*, above n 22.

[27] The relief sought by Mr Deliu in respect of the NZBORA cause of action included, in addition to declaratory relief and a direction that the police publicly apologise to him, an award of damages as follows:

> An order that the defendant pay the plaintiff not less than $15,000 in general damages for humiliation, embarrassment, loss of dignity, loss of self-esteem, loss of pride, distress, anxiety injury to reputation and/or trouble and inconvenience and/or not less than $5,000 in public law damages;

[28] In addressing the issue of relief the Judge proceeded to consider the various forms of relief sought by Mr Deliu, commencing as follows:

> [273] Mr Deliu is entitled to relief for the arbitrary detention that I have found he suffered. First, he is entitled to a declaration that his rights under s 22 of the NZBORA were breached.
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> [274] Mr Deliu also seeks monetary compensation for the breach of s 22. It is well settled since *Baigent's Case* that grants of monetary compensation for breaches of NZBORA rights are available. Such grants are for the purpose of giving effect to or vindicating the rights protected by the NZBORA. In principle there must be no overlap with damages awards for torts that are established from the impugned conduct, but here that principle is not engaged.
>
> (Footnotes omitted.)

[29] The issue is not simply one of availability. As the appellant observes, in some cases a declaration will be sufficient to vindicate the right which has been breached. It submits that this is such a case. However the Judge did not discuss *Taunoa* or subsequent decisions of this Court such as *Attorney-General v Van Essen*[24] and *Dotcom v Attorney-General*.[25] In the former, after reference to *Taunoa* this Court stated:[26]

> [82] Accordingly the question of remedy first requires consideration of the non-monetary relief that can be or has been given. The Court will assess whether that is enough to redress the breach and any relevant injury. Only if the breach in question requires something more to vindicate it will an award of damages be considered necessary. …
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> (Footnote omitted.)

[30] Although at the commencement of her discussion of an apology, the Judge remarked that the declaration and the sum of compensation awarded were a proper

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24 *Attorney-General v Van Essen* [2015] NZCA 22, (2015) 10 HRNZ 155.
25 *Dotcom v Attorney-General* [2018] NZCA 220, [2018] NZAR 1298.
26 *Attorney-General v Van Essen*, above n 24.

reflection of the redress to which Mr Deliu was entitled,[27] it is not apparent to us that the Judge focused directly on the question whether, in light of the grant of a declaration, it was necessary to also make an award of public law damages. Consequently we proceed to address that question. We do so by considering the circumstances giving rise to the detention, Mr Deliu's reaction at the time, and the nature and duration of the detention.

The circumstances leading to the detention

[31] The Judge commenced her analysis of the interaction between Mr Deliu and the police officers in this way:

> [276] In the present case the Police complaint about Mr Deliu when he "intruded" on the search was that he was aggressive and rude. That was as far as Detective Senior Sergeant Chapman could go to explain why he reacted as he did. However, I do not find the words Mr Deliu expressed to be rude. This can be seen from reading the transcript of the exchanges between Mr Deliu and Police officers that day. He made it clear he did not want to engage with Detective Senior Sergeant Chapman, but this was in circumstances where rather than speak directly to Mr Deliu about the search and what had been seized already Detective Senior Sergeant Chapman proceeded to give Mr Deliu the NZBORA rights that Police give to suspect persons and he failed to address directly the questions that Mr Deliu posed to him. Those factors exacerbated the situation facing Mr Deliu. Neither party acted politely towards the other.

[32] Perceptions may vary as to the divide between impoliteness and rudeness. However Mr Deliu was unquestionably aggressive in his approach. That was reflected in his comments while moving towards the box of material already located in the search:

> I'm not pushing, you're in my way.
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> …
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> Okay then move or just get out of the way.

It was also evident later when he upbraided an officer who unwisely smiled.

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[27] *Deliu v New Zealand Police*, above n 2, at [293].

[33] The Judge appears to suggest that DSS Chapman had not attempted to speak directly to Mr Deliu about the search. However he had tried a number of times, but was rebuffed by Mr Deliu in these terms:

> … I don't need to hear from you.
>
> …
>
> I don't care, you've told me your name, I don't need to hear from you …
>
> …
>
> Can you not talk, you're on my floor, I'm not asking you to talk.

[34] In weighing such behaviour the Judge observed that Mr Deliu was angry and upset. She said his demeanour was not surprising given that he was faced with an unlawful search of the premises from which he practised.[28] Of course, Mr Deliu was not aware at the outset that the search was unlawful. Nor was DSS Chapman.

[35] In cross-examination DSS Chapman explained the effect which Mr Deliu's conduct had on the situation:

> … my first approach to you, first conversation with you was, can we just have a chat about this, can we just discuss what's going on. That was very quickly overridden by you, you weren't, in my view, willing to hear anything I had to say. And it would have become very clear, had you come into the office, sat down and you and I had a conversation, that none of this would have occurred. From my perspective, everything that occurred, with respect to the detention, to the warning for obstruction, was a direct result of your action as you came into that office, and the manner at which you approached that circumstance.

[36] The Judge was clearly sympathetic to Mr Deliu's situation. In the course of addressing the issue whether the level of compensation should be reduced on account of Mr Deliu's conduct, and while stating that she could imagine other possibly better ways of approaching police when faced with the situation that confronted Mr Deliu,[29] the Judge said:

> [282] Finally, there is the fact that Mr Deliu would have had little time to think about what was happening that day and how best to approach matters. The first he would have known was when he was telephoned and told the Police were at level 7. When he walked into the premises the Police were in the conference room and the search had already begun. Thus, Mr Deliu had

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28 At [278].
29 At [283].

> to respond to a problem that he had only recently learned about. He did not have time to reflect on how best to approach the Police. Indeed, until he entered the conference room he may have had no idea about how they would respond to him.

[37] By contrast is the Judge's assessment of the position of the police:[30]

> The Police had placed themselves in a difficult position when they arrived unannounced only to find Ms S was not present. Their difficulties were exacerbated when Mr Deliu arrived and questioned what they had been doing. However, these were difficulties of their own making.

Mr Deliu's reaction

[38] The Judge stated that Mr Deliu remained in the conference room for a few minutes, then left and went to his office.[31] The Judge considered that Mr Deliu's will to resist was overborne to such a degree that he was prepared to retreat from the search area of the legal premises to his own office in compliance with the detention order.[32] However it does not appear to us from our viewing of the videos (an impression which is not fully conveyed by the transcript alone) that Mr Deliu was so affected.

[39] His initial reaction on being advised that he was detained was: "we're gonna get to that later". He went on to ask about the contents of the first envelope in the box of seized material on the desk in the conference room. On being informed that it was a partial file in relation to a property transaction he then asked questions seeking to identify the office from which the file had been taken. He walked out of the conference room towards the identified office and then returned. This episode is recorded in the transcript in his statement:

> Okay the office on the left — just to be clear here I'm just going to record this. Are you talking about the first door there on the left, is that correct? This door right here.

[40] Having identified the door and returned to the conference room he addressed the officer who, like Mr Deliu, was recording events on his cellphone, stating:

> You don't have my permission to do that by the way.

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30 At [287].
31 At [204].
32 At [291].

[41] Mr Deliu repeated the process with two further documents. He then asked the officers:

> … are you done with your search?

When it was explained that pursuant to the warrant the officers wished to see the full files in relation to the sale and purchase transaction, Mr Deliu then endeavoured to have the search deferred. The police responded that they would be continuing with the search "ideally with [Mr Deliu's] co-operation." Mr Deliu replied that he would need to consider that. When asked what period would be involved, he said:

> I don't know, as long as it takes.

[42] The exchange which immediately preceded Mr Deliu's "retreat" from the conference room was as follows:

> A. … So the question is, do we wish to co-operate, correct?
>
> Q. Yes.
>
> A. Okay, we'll come back to you with that.
>
> Q. How long?
>
> A. Carry on with your search.
>
> Q. How long?
>
> A. As long as it takes, I told you that.
>
> Q. Okay, we'll carry on with the search.
>
> A. Okay.

The nature and duration of the detention

[43] The Judge explained the purpose and effect of the detention in this way:[33]

> [205] The purpose of the detention order was to give Police an element of control over Mr Deliu both inside and outside the conference room, which can be seen from Detective Senior Sergeant Chapman's evidence regarding the dual purpose of the order. Detective Senior Sergeant Chapman also referred to how Mr Deliu was free to leave the conference room and to go to his office, which in his view meant any detention was for a few seconds only and no more than a "technical detention". However, I regard this to be an ex post

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33 *Deliu v New Zealand Police*, above n 2.

> facto explanation of no more than what actually happened after the making of the detention order. I do not believe the explanation. It is inconsistent with the overall impression I have gained from the direct and circumstantial evidence relevant to the search. Also, I do not understand this degree of movement to be inconsistent with the purported legal restraint imposed by the detention order. There is a difference between a legal occupant of level 7 physically moving from one part to another part of level 7 while a Police search is underway and that occupant being at liberty to do whatever he might otherwise have wanted to do at the time on this private property. Mr Deliu said as much under cross-examination.
>
> (Footnote omitted.)

[44] The Judge acknowledged that the effect of the detention "did not go so far as to constrain Mr Deliu 100 per cent", noting there were no cases where the degree of constraint was analogous to what occurred in this instance.[34] The Judge endeavoured to identify the degree of constraint which the order imposed on Mr Deliu, observing that the detention order put Mr Deliu on notice that he was not to intrude into the search. The Judge was in no doubt that had he continued to do so "consequences would have followed".[35]

[45] The Judge was satisfied that the detention order remained in effect after Mr Deliu left the conference room.[36] The Judge further explained:[37]

> For [the period of detention] his liberty to move at large on the floor where his legal premises were situated was constrained. Although no Police officer interfered with him after he was given the detention order, this was in circumstances where his conduct was compliant and therefore unlikely to trigger further interference by Police.

[46] The detention ceased at some point "after 11.30 am and before 11.45 am".[38] Hence the reference in the declaration to the period of detention being for "20–35 minutes".

Our assessment

[47] The Judge plainly considered that the police were the authors of their own misfortune and that Mr Deliu had been very poorly treated. That perception is

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34 At [224].
35 At [226].
36 At [210].
37 At [231].
38 At [213].

encapsulated in the finding that the police conduct towards Mr Deliu was "high-handed, overbearing and unreasonable".[39] Mr Deliu appears to have been absolved of any responsibility. We infer that is because the search had been held to be unlawful notwithstanding that Mr Deliu was not aware of that in the course of the episode leading up to the detention.

[48] Given that Mr Deliu would not engage with the police officers, it is not apparent to us what the Judge expected that the police should have done when confronted with Mr Deliu's robust conduct. If they were not to take steps to exclude him from the search area, the only other possibility would appear to be to abandon the search and withdraw.

[49] In our view, Mr Deliu was endeavouring to obstruct the search and was desirous of bringing it to an end. We consider the obstruction warning was justified. Quite apart from the fact that it was not within the authority of the warrant, the further step of purported detention was clumsy and possibly also hasty. However, as the videos clearly show, the atmosphere following Mr Deliu's arrival was tense. Mr Deliu was very assertive and sought to dominate the exchange with the police officers. Given their limited range of options we do not share the Judge's view that the reaction of the police to Mr Deliu's behaviour was high-handed or over-bearing. It was a gauche attempt to ensure the search would continue without further interference by Mr Deliu. The detention, such as it was, was in the nature of an exclusion from a space, not a physical confinement.

[50] In *Van Essen* this Court carried out a survey of awards of public law damages.[40] The Court observed:

> [106] … We briefly comment on the practice of awarding public law damages in New Zealand courts. First, in most cases in which damages are eventually awarded, the conduct concerned has involved physical restraint, direct infliction of physical harm, or a prolonged or significant deprivation of liberty. These cases span in seriousness from physical detention, handcuffing, to inappropriate solitary confinement and physical violence in prison similar situations. The seriousness of the circumstances is reflected in the quantum awarded to acknowledge the gravity of the breach in each case.

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39 At [284] and see also [291].

40 *Attorney-General v Van Essen*, above n 24, in Appendix 1 to the judgment.

> [107] Conversely there are very few cases in which public law damages have been awarded where no physical damage or interference with liberty has occurred. Where damages have been awarded in such cases, this has typically been to reflect equivalence with tortious claims, or on the basis of clear pecuniary loss arising directly from the breach of the right itself. The largest awards to date have been justified with dual reference to tortious or common law compensatory principles. These were predominantly prior to *Taunoa*.
>
> [108] The *Taunoa* decision itself featured a comprehensive review of international human rights jurisprudence on the issue of remedies. In addition, and in the period since *Taunoa*, there have been recent cases in the United Kingdom offering damages for breach of human rights, extending to compensation for the frustration and anxiety experienced by the individual suffering such a breach. Again, however, those damages awards were justified expressly with reference to the gravity of the breach of the right involved, namely the "precarious nature of the deprivation of liberty" in the case of prisoners serving a mandatory sentence.
>
> (Footnotes omitted.)

[51] The present case does not involve those factors of physical restraint, direct infliction of physical harm or prolonged or significant deprivation of liberty. The consequence of the detention order was that for a comparatively brief period of time Mr Deliu's liberty to move at large on the floor where his legal office was situated was constrained.[41] The Judge acknowledged that there were no cases where the degree of constraint was analogous to the present case.[42]

[52] A finding of arbitrary detention will frequently be accompanied by a finding of false imprisonment. However Mr Deliu was found not to have been falsely imprisoned. The appellant submits that this results in identification of the appropriate remedy being more difficult. It submitted that the Judge appeared to have countered this difficulty by treating the calculation of public law compensation and damages in tort as equivalent. The appellant contended this was demonstrated by the Judge's adoption of this Court's obiter comment in *Dunlea v Attorney-General*[43] that there are strong reasons for adopting the same approach in calculating both remedies.[44]

[53] However as noted above this position was rejected in *Taunoa*.[45] McGrath J observed:

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41 *Deliu v New Zealand* Police, above n 2, at [231].
42 At [224].
43 *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at [37]–[38].
44 *Deliu v New Zealand* Police, above n 2, at [285].
45 *Taunoa v Attorney-General*, above n 22.

> [368] The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. …

[54] The Judge's focus on *Dunlea*[46] may have been a factor in her division of the damages award into $2,000 to compensate for distress and harm suffered by Mr Deliu, and $1,000 to reflect his and the public's interest in the protection, promotion and vindication of the rights affirmed in s 22. However, in our view the allocation of the larger sum to compensate Mr Deliu does not accord with Blanchard J's statement in *Taunoa*:[47]

> [259] … In public law, making amends to a victim is generally a secondary or subsidiary function. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law by governmental agencies and officials, which is the primary function of public law. Thus the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings.
>
> (Footnote omitted.)

[55] We recognise that, as Blanchard J observed, the fixing of NZBORA damages is far from an exact science and there is no scale of damages to which a Judge can resort.[48] However our review of the authorities identified a number of cases which on a comparative basis would indicate that the award to Mr Deliu was excessive.

[56] In *Attorney-General v Udompun* this Court found there had been a breach of s 23(5) of NZBORA, which protects the right of those deprived of liberty to be treated with humanity and with respect for their inherent dignity. Mrs Udompun arrived at Auckland Airport from Thailand and was refused entry into New Zealand. As the next available flight was in two days, she was held in the Papakura Police Station pending departure. The majority held that the breach of s 23(5) arose due to a combination of the police not allowing her to change her clothes before leaving the airport,

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46 The other case to which the Judge referred was also a false imprisonment case, at [289]: *Wright v Bhosale* [2015] NZHC 3367, [2016] NZAR 335.

47 *Taunoa v Attorney-General*, above n 22.

48 At [260].

inadvertently not providing sanitary products upon Ms Udompun's request, and not supplying food for the 12 hours she was held at the airport. An award of $4,000 damages was made.[49] While the Court was of the view that Mrs Udompun should take some responsibility for her situation, important considerations were that the right related to human dignity and the length of time for which she was without sanitary products (some 23 hours) was not insignificant.[50] In our view this was a more serious breach than the present case.

[57] *Taunoa* dealt with prisoners held in Auckland Prison's "Behaviour Management Regime" in breach of their right to be treated with humanity and dignity when deprived of their liberty. One of the prisoners, Mr Kidman, received an award of damages of $4,000. However the duration of the breach in his case was three months, whereas a roughly comparable award to Mr Deliu was made in respect of only approximately half an hour spent in the environment of his own office.

[58] As required by *Austin Nichols* we must reach our own conclusion on a matter which involves an assessment of fact and degree and entails a value judgment.[51] We do so mindful of the direction of Blanchard J in *Taunoa* that a figure must be chosen with which responsible members of New Zealand society will feel comfortable taking into account all of the circumstances, including the nature of the infringed right, the nature of the breach, the effect on the victim and the other redress which has been ordered.[52]

[59] Weighing those factors, it is our view that the declaration made in this case was sufficient to vindicate the contravention of the right. Additional relief in the form of monetary compensation was not required. Consequently the appeal in respect of the damages award is allowed.

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49 *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [141]–[148] and [189].
50 At [175].
51 *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 20, at [16]. See [23] above.
52 *Taunoa v Attorney-General*, above n 22, at [260]. The Judge added that the level will have to be worked out on a right-by-right and breach-by-breach basis, sometimes with the assistance of the appeal process.

[60] In these circumstances it is unnecessary for us to answer the second of the parties' agreed issues,[53] namely whether a plaintiff's conduct can be taken into account when assessing remedies for breach of NZBORA. However we consider that the appellant's point is well taken that it was not the Judge's intention to rule that contributory conduct can never be taken into account in the assessment of compensation.[54] If it were otherwise, that would contradict the Judge's subsequent observation:

> [279] I acknowledge that the circumstances of the breach including the conduct of the plaintiff are relevant to the level of compensation to be awarded insofar as trying circumstances created by a plaintiff's conduct may in appropriate occasions warrant a lesser sum of compensation, just as more egregious conduct on the part of the defendant can warrant an increase in the level of compensation. …

Is an order to provide a plaintiff with a written apology an available remedy for a breach of NZBORA?

[61] The relief which Mr Deliu sought included:

> A direction that the defendant publicly apologise to the plaintiff in open Court and/or in a press release to the media and/or in a publication on the front page of the New Zealand Police's website for a period of one month;

[62] The Judge's discussion of this aspect of the claim was brief. There was no analysis of case law or academic writing concerning the availability of an apology as a coercive remedy. The Judge said:

> [293] Mr Deliu also sought an apology from Police. I consider the declaration made in this judgment, and the sum of compensation awarded are a proper reflection of the redress to which Mr Deliu is entitled. Public apologies are usually associated with the tort of defamation, and no authority to support a direction for the type of apology sought by Mr Deliu in the amended statement of claim was drawn to my attention. Nonetheless it is clear to me from *Baigent's Case* that the range of remedies available to the Court to redress breaches of NZBORA is wide. I consider Mr Deliu is entitled to an apology but it need be no more than a written apology sent to him. How he then chooses to treat the apology is a matter for him. This deals with the relief sought for this cause of action.

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53 See [22] above.

54 *Deliu v New Zealand* Police, above n 2, at [277].

The Judge did not specify the terms of the apology but directed that the police were to provide Mr Deliu with a written letter of apology "acknowledging the breach of s 22(b) of the NZBORA".[55]

[63] The appellant's challenge to this finding was advanced both on the ground that the remedial jurisdiction did not extend to mandatory apologies and that, in any event, such relief was not appropriate where the Crown is the defendant.

[64] Although the parties' submissions on the first issue were fulsome, we do not consider that the present case is a suitable context in which to resolve the question whether the Court has jurisdiction to order the making of an apology. That is because, even if the jurisdiction exists, it would not apply in the present case where the Crown is the defendant.

[65] We agree with the submission of Mr Perkins, on behalf of the appellant, that s 17(1)(a) of the Crown Proceedings Act 1950 is a complete answer to the prayer for an order to make an apology. It provides:

> (1) In any civil proceedings under this Act by or against the Crown … the court shall, subject to the provisions of this Act and any other Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> provided that—
>
> (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may instead make an order declaratory of the rights of the parties; ...
>
> …

[66] A court-ordered apology would be of its nature a form of mandatory injunction which is a type of relief which has never been obtainable against the Crown and would only be available in the event that Parliament amended the Crown Proceedings Act.[56]

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55 At [299].

56 *Burrows v New Zealand Police* [2018] NZHC 2088, [2019] 2 NZLR 652 at [75].

The High Court had no jurisdiction to grant the order for an apology which Mr Deliu sought. The appeal on this issue is also allowed.

Result

[67] The appeal is allowed.

[68] The award of damages and the direction that the appellant must provide a written apology to the respondent are set aside.

[69] The appellant proposed that were the appeal to be allowed there should be no order for costs. Accordingly there is no costs order.

Solicitors:
Crown Law Office, Wellington for Appellant

Transcript of video

A. Hey I'm Frank Deliu, I'm the owner of this floor and counsel acting so I'm going to record this okay.

Q. Nice.

A. Thanks.

Q. I'm Iain Chapman.

A. Good to meet you Iain.

Q. Peter (inaudible 10:56:59).

A. Hello Peter.

Q. Gill Holland.

A. Hi Gill, good to meet you. So is that stuff taken from this office?

Q. Well shall we have a chat and I'll explain everything to you.

A. I understand the basics, can you just answer my question, is that stuff taken from this office or not?

Q. These three envelopes so far.

A. Okay, can I just record them please, excuse me, I'm not pushing you're in my way.

Q. (inaudible 10:57:18).

A. Okay then move or just get out of the way, and what's in there, what's in there please?

Q. Sorry, I spoke to, was it you I spoke to?

A. I'm the owner of this floor and I'm his lawyer, what's in the envelopes please.

Q. Can you detail (inaudible 10:57:34).

A. Thank you.

Q. Before we go any further –

A. Okay, I'll just ask my questions, I don't need to hear from you.

Q. My name is Detective Sergeant –

A. I don't care, you've told me your name, I don't need to hear from you, I'm not asking you questions.

Q. My name is Detective Senior (inaudible 10:57:43).

A. Can you not talk, you're on my floor, I'm not asking you to talk.

Q. Frank, I'm warning you for obstruction.

A. Obstructing what?

Q. A police constable in the execution of his duty.

A. And how am I obstructing you, I don't want you to talk to me.

Q. My name is Detective Senior Sergeant Iain Chapman of the Auckland Police –

A. Okay, so I don't need your speech.

Q. I'm executing a search warrant –

A. Good thank you –

Q. Under section 6 of the Search and Surveillance Act –

A. We've got the warrant right here, thank you very much.

Q. You have the right to refrain from making a statement –

A. We're not making a statement, we're asking you questions of what you've taken, can you please answer the question of what you've taken. Am I a suspect, why are you even giving me my rights?

Q. We have a list of lawyers that you can speak, because we're executing a search warrant.

A. Am I a suspect, why are you giving me my rights?

Q. You were detained pursuant to –

A. I'm detained.

Q. Pursuant to this search warrant.

A. I'm detained?

Q. Yes.

A. Okay, okay.

Q. You've (inaudible 10:58:20) yourself in here, I have spoken to Richard –

A. Okay, okay if I'm detained we're gonna get to that later, now what's in the envelope please?

Q. You have the right to refrain from making a statement.

A. Nobody's making a statement, what's in the envelope?

Q. You have the right to speak to a lawyer in private and without delay and we have a list of lawyers that you can speak to for free. Do you understand your rights?

A. Yes, thank you very much now what's in the envelope?

Q. (inaudible 10:59:14). Exhibit 1. There's a partial file in relation to property (inaudible).

A. And where were these taken, from what office?

Q. The office on the left here.

A. Okay the office on the left – just to be clear here I'm just going to record this. Are you talking about the first door there on the left, is that correct? This door right here.

Q. Yes, the glass door.

A. The glass door right here that's visible to us?

Q. The one that's just been opened.

A. Okay, I just wanted to confirm that, next please. You don't have my permission to do that by the way.

Q. Exhibit 2, same place.

A. Same place, another sale and purchase document is that right?

Q. It's a partial file in relation to the sale (inaudible 10:59:55) property 3 (inaudible 10:59:58) [Eden Crescent property].

A. Yep, great, thank you.

Q. And exhibit 3 (inaudible 11:00:06).

A. And same place, is that right?

Q. Same place.

A. Yeah wonderful. Is that everything?

Q. That's everything.

A. Okay, and are you done with your search?

Q. No.

A. You're not done, what's left?

Q. We've got the warrant, we'll see – we want the full files in relation to this sale and purchase (inaudible 11:00:25) property. There's also some documents in relation to the trust account, and the settlement statements.

A. Okay. Well we need time to consider the warrant obviously before we can give you an answer on that.

Q. Frank, that's not how it works. We're here with the search warrant, we will be obtaining this, ideally with your co-operation as we discussed on the phone.

A. Okay ideally or not.

Q. And if not, then we will just search.

A. Okay, and that's what I mean, so as to the question of co-operation, we'll have to consider that.

Q. Well how long are you talking about?

A. I don't know, as long as it takes.

Q. Well that's again –

A. Are you laughing, is there something funny here, Sir?

Q. Frank –

A. Is there something funny here, Sir? Is this a funny situation?

Q. Frank –

A. Thank you.

Q. As I said to you before, we're here executing a search warrant.

A. Okay, I thought it was something comical that was happening here. I was confused.

Q. Frank. I can't understand you. You have actually hurt my foot, which I am having treatment on.

A. Okay.

Q. You were very rude –

A. Is that what's funny? Is that what's funny?

Q. Frank – no it's not –

A. Thank you, okay, yes, please.

Q. We will be searching this office.

A. I understand, co-operation is the one we're talking about right now, please let's not talk about what you're gonna do, you said that you'd like my co-operation, is that right or wrong?

Q. Ideally.

A. Ideally.

Q. But we don't need it.

A. Okay. And nobody's debating that, Sir. So the question is, do we wish to co-operate, correct?

Q. Yes.

A. Okay, we'll come back to you with that.

Q. How long?

A. Carry on with your search.

Q. How long?

A. As long as it takes, I told you that.

Q. Okay, we'll carry on with the search.

A. Okay.