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The Owners Strata Plan 21372 v Banovic [2017] NSWSC 177 (28 February 2017)

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Supreme Court
New South Wales

Case Name:	The Owners Strata Plan 21372 v Banovic
Medium Neutral Citation:	[2017] NSWSC 177
Hearing Date(s):	27 February 2017
Date of Orders:	28 February 2017
Decision Date:	28 February 2017
Jurisdiction:	Equity
Before:	Darke J
Decision:	Orders that the plaintiff's notice of motion for contempt filed on 15 March 2016 be permanently stayed
Catchwords:	CONTEMPT – civil contempt – failure to comply with orders of the Court – alleged contemnor seeks permanent stay of contempt proceedings – tutor previously appointed for alleged contemnor – whether alleged contemnor fit to face charge of contempt – whether requirements of fitness to plead test in R v Presser [1958] VicRp 9 ; [1958] VR 45 satisfied – contempt proceedings permanently stayed
Legislation Cited:	Civil Procedure Act 2005 (NSW) Mental Health (Forensic Provisions) Act 1990 (NSW) Uniform Civil Procedure Rules (NSW)
Cases Cited:	CFMEU v Boral Resources (Vic) Pty Ltd (2015) 256 CLJ 375 ; [2015] HCA 21 Eastman v The Queen (2000) 203 CLR 1; [2000] HCA 29 Prothonotary of the Supreme Court of New South Wales v Chan (No 15) [2015] NSWSC 1177 R v Presser [1958] VicRp 9 ; [1958] VR 45 Witham v Holloway (1995) 183 CLR 525
Category:	Procedural and other rulings

Parties: The Owners Strata Plan 21372 (Plaintiff)
Joe Banovic (First Defendant)
Nada Banovic (Second Defendant)

Representation: Counsel:
Mr T Davie (Plaintiff)
Mr L Geary (solicitor) (First Defendant)
Mr Bambagiotti with Mr F F F Salama (Second Defendant)

Solicitors:
The Law Man (Plaintiff)
Salvos Legal (First Defendant)
Makinson d'Apice Lawyers (Second Defendant)

File Number(s): 2015/00301623

Publication Restriction: None

JUDGMENT

1. On 15 March 2016 the plaintiff, the Owners Corporation of Strata Plan 21372, filed a motion seeking orders that the first defendant, Mr Joe Banovic, be held in contempt of court for failing to comply with certain interlocutory orders made by me on 1 December 2015.
2. Mr Banovic is 85 years of age. He lives alone in a unit owned by his daughter (the second defendant) in the strata complex. In essence, the orders made on 1 December 2015 required Mr Banovic to take certain steps to facilitate, and not to hinder or obstruct, the carrying out of certain works on the balcony to the unit in which he lives.
3. The motion for contempt was listed for hearing to commence yesterday. When the matter was called on, the first defendant, for whom a tutor was appointed on 1 August 2016, applied to have the Court first deal with a motion seeking a permanent stay of the contempt motion. Mr Geary, solicitor, who appears for the first defendant, explained that the basis of the stay was that the first defendant was not fit to be tried for contempt. He submitted that the issue of fitness ought to be determined as a preliminary matter. Mr Davie of counsel, who appears for the plaintiff, informed the Court that it was also the plaintiff's position that the issue of fitness be determined as a preliminary matter. It was also common ground that if the Court decided that Mr Banovic was not fit to face the alleged contempt charges it would be appropriate for the contempt motion to be permanently stayed.
4. These positions were maintained in the face of some expressions of doubt on my part as to whether the principles concerning fitness to be tried were truly applicable in civil contempt proceedings, notwithstanding that such proceedings share some of the characteristics of criminal proceedings (see *Witham v Holloway* (1995) 183 CLR 525 at 534 and *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375; [2015] HCA 21 at [42]- [45]). In view of the common position of the parties I acceded to the application to proceed with the fitness issue as a preliminary matter. Leave was granted for the filing of the motion.
5. The first defendant and the plaintiff were also in agreement that the [Mental Health \(Forensic Provisions\) Act 1990](#) (NSW) did not apply in the present circumstances;

and they agreed that the test to be applied on the question of fitness was as stated by Smith J, in the context of a criminal trial proper, in *R v Presser* [1958] VicRp 9; [1958] VR 45 at 48. Smith J stated that the question was whether the accused, because of a mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him. His Honour continued:

He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.

6. Mr Geary submitted that the evidence in the present case, and the fact that a tutor was appointed on 1 August 2016 on the grounds that Mr Banovic was a person under legal incapacity, led to the conclusion that the minimum standards required to be met in order to avoid unfairness or injustice to Mr Banovic were not satisfied. Mr Geary emphasised in particular the inability to obtain instructions from Mr Banovic, and his apparent lack of understanding of the nature of the proceedings generally.
7. Before turning to the detail of the evidence, something should be said about the appointment of the tutor and the circumstances that led to the appointment.
8. The contempt motion was made returnable on 24 March 2016. There was no appearance by Mr Banovic (who was not then legally represented in the proceedings) on that day. An order was made for him to attend Court on 31 March 2016 for the purpose of answering the motion. He did not appear on that day. An arrest warrant was issued (the operation of which was stayed for a period) requiring Mr Banovic to be brought to Court on 12 April 2016 at 9.30am.
9. When the matter was called on that day there was initially no appearance by Mr Banovic. The Court was informed by Sheriff's Officers that they had attended Mr Banovic's residence but were unable to contact him. However, at about 9.34am Mr Banovic himself appeared in Court, unrepresented. Attempts were then made by me to explain to Mr Banovic the nature of the contempt proceedings that were being brought against him. That attempt continued for a while. As can be seen from the transcript of the proceedings on that day (which is in evidence on the present application) I became concerned that Mr Banovic was not comprehending what was taking place. Mr Davie, who was appearing for the plaintiff on that occasion as well, apparently shared my concern. The appointment of a tutor was

suggested by Mr Davie. The matter was stood down to enable inquiries to be made about obtaining some pro bono legal assistance for Mr Banovic. After a while a barrister, Mr Abdulhak, appeared and offered to try to assist Mr Banovic. Mr Abdulhak had a conference with Mr Banovic. I note that Mr Abdulhak told the Court that there were "potential issues of capacity to really appreciate the nature of the proceedings" and that he had difficulty traversing the issues "and the relevance of orders that were made in December." The contempt motion was adjourned to 10 May 2016.

10. In the meantime, Mr Geary (of Salvos Legal) became involved. He swore an affidavit on 29 June 2016. That affidavit, and an affidavit of a relatively formal nature affirmed by Ms Barbara Ramjan on 28 July 2016, were relied upon by Mr Geary on the application made on 1 August 2016 for the appointment of Ms Ramjan as a tutor for Mr Banovic in the proceedings. The appointment was not opposed by the plaintiff. Mr Geary's affidavit, which was also read on the present application, included the following:

8 Since originally taking instructions from the first defendant in early May 2016 I have had cause to carefully consider whether I believe the first defendant is or may be a person under a legal incapacity, for the purposes of UCPR 7.18. I have no medical or psychological qualifications and cannot offer any clinical opinion, other than as a lawyer who has some considerable experience dealing with individuals at times of crisis in their lives.

9 Throughout the course of my engagement with the first defendant he has largely been cooperative with me and has provided me with his understanding of the history of the present proceedings and related matters involving some of the other residents within his strata building. At times the instructions have been quite lucid but at other times, the first defendant proceeds to talk quite passionately about matters unrelated to the issues in dispute in the proceedings but which he believes are bigger issues for the court's consideration, such as regards apparent drug use and drug dealing by others within his strata complex.

10 I have always spoken orally with the first defendant in the English language and to the best of my knowledge he appears capable of understanding and communicating back to me in the English language. I do have some doubts as to the first defendant's ability to read written correspondence and he has confirmed to me that he has difficulty in this regard, most recently in conference on 28 June 2016 when I specifically sought his confirmation of this difficulty which he acknowledged. The first defendant has expressed a willingness to communicate with me orally in English, rather than through a Serbian interpreter.

11 On the basis of my engagement with the first defendant in this matter as set out above and my professional experience as a lawyer who has dealt with a large number of individuals in similar circumstances as the first defendant over the past 13 years, I have formed an opinion that the first defendant has a legal incapacity which affects his ability to understand some significant aspects of these proceedings, in particular:

- (a) the nature of a charge of either a civil or criminal contempt and the potential consequences;
- (b) the complexities involved when discussing matters relating to common/lot property;
- (c) notions of private/exclusive use of common property, as relates to parts of strata premises such as a balcony;
- (d) the authenticity of a court transcript as an accurate record of

proceedings;

(e) the cross-over between civil and criminal jurisdictions of the Supreme Court, notwithstanding that these proceedings are in the Real Property List; and

(f) the validity of court orders printed from a computer rather than those which may be physically signed by the presiding Judge.

12 I believe that these matters are compounded by the first defendant's (potentially very) limited English literacy. I accept that the first defendant does have some English literacy but from all of my own observations and engagements with him to date, I believe that the level of comprehension would be very basic and quite probably nowhere near the level required to properly understand many of the matters set out in [11 (a)-(f)] above. I note that the first defendant indicated per pg. 4 In 10 of the transcript of 12 April 2016 that "I don't read English, maybe a little bit."

13 I have sought to give the first defendant advice as to a course of responding to the present charge which would be in his interests but he has not been willing to follow that advice. However, at the same time, he has not withdrawn his instructions for me to seek to assist him in the proceedings. Whilst he appears happy to speak with me regarding this matter, I have been unable to obtain clear instructions as to how I am to respond to the present contempt charge, despite my efforts to do so. It is my opinion that due to a combination of his literacy deficiencies and other matters affecting his capacity, the first defendant does not understand:

(a) The nature of the proceedings as a whole, let alone the nature of a contempt charge;

(b) The validity of the orders made by the court on 1 December 2015;

(c) That the orders made on 1 December 2015 were in fact orders of the court and not a document put forward by the solicitor for the plaintiff;

(d) The specific wording of the orders made on 1 December 2015 and the consequences for non-compliance by him;

(e) The elements required to prove a contempt charge against him; and

(f) The further steps for the proceedings and the nature of any final hearing.

14 As such, I feel I do not have the ability to take proper instructions and am therefore regrettably unable to enter a plea or file any submissions in response to the contempt charge.

11. A report dated 21 September 2016 prepared by Ms Ramjan was also read on the present application (apart from paragraph 8). Ms Ramjan is not medically qualified, but she possesses considerable experience in dealing with issues of mental incapacity. She has served for about 13 years, albeit some time ago, as a member of the Guardianship Tribunal of New South Wales. Her report includes the following:

3. I met Mr Banovic on 1 August 2016 prior to Court. I attempted to explain my role and how and why I came to be involved but Mr Banovic was not prepared to listen or engage. Mr Banovic said he did not want me and was not happy with my appointment and initially would not respond to my questions. I attempted to engage with Mr Banovic again once we arrived at court. After a short period of discussion with Mr Geary and myself and then between Mr Geary and Mr Banovic, Mr Banovic did speak with me. I observed him to be upset and angry. I noted he was determined for me to hear his statements. He said there were drug dealers in his unit complex. There were many drug deals done daily. He said that there was a doctor living in one of the units that wrote hundreds of thousands of medical scripts

for drugs and that he was a criminal. Mr Banovic said that I had to tell the Judge about these people...

...

5. I met Mr Banovic on 29 August 2016 prior to court. I observed him to be very angry with me. He attempted to say something to me but on each occasion just shook his head and glared at me. He then said I did not tell 'the judge' what he told me. He said I lied; I didn't say what was true. I attempted to speak to him but he refused to listen and either turned away or walked away.

6. I have attempted to call Mr Banovic but have not been able to speak with him. On several occasions it appears he has answered the phone but chosen not to respond to me, on other occasions his mobile phone has not been answered.

...

9. On each occasion I have been able to speak to Mr Banovic he would not disclose any of his history to me except to tell me that there were drug dealers in his complex, that he had photographed them, he had reported them and they were dealing daily. He said they were killing children; there was a school close by and asked why I wasn't doing something about this.

10. Mr Banovic presents as an elderly man, well dressed, who cares about his appearance. He is partially deaf and this makes conversing with him a challenge, as does his poor understanding of English. I observed on both court days [1 August 2016; 29 August 2016] that Mr Banovic rejected the use of the court appointed interpreter preferring to use the Hearing Wand. I observed him to have more comfort in his own hearing of the words spoken than those interpreted to him. He appeared suspicious of what others might tell him was being said in the courtroom. I note from the transcript of 12/4/16 [Annexure "D"] and from Mr Geary's affidavit of 29 June 2016 that Mr Banovic has a diagnosis of diabetes.

11. I note that Mr Banovic was scheduled under the Mental Health Act in 2009 and that this hospitalisation resulted from an issue similar to this in that there was an attempt to enter his unit and to either remove or trim his "trees" on his verandah. I note that there was no diagnosis of mental illness but that a 'mild cognitive impairment' was diagnosed amongst other things.

12. In my opinion and on each occasion I have been able to speak with Mr Banovic he confirms that he clearly has no understanding of the import of this court matter. I observed him to be fixated on what appears to be a delusion that there are a number of tenants in his complex dealing drugs daily, that the Doctor living within the complex writes thousands of scripts for improper purposes and for illegal means. I have attempted to convey to Mr Banovic that he had breached court orders but he could not accept what I was saying, he had no appreciation of the orders, he conveyed no understanding of the obligation those court orders placed on him. In summary I believe that Mr Banovic had no understanding of what those court orders required of him...

13. Based on my reading of the material, my meetings with Mr Banovic, my phone calls answered but not responded to, as well as my observations of Mr Banovic, I am of the opinion that Mr Banovic lacks legal capacity...

14. It seems clear that Mr Banovic is suffering from a cognitive impairment type condition probably exacerbated by delusions...

12. Ms Ramjan affirmed a further affidavit on 9 November 2016. This affidavit was also read on the present application (apart from paragraphs 12 to 18). She deposed that she affirmed the contents of her earlier report and maintained the

opinions expressed therein. She also deposed that she had made several attempts to telephone Mr Banovic without success, and that even when he answered the phone he did not say anything to her. Ms Ramjan continued (at paragraphs 6 to 9 of her affidavit):

6 In each of my interactions with Mr Banovic I have seen nothing to indicate that he understands the importance of these proceedings.

7 Further, in my observations Mr Banovic has never shown any appreciation of the obligations that past court orders have imposed upon him.

8 It remains my opinion that Mr Banovic has no proper awareness or understanding of the court orders which were made on 1 December 2015 and of the obligations they placed upon him.

9 Based on the report of Professor Brodaty and the various hospital records produced under subpoena in these proceedings, it is my opinion that Mr Banovic is suffering from a significant cognitive impairment and it is my opinion that Mr Banovic was suffering from that impairment as at 1 December 2015.

13. The report of Professor Brodaty mentioned by Ms Ramjan was also read. This report, dated 22 August 2016, is essentially based on information contained in Mr Banovic's file at the Prince of Wales Hospital. It appears that Mr Banovic had been admitted there in 2009 by police acting on a magistrate's order made on the request of the Acute Care Team. On that occasion a diagnosis was made of mild cognitive impairment with paranoid ideation in the context of cerebrovascular disease and type II diabetes. There was also a suggestion that there was an early vascular dementing process. I note that an appointment had been made for Professor Brodaty to visit Mr Banovic at his unit on 22 August 2016. However, Mr Banovic was either not at home or did not answer the doorbell when the Professor arrived. Professor Brodaty's report includes the following:

I cannot comment on Mr Banovic's mental state without having assessed him. If he has been able to look after himself and be well maintained in his home unit for the last seven years since the diagnosis of mild cognitive impairment was made this argues against a degenerative process. On the other hand he may have had a stroke or vascular dementia prior to 2009 which could be stable even though usually cerebrovascular disease progresses.

In the hospital file it is stated that his daughter claimed three years ago that there were no issues with his cognition nor did she think that he was delusional. However the nature of the complaints and the fact that they involved several disparate people within the block of units does suggest to me that he has paranoid ideation.

14. Finally, a report of Dr Robert Lewin (obtained by the plaintiff's solicitors) dated 21 December 2016 was read. Dr Lewin reviewed various documents including the medical records relied upon by Professor Brodaty, and Professor Brodaty's report itself, as well as Ms Ramjan's affidavit of 9 November 2016. Dr Lewin expressed the opinion that a careful medical examination of Mr Banovic is required. Noting that he had not examined Mr Banovic, Dr Lewin stated, however, "that the various data raised significant questions and doubts regarding Mr Banovic's capacity to understand, to follow and to participate in legal proceedings." Dr Lewin continued:

These data are insufficient to reach a firm conclusion as to his capacity to instruct, to make his case, to respond to matters put to him, or to deal with the court's directions.

15. None of the witnesses (including Ms Ramjan who was present in Court) were required for cross examination.
16. Mr Geary accepted that there was no formal diagnosis of Mr Banovic's mental condition and that the evidence was imperfect. He submitted, however, that there was at least evidence that Mr Banovic was suffering from a paranoid condition and the evidence of Ms Ramjan who has considerable experience in the field (and to a lesser extent his own evidence) demonstrated that Mr Banovic had a significant mental incapacity that precluded him from adequately understanding the nature of the proceedings, and precluded him from giving instructions on the issues raised by the contempt motion. Mr Geary submitted that the minimum requirements referred to in *R v Presser* were not satisfied. He emphasised that he was unable, for example, to obtain instructions from Mr Banovic going to the key question of Mr Banovic's knowledge of the orders made on 1 December 2015. Mr Geary further submitted that the order for the appointment of a tutor, which continues in force and is based on the notion that Mr Banovic is a "person under legal incapacity", provides another basis to conclude that the *R v Presser* minimum requirements were not satisfied. He submitted that Mr Banovic fell within paragraph (e) of the definition of "person under legal incapacity" found in [s 3](#) of the [Civil Procedure Act 2005](#) (NSW) as an incommunicate person, unable to express his will with respect to the contempt motion and the proceedings generally.
17. Mr Davie submitted that there is a starting presumption that someone is fit to stand trial and that the onus was on Mr Banovic to displace it. Mr Davie pointed out that there was no psychiatric opinion that Mr Banovic was unfit. Mr Davie further submitted that although there is evidence about difficulties in communicating with Mr Banovic and obtaining instructions from him, the evidence did not disclose why that was the case. He submitted that the answer to the question could not be known unless Mr Banovic is medically examined. He said there was a paucity of evidence, and the Court was not in a position to reach a firm conclusion in relation to fitness. Mr Davie also submitted that the test for appointing a tutor differs from the *R v Presser* test, so the mere fact that there is a tutor is not sufficient reason to conclude that Mr Banovic lacks fitness.
18. I accept that last submission. Even where the basis for the appointment of a tutor is a mental disability or incapacity, in determining the fitness of a person to face contempt charges it remains necessary in my view to consider the totality of the evidence and then make an assessment of fitness.
19. The evidence given by Mr Geary and Ms Ramjan was not the subject of any challenge. I have considered the whole of their evidence, the more salient parts of which are referred to above.
20. It is noteworthy that:
 - (a) Mr Geary expresses the opinion that due to a combination of Mr Banovic's literary deficiencies and other matters affecting his capacity, Mr Banovic does not, amongst other things, understand the nature of the proceedings as a whole let alone the nature of the contempt charge, or that

the orders made on 1 December 2015 were in fact orders made by the Court; and that he – Mr Geary – therefore lacks the ability to take proper instructions from Mr Banovic including in relation to the contempt charge; and

- (b) Ms Ramjan expresses the opinion (in her report of 21 September 2016) that on each occasion she has been able to speak to Mr Banovic "he confirms that he clearly has no understanding of the import of this Court matter" and observed him to be fixated on what appears to be a delusion that there are a number of tenants in his complex dealing drugs daily and that a doctor living there writes thousands of scripts for improper purposes and for illegal means. Ms Ramjan further states that she has attempted to convey to Mr Banovic that he breached court orders but he had no appreciation of the orders or understanding of the obligation the orders placed upon him. Ms Ramjan goes on to express the opinion that Mr Banovic lacks legal capacity.
21. Whilst neither Mr Geary nor Ms Ramjan are qualified to give expert medical opinions, they each possess, in different ways, considerable experience in dealing with persons with mental health issues and intellectual impairments or incapacities. I accept the evidence of each of them and consider that such evidence is entitled to be afforded significant weight on the question of Mr Banovic's fitness to face the contempt charges.
 22. The evidence given by Mr Geary was the central basis of the application made last year for the appointment of a tutor. Such an appointment may be made in respect of a person under legal incapacity. A person under legal incapacity is defined in [s 3](#) of the [Civil Procedure Act](#) to mean any person who is under a legal incapacity in relation to the conduct of legal proceedings and includes, inter alia, a person who has such a mental disability that he or she is unable to express his or her will with respect to his or her affairs. Further, [Uniform Civil Procedure Rules 2005](#) (NSW), r 7.13 provides that in Division 4 of [Part 7](#) of the Rules a person under legal incapacity includes a person who is incapable of managing his or her affairs.
 23. The clear basis of the application for the appointment of a tutor was that Mr Banovic did not understand the nature of the proceedings and it was not possible to obtain proper instructions from him. As I have already mentioned, the appointment of a tutor was not opposed by the plaintiff. The Court considered that the appointment was warranted in the circumstances. Apart from Mr Geary's evidence, account was taken of the events of 12 April 2016 when Mr Banovic appeared, unrepresented. Having sought to engage Mr Banovic about the nature of the contempt motion brought against him it readily became apparent that Mr Banovic had difficulty in following what was taking place. This gave rise to concern on my part (and on the part of Mr Davie) about his level of understanding. Notwithstanding that there seemed to me to have been a deterioration in Mr Banovic's level of understanding since December 2015, I gained no impression that Mr Banovic was behaving in other than a genuine fashion (compare *Prothonotary of the Supreme Court of New South Wales v Chan (No 15)* [\[2015\] NSWSC 1177](#) at [\[41\]](#) and [\[44\]](#)).

24. Since the appointment of Ms Ramjan as tutor, the evidence has been augmented by her evidence as referred to earlier, and also by the rather limited evidence contained in the reports of Professor Brodaty and Dr Lewin.
25. It is correct that there is no firm medical evidence, or diagnosis, of a particular condition suffered by Mr Banovic. The closest the expert medical evidence comes to a particular diagnosis is Professor Brodaty's rather tentative suggestion that Mr Banovic has paranoid ideation. However, the unchallenged evidence of Mr Geary and of Ms Ramjan supports the conclusion that Mr Banovic suffers from an impaired mental capacity which causes him to lack a proper understanding of the nature of the proceedings (in particular the contempt charges brought against him) and renders him incapable of providing instructions concerning the proceedings, including the contempt motion. Having considered the entirety of the evidence I am satisfied that such conclusion should be drawn notwithstanding the lack of a firm medical diagnosis.
26. The medical evidence, limited as it is, seems to me to be consistent with the opinions proffered by Mr Geary and Ms Ramjan. There is evidence of at least mild cognitive impairment and a suggestion of an early vascular dementing process in 2009. Professor Brodaty suggests Mr Banovic may have paranoid ideation and Dr Lewin agrees (without reaching any firm conclusion) that the data he has analysed raises significant questions and doubts regarding Mr Banovic's capacity to understand, to follow, and to participate in legal proceedings.
27. The opinions given by Mr Geary and Ms Ramjan as to a lack of understanding are to an extent reinforced by Mr Banovic's behaviour in Court on 12 April 2016. So, too, is Ms Ramjan's evidence about Mr Banovic's fixation on what appears to be a delusion about drug dealing in the block of units. As I have said, I do not think that Mr Banovic's behaviour on that occasion was anything other than genuine. Mr Davie eschewed any suggestion to the contrary.
28. In my opinion, adapting the test laid down by Smith J in *R v Presser* (supra), the minimum standards required to be met before Mr Banovic could face the charges for contempt without unfairness or injustice to him have not been satisfied. I do not think that he is able to understand the nature of the contempt charges brought against him. I do not think he possesses a general understanding of the contempt proceedings and I do not think that he is capable of giving necessary instructions concerning the facts or issues relevant to the contempt proceedings.
29. The presumption, which undoubtedly exists, that Mr Banovic is fit to face the charges for contempt has in my view been rebutted by the evidence adduced on this application. If there was an onus cast upon Mr Banovic in that regard, it has been discharged. I do not consider that Mr Banovic is fit to face the charges of contempt made against him. It follows that the plaintiff's motion for contempt should be permanently stayed.
30. Finally, I should note that Mr Davie submitted that it would be a startling conclusion that someone can thus be effectively placed "beyond the law". However, it could be said to be at least as startling that the law would permit a hearing of contempt charges to proceed against a person (who would thereby be potentially subject to punishment including imprisonment) in circumstances where the person, by reason of an impaired mental capacity, was not able to understand the nature of the charges or the proceedings generally and was not able to give

necessary instructions. The policy of the law as reflected in the test laid down in *R v Presser* (supra), which the parties accepted was applicable in the present case, is that in these circumstances fairness and justice to the accused person requires that the hearing not proceed (see also *Eastman v The Queen* (2000) 203 CLR 1; [\[2000\] HCA 29](#) at [\[62\]](#) to [\[64\]](#)).

31. The Court orders that the plaintiff's Notice of Motion filed on 15 March 2016 be permanently stayed.

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