IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 5/2012

BETWEEN **ARUMIA ROBERT SAMATUA**

Plaintiff

AND **THE ATTORNEY-GENERAL**

Defendant

Hearing: 1, 2, 3, 4 and 5 December 2014

Decision: 3 June 2015 (NZT)

Appearance: Mr N Russell and Ms S Jones for the Plaintiff
Ms C Evans and Ms C King for the Defendant

JUDGMENT OF GRICE J

Judgment edited for clerical slips, reformatted and paragraphs renumbered.
See Minute of Grice J dated 23 June 2015 (NZT)

Contents

Introduction

1. Arumia Robert Samatua[1] was born in Auckland, New Zealand. He lived there until 1997, when he moved his family to the Cook Islands where his parents had been born. His father had a home at Tautupae, Penrhyn.

2. Mr Samatua, his wife Sheryl and young son, moved to his father's island, Penrhyn, shortly after 11 September 2001.

3. In Penrhyn Mr Samatua spent a lot of time with his father Reisura Samatua.[2] They fished together in the waters surrounding Penrhyn for a living. At the time Mr Samatua Senior was residing in a residential unit in the government Marine Research Centre ("MRC") at Omoka, Penrhyn. This was on land leased by the Cook Islands Government through the Ministry of Marine Resources ("the Ministry").

4. Reisura Samatua had been involved in a dispute over the MRC land for some years. He claimed the right to occupy the land as an owner. It was this dispute and his refusal to give up the MRC residence which gave rise to the events which lead to the imprisonment of Arumia Samatua.

5. Reisura Samatua then occupied the MRC unit without the permission of the Naharakura Trust which administered the lease for the Ministry. They wanted him to leave the residence. Arumia Samatua spent a lot of his time at the residence with his father. He supported Reisura Samatua's claim to occupation based on his rights as an owner of the land. In May and June 2006 Arumia Samatua appeared in the Penrhyn Court before Justices of the Peace on three occasions facing charges relating to the occupation of the unit and supporting his father in that occupation. He was convicted and sentenced on each occasion. The first charge was theft of keys of the MRC unit and the second and third charges were Contempt of Court. He was sentenced to periods of imprisonment on the second and third charges. Subsequently he was taken by ship to Rarotonga where he completed a term of 12 months in Arorangi Prison followed by probation.

[1] Arumia Samatua is also known as Robert.
[2] Reisura Samatua is also known as John.

6. Mr Samatua says that his arrests, the Court hearings on Penrhyn, his imprisonment on Penrhyn, removal to and detention in prison in Rarotonga and the subsequent charges and imprisonment in Rarotonga, as well as surrounding events were unlawful and breached the Constitution.

7. These proceedings claim public law compensation for constitutional breaches and damages for false imprisonment and misfeasance in public office.[3] Mr Samatua also seeks a declaration for the breaches of the Constitution. The claims are against the Attorney General representing the Crown, in respect of actions of the Police, Justices of the Peace, officials, prison and probation officers.

8. In 2010 the High Court set aside Mr Samatua's three Penrhyn convictions. By then any appeal was well out of time. The High Court was of the view that there was no power to extend the time limit and dealt with the matter as an application for retrial. The Crown said it could not be sure that the matter was properly dealt with by the Justices of the Peace and as a consequence the Court could have concern that due process was not followed. The High Court reached the view that prima facie the events involving the Police and the Court hearings in Penrhyn were conducted in a manner that was not consistent with natural justice nor in accordance with the rights guaranteed by Article 65 (1) of the Constitution. An order quashing the convictions was made at the suggestion and with the consent of the Crown.[4] As part of the process the Crown agreed to offer no evidence at a retrial. Therefore the Penrhyn convictions are no longer extant.

9. The Crown have denied that these prima facie breaches of the Constitution give rise to a right to damages or public law compensation.

---

[3] Claims in negligence were abandoned at trial. The terms *public law or constitutional compensation* and *public law damages* are used interchangeably although I generally refer to *public law damages.*

[4] *Samatua v Attorney-General* OA 5/10 (CA 1/10). Consent memorandum dated 3 June 2010 (p.5 bundle of documents).

Evidence by Skype

10. As a preliminary matter before trial, the Crown sought leave for a number of witnesses to give their evidence by way of Skype connection[5] from Penrhyn. Before the trial commenced I gave a decision granting leave and setting out my reasons as well as some procedural guidance.

11. The relevant witnesses gave their evidence from the courtroom in Penrhyn. Two large screens were set up in the courtroom in Rarotonga which allowed a clear view of the witnesses while they gave their evidence and were questioned. The witnesses in Penrhyn were able to see and hear the Judge and counsel as required. When needed, an interpreter was present in both the Penrhyn and Rarotonga courtrooms.

12. The Skype audio and visual transmission was clear in both directions. A few minor technical glitches led to some short delays but these were dealt with in a timely manner at the Penrhyn end by the resident telecommunications technician. The court and the IT staff in the Ministry of Justice in Rarotonga have developed considerable expertise in Skype setup and implementation and were able to deal with technical issues at this end efficiently.[6]

13. Most of the witnesses required the assistance of interpreters. This always slows down the speed as well as affecting the spontaneity of the evidence and responses in any event. Any advantages in having the witnesses present in the courtroom would have been minimal.

14. There will always be cases where it is necessary for a witness to travel from a distance to be present in person to give evidence. However the experience in this case supports the wider use of Skype in courts in the Cook Islands. The cost of bringing witnesses from the outer islands can be significant. In my earlier decision I set out the Crown estimates of the costs which would have been incurred in this case had the witnesses been required to give evidence in person. These included the costs of chartering a flight from Penrhyn, accommodation during the trial and the cost of returning the witnesses. The

[5] Skype is a technology which provides real-time transmission of voice and video over the internet.
[6] Skype was used for the evidence of witnesses based in Penrhyn in an electoral petition case heard by the High Court earlier in the year.

use of this technology will greatly assist in managing the costs of trials involving witnesses from outside Rarotonga in the future.

Issues

15. The causes of action relate to a series of events which began in Penrhyn in May 2006 and ended in Rarotonga over a year later. The causes of action set out in the Statement of Claim are: breach of the Constitution; false imprisonment; misfeasance in public office and negligence. In the course of the trial Mr Russell, for the defendant, indicated he did not intend to pursue the claims in negligence.[7] **Attached** as **Schedule 1** is the Agreed Statement of Issues for Determination filed by the parties. This does not narrow the issues but rather sets out the events relied upon by the Plaintiff under the respective causes of action.

16. Bad faith is not listed as an issue in the Agreed Statement of Issues. Nevertheless it must be established in respect of the claims in tort to avoid the statutory immunity which may be available to the Crown for tortious actions involving actions of a judicial nature and execution of judicial process.[8] Bad faith is also an element of the tort of misfeasance in public office. I deal with bad faith as an issue below.

17. In respect of each of the events listed in the Agreed Statement of Issues the relevant particulars are set out in the Amended Statement of Claim. I **attach** a list of particulars pleaded by the Plaintiff as breaches of his Constitutional rights cross referenced to the Amended Statement of Claim as **Schedule 2**. The allegations are wide ranging and cover a number of incidents. I deal separately with each of the events and make findings on the facts in light of the relevant particulars.

[7] The Crown made written submissions on that cause of action but did not take them further after counsel for the plaintiff clarified in his closing submission that he would not pursue the action in negligence.
[8] Section 6(5) of the Crown Proceedings Act 1950 as it applies in the Cook Islands. See below.

The Background

18. Dorothy Samatua is Reisura Samatua's daughter-in-law. She managed the MRC site until she and her family left for Rarotonga in about 2002. Her employment arrangement with the Ministry allowed her and her family to reside in the MRC unit. When she left in 2002 the Ministry asked that the unit be vacated. Reisura Samatua who had been staying with his daughter-in-law and family continued in occupation after she left. He refused to leave despite requests that he vacate the residence from the Ministry and the Naharakura Lease Trustees who held the land for the benefit of the owners. Reisura Samatua claimed he was entitled to occupy the residence as owner of the land. He said that the lease to the Ministry was invalid.

19. The Ministry had leased the MRC land from a group of Penrhyn landowners since 1976. The Naharakura lease was validated in 1992 by an Act of Parliament.[9] It was enacted to deal with unresolved disputes about the ownership of the land and to create a lease to allow the land to be used for the benefit of the people of Penrhyn and the Cook Islands.[10] The trustees of the land for the owners were the members from time to time of the Penrhyn Island Council ("the Island Council"). Reisura Samatua was an owner of the land.[11]

20. At the time of these events Reisura Samatua did not accept the validity of the lease despite the validating Act. In December 2008, the High Court declared

[9] The Penrhyn (Naharakura Lease) Facilitation Act 1992 validates the lease of the land on which the MRC is situated. It preserves the rights of the owners of the leased land. Those were to be determined by the Land Division of the High Court. A body corporate known as the Naharakura Development Trust whose trustees are the members from time to time of the Island Council of Penrhyn administer the lease and receive the rental. The beneficiaries of the Trust are the successors of Revahua and Pangerua. There were ongoing disputes about the amount of the rental which have been settled between the Government and the trustees.

[10] *Reisura Samatua v Cook Islands Government Property Corporation* OA 4/06, 8 December 2008. Nicholson J at para 12. This was an application for a declaratory judgment relating to the validity of the MRC lease and whether claimants would be entitled to reimbursement of costs to pursue the update of titles to the site. The Court declared the lease valid and that no reimbursement of costs for updating titles was available.

[11] A person who had been determined by the Land Division of the High Court to be an owner in the leased land and who had had his relative interest in each of the leased lands determined by the Court was entitled to give notice to assign his rights and interest in the capital and any income to him or to charitable purposes beneficial to the island of Penrhyn.

that the lease was valid following an application for a declaratory judgment made by him.[12]

21. Throughout these events Arumia Samatua was assisting and supporting his father in the land claim. As his father was getting old Arumia considered that unless action was taken while he was in occupation of the MRC site it would be hard to do anything later. He regarded his father's occupation of the MRC unit as a peaceful protest.

22. Arumia Samatua's support of his father included looking after his father's needs, providing him with food and spending most days and part of the nights at the MRC unit and on the Ministry's site.

23. Mr Teariki Jacob was supporting the Samatuas in relation to the land claim also. He is mentioned on a number of occasions as giving legal advice and assistance to the Samatuas. Mr Jacob is highly regarded by them and a cousin of Reisura's wife, Mrs Ngapere Samatua. While he had knowledge of legal and land matters, Mr Jacob is not a lawyer nor is he legally qualified. According to Mr Samatua, Mr Jacob has a university degree and had worked at the High Court as well as being a former Secretary for Justice. He had also been involved in the setting up of the Naharakura Trust.

24. Mr Jacob assisted Reisura Samatua in the land claim in the period leading up to and throughout these events. While he did not give evidence his advice was important to the Samatuas and he provided guidance to them in the quest to secure Reisura Samatua's rights to the land and to maintain his occupation of the MRC unit.

25. Reisura Samatua had been trying to get the Land Court to sit in Penrhyn to deal with the land claims and allow him to succeed but had been unsuccessful. Mr Jacob was providing guidance on that matter and he had prepared documentation setting out Reisura Samatua's claim to the ownership of the MRC site supporting his right to occupy the residence. This was sent to the Island Council in Penrhyn to justify Mr Reisura Samatua's occupation of the MRC unit and to persuade the members of the Council (who

[12] *Reisura Samatua v Cook Islands Government Property Corporation* Supra .

were the Naharakura Trustees) that he was justified in refusing to leave the MRC residence.

26. The advice that Mr Jacob gave was not only in connection with land matters. He also advised Arumia Samatua during the incidents giving rise to these proceedings. It was on the advice of Mr Jacob that Arumia Samatua said he kept notes of the Penrhyn incidents. Mr Samatua said Mr Jacob had told him what would happen and that it was important to keep a diary.

27. The Samatuas also turned to Mr Jacob for advice following the first Court hearing. After Mr Samatua was imprisoned Mr Jacob prepared court applications for Arumia Samatua seeking his release from prison, for compensation and for various related orders.

28. Mrs Samatua Senior thought that she gave documents prepared by Mr Jacob to the visiting Justice Mr Kenning and the Ombudsman when Arumia Samatua was in prison in Rarotonga, although she is not certain exactly what was contained in the documents provided.

The Events

The First Appearance 23 May 2006 – Penrhyn

29. The Penrhyn Police were asked to intervene in the dispute over the MRC. There were two Police officers on the island, the officer in charge, Sgt Mita Tini and Constable Rangi Ben.

30. Sgt Tini is a cousin of Mr Reisura Samatua. The Sergeant visited him at his house at Tautupae on 23 May 2006. He spoke to Reisura Samatua about vacating the MRC residence. Reisura told Sgt Tini that his lawyer had told him he could stay there. He would not give the name of his lawyer so Sgt Tini suggested that he call the lawyer from the Police station. On the way they went to the MRC site.

31. Arumia Samatua was present at the MRC site or arrived shortly after. He said he thought the Police were interfering with his father's peaceful occupation of the residence and was afraid for his father and their safety.

32. Sgt Tini says Arumia told his father not to speak to Sgt Tini and told his father to walk away. Arumia then took hold of the keys (to the MRC unit) and ran away. Arumia Samatua intended Sgt Tini to think he had the keys and was running off with them to draw the Police away from his father. Arumia ran approximately two kilometres to the school where his wife Sheryl taught. At the school he telephoned Mr Jacob and told him what had happened. This call was interrupted by the arrival of the Police.

33. While the accounts of this incident vary in detail, it is clear that Arumia Samatua did want to make the police officer think he had the MRC residence keys. He succeeded. The officer proceeded on the basis that Arumia had taken the MRC unit keys and run away with them.

34. At the police station Sgt Tini says he contacted Chief Inspector Tearoa Tini (in Rarotonga) by telephone. He sent Constable Ben to find Arumia Samatua. He was located at Omoka Primary School and brought to the police station. Mr Samatua said he was told he would be arrested if he did not go.

35. Sgt Tini then arrested Mr Samatua at the station when he would not respond to the request for the keys. He did not respond when placed under arrest and put in the cell. Sgt Tini says he also arrested Arumia for wilful trespass. That charge was not laid.

36. Arumia was charged with theft of the keys and appeared on that charge before a Justice of the Peace on the same day. Sgt Tini says he did ask Mr Samatua if he wanted a lawyer in Penrhyn Maori, but that Mr Samatua was not paying any attention and made no reply.

37. Arumia Samatua appeared before Justice of the Peace Ben Samuel. It is not possible to establish precisely what procedure was followed in any of the three Penrhyn hearings.

38. The Court records produced are limited. They comprise:
    i. Photocopies of pages from the Criminal Record Book. These appear to be copies of the handwritten records taken at the time of the hearings;

ii. Photocopies of three Informations with a record of the outcome on the backing sheets;
iii. Two pages entitled Certified Extracts in the Criminal Record Information System, dated 3 January 2007;
iv. Two Warrants for Imprisonment each dated 28 July 2006.

39. The Criminal Record Book extract was produced by the Crown by consent after the hearing had commenced. It is a photocopy of a faxed or scanned document transmitted from Penrhyn. For each charge the record book includes handwritten entries in columns headed: "Date"; "Number"; "Prosecutor"; "Persons Charged"; "Offence"; "Plea"; "Decision" and "Total Amount of Fines and Costs".

40. There was no direct evidence as to who made the handwritten entries in that Book, but it would have been either the Deputy Registrar, Tangoroa Ariki Tai (now deceased) or the Justice of the Peace who presided. The entries are in English. Ben Samuel, the Justice who presided over the first and second hearing is also now deceased.

41. Mr Samatua says he did not respond to questions or participate in the hearing, apart from entering a "no plea" when the charge was put to him. He said he did not reply to the Police or say anything, he says "because things were going to happen". He did not elaborate on this. Arumia Samatua says Sgt Tini intervened and said "no plea" was to be interpreted as a guilty plea.

42. The Information records the plea as "not guilty". The Criminal Record Book records the plea as "N.G."

43. A handwritten note in the Criminal Record Book, under the heading "Decision", sets out questions apparently put by the Justice to Arumia Samatua about the keys and why he ran away with them. It records that no answer was given. It reads:

> "Robert Samatua
> Why you saying not Guilty.
> No [illegible word].
> Robert you have key of house of Ministry Marine.
> No [illegible word].
> Court asking again.
> Robert why you run away with key from the Police. No Ans.
> The Court prove he is guilty. Court fine Robert"

44. Sgt Tini did not recall who gave evidence although he says he read a summary of facts and that Arumia was asked what plea he entered. In his affidavit and in his evidence Arumia says that Constable Ben gave evidence for the Police about what had occurred at the MRC. Sgt Tini could not remember if Arumia was allowed to ask questions.

45. Sgt Tini recalled a lot of discussion between Arumia and Reisura Samatua. He was concerned about the behaviour of both the Samatuas in Court which he described as "cheeky". The other witnesses who were in or around Court as observers either cannot recall what happened or had left the courtroom.

46. Mr Reisura Samatua also appeared on separate charges. He was in the courtroom throughout his son's hearing.

47. Arumia Samatua was convicted on the charge of theft and sentenced to three months "hard labour". This was recorded in the Criminal Record Book and on the back of the Information.

48. Mr Samatua was entitled to refuse to answer any questions and put the prosecution to proof. He said he had refused to speak following Mr Jacob's advice.

49. I now turn to consider the specific issues relating to this event.

WAS MR SAMATUA GIVEN THE OPPORTUNITY TO INSTRUCT A LAWYER?

50. Mr Samatua says he was not advised by either the Police officers or the Justice of the Peace of his right to instruct a lawyer.

51. Sgt Tini recalled discussing a lawyer with Reisura Samatua but could not recall whether Arumia Samatua was present at that discussion. Sgt Tini had been in the process of taking Reisura Samatua to call his legal advisor when this incident occurred. Under cross-examination Sgt Tini said he did ask Arumia if he wanted a lawyer. He said he did this in Penrhyn Maori, but that Mr Samatua was not paying any attention and made no reply.

52. Sgt Tini did not keep a note book and was unable to locate the job sheets or log book relating to the matters giving rise to these proceedings. He said these had been left on Penrhyn and were not able to be found. Nor could he point to any manual or procedures in place on Penrhyn which he could use to give him guidance when dealing with matters such as the laying of charges, arrests and conducting of Court hearings.

53. It was unusual for the criminal court to sit in Penrhyn and this case was the most serious to come before the Court in some time. There were no lawyers on Penrhyn. The only way to contact a lawyer was by telephone. There was no evidence of any arrangements in place such as a list of lawyers or phone numbers of any lawyers who might be called.

54. Mr Samatua said he had been convicted of criminal charges in both New Zealand and Rarotonga and had served terms of imprisonment in both countries. He was also familiar with the legal process. He agreed that he knew of his right to a lawyer. He had also spoken to Mr Jacob who had given him some advice over the processes. Nevertheless, he said the procedures followed by the Police and in the Court in Penrhyn were different to those elsewhere and he said he did not want to rock the boat by asking.

55. At best Sgt Tini told him of the right to consult a lawyer in the Penrhyn language but Mr Samatua did not respond. Sgt Tini took no steps to check that Mr Samatua had understood what was being said.

56. I find that Mr Samatua was not advised of a right to a lawyer nor given the opportunity to seek legal advice. He should have been advised of that right.

WAS MR SAMATUA ARBITRARILY DETAINED?

57. Arumia Samatua was arrested after he arrived at the police station. He says he understood from the Police that he was to be charged with theft of the keys, although he says he did not know exactly the specific charge for which he was arrested.[13] Sgt Tini says he arrested him for stealing the keys. Constable Ben then took him to a cell. Mr Samatua resisted.

58. The incident for which Mr Samatua was arrested occurred just before the arrest. Mr Samatua had intended the Police to think he had run away with the keys. Even if he did not hear the charge at the time of the arrest, he knew that he was being charged for the theft of the keys. The officer had reasonable and probable grounds to believe that Mr Samatua had taken them.[14] Mr Samatua was then brought before the Court. There was no issue taken with the timeliness of the Court appearances.[15] He was free to go following the hearing.

59. I find that Mr Samatua was properly arrested. He was not detained for longer than necessary, he was brought before the Court promptly and released after the hearing. In the circumstances the arrest and detention in order to bring him before the Court were justified.

60. The question of whether the detention was arbitrary is a wider issue. "Arbitrary" extends beyond notions of unlawfulness and illegality. The view that illegal detention is arbitrary has been consistently upheld in international jurisprudence on the International Covenants on Civil and Political Rights. The

[13] Section 9 (1) of the Criminal Procedure Act 1980-1981 provides: "Duty of Persons Arresting – (1) It is the duty of every one arresting any other person to inform promptly the person arrested of the grounds of his arrest, and of any charge against him and to allow him to consult a legal practitioner of his own choice without delay."

[14] Section 35 of the Crimes Act 1969: "Arrest by constable of person believed to have committed offence - where under any enactment any constable has power to arrest without warrant any person who has committed an offence, the constable is justified in arresting without warrant any person whom he believes, on reasonable and probable grounds, to have committed that offence, whether or not the offence has in fact been committed, and whether or not the arrested person committed it."

[15] Section 9 (5) of the Criminal Procedure Act 1980-1981 provides: "Every person who is arrested on a charge of any offence shall be brought before the Court, as soon as possible and in any case no later than 48 hours after the time of his arrest, to be dealt with according to law."

issue of whether lawful detention may also be arbitrary, if it exhibits elements of "inappropriateness, injustice or lack of predictability or proportionality" remains open.[16] In the circumstances as the detention was lawful and appropriate in the circumstances the detention was not arbitrary.

WAS MR SAMATUA GIVEN THE OPPORTUNITY TO ELECT TRIAL BY JURY?

61. Mr Samatua was charged with theft of the keys to the MRC unit. The Criminal Record Book records the charge as being under s 242 and 249 (c) of the Crimes Act and the Information does not specify the value of the keys.

62. The maximum term of imprisonment for the offence is one year. A Justice of the Peace sitting alone may deal with a charge of theft under s 249 (c) of the Crimes Act 1980-1981.[17] A defendant has the right to elect a trial by jury for offences punishable by a term of imprisonment exceeding six months.[18] The form of the election to be put to a defendant before the charge is gone into is specified in s 16 (2) of the Judicature Act.[19] Following election the defendant is remanded to appear before a Judge and jury and the provisions relating to preliminary proceedings apply.[20] The Justice of the Peace taking the plea must remand the defendant to appear at the High Court in Rarotonga for trial.[21] The transfer to Rarotonga must be undertaken pursuant s 37 of the Criminal Proceedings Act.[22] The Registrar must send the Information and other documentation to the registrar of the substituted Court.[23]

---

[16] *Manga v Attorney General of New Zealand*, HC Hamilton CP90/98, 13/9/99 at 40.
[17] Section 19 (a) (ii) of the Judicature Act 1980-1981 provides that a Justice of the Peace has jurisdiction in relation to offences set out in Part I of the Second Schedule of the Act. This includes offences under s 249 (c).
[18] Section 16 (1) of the Judicature Act. S15A of the Judicature Amendment Act 1991 allows for an election to have a trial before 3 Justices sitting together or a Judge alone on a charge of theft where the information as worded refers to a monetary value not exceeding $5,000.00.
[19] Section 16 (2) of the Judicature Act provides: "the Court shall before the charge is gone into in respect of any offence to which this section applies, inform the defendant of the right conferred on him by subsection (1) of this section, by addressing him to the following effect:
"You are charge (sic) with an offence for which you are entitled, if you desire it, to be tried by a jury instead of being dealt with by the Judge alone.
Do you desire to be tried by a jury or by the Judge?" (sic).
[20] Section 16 (3) Judicature Act 1980-1981.
[21] Section 22 (1) (b) of the Judicature Act 1980-1981.
[22] Section 22 (2) of the Judicature Act 1980-1981.
[23] Section 37 (5) Criminal Procedure Act 1980-1981 provides: "(5) When such an order is made, the Registrar of the Court of hearing shall forthwith transmit to the Registrar of the substituted Court the information and any bail bond, depositions, examinations, or other documents relating to the alleged offence."

63. Mr Samatua's evidence indicates he was not given the opportunity to elect trial by jury. Sgt Tini was the prosecutor and cannot remember the detail of what happened in the Court. He remembers reading a summary of evidence and how Mr Samatua pleaded. Neither Sgt Tini nor Constable Ben mentioned any election being put to Mr Samatua.

64. The records do not indicate that the opportunity to elect trial by jury was put to Mr Samatua. The Criminal Record Book records a "not guilty" plea and questions put to Mr Samatua which were not answered by him. The blank space provided on the backing sheet of the relevant Information to record the election (if any) has not been completed on the Information.

65. The allegation that Mr Samatua was not given an opportunity to elect trial by jury was squarely before the Court. The evidence points to his not being given the opportunity to elect. Mr Samatua was eager to get this matter to the High Court in Rarotonga, and it is likely he would have taken the opportunity to elect trial by jury if he had known he was entitled to that election.

66. I find Mr Samatua was not given the option to elect trial by jury.

WAS MR SAMATUA PREVENTED FROM MAKING HIS CASE TO THE COURT?

67. The proceedings were flawed from the outset as Mr Samatua was not given the right to elect trial by jury. While it is always a matter of conjecture as to whether an election would have been made, as I have said it is likely that in this case that Mr Samatua would have made an election in order to get the case to the High Court in Rarotonga.

68. Whatever else followed could not cure the failure to give Mr Samatua the opportunity to elect trial by jury. Nevertheless I now deal with the evidence on what did happen in the courtroom.

69. This was the most serious matter that had come before the Penrhyn Court in some time. Criminal proceedings of any nature were rare. What actually did happen is not clear. Mr Samatua says he was given no opportunity to present his case in the Court. He said he was not provided with any written evidence by the prosecution, including written statements or summaries of evidence of

the prosecution witnesses. There is no evidence or record that he was given any such material.

70. Sgt Tini was the prosecutor. He remembers the court clerk putting the charges. He recalls the Justice of the Peace asking for the plea and speaking in English. Otherwise the proceedings were conducted in the Penrhyn language.

71. Mr Samatua entered a plea of "no plea" or "not guilty". Constable Ben gave evidence and then left the courtroom to deal with the crowd outside. Sgt Tini read out a summary of the facts. It is unclear as to whether he actually gave evidence and whether Mr Samatua was given the opportunity to cross-examine.

72. The Criminal Record Book records what appear to be questions put to Mr Samatua which he does not answer. The questions recorded are likely to have been put by the Justice of the Peace Ben Samuel as they have been recorded in English. I have set out that extract above.

73. Mr Samatua says he was not given a chance to make submissions to the Justice. Mr Samatua said he only answered when asked how to plead and the rest of the time of some 30-40 minutes, was taken up with Reisura Samatua talking to the Justice of the Peace about the land. Mr Samatua said he was not given a chance to make his own submissions although he said he did answer direct questions and later complained to his wife that the Justice did not listen to him. This is not consistent with his earlier evidence that he did not respond at all.

74. The Crown conceded that the proceedings were largely conducted in the Penrhyn language. Otherwise it made no specific concessions as to procedural failures at the hearing. It says that Mr Samatua was familiar with the criminal legal system as he had appeared before the criminal Courts and served terms of imprisonment in New Zealand. He had been represented by lawyers in New Zealand. He had also been convicted in the Cook Islands of assault and served a term of imprisonment in Rarotonga. The Crown says that he knew his rights and that it is not clear whether he did or did not try to

exercise them. The Crown argues that in any event he knew what his rights were and by inference waived those rights.

75. The fact that Mr Samatua was familiar with the New Zealand legal system does not affect his Constitutional right to a fair trial.

76. Mr Samatua did not receive a fair trial. Even if Mr Samatua had been given an election and chose to have the matter heard by the Justice what followed was not a fair hearing. While it is impossible to reconstruct what did happen at the hearing with any certainty, due process was not followed. In addition to the matters I have outlined above there was no evidence that Mr Samatua was cautioned, was given the required directive to defendants pleading not guilty, or was asked whether he wished to call evidence.[24] Sgt Tini also said that the hearing was in the Penrhyn language and it is likely that Mr Samatua who was not fluent in that language would have been unable to follow the proceeding properly. Mr Samatua may not have assisted himself by remaining silent and refusing to answer but that did not negate his right to a fair hearing.

WAS MR SAMATUA PROVIDED WITH WRITTEN MATERIAL:

(1) Of evidence on which the charges against him were based?
and/or
(2) A written statement of the prosecution witness or tendered in lieu a written summary of that evidence and reasons as to why no written statement was obtained?

77. Mr Samatua was not provided with written material of that nature. It would have been required if the matter had proceeded as a preliminary hearing in front of the Justice of the Peace to decide whether the defendant should be committed for trial.[25]

The Second Hearing – Penrhyn

78. At the end of the hearing Mr Samatua was sentenced by the Justice to three months "hard labour". The relevant Information records a conviction and the

[24] A caution is required to a defendant without cause: s 71 Criminal Procedure Act 1980-1981. The defendant must also be asked if he wishes to give or call evidence s 72 Criminal Procedure Act 1980-1981.
[25] Criminal Procedure Act 1980-1981 ss 99 & 100.

sentence of three months hard labour as well as a $20.00 Court fee. The entry of the decision in both the Criminal Record Book and the Information is signed by Ben Samuel JP.

79. "Hard Labour" is not a sentence available in Cook Islands law. Sgt Tini said that in his role as Acting Prison Warden he explained to Arumia that "hard labour" is the name given in Penrhyn for community service. Sgt Tini said this sentence usually involves picking up rubbish from the beach and doing some cleaning up. Mr Samatua acknowledged he was told to report for the "hard labour" to the Police the next day.

80. Arumia said that he spoke to Mr Jacob about the sentence and as a result of that discussion he did not report for the hard labour at all. Sgt Tini said that he turned up for a couple days and then stopped. No records were provided relating to this.

81. The Crown accepted that no sentence of "hard labour" exists in Cook Islands law. It submitted that a "hard labour" sentence was in fact a sentence of community service. A community service order may be made by the Court.[26] The sentence entails undertaking of various types of work under the supervision of a designated person.[27] Categories of community service include works on any land administered by the Crown or Island Council or clearing litter or debris from any foreshore.[28]

82. Due to his failure to turn up to undertake "hard labour" Mr Samatua was charged under s 36 and s 37 of the Judicature Act for Contempt of Court.[29] If the hard labour sentence was intended to be community service a charge of failure to report for community service[30] might have been more appropriate in the circumstances.

83. Arumia Samatua appeared before the Court on the charge of Contempt of Court on 29 June 2006. The Criminal Record Book and Information record that the charge was based on a failure to comply with the directions of the

[26] Criminal Justice Amendment Act 1976 (in force 9 August 1984) Section 8.
[27] Criminal Justice Amendment Act, s 14.
[28] Section 14 (3) Supra .
[29] Section 37 Judicature Act provides for a term of imprisonment not exceeding six months.
[30] Section 19 of the Criminal Justice Amendment Act 1976.

Court to serve the three month term of hard labour for the period 23 May 2006 to 29 June 2006.

84. The hearing lasted 30 or 40 minutes. Arumia Samatua said the time was spent explaining to the Justice of the Peace, Ben Samuels, the events giving rise to the first hearing and his views on the land dispute. The Justice asked him why he had not raised those matters at the first hearing and Arumia responded that he had entered no plea so he could gather evidence to put his case at the next Court hearing. He told the Court it had no right to sentence him to hard labour and asked the Justice: "*if hanging was still a penalty that the Court could impose?*" Mr Samatua says Sgt Tini then interrupted and said Arumia was a threat to the community and should be removed, that he had been in prison before and should be sent back.

85. Sgt Tini agreed in cross-examination that he had read out the summary of facts in the Penrhyn language. He said no one talked about calling lawyers and he could not recall the hearing in any detail.

86. Following this hearing the Justice of the Peace imposed a sentence of imprisonment on Mr Samatua. There was a dispute about the term of imprisonment which was imposed. The Crown said the Justice of the Peace sentence imposed a total of nine months imprisonment whereas the plaintiff said it was six months. The Crown conceded that if it was nine months, the Justice of the Peace had imprisoned Mr Samatua three months longer than was lawful.[31]

87. The Criminal Records Book signed by Ben Samuels JP notes:

> "FOUND GUILTY AND JP ADD ANOTHER 6 (SIX) MONTHS BESIDE THE (3) THREE MONTHS FROM 23.05.06 AND ALSO TRANSFERRED TO SERVE HIS PRISONMENT IN RAROTONGA".

88. This is inconsistent with the entry made on the backing sheet of the Information which records a sentence of nine months imprisonment to be served at Arorangi Prison. This is also signed by the Justice of the Peace.

[31] Para 5 (a) (i) Closing Submissions of Counsel for the Defendant dated 5/12/14.

89. Different again, is the certified copy of the conviction record in relation to the conviction on 29 June 2006 for Contempt of Court. It records that "NO PLEA" was entered and in the column for decisions says:

> "REFER DECISION 230506 OR 0206 GUILTY AND SENTENCED TO SIX MONTHS IMPRISONMENT AND TO BE TRANSFERRED TO RAROTONGA PRISON".

It does not refer to an extra three months imprisonment.

The certified copy extract also has a notation at the side of the Decision Column:

> "WAS ALSO WARNED NOT BE SEEN ON THE TONGAREI MARINE RESOURCE PREMISES".

The certified copy goes on to refer to the later conviction of 4 July 2006. It records a not guilty plea to a Contempt of Court charge and the entry reads:

> "FOUND GUILTY AND SENTENCED TO 3 MONTHS IMPRISONMENT. TOTAL SENTENCED 12 MONTHS. NOW SERVING IN RAROTONGA PRISON"

90. If only six months imprisonment was imposed on 29 June 2006 the addition of a further three months imprisonment would make a total of nine months, rather than 12 months.

91. These certified copies were not created until 3 January 2007. They purport to be certified copies of entries in the Crime Information System. They are certified by the Penrhyn Deputy Registrar as being a true extract from the criminal record system of the High Court at Penrhyn and dated 3 January 2007. They are headed "Extract from record of proceedings in the High Court at Rarotonga" (rather than Penrhyn), but the certificate at the base of the document refers to it being a true extract from the High Court at Penrhyn. A comparison with the "Criminal Record Book" entry shows that the certified copy in fact is not an exact copy of that record.

92. The records are therefore of little assistance. However it is likely that the Justice intended to substitute a period of imprisonment for the hard labour sentence imposed on 23 May 2006, but unserved.[32.] During the hearing

[32] Closing submission of Plaintiff dated 5 December 2014.

counsel filed a joint memorandum recording their agreement that the sentence imposed on 29 June 2006 was six months imprisonment.[33] However the Crown clarified its position as being that the total period of imprisonment imposed was nine months: being six months imprisonment plus the additional three months imprisonment by way of substitution for the three months hard labour (community service). This is consistent with the entry in the Criminal Record Book that the Justice of the Peace added another six months "beside the 3 months from 23/05/06".

93. The Crown argued that the substitution of sentence from "hard labour" to imprisonment was allowed by virtue of Sections 19 to 22 of the Criminal Justice Amendment Act 1976. These provisions allow for a term of imprisonment to be substituted for a community service order in certain circumstances. The Crown suggested that the Justice could make the substitution of his own motion.

94. Section 21[34] of the Act requires that any application to substitute a community service order for another sentence must be made by a probation officer. The probation officer making the application must arrange for notice of the application to be served on the offender.[35]

---

[33] Joint Memorandum filed 2 December 2014. The Agreed Statement of Issues also refers to six months.

[34] Criminal Justice Amendment Act 1976 s 21 – "Application for substituted sentence:
(1) If any person who is subject to a Community Service Order is convicted of any offence, committed after the order was made, which is punishable by imprisonment (whether or not the person subject to the order was sentenced to pay a fine), any probation officer may, unless the Community Service Order has been terminated under section 20 of this Act, apply to the Court, in accordance with this section and section 22 of this Act, to substitute another sentence for the Community Service Order.
(2) Before the hearing by the Court of any application under this section for the substitution of another sentence for a Community Service Order, the probation officer making the application shall cause notice of the application to be served on the person subject to the Community Service Order.
(3) Notwithstanding anything in subsection (1) or subsection (2) of this section, if the person who is subject to a Community Service Order is charged with an offence against subsection (1) of section 19 of this Act, the probation officer, if he thinks fit, may before the hearing of the charge give notice to the person charged that if he is convicted of the offence charged, the Court will be asked to substitute another sentence for the Community Service Order. If the person so notified is convicted of the offence charged, the probation officer may, unless the Community Service Order has been terminated under section 20 of the Act, substitute another sentence for the Community Service Order, and it shall not be necessary for the probation officer to cause any subsequent notice of the application to be served on that person."

[35] Section 21 (2) Criminal Justice Amendment Act 1976.

95. There was no evidence of any application being made to substitute the community service order for another sentence. Sgt Tini when asked about this in cross-examination was unaware of the existence of the provision of the Act allowing substitution of sentence. There is no record of any application or an order for substitution under the Criminal Justice Amendment Act in either the Criminal Record Book or the Information. No application was served on Mr Samatua, nor is there any suggestion that options for a substituted sentence were canvassed before the Court.

96. A Justice of the Peace cannot substitute a sentence in those circumstances without hearing an application and meeting the statutory requirements.

97. Following his conviction and sentence, Mr Samatua was released and allowed to go home to await transport from Penrhyn to Arorangi Prison, Rarotonga.

WAS MR SAMATUA ARBITRARILY DETAINED?

98. I have considered the events leading to and following the Court hearing. Mr Samatua was summoned to Court and appeared voluntarily. He was released pending the ship arriving to take him to Rarotonga. Mr Samatua was not illegally or arbitrarily detained.

WAS THE MR SAMATUA GIVEN THE OPPORTUNITY TO ELECT TRIAL BY JURY?

99. Mr Samatua was not given an opportunity to elect. He was not entitled to an election as the charge carried a maximum period of imprisonment of six months.

WAS MR SAMATUA PREVENTED FROM MAKING HIS CASE TO THE COURT?

100. Mr Samatua was given an opportunity to address the Court at this hearing. He said Sgt Tini gave evidence that Mr Samatua had not turned up for hard labour. Mr Samatua said he had told the Justice of the Peace that he had not spoken at the first hearing as he had already given the relevant documents to the Police and so he did not think it would make any difference. The discussion, he said, was largely about events giving rise to the theft charge and to the land claims. Mr Samatua said the Justice of the Peace did not listen to that.

101. Mr Samatua entered a “no plea” or not guilty plea. The Criminal Record Book records that “no plea” was entered. Sgt Tini could not recall the hearing in detail. He said he read the summary of facts and Mr Samatua was given the opportunity to speak. The summary of facts which was read was not produced in evidence in this Court.

102. There is no record of the procedure followed and whether or what evidence was given. It appears there was some exchange between the prosecution and Mr Samatua in the courtroom on this occasion as Mr Samatua in his evidence said he asked Sgt Tini to take the oath before Mr Samatua would question him. It appears therefore he was given some opportunity to cross-examine Sgt Tini. Nevertheless it is not clear what evidence was led, or whether Mr Samatua was given an opportunity to cross-examine the witnesses or was allowed to present his case.

103. The Criminal Record Book records that the Justice of the Peace said to both Reisura and Arumia Samatua that they were “warned that if they are seen on the Marine Reserve that they may be arrested and…”. On the copy of the document produced to the Court the balance of that warning is cut off. The authority upon which the direction was based was not specified.

WAS MR SAMATUA GIVEN THE OPPORTUNITY TO INSTRUCT A LAWYER?

104. Mr Samatua was not advised of his right to a lawyer nor afforded any opportunity to obtain legal advice.

WAS MR SAMATUA PROVIDED WITH WRITTEN MATERIAL:

(1) Of the evidence on which the charges against him were based?

and/or

(2) A written statement of the prosecution witness or tendered in lieu a written summary of that evidence and reasons as to why no written statement was obtained?

105. There is no evidence that Mr Samatua was provided with this written material.

The Arrest on 4 July

106. In early July 2006 Mr Reisura Samatua's furniture was moved out of the MRC residence and taken to his home at Tautupae by Constable Ben and some Government workers. Reisura and Arumia Samatua left the MRC residence about the same time.

107. Mr Marsters, the manager of the Marine Resource Centre at the time, was present when this occurred. At Constable Ben's request he boarded up the MRC residence. He nailed up the windows with plywood, locked the doors and secured the stairs by nailing timber to them.

108. On the following evening Mr Marsters noticed there were people in the MRC unit. The next day he saw that the timber he had nailed up had been removed.

109. On the 4 July 2005 Sgt Tini and Constable Ben visited the MRC Unit and asked the Samatuas, who had returned, to leave. They would not leave.

110. Later on the same day Constable Ben arrived at the MRC residence with some Government workers who had been deputised to assist him. These included: Teheva Viniki, Kahuraingi Kirikava, Petero Tapaitau, Fana Ivirangi Junior and Taui Nuikore.

111. Constable Ben said he asked the workers to stay outside while he went into the building to speak to the Samatuas. Reisura and Arumia Samatua were inside playing cards. He spoke to them but they would not respond. He told them they had five minutes to leave or he would arrest them. He went outside waited five minutes and returned.

112. When Constable Ben went back into the unit he told the Samatuas that he was going to arrest them for being at the MRC residence when ordered by the Court not to be there. He says he cautioned Arumia Samatua and then tried to move him but he would not stand up. The Constable said Mr Samatua tightened his hands to resist being handcuffed. He would not move. Arumia Samatua was lifted and partly dragged out by some of the deputised government workers at the direction of the Police officer. They took him out

of the room and down the stairs to a truck outside. In the meantime, Constable Ben, with others, took Reisura Samatua out to the truck. By the time the Constable got outside Arumia Samatua was already on the truck.

113. Arumia Samatua said he was staging a peaceful protest. To that end he did not cooperate or do what Constable Ben asked him to do. He was seated and remained there. The versions differ as to what happened when the workers picked up Mr Samatua and tried to move him down the stairs. He had to be lifted up by two of the workers one on either side. He would not walk and the workers carried or dragged him to the stairs. The stairs were only wide enough to take two people causing Arumia or one of the workers to fall down the stairs taking the others with him.

114. Mr Samatua's version is that he was assaulted twice by one of the deputised government workers inside the unit. The government workers who moved Mr Samatua included Kahu Kirikava and Tauivananga (Taui) Nuikore. He said Kahu Kirikava was the assailant. The first assault, he says, was in the room and he was punched in the head and the side of the face and Taui Nuikore intervened to stop the incident. He says that Messrs Kirikava and Nuikore dragged him through the door at the top of the balcony and Kirikava raced him down the stairs dragging him behind on his stomach. Mr Samatua says the second assault occurred after he was dragged down the stairs. At the bottom, and outside the residence he says he was kicked in the back and punched in the back of the head and side of the face by Mr Kirikava. Mr Samatua says that Mr Kirikava was out of breath from the aggressiveness of the assault. Mr Samatua said his face was then pushed in the path of broken shells at the base of the steps and he bled.

115. Sheryl Samatua says she was outside when Mr Samatua came down the stairs and she saw Kirikava beating him at the bottom of the stairs.

116. Mr Reisura Samatua also supported Arumia's version. He says he saw Mr Kirikava punch Arumia Samatua and bash his head. He confirmed Arumia was resisting and had to be dragged out. He also said that Kirikava was wearing "safety capped" boots at the time he kicked Arumia. Reisura Samatua also said he did not see Mr Nuikore interfere as Arumia Samatua alleged.

117. Inside the unit, Constable Ben was attending to Reisura Samatua when the first alleged assault occurred. Constable Ben says he did not see any assault on Arumia Samatua. The Constable said he noticed a scratch and some bruises on Arumia Samatua later. Teheva Viniki was also in the room. He saw Arumia Samatua refusing to stand but did not see any assault. Fana Ivirangi Junior was another deputy assisting with Mr Reisura Samatua in the room. He did not see any assault by Mr Kirikava on Arumia Samatua.

118. Mr Nuikore denied that Mr Kirikava assaulted Arumia Samatua or that Mr Nuikore intervened. He also said he saw no assault at the bottom of the stairs. He says he and Kahu Kirikava moved Arumia to the stairs but that he was clinging to the bannister to resist being taken down. This caused both Mr Nuikore and Mr Samatua to fall down the stairs. They landed on top of Mr Nuikore who was not injured. Mr Nuikore did not notice any injuries on Mr Samatua. Later he realised that Mr Samatua had an injured leg but thought that had occurred when he was being put on to the truck.

119. Mr Marsters, who was waiting outside, saw Arumia Samatua come down the stairs with two people lifting him and saw them slip down. He saw one of the workers land first on the ground and Arumia land on him. Mr Samatua was then held at the bottom of the stairs.

120. I prefer the evidence of Mr Nuikore on the issue of the alleged assaults. He appeared a candid and unbiased witness. He said he did not know anything about the land dispute. He was recruited to assist in the removal of the Samatuas and he just came and did his job. In cross-examination he answered the questions in a straight forward manner. He did not embellish his evidence. He was one of the people who moved Mr Samatua downstairs. He agreed that they fell down the stairs but explains this was due to having to drag Mr Samatua who had made himself inert. This caused difficulty for the two people lifting Mr Samatua down the stairs. Mr Nuikore's version is consistent with that of Mr Marsters who was watching outside the unit. It is also supported by the observations of the other workers in the room at the time and who gave evidence.

121. The Court hearing was before Fana Ivirangi JP. Arumia Samatua recalls two witnesses giving evidence for the Crown: Mr Mataora and Mr Sihua. He says Sgt Tini, who was prosecuting, did not tell him about the evidence against him or give him any documents setting out the Police case. He says he was not told at any time that he could contact a lawyer. He said he pleaded not guilty and did not give evidence. He was sentenced to three months imprisonment.

122. Arumia Samatua said he visited the doctor immediately before the incidents in order to ask the doctor to take note of the fact he had no injuries for future reference.

123. Mr Samatua did not obtain a report from the doctor on the injuries although the doctor visited him and his father at the lock up cell a few days after the alleged assaults. He treated Mr Samatua for abrasions and gave him pain medication. The abrasions were consistent with Mr Samatua being forcibly removed and falling down the stairs. If he had been kicked with safety boots and assaulted in the fierce manner described by Mr Samatua it is likely that the injuries would have been more extensive and required greater medical attention. The doctor did not give evidence but now works in Rarotonga.

124. I accept there was some force used to remove Mr Samatua. Mr Kirikava and Mr Nuikore had to remove him from his chair and are likely to have applied force to do that and get him to the stairs. He fell down the stairs but that was largely caused by his gripping the balustrade. The evidence of Mr Nuikore in particular, but also that of Mr Marsters, supports this. The deputies had to drag or lift Mr Samatua from a seated position across the room to the stairway and downstairs. This may have required some force, but I do not accept that Mr Samatua was intentionally assaulted. It is likely that Mr Samatua felt aggrieved about being forcibly removed and Arumia, Reisura and Sheryl Samatua's evidence exaggerated the incident.

DID MR SAMATUA SUFFER A CRUEL AND UNUSUAL PUNISHMENT AND WAS HE TREATED IN AN INHUMANE MANNER?

125. Mr Samatua alleged that he was assaulted in the course of this arrest by Kahu Kirikava one of the workers who was assisting Sgt Tini.

126. The Police officers were of the view that Mr Samatua and his father had broken into the building without permission. The Police were called by the Manager of the MRC. Constable Ben went to the MRC residence and asked the Samatuas to leave. They would not. He gave them time to consider their options. The Samatuas refused to make any response and made it clear by their silence and failure to move that they were not leaving.

127. Arumia Samatua's "peaceful protest" was part of his strategy to draw attention to the plight of his father as the landowner and rightful occupier of the MRC unit. Some degree of force was needed to remove Mr Samatua from the premises. Mr Samatua's "peaceful protest" involved his resisting being removed, making himself a dead weight, refusing to walk to the truck, and grabbing the balustrades. It is difficult to see how Mr Samatua could have been removed without the workers applying some force to take him outside. He suffered some grazes and bruising in the course of removal, but these were consistent with the fall down the stairs due to his refusal to walk down.

128. The arrest and force used was reasonable in the circumstances. The Constable believed that Arumia Samatua had committed an offence by taking down the nailed timber and entering the premises in breach of a court order to stay off the premises. He then refused to leave when asked. This provided reasonable and probable grounds for the arrest as required under s 35 of the Crimes Act. Even if an offence had not been in fact been committed the arrest would have been justified.[36] I accept that the Police believed Arumia Samatua had committed an offence.

129. Under s 37 (1) of the Crimes Act, the government workers who assisted the Constable were justified in assisting in the arrest.[37] They were questioned

[36] Section 35 of the Crimes Act 1969 provides: "**Arrest by constable of person believed to have committed offence** - where under any enactment any constable has power to arrest without warrant any person who has committed an offence, the constable is justified in arresting without warrant any person whom he believes, on reasonable and probable grounds, to have committed that offence, whether or not the offence has in fact been committed, and whether or not the arrested person committed it."

[37] Section 37 (1) of the Crimes Act 1969 provides – "Persons assisting constable or officer in arrest - (1) Every one called upon by a constable to assist him in the arrest of any person believed or suspected to have committed any offence is justified in assisting unless he knows that there is no reasonable ground for the belief or suspicion."

about the incident and their knowledge of the land dispute. They had no motive other than assisting the police officers to make the arrest.

130. The force used was justified under s 42 of the Crimes Act 1969.[38] The workers would lose this justification if they had applied force intended or likely to cause death or grievous bodily harm. The evidence does not support that intention, or level of force.

131. The force applied by the deputies to assist in the arrest was reasonable in the circumstances. Mr Samatua did not suffer a cruel and unusual punishment nor was he treated in an inhumane manner.

132. Mr Samatua was taken to the police station and the appeared before the Court, where he was charged with Contempt of Court

WAS MR SAMATUA ARBITRARILY DETAINED?

133. The Police were justified in arresting and detaining Mr Samatua. The detention was not arbitrary.

The Appearance in Court on 4 July 2006

134. The charges against Arumia and Reisura Samatua are set out in one Information laid against them both. The charge says:

> "Failed to comply with the directions of the Order of the Court.
> To vacate the premises of the Tongarerua Marine Research Station."

It records the date of hearing as 4 July 2006 and the plea as "not guilty". The sentence imposed on Arumia Samatua is recorded on the backing sheet of the Information as follows:

[38] Section 42 of the Crimes Act provides – "Force used in executing process or in arrest - Where any person is justified, or protected from criminal responsibility, in executing or assisting to execute any sentence, warrant, or process, or in making or assisting to make any arrest, that justification or protection shall extend and apply to the use by him of such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, warrant, or process can be executed or the arrest made by reasonable means in a less violent manner:
Provided that, except in the case of a constable or person called upon by a constable to assist him, this section shall not apply where the force used is intended or likely to cause death or grievous bodily harm."

> "(2) Arumia Samatua was convicted and fine to $20.00 c/fee, sentenced another three months added to the nine months at Rarotonga Prison.
> Fana Ivirangi (JP)." (Sic.)

135. The same charge against Arumia Samatua is recorded in the Criminal Record Book as follows:

> "DID FAIL TO COMPLY WITH THE DIRECTIONS OF THE ORDER OF COURT TO VACATE THE PREMISES OF THE TONGAREVA MARINE RESEARCH STATION
> CONTEMPT OF COURT ORDER
> JUDICATURE ACT 1980-81
> SECTION 36 AND 37"

136. The plea is recorded in that Book as "NG". The decision is recorded as follows:

> "JP, Jacob (Fana) Ivirangi found defendant guilty and sentence him 3 month total 12 months Arorangi.
> Jacob Ivirangi J.P.".

137. The Criminal Record Book records it as a joint case under CRN No. 5/06. The charges, the plea and the decision in respect of each of the Samatuas were entered separately.

138. The relevant Information contains separate charges against each Arumia and Reisura Samatua. Generally a separate Information is required for each charge.[39] The Information is defective. Errors in record keeping may not be fatal in themselves but they support my view that a lack of experience and knowledge by the Justices led to the failure to follow proper process in the Court hearings.

139. The proceedings were conducted in the Penrhyn language. Mr Samatua is not a fluent Penrhyn speaker. His father who spoke Penrhyn was present in the courtroom, but there is no evidence of anyone acting as an interpreter.

140. This hearing was before Fana Ivirangi JP. It lasted between 30 and 45 minutes. Arumia Samatua says he did not give evidence and pleaded not guilty. Arumia Samatua recalls two witnesses giving evidence for the Crown: Mr Mataora and Mr Sihua. He says Sgt Tini, who was prosecuting, did not tell

[39] Section 15 (1) of the Criminal Proceedings Act.

him about the evidence against him or give him any documents setting out the Police case. He says he was not told that he could contact a lawyer. He was sentenced to three months imprisonment.

141. Mr Marsters recalls giving evidence and producing some of the timber that had been removed to gain entry to the MRC unit. He could not remember Mr Samatua asking him any questions.

142. Sgt Tini gave evidence that the Justice of the Peace had told Arumia and Reisura Samatua to keep away from the MRC premises at the appearance on 29 June 2006. Arumia had been released at large after that hearing. The Criminal Record Book records under an entry relating to a charge against Mr Reisura Samatua that:

> "*DEFENDANT WAS ALSO WARNED THAT IF THEY ARE SEEN ON THE MARINE RESOURCES PART THEY BE ARRESTED AND…* "(on the copy produced the writing goes off the page).

143. No specific issue was taken as to whether or not the warning was actually read out to Arumia Samatua.

WAS MR SAMATUA GIVEN THE OPPORTUNITY TO INSTRUCT A LAWYER?

144. Mr Samatua says he was not. In the circumstances I consider that is unlikely that he was advised of his right to a lawyer or legal advice and I conclude that Mr Samatua was not advised of his right to a lawyer or given an opportunity to instruct a lawyer.

WAS MR SAMATUA ARBITRARILY DETAINED?

145. I have found that the arrest was lawful and the force involved in shifting Mr Samatua to the Police station was reasonable. He was brought before the Court immediately. He was not arbitrarily detained.

WAS MR SAMATUA PREVENTED FROM MAKING HIS CASE TO THE COURT?

146. At least two witnesses gave evidence. Sgt Tini prosecuted but the procedure followed is unclear. It seems likely that Mr Samatua was not given the opportunity to cross-examine those witnesses or put his own case forward. It is accepted by the Crown that most of the proceedings were in the Penrhyn language and Mr Samatua was not fluent in Penrhyn nor did he have the assistance of an interpreter.

WAS MR SAMATUA PROVIDED WITH WRITTEN MATERIAL:

(1) Of the evidence on which the charges against him were based? and/or

(2) A written statement of that evidence and reasons why no statement was obtained?

147. There is no evidence that this material was provided to Mr Samatua.

The Behaviour of the Crowd at the Penrhyn Hearings

148. At each of the three Court hearings Mr Samatua says he was humiliated by the noise and behaviour of the crowd. He says the Police, the Court officials and Justices failed to quieten the crowd that gathered for the Court hearings. He says neither the Police nor the Justices took appropriate steps to stop this behaviour.

149. In relation to the first hearing Arumia and Reisura Samatua described the crowd at the court house as "whooping, booing or yelling". They say the crowd was noisy at each of the Court hearings and the islanders loudly expressed their various views. Arumia Samatua did not mention this behaviour in a note dated 24 May 2006 he made for Mr Jacob. The note was prepared for later use against the authorities. He mentions the interest that some of the members of the community were showing in the Samatuas' cause after reading the documents and that only half the number who attended the first hearing attended the second one. For that reason if he had any concerns about the behaviour of the crowd it is likely he would have added that issue to his description of the events on 24 May and 29 June 2005.

150. Sgt Tini and Constable Ben agree that there were a lot of people in and outside the Court and that they were making noise, but not to the extent of whooping or booing or disrupting the Court.

151. Constable Ben said that he did not hear anyone using abusive words. He went outside to control the crowd following giving evidence in front of Ben Samuel JP at the first hearing. He said that the people know when it comes to Court that there should be no noise.

152. Sheryl Samatua said that islanders talk loudly in general. She said most of the town was outside the Court when she was there. She was at all three Court appearances although it is not clear as to whether she was inside or outside the courtroom. She said that the people were saying things about her husband and they were not saying them quietly.

153. Mr Marsters gave evidence for the Police at the third appearance. He then left the courtroom and waited outside. He could not hear what was going on in the courtroom. Mr Nuikore did not recall noise inside the Court.

154. Sgt Tini said that the Court was respected and no one made noises or abused the Samatuas because of that respect for the Court. He said the people "know that there will be no noise".

155. I prefer the evidence of Sgt Tini and Constable Ben on this point. I accept that there was likely to have been a level of noise from the assembled islanders. Court hearings were unusual. They attracted a large crowd. The islanders were likely to have views which they expressed. However, I am of the view that given the Islanders' respect for the Court it is unlikely that the Police, the Registrar or the Justices would have allowed the crowd to make undue noise or act inappropriately. Additionally steps were taken to control the crowd and Constable Ben went outside to do that.

Language Issues

156. The Crown in its closing accepted that the only person who addressed Mr Samatua in English at the hearings was the presiding Justice. The Police spoke to Mr Samatua in Penrhyn Maori. The Justices spoke to Mr Samatua in English but there is no evidence that the proceedings were interpreted for Mr Samatua. It is not clear whether Sgt Tini and the Justices knew that Mr Samatua was not fluent in Penrhyn. It is likely that they did as Mr Samatua had been living on the island for some time. The fact that the Justices spoke to Mr Samatua in English indicates that they may have been aware that he was not a fluent Penrhyn speaker.

157. The right to a fair trial requires that one be present at one's trial and have the assistance of an interpreter if one is needed. The defendant must have the capacity to understand the proceedings and the prosecution case and have the full opportunity to answer it including deciding whether to call witnesses and whether to give evidence. If a defendant is unable to follow the language of the proceedings he will not have the capacity to understand and participate in his trial which would breach his right to a fair trial and could result in a serious miscarriage of justice.[40]

158. The threshold for the need for an interpreter is not an onerous one. An interpreter should be appointed when the defendant requests the services of one and the Judge considers that request is justified. An interpreter should also be appointed if it appears to the Judge that the defendant is having difficulty with the language in which the trial is being conducted. A person with a good command of a language in ordinary conversation may have difficulty understanding more formal language in a stressful situation of a courtroom. It is the responsibility of the judge to facilitate appropriate interpretation when it is apparent or should be apparent that the defendant is having difficulty with the language.

159. In *Abdullah*[41] no complaint was made at the trial over the adequacy or effectiveness of the interpretation. The appellant complained about the interpretation after the trial on a number of grounds including that the interpreter was not sufficiently expert. The judgment of Justice McGrath in the Supreme Court emphasised that a defendant had a right to a fair and public hearing. It is first necessary for the accused to show the need for an interpreter[42] and a failure to raise concerns over the quality and scope of interpretation during the trial is a factor that will be taken into account by the Court in determining whether there is a breach of the defendant's right. The right is a flexible one which depends on the circumstances of the case.

160. Mr Samatua did not ask for an interpreter at the hearing. The Amended Statement of Claim does not allege Mr Samatua was unable to understand the proceedings because he did not understand the Penrhyn language and

[40] *Abdullah v R* (2012) 1 NZLR 534.
[41] Supra at 542.
[42] *Abdullah* Supra at page 547. *R v Tran* (1994) 2 SCR 951 (Supreme Court of Canada).

was not provided with an interpreter. Arumia Samatua did not complain about not understanding the proceedings in a note he made for Mr Jacob on the 24th May 2006. The note was prepared for later use against the authorities by Mr Samatua. It records that Mr Samatua did understand and participate in the proceedings. He questioned Sgt Tini, at least in the second hearing. This participation does not mean that he fully understood what was going on but from the Justice's point of view it may have seemed that he did understand.

161. Throughout the Penrhyn hearings there were a number of people in the courtroom who could have acted as an interpreter, including the Deputy Registrar and Mr Samatua Senior. The requirement is to a fair trial which in turn requires that the defendant is capable of understanding what the case against him is and that he can respond to that. In his first appearance Mr Samatua said he did not respond to questions nor participate fully in the trial. The prosecutor spoke in Penrhyn. It is likely that the witnesses, if any, spoke in Penrhyn. The Justice of the Peace spoke to him in English and it is also is likely that there was some interpretation going on in the courtroom possibly with the assistance of Mr Samatua Snr.

162. The claim that Mr Samatua should have been provided with an interpreter was not specifically pleaded and the Crown was not given any advance warning of the issue. It arose first in the course of this trial after Sgt Tini gave evidence that the proceedings were conducted in the Penrhyn language except for the putting of the charges which was done in English and the Justice spoke in English.

163. Mr Samatua gave evidence that he was not fluent in the Penrhyn language although he could understand it to limited extent. I accept that evidence. Sgt Tini said that he had at one stage asked Mr Samatua whether he wanted a lawyer but he was speaking in the Penrhyn language and Mr Samatua did not respond. Mr Samatua may not have understood that question. However be that as it may Mr Samatua himself raised no concerns about the issue at the time and while this is not fatal, I am not persuaded that the Justices and Sgt Tini did know or should have known that Mr Samatua may not have been sufficiently fluent to understand everything that was going on in the courtroom.

164. As my findings already indicate I consider that the Penrhyn proceedings did not follow due process and Mr Samatua did not receive fair hearings. Mr Samatuas lack of fluency in Penrhyn, may have further hindered his ability to participate in the proceedings. However I do not consider the evidence supports a finding that the Justices or the other public officials should have recognised that Mr Samatua should have been provided an interpreter in the absence of a request or other indication from him, in the circumstances.

Detention in the Lockup in Penrhyn

165. Constable Ben escorted Mr Samatua to the Penrhyn lockup cell near the courthouse following the third Court appearance. He was held in this cell until the boat left for Rarotonga about two weeks later. Mr Reisura Samatua Snr was initially held in the same cell but he was released after a few days.

166. The lockup cell is a basic building of about 5m x 8m in the vicinity of the Government buildings in Penrhyn. It is 50m from the courtroom. Water is available from a tap two metres away. The toilet block is separate and about 30m away. Prisoners wash there or under a tap from the water tank which is the shower facility. They supply their own soap and towels. Mr Samatua's wife Sheryl brought these to him.

167. Sheryl Samatua also arranged for the doctor to visit him. This visit was permitted by the authorities. Arumia Samatua says the doctor cleaned up his abrasions and gave him pain medication. No report from the doctor was produced nor was any further visit required. The doctor also checked Reisura Samatua Snr's blood pressure.

168. Sheryl Samatua says she provided food as it was three days before the person organised by the Ministry of Justice provided any. Sgt Tini says food was arranged by the Deputy Registrar.

169. Mrs Samatua provided and supplemented the food and may have supplied the majority of the food for part of the period. However, there is no evidence that Mr Samatua was not fed or complained about the lack of food.

170. Arumia Samatua also said the outside shower arrangements were inadequate in that he said the shower should have been in an enclosed shower box. He did not complain about this to authorities as he said it would not have made any difference.

171. Mr Samatua said he did not have a mat or bedding. There is no evidence that he asked for one and it was not uncommon for islanders to sleep on the floor in Penrhyn. Mr Samatua agreed in cross-examination that he sometimes slept on the floor at home but felt that it was his choice to do so and he was to move somewhere else if it got cold.

172. Arumia Samatua said he was chained to the cell window grille at night with the door locked. His father said he saw Arumia with a chain from hand to foot but not chained to the grille. Mrs Sheryl Samatua said she saw Arumia chained to the grille on one occasion.

173. Police officers and Government workers were recruited for guard duty. A guard or guards were on watch outside the cell every night. Mr Nuikore was one of those on duty at night. He said Arumia Samatua was not handcuffed and he recalled the door was open. Mr Nuikore slept part of the time and his shift was shared with another worker.

174. Sgt Tini said Arumia Samatua was handcuffed to the grille to prevent him running away initially but the handcuffs were removed after a day or so. Constable Ben said that Mr Samatua was handcuffed initially when he went to the cell but not chained at night. Constable Ben also assisted with the watch duties. He said after the third day the door was not locked and was open during the day so Mr Samatua could come in and go out. He said at night Mr Samatua had a tin in his cell or he could ask the guard to let him go out to the toilet.

175. Sgt Tini said he had warned Mr Samatua not to do anything stupid when he was let out of the cell. He agreed that Mr Samatua was cooperative although he said he would sometimes play up depending on the guard. He agreed that Mr Samatua did not try to run away.

176. I accept that Mr Samatua was handcuffed in the initial days of imprisonment. Once he had shown that he was not going to attempt to escape he was released from the handcuffs. The night guard was sufficient to provide some security in the event Mr Samatua tried to leave. Given Mr Samatua's actions it was not unreasonable that he was handcuffed when put into detention and that arrangements were made for guards at night.

177. The lockup cell was the only option to detain a prisoner pending transport to Rarotonga and its use was a reasonable option for accommodation to secure Mr Samatua in the circumstances. The Police had a basis to take steps to ensure Mr Samatua did not escape. He had been sentenced to a term of imprisonment. When he was released earlier he had returned to the MRC and refused to cooperate when asked to leave.

178. I am of the view that Arumia Samatua's evidence and that of Reisura and Sheryl Samatua is exaggerated in relation to this issue.

179. Food, water, toilet and washing facilities were made available. Some food was supplied by Sheryl Samatua in the first few days but Mr Samatua was fed. There is no evidence that he asked for food which was then not supplied. Medical treatment was allowed although Mr Samatua said this should have been arranged for him earlier by the authorities. Whether the treatment was actually arranged by Mrs Samatua or the authorities makes no difference. The injuries were abrasions and bruising and were treated with no follow up visit.

180. From the evidence it appears that the role taken by the Deputy Registrar was not only as court taker but he was also the official responsible for providing food and accomodation for Mr Samatua while he was detained in the lockup. The allegations in relation to the conditions in which Mr Samatua was held are also made against him. There was no detailed evidence relating to his actions or omissions and I consider that my findings and conclusions do not require any particular analysis of his liablity in this matter.

DID MR SAMATUA SUFFER CRUEL AND UNUSUAL TREATMENT AND WAS HE TREATED IN AN INHUMANE MANNER?

181. My factual findings above indicate that the accommodation provided and manner in which Mr Samatua was treated in the circumstances was reasonable. Secure accommodation in Penrhyn was limited. The standard of accommodation was likely different to that which would be found in a New Zealand prison or even that of the prison in Rarotonga. Mr Samatua was supplied with food, medical and other necessities. The amenities and provisions were appropriate during the time Mr Samatua was held before he was transported to Rarotonga. Mr Samatua's needs were met and his requests for treatment were accommodated.

182. Mr Samatua did not suffer cruel or unusual treatment nor was he treated in an inhumane manner.

DID MR SAMATUA SUFFER A CRUEL AND UNUSUAL PUNISHMENT AND WAS HE TREATED IN AN INHUMANE MANNER WHEN HE WAS ALLEGEDLY CHAINED TO THE LOCKUP GRILLE?

183. Mr Samatua says he was chained to the grille at nights, after the first few nights. Sgt Tini and Constable Ben say he was handcuffed for the first few days, thereafter he was not. As I have indicated above I prefer the evidence of Sgt Tini and Constable Ben on this point. It is supported by Mr Nuikore who served on guard duty. My findings above are that Mr Samatua was handcuffed for the first few days which was reasonable in the circumstances. The evidence indicates that he was free to move around and sit outside, take showers and visit the toilet block when he wished to.

184. I do not consider that the manner in which he was detained and that he was handcuffed for an initial period when he was in the lockup cell was cruel and unusual punishment nor was he treated in an inhumane way.

WAS HE ARBITRARILY DETAINED?

185. My findings set out above indicate that the conditions were reasonable in the circumstances and this was not an arbitrary detention.

Detention on the Ship MV Maungaroa

186. After approximately two weeks in the lockup cell Mr Samatua was taken to the MV Maungaroa to be taken to Rarotonga. Sgt Tini and Constable Ben said Mr Samatua refused to leave the cell and had to be assisted into the pickup. Mr Samatua himself confirms that he resisted and had to be carried to the transport vehicle.

187. Sgt Tini accompanied Mr Samatua on the boat. This was the first prisoner Sgt Tini had escorted to Rarotonga. Messrs Viniki and Nuikore were also travelling. A number of other Islanders were on the vessel to attend the Constitution celebrations, on 4 August in Rarotonga.

188. Mr Samatua was handcuffed to the rail of the boat until it was out at sea. He was then released and taken to his allocated cabin. He ate with the crew, as did Sgt Tini. The cabin was hot and Mr Samatua went to the deck from time to time. Sgt Tini said he went with him to the deck.

189. Sgt Tini said that the cabin passengers ate with the crew and food was provided. This included Mr Samatua and Sgt Tini. Deck passengers brought their own food. He said Mr Samatua made no complaints about the food or water and spent much of his time on his bunk reading.

190. Mr Samatua denied that he spent time on the bunk reading and said he would not have been fed but for the Captain's intervention. He says that the Captain also intervened to get him released from the rail. Arumia said he was humiliated by being handcuffed on the deck with lots of people about. He said this was done by the Police with the intention of humiliating him. Mr Samatua said he was left handcuffed too long in the sun without water. He did not ask for water despite there being a number of people about.

191. Mr Samatua also said that Sgt Tini later tried to handcuff him in the cabin but the Captain again intervened. He says the cabin was hot and smelled of diesel but that he could sometimes put his head above deck after eating with the crew. Mr Viniki and Mr Nuikore said they visited him in the cabin but Mr Samatua said they did not.

192. Sgt Tini says he did not know which cabin had been allocated before the vessel left. He said he left the handcuffs on until land was a long way away so Mr Samatua would not jump overboard and swim back to Penrhyn. He said Mr Samatua was handcuffed to the rails close to the back of the vessel near the anchor and out of the way of passengers embarking.

193. It was not unreasonable for the Police officer to handcuff Mr Samatua to the deck until the vessel was well at sea. He had resisted leaving the cell to go to the wharf and had to be carried on board. This was consistent with his earlier behaviour and his strategy of "passive resistance". He was placed out of the way of the main comings and goings of the passengers. More attention was likely to be directed at him when he resisted boarding the boat than when he was on the deck.

194. The conditions on the boat were similar for all passengers. It was the only realistic method of transport to Rarotonga as flights to and from the Island are unscheduled and expensive if they could be arranged.

MR SAMATUA'S TREATMENT AND CONDITIONS ON BOARD

195. I do not accept that Mr Samatua was treated badly while on the boat. The Police had arranged a cabin for him as well as for meals for him with the crew. While it was hot in the cabin this was the case for all the passengers. Mr Samatua had access to the facilities on the boat, including food, and was able to go onto the deck from time to time.

196. He was subject to the same conditions as the other cabin passengers apart from his movement around the vessel being restricted.

197. The precaution of handcuffing Mr Samatua on deck until the ship was out to sea was a reasonable step to secure Mr Samatua. Mr Samatua was treated appropriately. He was provided with appropriate accommodation and food. His treatment was not cruel or an inhumane punishment nor was Mr Samatua treated in an inhumane manner.

198. Given my findings as to his accommodation and treatment on the boat I do not consider he was arbitrarily detained by virtue of the method of detention or the accommodation provided or for any other reason.

Mr Samatua's First Prison Sentence: August 2006 to June 2007

199. When the MV Maungaroa docked at Rarotonga Mr Samatua and Sgt Tini were met by the Police. Another officer and Sgt Tini accompanied Mr Samatua to Arorangi jail where Mr Samatua was to serve the term of imprisonment. There was a trip back to the police station and the courthouse as Sgt Tini did not have the warrants. The relevant informations and two warrants were faxed from Penrhyn. At the courthouse Mr Samatua says he complained to the Registrar that he been in a lockup for three weeks with no paper work and then held overnight at the jail. Mr Samatua said nothing was done and the Registrar told him he was not a Judge and could not do anything.

200. The two warrants were dated 28 July 2006. They were addressed to every constable, the prison officer-in charge at Penrhyn and the superintendent of the prison at Arorangi Rarotonga. The first warrant relates to the conviction for Contempt of Court of 29 June 2006 it records that on the date of the warrant a sentence of imprisonment of nine months was imposed. The second warrant refers to a conviction of 29 June 2006 (rather than the correct date of 4 July 2006) for Contempt of Court. It refers to a sentence imposed on the date of the warrant of "three months imprisonment such term to be served cumulatively with the nine months imprisonment imposed on 29 June 2006 (CR03/06) and to be served at the Arorangi Prison in Rarotonga".

The Prison: Rarotonga

201. Mr Samatua spent 12 months in Arorangi Prison, Rarotonga. He raises a number of issues in respect of that imprisonment and incidents occurring during the time. I have considered all the issues he raised but do not itemise them all. The major issues included:

    - His cell was next to the toilet and smelled of urine. The security light outside the door kept him awake at night.
    - He was underfed. He served as a cook for two to three months. He considered the food was inadequate. Surplus food donated from weddings and other events arrived at odd times.

- The prisoners' work was hard and unrewarding. He worked making ukuleles for a while in the craft workshop. The wood was supplied but the extras increased the value of the instruments. He liked to make Tahitian style ukuleles which were sold for better prices in the market than the ordinary ukuleles. He had to buy items such as frets and strings to make the higher value instruments. On sale of a ukulele he received 40% of the actual sale price. The prison authorities kept the balance.
- He became distressed and developed a sleep related disorder. He saw a doctor, had tests and was prescribed medication.
- He volunteered for work but he was kept isolated in the yard for a period.
- He was assaulted on a number of occasions by prison wardens and other inmates. The incidents he described were dealt with by the Superintendent as follows:
    - One incident resulted in an enquiry which led to punishment of the inmates involved and criminal charges being laid against them. The wardens involved were disciplined and suspended. Mr Samatua was bruised in the assault and received medical treatment.
    - A further incident occurred on his last day in jail. Mr Samatua had refused to participate in a prayer session. The warden dragged him from his cell and assaulted him. No injuries were reported. The subsequent report from the prison Superintendent Mr Vaiimene to the Secretary for Justice records that the officer was disciplined, suspended for two weeks and warned that a further offence would result in reduction of rank or termination of service.

202. Mr Samatua filed a number of written Requests for Interviews with the Visiting Justice and/or the Superintendent. He produced six of these. The typed Request for Interview forms were completed in handwriting by Mr Samatua. Each from provided the option of addressing it to the Visiting Justice or the Superintendent of the Prison. It also listed a number of options to circle to indicate the purpose of the interview. Provision was made for comments and for "Action Taken" or "Decision".

203. The six produced by Mr Samatua are summarised as follows:

i. 9 March 2007:

<u>To: the Visiting Justice</u>

Purpose: Health and Welfare

The comments:

"Request for Interview – Visiting Justice

Dated 1st-3-07,

1. PRIORIT

2. CONDUCT – PRISON WARDENS

Re: Request for Interview – VISITING JUSTICE

Dated: 9th-3-07

1. PRIORITY – I.E. PRISON

2. CONDUCT – PRISON WARDENS" (sic)

ii. 9 March 2007.[43]

<u>To: the Superintendent of Prison</u>

Purposes: Health, Welfare & other

Comments:

"Re: Clarify Visit – am I being refuse my rights to legal visit and phone call.

Phone calls

All above – from my representative"(sic)

iii. 28 February 2007

<u>To: the Visiting Justice & Superintendent of Prison</u>

Purpose: Health, Welfare, Family, Education and other

Comments: Related to cap removed in toilet and smell entering cell; refund of $10.00 for tablets; and sleep disorder, requesting medication for stress.

iv. 20 April 2007

<u>To: the Superintendent</u>

Purpose: Health, Welfare, Education and other

Comments: Insomnia, security light and complaint about warden response to asking for security light to be turned off.

v. 14 May 2007

<u>To: the Superintendent</u>

[43] In the Index to the Bundle of Relevant Documents for Hearing, (Volume 2: Exhibits), this is incorrectly described as a Request for an Interview with Visiting Justice.

Purpose: not selected

Comments: Midday meal complaints and food

vi. 14 May 2007

To: the Visiting Justice

Purpose: Health, Welfare, Education and other

Comments: relate to food.

204. Mr Vaiimene was the superintendent of Arorangi Prison during the time that Mr Samatua was resident. He is now retired. He gave evidence that at the time he was superintendent there was no overcrowding in the jail. He remembered Mr Samatua and that he had complained more than once. In general, Mr Vaiimene said, there were always complaints about the food but it was adequate and three meals a day were provided. The prison had a budget for food and in addition gifts of food were made to the prison for the prisoners from time to time. In relation to the claims of smelly toilets he said that these toilets were cleaned every morning by the prisoners although there were incidents from time to time when an inmate did misuse the toilets. Mr Samatua occupied the first cell which was nearest the administration area and therefore next to the toilet and shower room. He said that Mr Samatua was in that cell because his attitude was such that he was not a good influence on the other inmates so he needed to be monitored.

205. Mr Vaiimene recalled following up the complaints made by Mr Samatua concerning the assaults. He responded to all Mr Samatua's requests and complaints, although Mr Samatua was not content with some of the responses. Mr Vaiimene also facilitated various approaches and meetings for Mr Samatua with the Secretary for Justice and with Mr Kenning, the Visiting Justice. He allowed Mr Samatua to see and telephone his mother outside visiting hours and gave her privileges as Mr Samatua's appointed legal representative.

206. Mr Vaiimene gave evidence about the medical attention provided. Mr Samatua wanted to see a doctor on 9 April 2007 because of lower back pain. Arrangements were made for him to see the doctor that evening and he went back for blood and urine tests the following day. The results came back indicating there were no medical problems. When Mr Samatua complained of lower back pain again he was taken back to the hospital where he was

prescribed Ranitidine. Mr Samatua agreed he was taken to the doctor, but queried about whether this was sufficiently prompt. He also was not convinced about the quality of the medical attention. He was unable to point to any reasons for this criticism.

207. Mr Samatua also produced two articles from the Cook Island News of August 2009. The first referred to overcrowding at the prison and problems with security, water, lack of rehabilitation programs, understaffing and training. The second referred to Arorangi Prison being "*outdated, overcrowded and well due for improvement*" and to an escape. I place no weight on these articles. They do not relate to the relevant time period and they deal with a range of issues not relevant to this case. They include reported comments from a variety of commentators who did not give evidence.

208. Mr Vaiimene acknowledged there were shortcomings in the prison but said that the prisoners were adequately fed, given work and action was taken on complaints about the behaviour of staff and work for prisoners. He said there were always complaints about prisons and would be no matter how well run they were

209. An inquiry into the conditions in the prison in general is not a matter for this Court. I accept the evidence of Mr Vaiimene. Mr Samatua was provided with adequate water, meals and accommodation. He was given opportunities to work which he took up. He was able to earn some money from selling ukuleles which he made from basic materials supplied and added extras which he supplied. It is not inappropriate that he had to pay for the extras nor that the prison took a share of sale proceeds. Complaints were followed up when they were made and action taken by the authorities when necessary. This included the charging and disciplining of staff and inmates in relation to the two assaults on Mr Samatua. Other matters he complained about were looked into even if a remedy that suited Mr Samatua was not available. Medical treatment was provided in a timely way and appropriate tests and medication was provided.

210. I now turn to the efforts that Mr Samatua says he made to obtain legal and other assistance.

211. Mr Samatua says that he wanted to appeal his case. Superintendent Vaiimene made an appointment for him to see the then Secretary for Justice, Mr Terry Hagan. At that meeting Mr Samatua says he spoke to Mr Hagan about his wrongful imprisonment and asked about legal aid. Following this meeting, Mr Hagan wrote to Mr Samatua on 4 October 2006. The letter was addressed to the Superintendent and a copy was provided to Mr Samatua. It read:

> "Re: Legal Aid Request for Inmate: Samatua
>
> Further to the meeting on the 22nd September between yourself, inmate Samatua, and myself I can confirm the discussion concerned efforts on the part of Samatua to appeal the sentence handed down on him in Penrhyn. He had been unable to obtain any legal assistance since being transferred to Rarotonga and could not afford to do so now.
>
> I explained to him that the Legal Aid Act 2004, Section 9(b) states that legal aid may be granted in "appeals to the Court of Appeal in criminal proceedings, where the Solicitor General certifies the grant of legal aid is desirable in the public interest". His problem was that the normal time for lodging an appeal had expired but it would be over to his legal advisor to decide whether there would be grounds for a further appeal.
>
> Finally, it was agreed at the meeting that Samatua should obtain legal advice if he wished to take the matter further and you would give him access to the telephone to arrange for legal representation.
>
> An additional copy of this letter is enclosed to be provided to Samatua.
>
> Yours sincerely
>
> Terry Hagen
>
> Secretary"

212. Mr Samatua said he was confused by this letter as he could not afford a lawyer and it seemed to say he needed to see a lawyer before he could apply for legal aid. Nevertheless he did not seek to clarify the position but appointed his mother his legal representative. This afforded her the privilege of generous contact with him and allowed her visits to her son to be more private as well as outside the usual visiting hours. This letter of appointment is handwritten, signed and dated 25 December 2006. It is addressed to Terry Hagen and says:

> "I Robert Arumia Samatua appoint my Mother Mrs NGAPARE Cecil Samatua as legal Representative 'Counsel' Therefore Client and Counsel visit situation be address and unobstructed by Arorangi Prison Wardens within leg "act"."(sic)

213. A handwritten note was made on the letter of appointment recording that it was "sighted" on 8 January 2007. The signature is illegible but resembles the signature which appears on a number of the Requests for Interviews lodged by Mr Samatua and is likely to be that of a senior prison officer.

214. Mrs Samatua Senior was in contact with Teariki Jacob regularly. Her dealings with Mr Jacob appeared to relate to the Penrhyn land dispute as well as advice in relation to Arumia Samatua's predicament. Mr Jacobs lived in New Zealand and his advice was provided to Mr Samatua through Mrs Samatua Senior.[44]

215. While Mr Samatua was in prison he believed that Mr Jacob was to file an application to the Court in Rarotonga to obtain a discharge or set aside the Penrhyn convictions so as to obtain his release. Mr Samatua does not know if this application was actually filed by Mr Jacob. Mr Samatua produced three documents prepared by Mr Jacob. The first is dated 2007 but unsigned. It is formatted as a Court application and is intituled as a "Notice of Application for discharge, certiorari and other orders and sworn affidavits in support". It alleges malicious prosecution and refers to the Penrhyn convictions. It seeks orders for discharge and certiorari as well as for compensation. The second document is a similar application headed "Notice of Application for Court Orders and directions". This is signed by Arumia Samatua and dated 12 May 2008. It covers similar ground to that of the previous document. The third document is an Affidavit in Support of the same date. The documents use legal language but do not appear to be prepared by a lawyer or anyone familiar with civil court proceedings. The use to which they were put is unclear.

216. Mr Samatua said that Mr Jacob had prepared other documents which had been provided to the Island Council, the Ministry of Justice, the Secretary for Justice and the Ombudsman at various times. The content of these documents was not made clear.

[44] In December 2008 the dispute between Mr Reisura Samatua and the Island Council and Marine Centre was heard in the High Court in Rarotonga. Mrs Samatua Senior appeared for Reisura Samatua in that matter before Justice Nicholson. A declaratory judgment was issued that the Penrhyn (Naharakura Lease) Facilitation Act 1992 did grant a valid lease of the Marine Resources Centre. (*R Samatua v Cook Islands Government Property Corporation,* High Court Rarotonga 8 December 2008, Nicholson J).

.

217. Mr Samatua also met the Visiting Justice, John Kenning. The meeting was in about March 2007. Mr Samatua says at that meeting he spoke to Mr Kenning not only about the prison issues but also his own position and what he had tried to do about an appeal. Mrs Samatua Snr subsequently saw Mr Kenning and delivered a letter and document to him from Arumia. She could not recall what was in the document and thought she might have seen Mr Kenning on two occasions.

218. Mr Kenning did receive some documents relating to the incidents in prison. He did not consider they were sufficient to enable him to undertake an inquiry. He wrote to Mr Samatua on 29 March 2007 asking for a complete copy of the letter and appendices which had been delivered. He asked for the originals of some witness statements from inmates. He also requested that the witnesses be properly identified. One of those was a Mr Loomes, who was involved in one of the assaults on Mr Samatua.

219. In his letter Mr Kenning said he was prepared to review the claims by Mr Samatua but would not proceed with an inquiry until the shortcomings in the documents were rectified. He returned the documents. Mr Kenning referred only to information concerning prison issues and particularly the assaults. He made no mention in the letter of any discussion about legal assistance or an appeal. It seems unlikely that these issues were raised with Mr Kenning given there is no mention of his having been asked about them or requested to assist Mr Samatua in this regard.

220. Mr Samatua said that material prepared by Mr Jacob was provided to Mr Kenning by Mrs Samatua. No detail was given about this material. If this had been the draft court applications which sought discharge, certiorari and other orders which were produced in this case it is likely that Mr Kenning would have referred to that application and those documents in his letter.

221. I conclude that on the evidence the matters raised with Mr Kenning related to the prison conditions and assaults in prison. Mr Samatua received the letter from Mr Kenning but there is no evidence of any response to Mr Kenning's requests or to his letter. The further information which he asked for was not supplied.

222. Mr Samatua says he spoke to the Ombudsman, Janet Maki, by phone from the prison and she was going to get back to him. He gave no detail of exactly what he asked her to do. He said his mother was to follow it up. Mrs Samatua Snr could not recall meeting with Ms Maki although she thought she might have taken her some material which Mr Jacob had prepared. She did not know what was in that material. Mr Samatua says he did not follow up the telephone discussion while in jail. He said after he was released the second time he did call on the Ombudsman but was not specific as to what he asked her to do.

223. I am of the view that there is insufficient evidence to establish that either the Ombudsman or Visiting Justice were asked to and failed to take action to assist Mr Samatua in relation to the matters that gave rise to these proceedings. In particular I am not persuaded that Mr Samatua provided either of them with any/or sufficient information about the Penrhyn events which would give rise to any obligation to make further inquiries, or otherwise be taken into account in these proceedings.

Mr Samatua's Second Prison Sentence - Rarotonga

224. Mr Samatua was released on parole on about 26 June 2007. He then served 12 months on parole probation. He said he told prison officers that he wanted to serve the supervision term in Penrhyn. Probation officers visited the jail but Mr Samatua refused to meet them without an assurance that he could serve his probation in Penrhyn. Therefore no meeting took place.

225. After he was released Mr Samatua stayed with his mother on Rarotonga at Tupapa. Mr Browne a Probation Officer visited him there two weeks after his release and explained to him he must report to the Probation Service in Avarua each week. Mr Samatua said Tupapa was too far away for him to walk and in any event he wanted to serve his sentence in Penrhyn. He did not report as requested.

226. Mr Samatua said he saw the Visiting Justice John Kenning in the Courthouse car park about this time and told him about the situation. Mr Kenning told him to get a lawyer and gave him some names. Mr Samatua said he saw one

lawyer who would not take the case and contacted some others, but they would not take the case.

227. Mr Browne, the Probation Officer, gave evidence that anyone on parole supervision must serve the first month in Rarotonga, and after that a change of venue for reporting would be entertained. He said he told Mr Samatua this when he asked if he could serve the probation on Penrhyn

228. As a result of this breach of his parole conditions Mr Samatua was charged and came before the Court in Rarotonga. He was sentenced to a further three months imprisonment which he served in maximum security at his request. He said he was so distressed and traumatised by events that he felt it was better he was alone.

WAS MR SAMATUA SENTENCED IN OPEN COURT?

229. Mr Browne gave evidence at a hearing dealing with the breach of parole conditions before a Justice of Peace. Mr Samatua was convicted and sentenced to three months imprisonment on that charge.

230. Mr Browne confirmed Mr Samatua's evidence that the charge was heard by the Justice in the jury meeting room. This room is in the Court building adjoining the courthouse entrance and waiting area, beside the main courtroom. The jury room door was closed and locked. Mr Browne said that anyone who wished to enter was allowed in. The lock was operated by a code entered into a keypad on the door. Mr Browne said that no one tried to enter the room. Mr Samatua said that a media representative had been present at the morning session but was not there in the afternoon when he appeared.

231. Mr Elikana, now the Secretary for Justice, gave evidence that usually matters were heard in air-conditioned courtrooms which had closed doors but they were not locked. There was no explanation as to why this particular case was heard in the jury meeting room.

232. I do not consider that there was any intention to exclude the public from Mr Samatua's hearing. Subject to limited exceptions it is usual for Court hearings in the Cook Islands to be held in courtrooms which are readily

accessible by members of the public. I am satisfied that no member of the public or the press who wished to be present and sought admission was refused entry.

233. In this case the holding of the hearing in a room which had a lock on the door requiring anyone seeking entry to knock so the door could be opened appears to be in the category of a bureaucratic bungle rather than a breach of rights for which redress should be given.

Parole: Rarotonga

234. Upon his release Mr Samatua served the remaining nine months of his term of probation in Rarotonga. Initially he stayed with his brother and family but things became tense resulting in a domestic disturbance. He then moved to the family land at Tupapa and lived there. He reported to probation service weekly until he finished his term of probation.

235. He said he had no funds to get himself back to Penrhyn and so stayed in Rarotonga. He remains in Rarotonga to deal with this Court case and hopes to return to Penrhyn.

Whether Mr Samatua was Deprived of his Right to Apply for a Writ of Habeas Corpus

236. Mr Samatua did not have the opportunity to seek legal advice when he was arrested on Penrhyn and therefore was probably unaware of his right to apply for a writ of habeas corpus.

237. I do not consider that he was deprived of this right other than indirectly in that he was not advised of the right. The issue of whether lack of advice might amount to a deprivation of the right was not an issue that was argued.

238. Therefore I do not find this right was breached directly. Without a lawyer Mr Samatua was unlikely to be aware of his rights generally including the right to habeas corpus. I deal with his right to seek legal advice below.

The High Court Quashing of Mr Samatua's Convictions in 2010

239. On 11 January 2010 Mr Samatua lodged an appeal against the Penrhyn convictions. This came before Justice Weston on 20 April 2010 who noted that the time for appeal had expired and that there was no provision for an extension of time. The Judge suggested the matter might be dealt with as a judicial review and directed that the court staff and the Police undertake an information gathering exercise.

240. The application came before a bench of Chief Justice Williams and Justice Weston on 13 May 2010[45]. Mr Samatua appeared in person and Mrs Saunders for the Crown.

241. The Crown confirmed that there was no right to appeal out of time, but was of the view the convictions should not stand. Mrs Saunders submitted the appropriate procedure was to order a retrial at which the Crown would not offer any evidence. The convictions would then cease to have any effect. In relation to this result the Crown said:

> "It is consistent with natural justice provided for by section 8 of the Judicature Act in accordance with the rights to a fair hearing guaranteed by Article 65 (1) of the Constitution."[46]

242. The Crown concluded that a miscarriage of justice had likely occurred. To reach that conclusion and so order a retrial, the Court had to be satisfied that the application for retrial could not reasonably have been made sooner.[47]

243. The Court queried the extent to which a finding of justification supporting quashing the convictions and granting a retrial could be relied upon by the applicant in any subsequent claim for damages for wrongful imprisonment (or similar). The Minute records the Crown responding as follows:

> "• The Crown cannot be sure that the matter was properly dealt with by the Justice of the Peace in 2006. As a consequence, this Court can probably have a concern that due process has not been followed;

[45] *R A Samatua v Cook Islands Police* OA 5/10 Minute (No. 3) dated 19 May 2010 (NZT) records the background and process adopted.
[46] *R A Samatua v Cook Islands Police* OA 5/10, Minute (No. 3) of the Court.
[47] Section 102(2) Criminal Procedure Act.

- As a result, it appears there has been miscarriage of justice;
- The Court could reach these conclusions on the papers without making formal findings of fact to that effect[48]."

244. The Court said that to order a retrial it had to reach an appropriate platform of factual understandings. As the Crown did not oppose a retrial it had arguably accepted some or all of the complaints made by Mr Samatua. In the absence of contrary evidence the Court was satisfied that the applicant had raised a prima facie case of miscarriage of justice.

245. The Court noted that the finding was on the basis of prima facie evidence and that there was no formal finding of fact binding upon the Crown in any subsequent claim against it for wrongful imprisonment (or the like). It stated that it did not have jurisdiction in the judicial review application to order damages for breach of any public law, duty, right or obligation.[49]

246. The matter was then adjourned to enable Mr Samatua to obtain legal advice. Subsequently on 3 June 2010 a consent memorandum was filed. It was signed by Mr Samatua and counsel for the Crown and it sought retrials in the respect of the three Penrhyn convictions. It said that the convictions should be set aside and that the Crown would offer no evidence at the retrial. It recorded that costs in favour of Mr Samatua of $80.00 were agreed.

247. Mr Samatua had retained a New Zealand based lawyer for the application. That lawyer did not appear before the High Court. The Court was critical of the standard of the documents filed on Arumia Samatua's behalf. It said they were not up to a sufficient standard and were drafted by a lawyer not familiar with judicial review proceedings. It was not clear who prepared the documents. In its minute the Court referred to the position of the lawyer as "inscrutable". His name did not appear in any papers filed although the Court assumed that he had some input into them as it was unlikely Mr Samatua would have been able to draft them himself.[50]

---

[48] *R A Samatua v Cook Islands Police* OA 5/10, Minute (No. 3) of the Court at para 21.
[49] Supra at para 25.
[50] *Samatua v Cook Islands Police et Ors* OA 5/10 (CA 1/2010). Minute (No.3) of the Court, 13 May 2010. Williams CJ and Weston J at para 28.

The Evidence Generally

248. I have reviewed the events and the relevant evidence. In the course of doing so I have dealt with the allegations as they relate to the particulars pleaded by Mr Samatua in his Amended Statement of Claim. In doing so I have recorded my essential findings of facts.

249. The recollections of many of the witnesses were dimmed by time. The lack of reliable records made the task of reconstructing events more difficult. The Court records produced were incomplete and inconsistent in some respects. The usual Police log books and related material were missing. That may be explained by the length of time that had passed. The proceedings were commenced in 2012, almost six years after the first hearing in Penrhyn. Nevertheless the Crown must have had to investigate some of the matters which were the subject of these proceedings in 2010 at the time it proposed the course of action leading to the quashing of Mr Samatua's convictions.

250. There was also a lack evidence of documented procedures, manuals or other written guidance available at the time for the Police officers or the Justices in Penrhyn. No detailed evidence was given as to the specific training that the relevant officers or Justices received to assist them in ensuring the legal requirements and procedures were followed when dealing with criminal matters.

251. Sgt Tini, the prosecutor at the Penrhyn hearings, was unable to outline with precision the procedure followed at the hearings. The court processes were confused and I had the impression the Justices and the officials lacked the knowledge and experience required to ensure the proper processes were followed and to ensure a fair hearing of a defended criminal matter.

252. At the same time the assessment of the evidence of Mr Samatua requires care. I consider Mr Samatua and his family exaggerated their version of some events to put the public officials including the police officers in the worst possible light. Mr Samatua was focussed on remedying the injustice he considered his father had suffered in the land claim. He and his father were preparing themselves and their evidence from an early stage with a view to

somehow precipitating some action which would get the land dispute before the High Court.

253. Mr Jacob was advising them on this strategy. Mr Samatua's actions in running away from the Police with the unit keys (intending the Police to believe he was taking them), returning to and breaking into the unit and then resisting the Police when they tried to remove him, were part of what he described as the "peaceful protest" over the land dispute. Nevertheless this strategy does not excuse any unlawful or inappropriate actions by the Police but rather provides a background and a context when reviewing the events. I accept that Mr Samatua considered his father was entitled to occupation and so was justified in taking the action he did to support his father in the occupation of the MRC residence to bring his father's claims to the attention of the authorities.

254. In particular I preferred the evidence of other witnesses to that of Mr Samatua and his family in relation to some of the incidents which Mr Samatua pointed to as evidencing bad faith.

Bad faith

255. Proof of bad faith is an element of the tort of misfeasance in public office. Mr Samatua alleges that Police officers, prison officials, probation officers and Justices of the Peace as public office holders:

> "…acted maliciously towards the plaintiff with the motive of harming him or damaging his reputation, or acted in a manner they knew was not in accordance with the law and would cause the plaintiff harm."[51]

256. Bad faith also defeats the statutory exemptions for certain liabilities afforded to the Crown in respect of tortious claims.[52] These immunities do not apply if

[51] Paragraph 52, Amended Statement of Claim, dated 31 May 2013.
[52] Crown Proceedings Act 1950 (New Zealand) in force under s 350 of the Cook Islands Act 1915.

the action is in bad faith.[53] Although bad faith does not need to be proved in claims for public law redress for Constitutional breaches.[54]

257. The plaintiff points to a number of alleged actions or failures to act by public officials as evidence of bad faith and so invites the Court to imply bad faith on the part of the relevant officials.

258. Counsel for Mr Samatua submitted that the Crown agents acted as they did specifically intending to injure Mr Samatua.[55] He summarised the events which he says were done in bad faith as follows:

> (a) The original theft charge was laid in bad faith;
>
> (b) The conduct of Crown agents at the plaintiff's Court appearances was so poor, and in such flagrant breach of the plaintiff's rights that bad faith can be inferred;
>
> (c) Sgt Tini and Constable Ben agreed during questioning from both counsel and the court that they had received training on Constitutional requirements prior to the events that form the basis of this claim. They therefore had no excuse to act in breach of those rights;
>
> (d) While the Crown disputes that the plaintiff was chained up during the lockup detention, it is clear that he was chained to the window at least once. He was also cuffed to the railings on the ship without any reasonable justification.[56]

259. In *Van Essen v Attorney General,*[57] allegations of "bad faith" were made against the Police and Accident Compensation investigators who improperly obtained search warrants from a judicial officer. Justice Whata said "bad faith" had an imprecise meaning and imparted connotations of dishonesty, misleading conduct, improper purpose and deliberate breach of a duty.[58] He said :

---

[53] *Simpson v Attorney-General* (Baigent's case) [1994] 3 NZLR 667 at 674 (CA).
[54] *Simpson v Attorney-General [1994] 3 NZLR 667 (CA)*. The Court of Appeal held that, although s 6(5) of the Crown Proceedings Act 1950 contains exemptions from certain liabilities, none of these exemptions is directed towards Bill of Rights liability.
[55] Para 6 of the Plaintiff's Closing Submissions dated 5 December 2014 in respect of Misfeasance in Public Office.
[56] Paragraph 116 of the Plaintiff's Closing Submission dated 15 December 2014.
[57] *Van Essen v Attorney General & Ors* [2013] NZHC 917
[58] *Van Essen v Attorney General & Ors* [2013] NZHC 917 at para 76 (Whata J).

> "Deliberate or knowing disregard of fundamental rights, and/or misleading a judicial officer for the purpose of obtaining evidence is repugnant to the common law and inherently improper. By contrast, breach of standards or expectations or non-compliance with policy, norms or guidelines may lack the requisite obliquity to qualify as bad faith for the purposes of remedy. Indeed, as was stated by the majority in R v Williams:
>
> > [116] ... The term "bad faith" is not apt in cases where the officers do not know they are acting illegally or where they might be acting for what seems to them (mistakenly) to be a proper motive. ..." (R v Williams (2007) 3 NZLR 207 (CA) at (116)).

On appeal, the Court of Appeal[59] referred to its earlier decision in *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd*[60] and emphasised that a party alleging bad faith must discharge a heavy evidential burden commensurate with the gravity of the allegations.[61]

260. The House of Lords in *Three Rivers District Council v Bank of England (No.3*),[62] considered bad faith as an element in the tort of misfeasance in public office. Lord Hobhouse said:[63]

> "The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in tort, first in his pleading and then at the trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden – the balance of probabilities – but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence, which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out."

261. Lord Millett said:[64]

---

[59] *Attorney General v Van Essen & Ors* [2015] NZCA 22. The appeals were successful to the extent of quashing the order for public law damages and costs. This did not affect the findings of bad faith made by Whata J.
[60] *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* (2007) NZLR 721(CA) at [89]
[61] *Attorney General v Van Essen* (CA) (ibid) at para 61.
[62] *Three Rivers District Council v Bank of England (No.3*) [2001] 2 A11 ER 513
[63] *Three Rivers District Council v Bank of England (No.3*) [2001] 2 A11 ER 513, 569.
[64] *Three Rivers District Council v Bank of England (No.3*) [2001] 2 A11 ER 513, 578,

> "It is well-established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence ... This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so."

262. Therefore the evidence relied upon to prove bad faith must show more than mere negligence. On the balance of probabilities but bearing in mind the seriousness of the allegations Mr Samatua must show that the public officer holder was acting in bad faith. It is a heavy evidential burden. This assessment has an objective and subjective component and is assessed from the totality of the circumstances.[65]

263. I have made factual findings in the course of my review of the events. Those findings form the background against which I now consider the allegations of bad faith.

Events Alleged to have been done in Bad Faith

264. I deal with each of the matters which Counsel for the plaintiff listed in his closing submissions as being done in bad faith.

(a) Was the original theft charge laid in bad faith?[66]

265. The relevant officers involved in this incident and against whom the allegations of bad faith were made are Sgt Tini and Constable Ben.

266. Mr Samatua said that the Police officers knew that Reisura Samatua was having a dispute with the Ministry and the Nahatrakura land trust over his right to occupy the MRC unit. The dispute was based on Reisura Samatua's claim that ownership rights in the land gave him the right to occupy the residence. Land disputes were usually civil matters and, Mr Samatua submits that this dispute should have been treated as a civil matter. Therefore the Police officers should not have become involved in it. A second factor was that Mr

[65] *Van Essen v Attorney General & Ors* [2013] NZHC 917 at para 76 citing *R v Miles (2012) NZHC 1820.*
[66] Plaintiff's Closing Submissions, dated 5 December 2014 at para 116.

Samatua said had an arguable defence to the charge of theft of the keys in that he had not taken the keys with the intention of depriving the owner of the property. He had a right to the keys based on his father's claim to occupation of the MRC unit and that the keys had been given to Mr Samatua by his father who in turn had received them from Dorothy Samatua a person entitled to possess them by virtue of her employment. That the Police charged him with an offence in those circumstances, Mr Samatua says, is evidence of bad faith.

267. I do not propose going into the detail of the allegations surrounding this event as I have set them out earlier. Sgt Tini knew there was a dispute and that Reisura Samatua was claiming a right to occupy the MRI unit. The dispute had been going on for some time. He was aware of the involvement of the mayor and the Island Council members as trustees of the land trust that the MRC wanted the Samatuas out of the unit. Sgt Tini did not know the full details of the dispute but was acting on the information he was given that the keys belonged to the MRC.

268. I am of the view that Sgt Tini made proper inquiries. He took time to try and find a way of dealing with the issues to avoid the need to lay criminal charges. On 23 May 2006, he went to discuss the MRC occupation with Reisura Samatua. He said they were trying to reach a solution. In the course of that discussion Reisura indicated he was relying on legal advice but would not tell Sgt Tini who was providing it. Nevertheless Reisura Samatua agreed to telephone the advisor. They reached the MRC and were looking for the keys when Arumia Samatua intervened. Arumia then ran away but Sgt Tini did not follow Arumia. He continued dealing with Mr Reisura Samatua.

269. Arumia Samatua intended Sgt Tini to form the view that he had run away with the keys. I have found that it was appropriate to arrest Mr Samatua even if he had possible defences to the charges.

270. Sgt Tini was cross examined about his attitude to the Samatuas. He agreed that the Samatuas were causing trouble and he wanted the trouble to stop but he denied wanting to lock Mr Samatua up. His demeanour and responses did not indicate malice or any improper motive in taking the actions he did. Nor did he exhibit any ill-will against the Samatuas.

271. Constable Ben was also aware of the land dispute and Reisura Samatua's claim to ownership of the MRC land. Sgt Tini sent Constable Ben to find Arumia Samatua and the keys. He did so. Mr Samatua went to the Police station and was subsequently arrested.

272. On his arrest Mr Samatua should have been given the opportunity to retain a lawyer. Under s. 9(1) of the Criminal Procedure Act 1980-81 Mr Samatua should have been allowed to consult a legal practitioner. This provides:

> "Duty of Persons Arresting – (1) It is the duty of every one arresting any other person to inform promptly the person arrested of the grounds of his arrest, and of any charge against him and to allow him to consult a legal practitioner of his own choice without delay."

273. While the words of that provision do not spell out the requirement that the officer must inform the person arrested that they may consult a legal practitioner, it is implied. Without some indication by the arresting officer that the person is allowed to consult a lawyer and giving that person the opportunity to do so the right is illusory. Most people who have not had legal training do not know what their rights are when arrested nor would they know that they were allowed to see a lawyer.

274. This interpretation is supported by the Constitution. The right of a person to retain and instruct a lawyer is preserved under the Constitution. Article 65 (1) (c) (ii) says:

> "…the right, wherever practicable to retain and instruct a barrister or solicitor without delay".

275. A liberal interpretation of this provision in conjunction with the provision in the Criminal Justice Act allowing the person arrested to consult a lawyer, supports the requirement that a person should be advised of that right and allowed the opportunity to exercise it. This approach to interpretation is in accordance with the provisions of Article 65(2) which says:

> "(2) Every enactment, and every provision thereof shall be deemed remedial, whether its immediate purpose is to direct the doing of anything that the enacting authority deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment [of the

object] of the enactment or provision thereof according to its true intent, meaning and spirit."

276. Both Police officers said they did receive training about the Constitution but gave no details. While Constable Ben said he had received training on the Constitution and the law, he considered it was Sgt Tini's job to make sure the rights were observed. Sgt Tini also said he received training.

277. Sgt Tini was the arresting officer and, when he arrested Mr Samatua, he should have given him the opportunity to consult a legal practitioner. Mr Samatua had had experience of the criminal process in New Zealand and may have known of his right to a lawyer. Nevertheless now he was in a different country, subject to the laws of that country on an isolated island which had no resident lawyers. Although he knew he was facing a criminal charge, it is unlikely he had any knowledge of the procedure required to be followed, of his rights or of the consequences that might follow.

278. Sgt Tini did recognise his obligation to advise Mr Samatua of his right a lawyer and to provide him with an opportunity to do so. In cross-examination he said that he did ask Mr Samatua whether he wanted legal advice. He did so in the Penrhyn language but received no reply. He did not repeat the request nor did he clarify that Mr Samatua had heard. The evidence was that Mr Samatua was not fluent in the Penrhyn language, so it was likely he did not understand what had been said and so did not respond to the question. To give any meaning the right to consult a legal practitioner the officer should have ensured that he was understood. There was no evidence that Mr Samatua waived his right to legal advice.

279. There was a suggestion that it was not practicable to retain or instruct a lawyer in the circumstances. I do not accept this. It may be difficult from Penrhyn to contact a lawyer as there are none resident but the phone was available and indeed Sgt Tini used it to discuss this case with the Inspector in Rarotonga. It would have been a simple matter to allow Mr Samatua access to the phone to call a lawyer.

280. The failure to advise Mr Samatua of his right to consult a lawyer was a breach the Constitution, but that breach does not of itself establish bad faith.

281. I do not consider that the evidence in relation to the laying of the theft charge supports an allegation of bad faith. I have found that the laying of the charge and the actions of the officers leading up to Mr Samatua's arrest were appropriate. Sgt Tini appeared to be trying to do the right thing. Although he did not refer to standard procedures, he could not recall clearly in a number of respects what procedure was followed, and there were defects in the manner he prosecuted the proceedings, I consider that this was due to lack of guidance, training and experience rather than bad faith.

(b) Was the conduct of the Crown agents at the plaintiff's Court appearances so poor, and in such flagrant breach of the plaintiff's rights, that bad faith can be inferred?[67]

282. The public office holders present at each of the Court hearings were the presiding Justices, the Police officers and the Deputy Registrar, who is now deceased. I have found that there were defects in the manner in which the hearings were conducted. Due process was not followed and Mr Samatua did not have fair hearings. The reason for these failures was because the Justices and officials were inexperienced and lacked the skill and knowledge to oversee the conduct of proceedings of this nature.[68] This is reinforced by the imposition of a sentence of "hard labour" rather than community service and the subsequent substitution of that sentence with a term of imprisonment without any reference to the relevant legislation.

283. I have dealt with the allegation that the crown agents failed to control the noise and behaviour of people in the courtroom. I do not accept that this supports a finding of bad faith on the part of the Justices, officials or the Police officers.

284. The next matter which counsel pointed to, to support a finding of "bad faith" was:

[67] Supra at para 116.
[68] I am aware that in recent years training and comprehensive procedure manuals have been made available to Justices of the Peace. I refer to this in more detail below.

(c) Sgt Tini and Constable Ben had received training on Constitutional requirements prior to the events that form the basis of the claim. Therefore did they have any excuse in acting in breach of those rights?[69]

285. When Sgt Tini was questioned about his training he said he was aware of the rights granted under the Constitution, and that it was his job to help the plaintiff exercise them. He had trained in 1983 when he joined the Police force. He could not remember the dates but thought he might have undertaken some further training in 2004. Details of topics covered by the training were not given. Sgt Tini could not recall what manuals or information that he had access to in Penrhyn. He telephoned headquarters for assistance.

286. I am of the view that failure of the police officers to follow proper procedures and allow Mr Samatua his rights was due to their lack of training or experience as to how to apply the law and the Constitution in the circumstances of this case.

287. Sgt Tini presented as an honest witness. Under cross-examination he admitted facts which did not suit his position or that of the Crown. For example:

    i. He admitted he knew of the land dispute and that the Police do not usually get involved in land disputes on Penrhyn;
    ii. He admitted that spoke to Arumia in the Penrhyn language throughout including during the hearings;
    iii. He agreed it was his job to help defendants exercise their rights under the Constitution;
    iv. He did not argue that he had followed proper process in the hearings when he could not remember what had happened.

288. While these are small points, they assume significance in the context of the allegations of bad faith. This self-reporting provides a mark of honesty.

289. The failures may be consistent with negligence on the part of the Police officers but they do not support a finding of bad faith or dishonesty.

[69] Supra at para 116.

(d) Did the allegations that the plaintiff was chained up during the lockup detention and cuffed to the railings on the ship without any reasonable justification indicate bad faith?"[70]

290. My findings in relation to each of these incidents are set out above. I am of the view that in the circumstances, the manner that Mr Samatua was treated in the lockup cell and on the ship were appropriate and do not indicate bad faith on the part of the Police.

Causes of Action

291. Mr Samatua's primary cause of action is based on breaches of the Constitution. The Amended Statement of Claim pleads three tortious causes of action: misfeasance in public office; false imprisonment and negligence. The claim in negligence was abandoned in the Plaintiff's Closing and therefore I do not propose dealing with that. I deal with the first two tortious causes of action, before moving on to the Constitutional claims.

False Imprisonment

292. The Amended Statement of Claim alleges that the plaintiff was "*at various stages detained by the defendants' agents without lawful jurisdiction*".[71]

293. To establish the tort of false imprisonment the plaintiff must prove that he was imprisoned by the act of the defendant, whether intentionally or negligently.[72] An unlawful arrest is a false imprisonment if the unlawfulness is due to lack of grounds for making the arrest or the improper manner in which the arrest was carried out.[73]

294. I have found that the arrests in relation to the first charge (theft of the keys) and in relation to the third appearance (contempt of court for failure to comply with directions of the Court to vacate the MRC premises) were made on reasonable and proper grounds.

---

[70] Supra at para 116.
[71] Amended Statement of Claim dated 31/3/13 at para 50.
[72] The Laws of New Zealand, Tort Part II, Specific Torts. Trespass to the Person: False Imprisonment. General Principles para 138.
[73] *Murray v Ministry of Defence* (1988) IWLR 692.

295. In relation to the second charge of contempt of Court (by failing to comply with the "hard labour" sentence) Mr Samatua received a summons and went to the Courthouse. He was released immediately following the hearing to await the next boat to Rarotonga where he would serve his sentence of imprisonment.

296. After his third appearance Mr Samatua was held in the lockup cell and commenced serving a sentence of imprisonment which had been imposed by the Court. He was then transported by ship to Rarotonga and to Arorangi prison.

297. The Deputy Registrar, and the officers and persons lawfully assisting in the supervision of Mr Samatua were justified by statute in detaining him by virtue of s 29 and s 30 of the Crimes Act 1969. These provide:

> "**29. Execution of sentence, process, or warrant** - (1) Every ministerial officer of any Court authorised **(sic)** execute a lawful sentence, and every Superintendent of any prison and every person lawfully assisting any such ministerial officer or Superintendent, is justified in executing the sentence.
> (2) Every ministerial officer of any Court duly authorised to execute any lawful process of the Court, whether of a civil or a criminal nature, and every person lawfully assisting him, is justified in executing it and every Superintendent required under the process to receive and detain any person is justified in receiving and detaining him.
> (3) Every one duly authorised to execute a lawful warrant issued by any Court or Justice or other person having jurisdiction to issue the warrant, and every person lawfully assisting him, is justified in executing the warrant; and every Superintendent required under the warrant to receive and detain any person is justified in receiving and detaining him.
>
> **30. Execution of erroneous sentence or process** - If a sentence is passed or a process is issued by a Court having jurisdiction under any circumstances to pass such a sentence or issue such a process, or if a warrant is issued by a Court or person having jurisdiction under any circumstances to issue such a warrant, the sentence passed or process or warrant issued shall be sufficient to justify the execution of it by every officer, Superintendent, or other person authorised to execute it, and by every person lawfully assisting him, notwithstanding that-
> (a) The Court passing the sentence or issuing the process had no authority to pass that sentence or issue that process in the particular case; …"

298. The sentences of imprisonment were imposed by Justices who had jurisdiction to pass those sentences of imprisonment for the relevant offences in appropriate circumstances. The statutory justification applies notwithstanding the Court may have had no authority to pass the sentence in

the particular case. My finding that the Justice was unable to substitute a sentence of imprisonment for the previous sentence of hard labour does not negate the statutory justification by the public office holders for detaining Mr Samatua.

299. The Superintendent and his assistants at the jail in Rarotonga where Mr Samatua served the balance of his imprisonment were justified under s. 29(2) and (3) and s.30 to detain him.[74]

300. Mr Samatua was detained in prison for the extra three months imposed by the Justice of the Peace in substitution for the hard labour sentence. The Crown in its closing submissions accepted that this was three months longer than was lawful.[75]

301. The prison authorities were acting in execution of a Court imposed sentence.[76] They were entitled to rely on the statutory justification in detaining Mr Samatua for the substituted three months as this extra period of detention was imposed by a court and was not due to any mistaken or intentional action or inaction by the prison officials. To that extent it differs from the situation which arose in *Manga*[77] where the plaintiff was detained longer than the imposed sentence because of a mistake by the prison authorities in their interpretation of effect of a remand period on the sentence.

302. The warrants for Mr Samatua's transfer to jail in Rarotonga did not arrive from Penrhyn until a day after Mr Samatua had arrived at the prison in Rarotonga. They were faxed to the Court in Rarotonga and contained various errors which I have described above. The delay in obtaining the warrants and the irregularities in the warrants did not affect the justification of the officials and those assisting them acting in the execution of the sentences passed by the Court.[78]

---

[74] Section 29 and 30 of the Crimes Act 1969.
[75] Closing Submissions of Counsel for the Defendant dated 5/12/14 at para 5.
[76] In *Quinland v Governor of Swaleside Prison* [2003] 1 AII ER 173 (CA) the Judge had made an arithmetical error when stating the total sentence of the prisoner. Authorities were justified in relying on the sentence as they were acting in accordance with the warrant.
[77] *Manga v Attorney-General* HC Hamilton CP90/98, 13 September 1999 at [38].
[78] The defects, irregularities and timing of the production of the warrants were not particularised in the Amended Statement of Claim.

303. The Superintendent and his staff were also acting in execution of a sentence passed by a Court in detaining Mr Samatua during the his further term of imprisonment which was imposed by the Court in Rarotonga for his failure to report for probation as required by the terms of his parole. The public officials were acting under the statutory justification.

304. A claim of false imprisonment is made against Mr Browne. He was the probation officer responsible for the supervision of Mr Samatua following his release on parole. Mr Samatua alleges that Mr Browne told him that he had to report on Rarotonga and was not allowed to serve his parole period on Penrhyn. Mr Browne acted under the provisions of the probationary licence. He was justified in requiring Mr Samatua to report in Rarotonga. Mr Browne said that Mr Samatua could have applied to serve his parole in Penrhyn. He said as a rule the first month had to be served in Rarotonga and following that a review was possible. Mr Browne says Mr Samatua did not apply to serve the term in Penrhyn.

305. Mr Browne presented as a straight forward witness. He did not hesitate to accept that the doors to the jury room in which Mr Samatua's case was heard were locked with a combination lock, despite the Crown's earlier stance that this was not the case. I accept the evidence of Mr Browne on this point.

Misfeasance in Public Office

306. The claims under this cause of action are directed at the Police officers, their deputies (specifically naming Kahu Kirikava) and Justices Ben Samuel and Fana Ivirangi. The claims are also made in respect of the actions of the prison officials at Arorangi, Mr Browne the probation officer and the Justice of Peace in Rarotonga who dealt with the charge of failure to meet the parole supervision requirements in Rarotonga. The particulars alleged under this heading largely repeat those detailed under the claims for breach of the Constitution. I have made findings on the relevant factual allegations above.

307. There are two forms of liability for misfeasance in public office. The first is targeted malice by a public officer which requires conduct specifically intended to injure a person or persons.[79]

308. The second form of the tort requires bad faith in the sense that the public official knows he has no power to do the act complained of and that the act will probably injure the plaintiff. Recklessness by the official as to the illegality of the act is sufficient. However this is recklessness in the subjective sense, of believing or suspecting the position and going ahead anyway. The element of bad faith is the absence of an honest belief in the lawfulness of the conduct which gives rise to the risk of probable loss.[80]

THE ARRESTS AND ACTIONS BY THE POLICE OFFICERS AND DEPUTIES ON PENRHYN

309. I have found that there was no bad faith on the part of Sgt Tini and Constable Ben. There was no targeted malice by them or their deputies (including Mr Kirikava), in that they had no intention to injure Mr Samatua, either physically or otherwise. I do not consider that they were acting in bad faith or maliciously as required in the second form of the tort.

310. In his closing submissions counsel for the plaintiff submitted that there was ample evidence that Mr Samatua's arrest and the laying of the charges were intended to injure him and that Sgt Tini and Constable Ben acted "*without jurisdiction to injure him*". This was because the land dispute should have been dealt with as a civil matter. Counsel submitted that the Police officers instead took matters into their own hands because they were intent on "*keeping the peace*" and stopping the trouble caused by the Samatuas. He also pointed to the evidence of Mr Marsters that he did not care about the Samatua family's rights and just wanted them out of the way, as support for the allegations of bad faith. Mr Marsters was not involved in the arrest and his actions are of no relevance to the allegations against the police officers.

311. Sgt Tini agreed that land disputes were usually civil matters and dealt with by the Island Council. He agreed they did not usually involve the Police. However in this particular case the issue had escalated. Arumia Samatua

[79] *Three Rivers District Council v Bank of England* (No.3) [2001] 2 All ER 513, at [46] per Lord Steyn.
[80] *Three Rivers District Council v Bank of England* [2000] 3 A11 ER 1 at 42 per Lord Hutton.,

acted in a manner which appeared to Sgt Tini to be unlawful and he was of the view that he had to intervene. He candidly acknowledged he viewed the Samatuas as causing trouble and he wanted it to stop. I do not accept that this is sufficient to infer an improper motive or subjective bad faith. He was intent on doing his job.

312. Counsel submitted that if intention could not be inferred then "*recklessness*" was sufficient for the tort to be made out. On that point he referred to the comments of Sapolu CJ in *Moala v Attorney-General.*[81] The Chief Justice was there referring to the second form of liability for misfeasance where a public officer must know that he has no power to do the act complained of and that the act will probably injure the plaintiff.[82] His Honour cited *Three Rivers District Council*[83] which makes it clear that subjective or advertent recklessness is required to establish liability not merely objective recklessness.[84] Sapolu CJ went on to note that Lord Hutton in that case had stressed the need for "*dishonesty*", "*bad faith*" or acting from a "*corrupt*" or "*improper nature*" and placed strong emphasis on the requirement of subjective bad faith.[85]

313. The Police officers' failed to advise Mr Samatua of his right to a lawyer and did not give him the opportunity to do so. This was a breach of his rights however this does not support a finding that the officers knew, suspected or were reckless, in the sense required to establish misfeasance, that they were acting illegally or improperly.

314. The Amended Statement of Claim also alleges misfeasance against the Police, Kahu Kirikava and the deputies in relation to the alleged assault on Mr Samatua when he was arrested at the MRC unit on 4 July 2006. I have found that the force applied to remove Mr Samatua was reasonable in the circumstances. The evidence in relation to this incident does not establish the requisite targeted bad faith nor malice in the sense of the second form of the tort. This claim fails also.

---

[81] *Moala v Attorney-General* (2010) WSSC (15/1/2010) at 67 and 68.
[82] *Moala* Supra at para 67.
[83] *Three Rivers District Council v Bank of England* [2000] 3 A11 ER 1, Supra
[84] *Moala* Supra at para 67.
[85] *Moala* Supra at para 71.

315. Claims of misfeasance in public office are made against the Police officers and the Deputy Registrar in respect of Mr Samatua's treatment in the lockup at Penrhyn and his detention on the ship. I have made findings of fact in relation to these incidents. I have found the detention in the lockup and Mr Samatua's treatment was appropriate in the circumstances. There is no basis for inferring bad faith, malice or improper motive such as required to establish misfeasance in either form of the tort. I have also made findings of fact in relation to the allegations about the treatment of Mr Samatua on the ship. No bad faith nor malice, as required for the tort of misfeasance, can be inferred from the actions of Sgt Tini or Constable Ben in relation to Mr Samatua's detention or treatment on the ship.

316. This claim fails.

JUSTICES OF THE PEACE

317. Claims of misfeasance in public office are made against the Justices presiding in the Penrhyn Court also. The relevant particulars are set out in the Amended Statement of Claim and relate to the conduct of the proceedings

318. The allegations against Ben Samuel JP, who heard the first and second charges, are that he:
    a. Failed to provide the opportunity to elect trial by jury;
    b. Failed to properly hear the plaintiff's case; and
    c. Permitted the proceedings to be conducted in a manner that was degrading to the plaintiff.

319. Those claims are repeated with the additional allegation in relation to the second hearing that Justice Ben Samuel "*permitted the proceedings to be conducted in a manner that was not in accordance with law*".

320. The allegations supporting the claims of misfeasance against Justice of the Peace Fana Ivirangi, in relation to the third hearing, are that he:
    a. Permitted the proceedings to be conducted in a manner that was degrading to the plaintiff; and
    b. Permitted the proceedings to be conducted in a manner that was not in accordance with the law.

321. In relation to the behaviour of the public officials in the conduct of the proceedings, including the control of the crowd in the Courthouse, the police officers acted appropriately to manage the crowd. The Justices did not allow the proceedings to be conducted in a manner that was degrading to Mr Samatua, beyond what would be usual for such proceedings given the attraction and interest of the spectators.

322. I have found that Mr Samatua was not given the opportunity to elect trial by jury on the first charge. I have also found all the hearings were defective. However there was no dishonesty or bad faith on the part of the Justices, such as is required for either form of the tort of misfeasance, that is, of targeted malice or of acting knowingly or recklessly as required in the second form of the tort. They exercised their judicial powers and presided over the hearings in an honest attempt to perform their duties. The evidence falls far short of establishing bad faith or dishonesty.

CLAIMS IN RESPECT OF IMPRISONMENT, COURT HEARING AND PAROLE ON RAROTONGA

323. Mr Samatua makes claims of misfeasance in public office in respect of various prison officials, probation officer Mr Browne and the Justice of the Peace who presided over the hearing in Rarotonga. The relevant allegations relate to Mr Samatua:
    a. His being held in prison for a day without a warrant;
    b. His treatment in prison;
    c. His case was heard in a locked courtroom; and
    d. His second probation period served in Rarotonga.

324. I have dealt with the facts in relation to these events in some detail and I will not repeat my findings here. I do not consider that any of the prison officials, Mr Browne or the Justice acted in bad faith or with an improper motive during those incidents. The plaintiff has fallen well short of showing the requisite bad faith or malice required to establish misfeasance, in either form of the tort, in relation to these claims.

325. I have found that the tortious claims fail. However I will deal with the issue of whether the Crown is protected from liability in tort in certain circumstances as that will be relevant if I am wrong in my findings in relation the tortious claims

insofar as they relate to the actions of the Justices and the Penrhyn proceedings.

Crown Defences for Tortious Courses of Action

326. The Crown Proceedings Act 1950 (NZ) applies in the present case. Section 6 of that Act provides that:

> "(1) The Crown shall be subject to all those liabilities in tort which…it would be subject:
>
> (a) in respect of torts committed by its servants or agents…"

The Attorney-General has been found to be liable for the negligence of the prison authorities in relation to the escape of a prisoner, under that provision.[86]

327. The Crown argues that s 6(5) of the Crown Proceedings Act 1950 (NZ) applies in relation to the tortious claims in this case. It says:

> "s 6(5) No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process."

328. In his closing submissions the plaintiff argued that none of the acts, with the exception of the incorrectly imposed sentence of imprisonment substituted for "hard labour", amounted to "judicial process" for the purpose of that provision. He submitted that the only Court involvement in the process was in relation to sentencing. He said the arrests were instigated by the Police so the Court merely dealt with the charges as they arose. Therefore the statutory exceptions do not apply.

---

[86] *Rolls v Attorney-General of the Cook Islands* [1991] CKHC 3. In that case authorities had allowed a prisoner to escape on a number of occasions culminating in his committing a serious attack on and raping of the plaintiff. The offender had broken into the plaintiff's home on an earlier escape. The Court accepted that the prison authorities had failed in their obligation to protect the public. The plaintiff was of the class of persons whom a duty of care arose therefore the Crown was liable for negligence through the actions or the inactions of the Department of Corrective Services. The claim was in negligence. The prisoner had escaped on seven separate occasions. The Judge found that not even elementary measures were implemented by the department to secure him.

329. Alternatively Counsel submitted that even if the acts complained of were of a judicial nature or in execution of judicial process, they were done in bad faith.

330. I have found that the Justices, Police officers and various officials did not act in bad faith therefore the alternative argument cannot succeed.

331. If the first submission is correct then nothing that occurred in the courtroom until the Justices passed sentence was an act or omission in the discharge of any responsibilities of a judicial nature vested in them.

332. The Justices were acting throughout the proceedings as judicial officers. In that capacity they presided over the Court proceedings, made findings, determinations and sentenced Mr Samatua as well as signing the record of proceedings. Each of the Penrhyn Justices must have been acting:

> "…while discharging or purporting to discharge …responsibilities of a judicial nature vested in him, or ….responsibilities which he has in connection with the execution of judicial process."

333. The Justices were acting or purporting to act in the course of their responsibilities of a judicial nature in presiding over the Court hearings. Therefore the proceedings to the extent that they relate to the actions of the Justices and the officials involved in the Penrhyn Court proceedings cannot lie against the Crown. The liability of the Crown is exempted for the purposes of the relevant tortious claims by virtue of s 6(5) of the Crown Proceedings Act 1950 (NZ).

The Constitution

334. The Constitution is the "supreme law of the Cook Islands"[87]. Part IV A is headed Fundamental Human Rights and Freedoms and contains Articles, 64 and 65 which provide:

> "64. Fundamental human rights and freedoms –

[87] Cook Islands Constitution Act 1964 s 4. The format of the Constitution is similar to that of other constitutions based on the Westminster Model. It has more complicated procedures for amending than for enacting ordinary Acts of Parliament. See *Minister of the Cook Islands National Superannuation Fund v Aorangi Timberland Ltd and others* [2014] CKCA 4/14 17 November 2014. Williams P, Barker JA & Paterson JA @ paragraphs 25-29.

(1) It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms:

(a) The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law;

(b) The right of the individual to equality before the law and to the protection of the law;

…

(2) It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands.

65. Construction of law –

(1) Subject to subclause (2) of this Article and to subclause (2) of Article 64 hereof, every enactment shall be so construed and applied as not to abrogate, abridge, or infringe or to authorise the abrogation, abridgement, or infringement of any of the rights or freedoms recognised and declared by subclause (1) of Article 64 hereof, and in particular no enactment shall be construed or applied so as to -

(a) Authorise or effect the arbitrary detention, imprisonment, or exile of any person;

(b) Impose or authorise the imposition on any person of cruel and unusual treatment or punishment; or

(c) Deprive any person who is arrested or detained -

(i) Of the right to be informed promptly of the act or omission for which he is arrested or detained, unless it is impracticable to do so or unless the reason for the arrest or detention is obvious in the circumstances; or

(ii) Of the right, wherever practicable to retain and instruct a barrister or solicitor without delay; or

(iii) Of the right to apply, by himself or by any other person on his behalf, for a writ of habeas corpus for the determination of the validity of his detention, and to be released if his detention is not lawful; or

(d) Deprive any person of the right to a fair hearing, in accordance with the principles of fundamental justice, for the determination of his rights and obligations before any tribunal or authority having a duty to act judicially; or

(e) Deprive any person charged with an offence of the right to be presumed innocent until he is proved guilty according to law

in a fair and public hearing by an independent and impartial tribunal; or

(f) Deprive any person charged with an offence of the right to reasonable bail, except for just cause; or

(g) Authorise the conviction of any person of any offence except for the breach of a law in force at the time of the act or omission; or

(h) Authorise the imposition on any person convicted of any offence of a penalty heavier than that which might have been imposed under the law in force at the time of the commission of the offence.

(2) Every enactment, and every provision thereof shall be deemed remedial, whether its immediate purpose is to direct the doing of anything that the enacting authority deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the enactment or provision thereof according to its true intent, meaning and spirit.

(3) In this Article the term "enactment" includes any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom, being an Act in force in the Cook Islands, and any regulation, rule, order, or other instrument made thereunder."

335. The Court of Appeal has recently considered the provisions of the Constitution in an appeal from a High Court decision that the Cook Islands Superannuation Act 2000 was invalid as it was contrary to the provisions of the Article 64 (1) (c) of the Constitution.[88]

336. The Court of Appeal gave some guidance as to interpretation:

> "… The Constitution has a special fundamental character of its own; austere legalism is to be avoided; a generous interpretation is required. The construction of the Constitution involves paying proper attention to the language used in the particular provisions but at the same time giving full weight to the overriding objects and scheme of the Constitution so as to avoid a blind literal and legalistic interpretation."[89]

337. The present case concerns whether or not the Crown breached various Constitutional rights through the acts or omissions of Crown agents, rather

[88] *Minister of the Cook Islands National Superannuation Fund v Aorangi Timberland Ltd*, 17 November 2014 CA No. 4/14, Williams P, Barker JA and Paterson JA.
[89] Supra at para 56.

than the Constitutionality of legislation. Nevertheless the comments of the Court of Appeal as to the approach to interpretation of the Constitution is relevant in general terms to this case.

338. The Court of Appeal also noted the importance of Privy Council decisions concerning the Constitutions of former British colonies with comparable Westminster Model Constitutions. It said:

> "Several of the Privy Council decisions cited in *Henry* were referred to by the Chief Justice in the judgment under appeal. We do not need formally to rule that they are binding, merely because the Privy Council is the Cook Island's final Court of Appeal. However, they are entitled to great respect because of that fact and also because, in the two major Constitutional decisions of this Court, *Henry v Attorney-General* and *Clarke v Karika*,[90] this Court gave prominence to Privy Council decisions on Westminster model Constitutions."[91]

339. Similar rights to those in Article 64 are protected by the New Zealand Bill of Rights Act 1990.[92] Counsel for both parties cited a number of cases dealing with the New Zealand Bill of Rights Act. The New Zealand Supreme Court has looked to the Privy Council decisions relating to breaches of various Caribbean Constitutions for guidance.

---

[90] Footnote "77" in the quote: "It may be noted that in *Breuer v Wright* [1982] 2 NZLR 77, the New Zealand Court of Appeal observed that a decision of the Privy Council given in respect of an appeal from the one country would be binding upon the Courts of the other countries which retain the Privy Council right of appeal. In *R v Chilton* [2005] 2 NZLR 341 (CA), the Court of Appeal made broadly similar observations. See also the article by the late Professor Taggart "The Binding Effect of Decisions of the Privy Council" (1984) NZULR 66."

[91] Supra at para 52.

[92] The relevant provisions of the New Zealand Bill of Rights Act 1990 are:

"25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) the right to a fair and public hearing by an independent and impartial court:
(b) the right to be tried without undue delay:
(c) the right to be presumed innocent until proved guilty according to law:
(d) the right not to be compelled to be a witness or to confess guilt:
(e) the right to be present at the trial and to present a defence:
(f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:...
(h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:…

"27 Right to justice

Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

340. The relevant rights to a fair trial set out in the Constitution are similar to those of the Constitutions considered in a number of Privy Council decisions. The Constitution of Trinidad & Tobago provides at s 4 (a) for:

> "(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law:"[93]

341. Similarly Article 64(1)(a) of the Constitution of the Cook Islands provides:

> "The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law";

In support of that right, Article 65(1)(d) provides that no enactment shall be construed or applied to abrogate, abridge or infringe the freedoms and rights in s 64(1) and in particular so as to –

> "(d) Deprive any person of the right to a fair hearing, in accordance with the principles of fundamental justice, for the determination of his rights and obligations before any tribunal or authority having a duty to act judicially."[94]

342. However the Constitution of Trinidad & Tobago specifically provides for redress for contravention of rights:

> "s 14 (1) For the removal of doubt it is hereby declared that if any person alleges that any of the provisions of this chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."

343. In contrast the Cook Islands Constitution has no specific provision relating to redress for breaches of rights. In New Zealand the absence of a specific provision for redress for breaches of the Bill of Rights Act has not precluded awards of public law damages. In *Baigent's Case*[95] the New Zealand Supreme Court held that effective remedies should be available for breaches of the Bill of Rights Act.[96] These public law remedies should include financial compensation. The Supreme Court, in *Chapman,*[97] considered that the lack

[93] The Constitution of Trinidad & Tobago Act no. 4 of 1976 (Trinidad & Tobago)
[94] The full provisions of Articles 64 and 65 are set out above.
[95] *Simpson v Attorney General* [*Baigent's* Case] (1994) 3 NZLR 667.
[96] *Baigent's* case at 669.
[97] *Attorney General v Chapman* (2012) 1 NZLR 462

of specific redress was not a basis for distinguishing the Privy Council decisions relating to cases from the Caribbean on Constitutional redress.[98]

344. An action under the New Zealand Bill of Rights is not a private law action in the nature of a tortious claim for which the state is vicariously liable, but rather an action directly against the state. Breaches of rights under the Constitution also attract public rather than private law actions and redress. As the Crown is primarily liable the statutory immunities available to the Crown in relation to tortious actions are not applicable to Bill of Rights claims for compensation.[99] In *Baigent's* case the court noted that the New Zealand courts would develop the remedies for breach of rights to the extent necessary. The courts were bound to give effective remedies for breaches. In that case the Court held that damages should be awarded. The Supreme Court subsequently held that such public law damages were not available for judicial breaches.[100]

345. In *Attorney General v Chapman*[101] the Supreme Court noted that in the absence of the provision of a specific remedy by Parliament it left it to the Courts to decide whether a remedy was available for those breaches. [102]

Judicial Breaches

346. In this case, the Crown did not argue that redress for breaches of the Constitution was never available due to the lack of an Article specifically allowing redress. However it submitted that judicial breaches should not give rise to public law compensation for the same reasons that support judicial immunity. It pointed to the New Zealand Supreme Court decision in *Attorney General v Chapman*[103] as authority for that proposition. This issue is a matter which has not come before this Court to date and requires careful consideration.

[98] *Maharaj v Attorney-General of Trinidad and Tobago (No. 2)* [1979] AC 385
[99] *Baigent's* case ibid at p 677 per Cooke P.
[100] *Attorney General v Chapman* (2012) 1 NZLR 462.
[101] *Attorney General v Chapman* [2010] 2 NZLR 317
[102] *Chapman* at 522.
[103] *Supra.*

347. *Chapman* involved a claim for financial compensation under the NZ Bill of Rights Act for judicial breaches.[104] By a majority the Supreme Court held that public law compensation was not available against the Attorney General for judicial breaches and was precluded for public policy reasons.[105]

348. Mr Chapman had been convicted for sexual offending and sentenced to six years imprisonment. He appealed to the Court of Appeal but was declined legal aid and his appeal was dismissed ex parte, without an oral hearing. This followed a process established by the then Judges of the Court of Appeal. The Privy Council in *Taito*[106] held that this process was invalid. Mr Chapman was granted a new appeal and released on bail. At the rehearing his appeal was allowed and convictions quashed. A new trial was directed. The trial never occurred due to extraneous circumstances. Mr Chapman was discharged without conviction under s 347 of the Crimes Act 1961 (NZ). He sought compensation under the Bill of Rights Act for the three years imprisonment he had served.[107]

349. The Supreme Court noted that there were imponderable issues as to the possible outcome which it could not seek to resolve. In particular these were whether Mr Chapman would have been granted a retrial if the Court of Appeal had dealt with the appeal properly initially, whether the retrial would have proceeded at that stage and what the verdict might have been.

350. The Supreme Court in *Chapman* said that *Baigent*[108] involved breaches of rights by the police and the judgment should be read as applicable only to the particular facts involved.[109] It examined a number of New Zealand cases involving claims against Judges. These included *Harvey v Derrick*[110] (a claim in tort only), *Rawlinson v Rice*[111] and *Attorney-General v Upton.*[112] A majority in the Supreme Court concluded that those cases were not persuasive in so

[104] *Attorney General v Chapman (2012) 1 NZLR 462.*
[105] *Supra at 501 para 97.*
[106] *R v Taito [2003] 3 NZLR 750.*
[107] *Chapman Supra* at 502.
[108] *Simpson v AG* [Baigent's Case] (Supra).
[109] At 509 per McGrath and William Young JJ.
[110] *Harvey v Derrick* [1995] 1 NZLR 314, (1994) 12 CRNZ 47. This involved a claim in tort against the District Court Judge personally although the Court made observations on the potential for public law remedies.
[111] *Rawlinson v Rice* (1998) 12 PRNZ 639.
[112] *Attorney-General v Upton* (1998) 5 HRNZ 54.

far as they assumed public law compensation was available for judicial breaches.[113]

351. The majority in *Chapman* also distinguished the Privy Council decision in *Maharaj v Attorney-General of Trinidad and Tobago (No. 2)*[114] in which their Lordships recommended an award of public law compensation for judicial breaches of the Trinidad and Tobago Constitution. The judicial breaches were in the nature of fundamental breaches of the rules of natural justice. Mr Maharaj, a lawyer, had been sentenced to imprisonment after the presiding Judge held he was in contempt of Court. The Judge had acted in an overbearing and unreasonable way toward Mr Maharaj and his clients. Mr Maharaj asked the Judge to excuse himself from dealing with any cases in which Mr Maharaj was engaged. The Judge cited him for contempt and then refused to grant Mr Maharaj's application for an adjournment to retain a lawyer. Their Lordships were of the view that the Judge did not tell Mr Maharaj plainly enough exactly what he had done wrong in order to enable Mr Maharaj to explain or excuse his conduct.

352. The majority in *Chapman* did not consider that the lack of specific provision for redress in the Bill of Rights was a basis for distinguishing the Privy Council decision in *Maharaj (No. 2)*. Rather it considered that *Maharaj (No. 2)* was no longer good law in relation to compensation for judicial breaches in the light of subsequent Privy Council decisions on point.[115]

353. The Supreme Court undertook a detailed analysis of the facts in *Maharaj (No. 2)*. It rejected the distinction drawn by their Lordships between judicial breaches involving correctable errors of fact, law or even jurisdiction for which public law compensation could not be sought on the one hand, and fundamental breaches of rules of natural justice for which a claim could be made.[116] McGrath and William Young JJ said:

---

[113] It noted that the public law compensation claims were: not fully argued but were conceded by the Crown (*Rawlinson);* no issue was taken with the availability of public law compensation for judicial breaches (*Attorney-General v Upton);* or involved a tortious claim only *(Harvey).*

[114] *Maharaj v Attorney-General of Trinidad and Tobago (No. 2)* [1979] AC 385.

[115] The Supreme Court went on to find that the factors supporting judicial immunity justified a different approach from that in Baigent's case which held that financial redress was available in relation to breaches by the executive. *Chapman* at 529.

[116] *Chapman*, Supra at 516.

> "There was no natural basis for determining how a particular error should be classified."[117]

354. In *Chapman* the majority noted that another factor that led to the award of compensation in *Maharaj (No. 2)* was that the only appeal available to Mr Maharaj, from the contempt conviction and sentence imposed by the presiding Judge, was an appeal by special leave direct to the Privy Council as no local appeal was available. This differed from the New Zealand appeal structure where an appeal would have been available to a local Court.

355. Their Honours found that the distinction based on appeal rights was illogical. They noted that it was unsurprising that *Maharaj (No. 2)* had subsequently been confined by the Privy Council in *Independent Publishing Co. Ltd v Attorney-General of Trinidad and Tobago*.[118] The majority in *Chapman* also noted that the extension of appeal rights in the Caribbean meant that *Maharaj (No. 2*) had become practically irrelevant.[119] McGrath and William Young JJ said:

> "This requires us to consider whether, and contrary to the view expressed by the Privy Council in *Maharaj (No 2)*, the particular characteristics of the judicial function and the importance of maintaining judicial independence from extraneous influences on decision-making provide a basis for distinguishing *Baigent* and holding that in that context there is no public law cause of action against the Crown."[120]

356. In *Chapman* the Supreme Court reviewed the considerations for and against state liability for compensation for judicial breaches of the NZ Bill of Rights Act.

357. Their Honours went on to outline the public policy reasons supporting personal judicial immunity justified confining the scope of Crown liability for governmental breaches of the Bill of Rights Act to actions of the executive branch. They said:[121]

> "[204] Judicial immunity is now conferred by a combination of the common law and statute law. For the reasons we have outlined, we hold

[117] *Chapman* Supra at 516 per McGrath and William Young JJ.
[118] *Independent Publishing Co. Ltd v Attorney-General of Trinidad and Tobago and another* [2005] 1 AII ER 499.
[119] *Chapman* at 517, 518.
[120] *Chapman* at 518 per McGrath and William Young JJ.
[121] *Chapman* at 529 per McGrath and William Young JJ.

> that the public policy reasons which support personal judicial immunity also justify confining the scope of Crown liability for governmental breaches of the Bill of Rights Act to actions of the executive branch. Such liability should not be extended to cover breaches resulting from the actions of the judicial branch. This does not, of course, mean that judicial immunity itself is being extended. Rather it is a recognition that the public law cause of action against the Crown, held in *Baigent* to be implicit in the Bill of Rights Act, would not appropriately be extended to cover the breaches of the judicial branch. As discussed, the desirability of finality in litigation and the importance of judicial independence and public confidence in that independence are here of particular importance. Relevant also is the extensive protection against judicial breach afforded by the justice system and in particular the current appellate process.
>
> [205] Together these factors justify in the public interest a different approach from the public law cause of action recognised in *Baigent* in relation to executive government breaches of rights. We would add that it is implicit that when the cause of action applies, as in *Baigent*, and monetary compensation is an available remedy, the Crown is liable. We are not persuaded by the Solicitor-General's argument that there is no concept of the state in New Zealand domestic law. However, having examined the contention that *Baigent* damages should apply to judicial breaches, we are satisfied that step is unnecessary. It would be destructive of the administration of justice in New Zealand and ultimately judicial protection of human rights in our justice system.
>
> [206] But the main reason why we reject the extension of the *Baigent* cause of action is because we consider it is unnecessary under the New Zealand court structure to provide financial remedies for breaches of the Bill of Rights Act by the judicial branch of government. The particular circumstances of Mr Chapman's claim, which of course arose under the former regime, do not persuade us that his case warrants a different approach."

358. Two relevant developments since Mr Chapman's trial referred to by their Honours were first, the establishment of the Supreme Court which substituted a final appeal from the Court of Appeal, and secondly the enactment of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (NZ). This provided a mechanism for investigating complaints against Judges.[122] The Supreme Court was of the view that the New Zealand Court structure even without these additional protections was robust and the respondent had

[122] *Chapman* at 527.

obtained a remedy through the rehearing of his appeal and his early release pending that rehearing.[123]

359. The Supreme Court referred to the other remedies for judicial breaches of rights which had been identified in the Law Commission's report[124] on Crown liability and Judicial immunity as follows:

> "Judicial immunity must be seen in context. There is a range of remedies available to those aggrieved, which reinforces the responsibility and accountability of Judges. They include:
>
> - rejection of evidence (eg, evidence obtained under an unlawful warrant) or stay of proceedings (eg, for delay);
> - appeal against, review of, or rehearing of, decisions;
> - civil proceedings in respect of actions of judicial officers not taken in the exercise of their judicial functions;
> - criminal prosecution in respect of the corrupt exercise of judicial functions; and
> - removal processes for serious judicial misbehaviour or incapacity."[125]

360. The policy considerations favouring judicial immunity were summarised as follows:

> "Allowing claims against Judges would provide an opportunity for disappointed litigants to harass those who had decided cases against them. It would also provide an opportunity for such litigants to put in issue the correctness of, and thus collaterally attack, earlier judgments. Given that around half of all litigants are likely to be dissatisfied (and sometimes irrationally) with decisions made by Judges, there would be many who would take up such opportunities. In this context, allowing claims to be made against Judges would:
>
> (a) have the tendency to distract Judges from their duty to deal with cases dispassionately;
>
> (b) result in Judges spending time responding to suits against them, causing much wastage of judicial time;
>
> (c) discourage judicial recruitment; and
>
> (d) by permitting collateral attack, undermine the finality of judgments.
>
> The principles of judicial immunity are the result of a balancing exercise. On the one hand there is the problem of a disappointed litigant with a genuine grievance but no remedy. On the other hand there are the undesirable consequences of permitting claims against Judges. The

[123] *Chapman* at 527.
[124] Crown liability and judicial immunity. A response to Baigent's case and Harvey v Derrick, Law Commission Report 37 [May 1997].
[125] *Chapman* at 527.

> response of the courts in cases such as *Nakhla* and *Gazley* has been to allow the latter consideration to trump the former."[126]

361. The Court noted that there would be situations where wrongly convicted persons would have inadequate remedies because of high public policy considerations.[127] Nevertheless it considered that existing remedies in the New Zealand justice system were generally effective. The Court also expressed concern that the effectiveness of existing remedies would be reduced if the rules of fairness were used to determine entitlements to compensation. This might lead to changes in judicial practice that would disadvantage criminal appellants.[128] There would be no shortage of potential plaintiffs for litigation in relation to judicial conduct and such potential would likely severely impact on some Judges. The court was of the view that allowing an action to proceed against the Crown for judicial breach would lead to the executive government having to defend actions against Judges which in turn might lead to an appearance that the Judge was helping the government. This could result in political pressure, direct and indirect, for the answerability of the Judges to the executive.[129]

362. The Supreme Court concluded that those reasons supported absolute judicial immunity and that Baigent damages were not available for judicial breaches.

363. In this jurisdiction decisions of the Supreme Court of New Zealand are highly persuasive. Nevertheless, an examination of the Privy Council decisions is necessary because of the respect which those decisions demand.

364. In *Independent Publishing Co. Ltd v Attorney-General of Trinidad and Tobago (supra)* the Privy Council rejected an interpretation of *Maharaj (No.2)* which allowed Constitutional redress for all judicial breaches. This case followed the introduction of rights of appeal to the local Court of Appeal of Trinidad and Tobago which were not available to the appellant in *Maharaj (No. 2).*[130] Lord Browne delivering the decision of the Board said:

> "87 Lord Diplock's judgment has been widely understood to allow for Constitutional redress, including the payment of compensation, to

[126] *Chapman* at 526.
[127] *Chapman* at 528 per McGrath and William Young JJ.
[128] *Chapman* at 528.
[129] *Chapman* at 525, 526 per McGrath and William Young JJ.
[130] *Independent Publishing Co. Ltd* Supra at paras 92 and 93.

> anyone whose conviction (a) resulted from a procedural error amounting to a failure to observe one of the fundamental rules of natural justice, and (b) resulted in his losing his liberty before an appeal could be heard. That, however, is not their Lordships' view of the effect of the decision. Of critical importance to its true understanding is that Mr Maharaj had no right of appeal to the Court of Appeal against his committal and equally, therefore, no right to apply for bail pending such an appeal.
>
> 88 In deciding whether someone's section 4(a) "right not to be deprived [of their liberty] except by due process of law" has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental human right, as Lord Diplock said, is to "a legal system ... that is fair". Where, as in Mr Maharaj's case, there was no avenue of redress (save only an appeal by special leave direct to the Privy Council) from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterised as unfair. Where, however, as in the present case, Mr Ali was able to secure his release on bail within 4 days of his committal - indeed, within only one day of his appeal to the Court of Appeal - their Lordships would hold the legal system as a whole to be a fair one."

365. The Privy Council decisions of *Hinds v Attorney General of Barbados*[131] and *Forbes v Attorney-General,*[132] dealt with Constitutional motions for redress based on complaints that the defendants' rights to a fair trial had been infringed. In both cases the appellate process had provided relief.

366. In *Forbes*[133] the appellant had served 19 months imprisonment before he was released on bail pending appeal. His appeal was finally heard 10 years after conviction. The Magistrate had not drawn up a statement of reasons for the decision as was required following the giving of a notice of appeal. The sentence imposed exceeded the maximum authorised by law to be imposed at the time. The local Court of Appeal found that there was sufficient evidence to properly convict but ordered the sentence to be varied. Mr Forbes then served a further 11 months in prison before his conviction was quashed on appeal from the Court of Appeal to the Privy Council. Lord Millett, delivering the decision, reviewed earlier Privy Council cases in which compensation had been awarded for judicial breach and said that it was only

[131] *Hinds v Attorney General of Barbados* (2001) UKPC 56.
[132] *Forbes v Attorney-General* (2002) UKPC 21.
[133] *Independent Publishing Co. Ltd v Attorney-General of Trinidad and Tobago* at 525 referring to *Forbes* per Lord Millett.

in rare cases where there was a fundamental subversion of the rule of law that resort to Constitutional redress likely to be available.[134]

367. In *Hinds*[135] the appellant had sought declaratory relief under the Constitution of Barbados. He had been denied free legal representation in the criminal trial despite his being obviously ill-equipped to conduct his own defence and suffering from severe mental health problems and was likely to have been in the grip of a delusional disorder at the time of the offending. The appellant had no knowledge or understanding of Court procedures and there was a possible insanity defence available. The trial Judge had not considered the legal aid application in accordance with the statutory provisions.

368. Lord Bingham delivering the decision of their Lordships said they could not make a reliable judgment of whether the Judge had erred in failing to grant legal aid or whether Mr Hinds was deprived of a fair hearing. Nevertheless, he pointed out the substantial difficulties faced by the appellant in mounting a defence without assistance. The Board was not hearing an appeal from the conviction which had been upheld by the Court of Appeal, and their Lordships were dealing with a compensation claim only. The Court expressed considerable concern about whether the appellant did have a fair trial without the benefit of legal assistance. He had been represented by legal counsel in the local Court of Appeal which did have the power to allow the appeal and order a retrial. Also a further appeal had been available to the Privy Council. Lord Bingham said:

> "The ordinary processes of appeal offered the appellant an adequate opportunity to vindicate his Constitutional right" .[136]

369. Their Lordships advised that the appeal should be dismissed.

370. The Privy Council cases decided after *Maharaj (No. 2)* made it clear that it would be in rare cases only if at all that Constitutional redress for judicial breaches would be appropriate. Lord Millett said:

> "… it is only in rare cases where there has been a fundamental subversion of the rule of law that resort to Constitutional redress is likely

[134] *Forbes v Attorney General of Trinidad & Tobago* [2002] All ER (D) 264 Supra at para 18.
[135] *Hinds v Attorney General Barbados and another* [2001] All ER(D) 161 (Dec)
[136] *Hinds* Supra at para 19.

> to be appropriate. However the exceptional case is formulated it is clear that the Constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process. In the present case the appellant was deprived of his liberty after a fair and proper trial before the magistrate, that is to say by due process of law. The appellant was able to challenge his conviction by way of appeal to the Court of Appeal and, when the Court of Appeal wrongly failed to quash his conviction, by way of further appeal to the Board. The appeals were conducted fairly and without procedural error, let alone any subversion of the judicial process. The appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. His Constitutional rights have not been infringed, and the Courts of Trinidad and Tobago were right to dismiss his Constitutional motions."[137]

371. In *Chapman* the primary reason for excluding Crown liability for judicial breaches put forward by the majority was that the New Zealand Court structure provided appropriate appeals and so it was unnecessary to allow financial redress for breaches of the Bill of Rights Act by the judicial branch.

372. At the time of the events in Penrhyn an appeal was available from the decision of a Justice of the Peace as of right to a High Court Judge. A further appeal was available to the Court of Appeal by leave for the relevant offences.[138] Appeals to the Privy Council from judgments of the Court of Appeal were available by leave.[139]

373. Mr Samatua therefore had an appeal available from the decisions of the Penrhyn Justices to the High Court. While he was out of time for an appeal due to his imprisonment and lack of knowledge of his rights, Mr Samatua was ultimately successful in obtaining a rehearing and the High Court made orders quashing his convictions.

374. In some respects Mr Samatua's case is similar to that of Mr Chapman's. Neither of them were able to access rights of appeal due to incarceration,

---

[137] *Forbes v Attorney-General of Trinidad and Tobago*, (Supra), at para 18 per Lord Millett.
[138] Appeals from Justices of the Peace: sections 76 to 80, Judicature Act 1980-81. Appeals from the High Court to the Court of Appeal sections 54 to 57. Judicature Act 1980-81 Section 60 (2) Provisions relating to appeals to the Court of Appeal were amended by the Judicature Amendment Act 2011: Section 67 (2) and (3) now expressly provide for a further appeal from a Judge to the Court of Appeal with leave of a Judge of the High Court or if referred to a single Judge of the Court of Appeal.
[139] Article 59 (2) of the Constitution of the Cook Islands

both of them were without legal learning, and both were unfunded for legal representation. Eventually they each had their convictions quashed, Mr Chapman after an appeal following an extraordinary process introduced to deal with cases affected by *Taito*, and Mr Samatua after an order for a retrial. Neither of them faced a retrial. Mr Chapman served three years imprisonment before he was released and Mr Samatua served 15 months imprisonment.

375. In *Chapman*[140] their Honours specifically noted that the existence of the Government compensation scheme in New Zealand, which allowed compensation to be paid in certain cases to someone wrongfully imprisoned, was not a significant factor in its decision. That scheme was outside the criminal justice system and was merely a response by officials of the executive branch explained by New Zealand's reservations to the International Covenant on Civil and Political Rights.[141]

376. I am not aware of any similar formal system for ex gratia payments maintained by the executive in the Cook Islands. This jurisdiction also retains its final right of appeal to the Privy Council. The majority in *Chapman* considered that the establishment of the New Zealand Supreme Court gave rise to an even greater likelihood that judicial error would be more speedily corrected on appeal.[142] Neither the lack of a local Supreme Court nor of a statutory regime for investigating complaints against Judges and redressing them,[143] at the relevant time, precluded the majority in *Chapman* from deciding that public law redress should not be available for judicial breaches. Therefore the lack of an executive compensation fund, the retention of the Privy Council as a final court of appeal in the Cook Islands and lack of a judicial statutory complaints body do not of themselves weaken the rationale for recognising absolute judicial immunity here.

---

[140] Supra
[141] Adopted by New Zealand 19 December 1966, entered into force 23 March 1976. New Zealand's reservation to Art. 14(6) relates to the right reserved not to apply Art 14(6) to the extent it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice. *Chapman* at 528.
[142] *Chapman* at 527.
[143] The Judicial Conduct Commissioner and Judicial Conduct Control Panel Act 2004 (NZ) created a regime for investigation of complaints by a Commissioner and addressing them according to their seriousness.

377. The New Zealand approach culminating in *Chapman* has excluded any redress by way of compensation for judicial breaches. William Young J in an earlier High Court decision put it as follows:[144]

> "[141] I would be very sorry to see the Courts assert a jurisdiction to award compensation in 'exceptional' or egregious' cases involving breach of fair trial rights. The not entirely happy experience of the Courts in this country with claims for exemplary damages suggests that the costs to litigants and the community of such a discretionary head of jurisdiction would be grossly disproportionate to the value of the few, if any, awards likely to be made and to any other public benefits likely to be derived from such litigation.
>
> [142] …
>
> (c) In 1990, the legislature did not intend the enactment of the New Zealand Bill of Rights Act to provide for anything like an entitlement to compensation for those subjected to unfair trial process. For the Courts to recognise claims to compensation in relation to unfair trial process would create a fiscal burden on the taxpayer which Parliament can hardly be seen to have authorised.
>
> (d) This is not to deny efficacy to the New Zealand Bill of Rights Act. At the risk of being thought to have adopted too simplistic an approach. I think that the 'natural' remedy for breach of fair trial rights is to be found in the jurisdiction of trial and appellate Courts rather than by way of damages. This approach is, in effect, the correlative of the Courts' willingness to exclude evidence obtained in breach of the New Zealand Bill of Rights Act rather than to compensate defendants with money payments.
>
> ….
>
> (f) This approach is consistent with the most recent Privy Council jurisprudence."

378. The Court structure in New Zealand and the availability of appeals were the primary reasons that the Supreme Court determined there was no jurisdiction to hear and determine Mr Chapman's compensation claim for alleged judicial breaches under s 25 and s 27 of the Bill of Rights.[145] The Privy Council decisions appeared to contemplate that public law redress may be available for judicial breaches in rare and exceptional cases. Neither *Forbes* nor *Hinds* was such a case despite concerns by their Lordships about the quality and fairness of the trials of at least Mr Hinds. It may be that as a matter of practical application as long as there is a fair legal system operating even in

[144] *Brown v Attorney-General* (2005) 2 NZLR 403 at paras 141 & 142.
[145] *Chapman* Supra at 530.Sections 25 & 27 of the NZ Bill of Rights Act relate to minimum standards of criminal procedure and right to justice respectively. They are set out above

cases where there has been a serious judicial breach the Privy Council would not impose public law redress for judicial breaches. The differences in approach between the Supreme Court and the Privy Council may be more illusory than real.

379. The Cook Islands Court structure provides appropriate appeals. The High Court found a way to ensure Mr Samatua's convictions were quashed well after the appeal period had expired. The legal system is fair and there are appropriate mechanisms for correcting errors in the judicial process. While there will be individual cases where the system does not respond appropriately, as the majority in *Chapman* noted, it is the courts structure and system as a whole that is the focus in considering whether redress is available for judicial breaches.

380. I am of the view that the reasons recognised by the Supreme Court in Chapman for rejecting claims against the Crown for public law redress for judicial breaches by Judges of general jurisdiction apply equally in this jurisdiction. As the Court in Chapman noted this may lead to situations where wrongly convicted persons would have inadequate remedies because of high public policy considerations.[146]

381. However that is not the end of the matter in this case. The Crown may not be liable for public redress for judicial breaches in the superior courts, but in this case the presiding judicial officers in the Penrhyn court were Justices of the Peace. Their position and jurisdiction are different from those of the Judges of the superior courts.

Justices of the Peace

382. Counsel did not specifically address the issue of whether judicial breaches by Justices exercising judicial functions were in a different category to those of Judges in terms of the liability of the crown for public law redress. This is no criticism of counsel as this case posed special difficulties. As well as difficulties for counsel in obtaining timely instructions, the allegations and claims were wide ranging and raised some matters of importance not

[146] *Chapman* at 528 per McGrath and William Young JJ.

previously considered. A lot of ground had to be covered within the time allocated and most matters remained in contention throughout. This meant that the focus on what ultimately emerged as the relevant issues, was limited.

383. Justices of the Peace have both criminal and civil jurisdiction. They perform an important role in the provision of justice and are a crucial part of the legal system in the Cook Islands. Justices carry a significant work load day to day in the Cook Islands courts, particularly in the criminal courts. They bring wisdom and a deep knowledge of local conditions and issues to the bench. As a matter of necessity and practice they play a more significant role as judicial officers in the Cook Islands courts, than do their counterparts in the New Zealand courts. Their role must be valued and respected.

384. The judicial breaches alleged in this case relate to the conduct of Justices of the Peace presiding in their criminal jurisdiction and their position must be examined in light of the principles enunciated in *Chapman*.

385. *Chapman* concerned judicial breaches by Judges of the New Zealand Court of Appeal. Its decision was confined to judicial breaches by Judges of the higher Courts. In New Zealand that includes Judges in the structure above the District Court: Judges of the High Court; Court of Appeal; and the Supreme Court.[147] The Supreme Court could not discern any principled reason supporting a notion that the principle should not also apply to Judges of the District Court.

386. The Privy Council decision in *Forbes* related to a breach of rights by a Magistrate.[148] In *Hinds* and *Independent Publishing Co. Ltd*, the judicial breaches were alleged in relation to High Court Judges.

387. The importance of judicial immunity was central to the reasoning of the majority in *Chapman*. When looking at the liability of the Crown for judicial

[147] *Chapman* Supra at p.519.
[148] In Trinidad and Tobago to qualify for an appointment as Magistrate a candidate must have at least five years standing as an Attorney at Law. Their jurisdiction is limited to summary criminal matters and preliminary inquiries into serious matters to determine whether a prima facie case has been established prior to indictment to the High Court. The Petty Civil Division of the Magistracy deals with small money claims of less than $15,000.00. Summary Courts Act Ch 4:20 and the Petty Civil Courts Act Ch 4:21 of the Laws of Trinidad and Tobago.

breaches by other classes of judicial officer, the application of that immunity is the starting point. Whether Judges of the District Court should be treated differently from those of the Higher Courts was discussed in *Chapman*. Their Honours referred to *Harvey v Derrick,* where Cooke P referred to the public policy arguments limiting the immunity to Judges of general jurisdiction. He quoted *Cooley on Torts.*[149]

> "'"Why the law should protect the one judge, and not the other, and why, if it protects one only, it should be the very one who, from his higher position and presumed superior learning and ability, ought to be most free from error, are questions of which the following may be suggested as the solution: The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which, under the law, appears doubtful. On the other hand, when a grant of general jurisdiction is made, a presumption accompanies it that it is to be exercised generally, until an exception appears which is clearly beyond its intent. Its very nature is such as to confer upon the officer entrusted with it more liberty of action in deciding upon his powers than could arise from a grant expressly confined within narrow limits, and the law would be inconsistent with itself if it were not to protect him in the exercise of his judgment. Moreover, for him to decline to exercise an authority because of the existence of a question when his own judgment favoured it would be to that extent to decline the performance of duty, and measurably to defeat the purpose of the law creating his office; for it cannot be supposed that this contemplated that the judge should act officially as though all presumptions opposed his authority, when the fact was directly the contrary."

[149] *Harvey v Derrick* (1995) 1NZLR 314 at 325. Quoting *Cooley on Torts* (3rd Ed) para 491. Cook P notes that in the United States judicial immunity extends to Inferior Court Judges.

388. Justice Fisher in *Harvey v Derrick* supported the view that there should be no difference in the application of judicial immunity between superior Court and District Court Judges. He said:[150]

> If anything, the local pressures faced by a District Court Judge resident in Gisborne are likely to be more intense than those faced by a New Zealand High Court or Court of Appeal Judge. The grounds for distinguishing between the Benches in this respect have an unattractively academic air to them. It may be analytically sound to say that only superior Courts can within jurisdiction determine the scope of their own jurisdiction but this says nothing socially useful as to the desirability of judicial immunity. District Court Judges have an indemnity under s 196A but, with respect to Lord Bridge in *Re McC* at p 542B, the indemnity is unlikely to be more than a partial answer to pressures on the District Court judiciary. It is one thing for Judges to be indemnified; it is another to be free of the humiliation, time, and trouble of litigation over the way in which they have exercised their judgment. Inferior Court Judges may be able to assess the scope of their own jurisdiction ultra-conservatively on the basis that jurisdictional errors are better corrected on appeal, but the public would be the poorer for it. Judicial independence is just as desirable in the District Court."[151]

389. The Law Commission[152] pointed out that large parts of the New Zealand District Court's business dealt with the matters which could also be dealt with in the High Court. The Commission pointed to the increased jurisdiction and status of the District Court Judges with the accompanying improved quality of representation and argument in that Court. It recommended the enactment of a statutory provision to prevent actions against the Crown for alleged breaches of the Bill of Rights Act by superior and District Court Judges. This legislation did not eventuate and was rendered unneccessary by the decision in *Chapman.*

390. Nevertheless the Law Commission recommended that immunity for judicial breaches not be extended to Justices of the Peace. The Commission based its recommendation on concerns expressed over whether the decisions of the New Zealand Justices at the time were of sufficient quality and whether the Justices had sufficient training and experience to effectively be given blanket

[150] *Harvey v Derrick* at 336.
[151] *Harvey v Derrick* Supra at 336.
[152] Crown liability and judicial immunity. A response to Baigent's case and Harvey v Derrick, Law Commission Report 37 [May 1997].

immunity from suit, as well as the fact that they had limited juridiction.[153] It recommended that the Crown should be liable for judicial breaches of the Bill of Rights Act by Justices of the Peace.

391. The position for Cook Island Justices of the Peace is closer to that of Justices in New Zealand than to District Court Judges. Justices are not required to be legally qualified nor experienced, their jurisdiction is limited and concerns over the uneven quality of decisionmaking have led to steps being taken to address that through the provision of better experience and training.[154]

392. In their criminal jurisdiction the Justices sit alone or as a bench of three. A Justice of the Peace sitting alone has jurisdiction in relation to the offences set out in the Second Schedule to the Judicature Act. This includes serious offences such as assault with intent to injure which carries a maximum of three years imprisonment.[155] A Justice sitting alone may pass a sentence of up to two years imprisonment. A bench of three Justices may impose terms of imprisonment of up to three years.[156]

393. In New Zealand no action can be brought personally against a Justice unless he or she has exceeded or acted outside their jurisdiction.[157] Similarly in the Cook Islands a claim may be made against a Justice of the Peace personally for tortious breaches, for acts or omissions in excess of jurisdiction or without jurisdiction. A Justice may therefore be liable personally.[158] Parliament has chosen to deal with the liability of Justices differently to that of the Judges of general jurisdiction.

---

[153] Law Commission Report No 37, Supra at 56.

[154] Selected Justices are approved by the Chief Justice to sit in Court: Court Report 2011/12, Ministry of Justice website retrieved at http://www.paclii.org/ck/court-reports/2011-12.htm. This is a matter of practice rather than law. In comparison a High Court Judge must practice as a barrister in New Zealand or commonwealth or other designated country for at least seven years: Article 49(3) of the Constitution.

[155] Crimes Act 1980-1981. S.213.

[156] Judicature Act 1980-1981. s 21. For a number of offences including those under Part X of the Crimes Act (Crimes against Rights of Property) where the information *as worded* refers to a monetary value not exceeding $5,000.00 and the offence is punishable by a sentence of 10 years or less, the defendant has the right to trial before three Justices sitting together or before a Judge alone.

[157] A Justice is entitled to indemnification by Crown on production of a certificate from a High Court Judge stating the Justice acted in good faith under the belief that he or she had jurisdiction and that in the Judge's opinion the Justice ought fairly and reasonably be excused.

[158] No claim is made against the Justices personally in this case. As a good employer, the Crown is likely to indemnify the Justice in appropriate circumstances.

394. Justices In the Cook Islands are in a position akin to that of New Zealand Justices of the Peace. They do not have the jurisdiction, training or expertise of New Zealand District Court Judges[159] who enjoy the same judicial immunity as that of superior court Judges. There are substantial similarities between the role, qualification and training of Justices serving in New Zealand and those of Justices in the Cook Islands. This indicates that the policy reasons put forward by the Law Commission leading to its recommendaton that judicial immunity and exclusion of Crown liability for public law redress for judicial breach should not extend to New Zealand Justices, applies equally to Justices in the Cook Islands. I consider that public law redress for judicial breaches should be available in this case.

395. The Chief Justice and the Ministry of Justice are alive to the challenges of maintaining a well functioning justice system in the outer islands particularly within limited resources. Innovations such as Skype, and other technology and communication links have made it easier to communicate and so to provide access to support from Rarotonga. Those innovations also allow for better supervision and monitoring of proceedings and provide more options for the provision of training and guidance for public officials in the outer islands. They are already providing part of a cost effective response to the access to justice challenges in the islands.

396. However distance and lack of resources do not excuse the breaches of Mr Samatua's Constitutional rights and the failure to provide him with fair trials. The Constitution and the relevant criminal procedure legislation apply throughout the Cook Islands, not just in Rarotonga.

397. I now turn to the Crown's arguments against redress for consititutional breaches in this case.

[159] New Zealand District Court Judges must be lawyers of at least seven years experience. In fact they are usually substantially more experienced than that. They have jurisdiction which in some respects crosses over with the jurisdiction of the High Court. The quality and status of the Court justifies the application of immunity to the same extent of that for superior Courts.

Did Mr Samatua Waive his Constitutional Rights

398. The Crown argued that due to Mr Samatua's experience in the criminal justice system he could be said to have "comprehended" his rights and therefore by not asking for those rights had waived them. He had appeared before criminal courts and served periods of imprisonment in New Zealand and Rarotonga. He had been advised by a "legal aid" lawyer in New Zealand. The Crown said the rights he should have known about were in particular: not to answer questions; to seek legal advice and to cross-examine witnesses. It submitted that it was not clear whether Mr Samatua had tried to exercise the rights and was refused or did not try at all.

399. I do not accept that Mr Samtua waived his rights. He was never given the opportunity to do so. A waiver of those rights cannot be inferred because of person's previous experience in the criminal justice system. The breach occurs because the rights are not proferred or made available to the person in an appropriate manner.

400. Moreover the events occurred in Penrhyn which was remote from Rarotonga and even further from New Zealand. If he did know he had rights in general terms, he is unlikely to have known how to exercise them or whether similar rules applied in Penrhyn as in the Courts in New Zealand where he had had the assistance of a lawyer.

401. He was not a lawyer nor legally trained so he is unlikely to have had any detailed knowledge of the Constitution or how to conduct a hearing. He had received some advice from Mr Jacob, which led him to enter a "no plea" to seek time to make his case. He also had been advised that "hard labour" was not a sentence and so refused to serve it. However this advice did not affect his right to be advised of his right to a lawyer and to be afforded a reasonable opportunity to contact one.

402. It is uncertain what direction matters would have taken had Mr Samatua taken the opportunity to obtain legal advice and been afforded due process and a fair trial. However, given his general approach and his desire to vindicate his father's right to occupy the premises, he would have been unlikely to waive any of his rights. For instance if he been given the opportunity to elect a trial

by jury and so have the matter transferred to the High Court in Rarotonga, he is likely to have made that election. He was anxious to get the land matters into the High Court and may have seen this as his opportunity to do so. Of course what the ultimate outcome would have been is speculative.

Were the Breaches Minor

403. The Crown submitted that the breaches were minor. Minor bureaucratic breaches are generally regarded as unlikely to attract Constitutional or public law redress under the New Zealand Bill of Rights Act. If the breach or the right is of a kind which is appropriately vindicated by non-monetary means, such as the exclusion of improperly obtained evidence at a criminal trial, it may be unnecessary or inappropriate to award public law damages.[160]

404. Mr Samatua was not given the opportunity to seek legal assistance, he did not receive a fair trial and due process was not followed. Neither the breaches nor their consequences were minor.

Is the Claim for Pecuniary Loss Unduly Speculative

405. The Crown submits that it is difficult to prove what the outcome might have been in the circumstances and in any event there was a basis for the conviction and sentence.

406. If Mr Samatua had been given the opportunity to retain and instruct a lawyer the outcome of the charges is imponderable. It is likely although speculative that he would have elected trial by jury. He had defences available to him. If he had been acquitted at trial on the first charge he would not have faced the second charge at all. If he had been convicted on the charges whether or not he would have been sentenced to imprisonment is an unknown.

407. The Crown itself accepted it was likely that the Penrhyn convictions were unsafe when it suggested to the High Court that the matter be dealt with as an application for retrial and the convictions were quashed.

[160] *Taunoa v Attorney-General (2008) NZLR 429 at para 256 per Blanchard* J.

408. A plaintiff is not entitled to public law damages for Constitutional breaches as a matter of course, but the fact that there are imponderables does not preclude a compensation claim.

Redress

409. Mr Samatua seeks a declaration that he was wrongfully convicted and imprisoned in violation of his rights under the Cook Islands Constitution. Those convictions include the three Penrhyn convictions and also the later conviction relating to his breach of parole. He spent time in jail in Penrhyn and Rarotonga following the Penrhyn convictions and a second period of imprisonment as well as a period of parole supervision in Rarotonga.

410. In addition to declarations for breaches of the Constitution Mr Samatua seeks public law compensation totalling $691,500.00 made up as follows:[161]

a.	General damages of a total of $691,500.00. This sum is comprised of:	
i.	423 days detention at Aorangi Prison at $1,250.00 per day	$528,750.00
ii.	26 days detention at the lockup and on the ship at $2,000.00 per day	$52,000.00
iii.	263 days in exile at Rarotonga at $250.00 per day	$65,750.00
iv.	Damages for distress, humiliation and upset	$45,000.00
b.	Further damages of $168,000.00 to compensate the plaintiff for loss of livelihood during his detention and exile and for loss of future earnings.	$168,000.00
c.	Special damages of $200,000.00 in respect of the breaches of the Constitution to reflect the sense of public outrage at the breach and the frequency and gravity of the breaches, and to emphasise the importance of the rights breached.	$200,000.00

411. Counsel for Mr Samatua submitted that a substantial award of damages was required to vindicate the plaintiff's rights. He pointed to Mr Samatua's loss of

[161] The claims for damages under each of the tortious heads are the same save the amount for the special constitutional damages of $200,000.00. The claims in tort were unsuccessful.

liberty, the conditions in prison and the treatment he was subjected to, as well as the impact that Mr Samatua's imprisonment in Rarotonga had on his family who were left behind in Penrhyn. He alleged bad faith on the part of the Crown agents and that the breaches were flagrant, deliberate or at least reckless. A significant part of the evidence related to Mr Samatua's treatment and the conditions of detention and imprisonment.

412. In support of the loss of earnings claim Mr Samatua produced a business proposal headed "Samatuas Fishing Business Proposal". Mr Samatua gave evidence of his previous fishing experience and his view of the possible markets for the fish. No supporting evidence was produced that indicated that this proposal had any real possibility of success. There was no evidence of Mr Samatua's past or present income, including his income from previous fishing ventures, that might support the relevant amounts claimed by way of damages.

413. Both parties referred and relied on the principles outlined in the New Zealand case of *Taunoa v Attorney-General.*[162] In that case the Supreme Court mandated the approach to public law damages in the context of the New Zealand Bill of Rights Act.

414. *Taunoa* involved an appeal from awards of compensation to a number of prisoners who were the victims of a non-statutory regime called the "Behaviour Management Regime". The regime imposed severe restrictions on the prisoners and was found to have seriously beached their rights under the Bill of Rights Act and contravened regulations made under the Penal Institutions Act (NZ).[163]

415. The Supreme Court[164] laid out a methodology for approaching redress and assessing public law damages once a plaintiff's rights had been infringed. This approach was succinctly summarised by the Court of Appeal in *Attorney-General v Van Essen:*[165]

> "[80] The focus of an inquiry into the appropriateness of an award of public law damages is on what order(s) or package of relief is necessary to provide an effective remedy for the breach of right concerned in all the

[162] *Taunoa v Attorney-General (2008) 1 NZLR 42 (SC).*
[163] Section 23 of the New Zealand Bill of Rights Act 1990.
[164] Blanchard, Tipping, McGrath and Henry JJ.
[165] *Attorney-General v Van Essen (2015) NZCA 22 (CA)*

circumstances in question. Elias CJ emphasised that, while the adjective "moderate" does not greatly assist in the determination of the appropriate quantum, any award should not be "extravagant". The remedy must fit the case. It will be necessary to consider whether relief is "within an appropriate range", not only adequate to compensate for any suffering or harm caused, but also to vindicate the important rights breached. Thus the method of achieving vindication of the right adopted in any case must "recognise the importance of the right and the gravity of the breach".

[81] Blanchard J also emphasised the guiding principle of the need to provide an effective remedy. The primary task is "to find an overall remedy or set of remedies which is sufficient to deter any repetition by agents of the state and to vindicate the breach of the right in question". Blanchard J stated:

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.

[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 …

[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.

[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. The quantum of those damages does not necessarily proceed on the basis of any equivalence with quantum of awards in tort (though that may be a useful guide in some cases). Nonetheless, as Blanchard J observed:

[258] … 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.

[259] But equally, it is to be remembered that an award of Bill of Rights Act damages does not perform the same economic or legal function as common law damages or equitable compensation; nor should it be allowed to perform the function of filling perceived gaps in the coverage of the general law, notably in this country in the area of personal injury. 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.
>
> [83] Factors that feed into this consideration might include the promptness in which the State has brought the wrongful conduct to an end, any measures put in place to rectify systemic issues causing the problems, administrative steps to prevent recurrence and whether there has been an apology to the individual affected in appropriate terms. Tipping J also emphasised that the existence of conduct by the party in breach undertaken to repair or remedy the breach would be relevant to any remedial action required from the Court. Tipping J noted that in reality there are two victims where a NZBORA right is infringed – the individual concerned and society as a whole. The Court must consider what is necessary by way of vindication to protect the interests of society in the observance of fundamental rights and freedoms. With respect to the nature of the remedy, the key is what is "necessary to compensate effectively for the breach."[166]

416. The Court of Appeal noted that *Taunoa* featured a comprehensive review of international human rights jurisprudence on the issue of remedies. It also referred to recent cases of the United Kingdom Supreme Court dealing with damages awards in cases involving human rights breaches.[167] It noted that the damages awards in those cases were made with reference to the gravity of the breach. Those cases also dealt with the relationship between legal principle applied locally and that applied by the European Court. Lord Reid noted that when looking at non-pecuniary loss, in particular for frustration and anxiety, damages should be on a modest scale.[168]

417. The Court in *Taunoa* emphasised that the fixing of public law damages is far from an exact science. A figure must be chosen with which responsible members of the local society will feel comfortable taking into account all the circumstances including:

    i. The nature of the infringed right: For instance a breach of natural justice may be better addressed by a rehearing than monetary compensation. The sum should reflect the wrongfulness of the conduct, solace for injured feelings as well as reflect any intention behind the conduct giving rise to the breach;
    ii. The effect on the victim;[169] and

[166] *Attorney-General v Van Essen* ibid at paras 80 to 85. (Footnotes excluded).
[167] *R (Haney, Kaiyam & Massey) v Secretary of State for Justice and another case [2014] UKSC 66; R (Faulkner) v Secretary of State for Justice & Anor; R (Sturnham) v Parole Board of England and Wales & Anor [2013] UKSC 23*
[168] *R (Faulkner) v Secretary of State for Justice& Anor; R (Sturnham) v Parole Board of England and Wales & Anor [2013] UKSC 23 at para 13.14.*
[169] Ibid at para 261.

iii. Other redress which has been ordered. It should also reflect ways in which the state has acknowledged the wrongdoings, any public apology to the victim and any measures put in place to prevent wrongdoing.

418. At the same time the amount must be restrained and does not perform the same economic or legal function as common law damages or equitable compensation.

419. The Court noted that the fixing of the monetary sanction for an individual is the most difficult issue but it should not vary significantly depending on the character of the victim.[170] It also noted that in some instances it may be appropriate to require of New Zealand authorities a higher standard of behaviour than the minimum standards that can realistically be applied and enforced internationally.[171]

420. I now turn to deal with the issue of redress in this case. I intend to make the declarations sought and any package of relief must take into account the redress already provided.

421. There is no evidence of an apology by the Crown to Mr Samatua. The Crown conceded that it was unlikely that Mr Samatua was given the opportunity to consult a lawyer or was advised of his right to do so and that the Justice was in error in substituting a term of imprisonment for an unserved community service sentence. Beyond that in these proceedings the Crown did not concede that Mr Samatua's rights had been breached or accept that there were any failures of process.

422. Against that the Crown did acknowledge, for the purpose of ensuring that the convictions were quashed in 2010, that it was likely that Mr Samatua did not receive a fair trial. The Crown was instrumental in his obtaining the order quashing the Penrhyn convictions and the costs award of $80.00 costs. The level of the costs award apparently did not please Mr Samatua who had spent $10,000.00 on a lawyer to represent him in the matter. I also note that the

[170] Ibid at para 266.
[171] Blanchard and Tipping JJ paras 179 and 279.

Crown counsel gave him some guidance on avenues of redress and directed him toward obtaining legal assistance to bring these proceedings.

423. I note that improvements in the support, guidance and training of Justices, in reporting and the supervision of the administration of justice in the outer islands as well as the introduction of a process for the approval of Justices entitled to sit in the court, have been instigated by the Chief Justice. While these are a work in progress I have no doubt that Mr Samatua's plight was instrumental in the instigation of better training and other steps which would go toward avoiding such a case in the future. He was well acquainted with the Penrhyn events having heard the application for retrial that led to the quashing of the Penrhyn convictions.

424. The tortious claims were unsuccessful therefore there are no damages awards to take into account.

425. I do not consider a declaration, and the quashing of the convictions by the High Court June 2010, as well as the matters I have referred to in the preceding paragraphs, are sufficient to redress the breaches and the consequent injury to Mr Samatua's rights. This is a case where financial redress is appropriate.

426. The Crown submitted that Mr Samatua could have mitigated the loss by way of appeal and/or other legal assistance, but he did not take such steps.

427. Mr Samatua may have gained a basic knowledge of his legal rights from his previous experience and from the advice of Mr Jacob. Nevertheless he was not conversant in the criminal law and could not be expected to know procedural requirements such as the time limits for lodging an appeal. While he may not have assisted himself by his approach in some respects, his failure to appeal or obtain legal assistance before he was released from prison is not a mitigating factor which should preclude redress in this case.

428. The Crown pointed to the lack of evidence of earnings as a fisherman as mitigating against compensation particularly as it related to the proposal for the Samatuas Fishing Business.

429. Mr Samatua's business proposal headed "Samatuas Fishing Business Proposal" outlined plans for a fishing enterprise. It proposed a Penrhyn based venture which would employ eight persons for periods during the year with an estimated a profit of $103,950.00 by Year 2, subject to the provision of capital and sales in Rarotonga. There was no reliable evidence that the fishing business plan would be feasible or even had a chance of success. There was no proper evidence to support the assumptions and figures in the plan and the reliability of the projections. In addition the evidence suggested that Mr Samatua's fishing venture in Penrhyn had provided only enough to feed his family and cover living costs. Since he had left Penrhyn he had not fished, at least in any commercial venture. I am of the view that the fishing proposal and projected income is entirely speculative. I also note that Mr Samatua did not provide any evidence of his present earnings, although he said he did assist in a family shop from time to time.

430. Public law damages are not intended to be a substitute for private law damages. Nevertheless in this case the breaches in question require something more to vindicate the rights than the non-monetary redress that can be and has been given. An award of public law damages is appropriate. The quantum of those damages does not necessarily proceed on the basis of an equivalence with the quantum of awards in tort although they may provide a useful guide in some cases. In this case the evidence provided is insufficient as a reliable basis to consider possible earnings. However the lack of evidence of earnings does not preclude me from determining an appropriate figure for public law damages.

431. I have set out my findings in detail above and do not propose repeating those. The following is a summary of the Constitutional rights which I have found to be breached and for which redress should be given:
    a. To be informed of his right to a lawyer: At the time he was arrested the relevant police officer should have ensured that Mr Samatua was advised of his right to a lawyer and allowed a reasonable opportunity to contact a lawyer.
    b. The right to a fair hearing in accordance with the principles of fundamental justice: In relation to the three proceedings held in the Penrhyn court presided over by Justices of the Peace due process

was not followed and Mr Samatua was deprived of his right to fair hearings in accordance with the principles of fundamental justice.

c. The right not to be deprived of liberty except in accordance with the law: In relation to the matters set out in (*a*) and (*b*) above.

432. The breaches of Mr Samatua's rights led to the loss of his liberty for 15 months[172] followed by a period of 12 months on parole served on Rarotonga.

433. The breaches were not intentional and the Crown agents did not act in bad faith. Rather the breaches occurred due to lack of experience, training and knowledge on the part of the relevant police officers and the Justices.

434. Mr Samatua's obdurate approach and his determination to find a solution for his father's land grievances led him to behave in a manner which contributed to the difficulties he encountered. Mr Samatua felt that he could vindicate his father's rights by directing the attention of the authorities to this father's plight. This approach led directly to his court appearances. This behaviour may explain the exasperation of the police officers, the Justices and the public officials who were trying to deal with the matter. However Mr Samatua's approach and behaviour does not excuse the breaches of Mr Samatuas' rights. I have put my observations in that regard to one side in considering the issues and reaching my decision in this case.

435. The Supreme Court in *Taunoa* indicated that public law damages should not fill the gaps in the coverage of general law and that the making of amends to the victim is generally a secondary or subsidiary function to the public law aspects of redress. The award must mark society's disapproval of official conduct and provide an incentive to the defendant state agencies not to repeat the infringing conduct. The plaintiff should not reasonably feel that the award is trivialising of the breaches. I take into account the relevant factors identified by the Court in *Taunoa* in fixing an appropriate award as follows:

a. **The nature of the infringed right and whether it could be fixed by non-monetary contribution:**

i. In this case Mr Samatua's convictions were quashed. Nevertheless he was imprisoned for a period of some 15

[172] Mr Samatua's calculation of damages in the Amended Statement of claim alleges he was imprisoned for 449 days.

months and served a period of 12 months parole supervision in Rarotonga. More than non-monetary redress is required in this case.

d. **The sum should reflect the wrongfulness of the conduct, and take this into account for injured feelings as well as intention behind the conduct giving rise to the breach:**

    i. I have found that there was no bad faith nor intentional wrong doing.

e. **The effect on the victim:**

    i. Mr Samatua lost his liberty, was separated from his family. He gave evidence of the effect of that on him. He served a term of imprisonment in conditions which were hard, although usual for prisoners on Rarotonga. Those conditions cannot be judged by comparison with those in other countries such as New Zealand.

    ii. I take into account that he was assaulted on a number of occasions in jail.

    iii. The Crown submitted that the fact that Mr Samatua had previously been imprisoned should mitigate against or reduce any compensation award. It referred to the decision of the New Zealand High Court in *Manga*[173] in which the quantum of damages awarded for false imprisonment was reduced from $90,000.00 to a net figure of $60,500.00 as Mr Manga was a recidivist and the reduction reflected the lesser impact of imprisonment on him. *Manga* involved an award of damages in tort. I accept Mr Samatua's submission that the character of the victim is irrelevant in considering public law damages and it is not appropriate to take it into account. Nevertheless the effect of the breach on the victim may be relevant to redress. There is no evidence as to the details of Mr Samatua's earlier imprisonment and the effect or otherwise on him of these further terms of imprisonment therefore this is not a factor to be taken into account in this case.

f. **Other redress**

[173] *Manga v Attorney-General* Supra.

i. As I have indicated I propose making the declarations sought.

ii. I accept Mr Samatua's submission that there has been no apology by the Crown. It has not publicly acknowledged nor apologised for the wrongdoing. Its approach to the quashing of the convictions in 2010 was constructive but did not amount to a public acknowledgment.

iii. While there was no direct evidence that the Crown had put in place procedures to avoid future breaches as a result of this case, steps have been taken to improve the skills and knowledge of the Justices as well as for better monitoring and support of the courts and processes in the outer islands.[174]

iv. These initiatives include the Chief Justice's proposals to restructure the Justices of the Peace jurisdiction;[175] the establishment of clear published procedures for complaints against Judges and Justices;[176] arrangements for mentoring and training of Justices[177] and the adoption as a matter of practice a process for the selection of Justices permitted to sit in the High Court[178] as well as the closer monitoring of the cases and judicial functions of Justices in the outer islands.[179] Even if the Chief Justice did not initiate those steps solely as a result of Mr Samatua's case, he would have done so well informed by the events that occurred in the court in Penrhyn in 2006. These steps are designed to begin addressing the need for better training, guidance and support for the Justices and the administration of justice. The financing and implementation of those measures is the responsibility of the Crown through the Ministry of Justice.

---

[174] This includes the provision of better technology and improved telecommunications allowing for the use of innovations such as Skype.
[175] Ministry of Justice Court report 2011/2012 retrieved at: *http://www.justice.gov.ck/courts/reports*
[176] *http://www.justice.gov.ck/images/justice/reports/complaints%20procedures*.pdf
[177] Courts Report 2012/2013, Ministry of Justice Court Report 2012/2013; Ministry of Justice Annual Report 2013/2014 Financial Year. Retrieved at: *http://www.justice.gov.ck/courts/reports*.
[178] Ministry of Justice Court report 2011/2012 Supra.
[179] Budget Estimates 2013\2014 commencing at page 241retrieved at: http://www.mfem.gov.ck/docs/Treasury/Budget/2013-14/Budget%20Book%202%20-%20Ministry%20Budget%20Statements.pdf.

> The Outcomes prescribed for the Ministry of Justice in its 2013/14 Statement of Outputs and Key Deliverables against which its funding is allocated includes the training of the Judges, Justices and staff of the court, as well as a review of the appointment processes and functions of the Justices of the Peace. There is also provision for an evaluation of the impact of the Justices of the Peace Act.[180]

436. In the context of quantum, counsel referred me to a number of cases in various jurisdictions. The only Cook Islands decision to which I was referred on quantum of compensation was that *Rolls v Attorney-General* (1991) CKHC 3. This involved an award of damages for negligence. It related to the Crown's liability for the escape of a prisoner resulting in the rape of an elderly woman. She was badly affected by the rape. The case proceeded on an agreed statement of facts and agreement that the Crown was liable for tortious acts of the Department of Corrections. The Judge found gross negligence on the part of the Department as the particular prisoner had escaped on numerous earlier occasions and had earlier broken into the woman's home. The sum of $15,000.00 was awarded which was a significantly lesser sum than that claimed by the Plaintiff. The facts and issues are very different from those in the present case and do not give much guidance in assessing quantum in this case.

437. Other cases to which I was referred included *Attorney-General v Mbwe*[181] *(Kiribati)* where an award of $K1,250.00 ($NZ1,500.00) was awarded following breaches leading to the victim serving 2 ½ months imprisonment after an unfair trial; and *Nnamdi v Attorney-General (*Samoa)[182] where an award of compensation of $T3,500.00 ($NZ1,925.00 per month) was made for false imprisonment involving deliberate wrongdoing. In *Neilson v The Attorney General*[183] the New Zealand Court of Appeal awarded $5,000.00 by

---

[180] Budget Estimates 2013\2014 commencing at page 241 retrieved at: *http://www.mfem.gov.ck/docs/Treasury/Budget/2013-14/Budget%20Book%202%20-%20Ministry%20Budget%20Statements.pdf.*

[181] *Attorney-General v Mbwe* (2006) KICA 3 (Kiribati).

[182] *Nnamdi v Attorney-General* (2001) WSSC 91 (Samoa).

[183] *Neilson v The Attorney General, CA 101/100. 3/5/200. Richardson P. Gault, Thomas, Keith and McGrath JJ.*

way of damages for a tortious claim for unlawful arrest and detention where there were no aggravating factors.

438. In its submissions the Crown noted that the GDP in New Zealand is approximately three times higher than in the Cook Islands which in turn is higher than Kiribati and Samoa. Therefore it submitted that a rate of $2,500.00 per month appeared reasonable if an award of compensation was to be made in relation to the three months imprisonment improperly substituted by the Justice. In that event the Crown submitted an appropriate total quantum of compensation for that 3 months would be in the range of $7,500.00 to $15,000.00. As Gross Domestic Product or GDP per capita is not a measure of personal income I do not consider that it is a helpful guide to compare damages awards between countries.

439. The cases from other jurisdictions are of limited assistance in assessing an appropriate quantum for public law damages in this case. It is difficult to make comparisons or draw much assistance from those cases. They involve different facts and circumstances, and the legal systems and local conditions vary considerably.[184] In the same vein, while the Privy Council decisions in the Constitutional cases to which I have referred above, assist in the general approach to redress for Constitutional breaches they do not provide much direction in assessing a specific quantum for monetary redress.

440. I bear in mind the factors laid out by the Supreme Court in *Taunoa* noting that the quantum of damages should not necessarily proceed on the basis of any equivalence with quantum of awards in tort (though that may be a useful guide in some cases) but at the same time should not trivialise the breach. The figure should be one chosen with which responsible members of the local society would feel comfortable taking into account all the circumstances.[185]

441. I consider the time Mr Samatua spent in prison and on parole supervision must be factors taken into account in this claim. I do not accept that his business proposal was anything other than speculative, nevertheless Mr

[184] For instance unlike the Cook Islands, Trinidad & Tobago retain the death sentence: British court to rule on death sentences for two Trinidad murderers | Law | The Guardian
[185] *Taunoa* at para 259.

Samatua would have had the opportunity to provide for his family if he had not been in prison.

442. In the absence of Mr Samatua's present or past financial position or of details of his income, I must find other information to give me some guidance. Publically available information must be treated with caution but it at least gives some assistance in establishing a figure. The average income in the 2011 census for Cook Islanders was $15,028 or $1252 per month.[186] This figure is an average only and so has its limitations. Of course Mr Samatua's income may have been well above or well below that average income, but the figure gives a general idea of the level of income in the islands. I also note that the amount charged by the prisons for general work by prisoners in 2013/2014 was $30 per day or $1140 per month.[187]

443. I take $32,000.00 as the starting point for an award of public law damages in this case. Mr Samatua lost his liberty for 15 months and he was under parole supervision for approximately 12 months. The exact periods are not crucial as the calculation of quantum is not a mechanical exercise or process. It is rather an overall assessment taking into account the relevant factors and circumstances. I have reached the conclusion that a compensation figure in the sum of $35,000.00 would be appropriate here. This amount might be viewed as a calculation in the region of $2,000.00 per month for the 15 months that Mr Samatua spent in prison plus an allowance for the time he was under supervision and for the assaults he was subjected to in prison. The level of income at $2,000.00 may be seen by some as on the generous side when compared to the average income and the charge out rate of prison workers. A better approach may be to apply a lower monthly rate and apportion a larger amount within that $35,000.00 as an allowance for the supervision and assaults. As I have said this is not a mechanical calculation but rather a lump sum taking into account an overall appraisal of what is appropriate in the context of this case.

444. That amount of compensation should incentivise the Crown and the relevant state agencies not to repeat the conduct as well as marking society's

[186] As at 1 December 2011. Census retrieved at: http://www.cookislands.org.uk/2011census. This can be adjusted for sex and other factors but the figure is only used general guidance.
[187] Ministry Of Justice Annual Report 2013/14 Financial Year Supra at page 51.

disapproval. The Crown agencies which may well bear the brunt of any damages award are the Ministries of Justice and Police. In the budget estimates for the year 2013/2014 the Ministry of Police received total resourcing of $4,308,024[188] of which $2,819,121 was the net appropriation for crime prevention and policy operations. The Ministry of Justice total resourcing was $1,976,623 which includes $359,197 for Courts and Tribunals.[189] The Ministry of Justice also noted the problems caused by constrained resources in its Annual reports.[190] An award of $35,000.00 damages in the context of those levels of funding will not pass unnoticed and should, together with the declaration, provide a suitable incentive for the relevant authorities to take steps to prevent such infringing conduct from occurring in the future. I expect that counsel for the Crown will ensure that this judgment is brought to the attention of the relevant authorities and the Ministry of Justice and the Ministry of Police.

Conclusion

445. Standing back and taking into account the circumstances, I am of the view that most responsible Cook Islanders would be comfortable with the figure of $35,000.00 as financial redress for Mr Samatua, and consider that it is within the appropriate range. The amount is sufficient not to trivialise the nature of the breaches and to act as an incentive for the defendant and state agencies not to repeat the infringing conduct. I note that the Penrhyn convictions have been quashed and as part of the package of redress I propose making the declarations sought.

Orders

i. Declaration: That the Plaintiff was wrongfully convicted and imprisoned in violation of his rights under the Cook Islands Constitution. Those convictions include the three Penrhyn convictions and also the 2007 conviction in the Court in Rarotonga relating to a breach of parole. The imprisonment includes the time he was detained and imprisoned in

[188] Cook Islands Government Budget Estimates 2013/2014 at page 329. Retrieved from: http://www.treasury.govt.nz/budget/2014/suppestimates/suppest14courts.pdf.
[189] Cook Islands Government Budget Estimates 2013/2014 at page 242. Retrieved from: http://www.treasury.govt.nz/budget/2014/suppestimates/suppest14courts.pdf.
[190] See, for instance the Ministry of Justice Annual Report, 2023-14 Financial Year at p 4-5.

Penrhyn and Rarotonga following the Penrhyn convictions and the second period of imprisonment in Rarotonga until his release:

ii. Damages: An award of public law damages of $35,000.00;

iii. Costs: If counsel are unable to agree on costs I direct that submissions be filed in terms of the following directions.

Costs Direction

At this stage I do not see any reason for departure from[191] the usual rule that costs follow the event. That indication may assist counsel to reach agreement on the issue of costs.

However if the parties are unable to agree I direct that submissions on costs and disbursements be filed as follows:

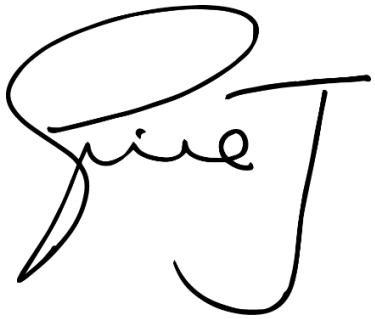
a. the Plaintiff's Submissions on or before 19 June 2015;
b. The Defendant's Reply on or before 26 June 2015 ;
c. The Plaintiff's Response on or before 3 July 2015.

In particular the submissions should address:

a. Any reasons for departure from the principle that costs should follow the event;
b. The level of contribution to costs which is appropriate in this case;
c. The amount of costs actually incurred and charged including an explanation and breakdown of the costs and the fee rates applied with reference to prevailing costs and rates;
d. Full details of and justification for any disbursements;
e. Comparisons with other awards of costs and disbursements;
f. Relevant authorities;
g. The Crown's submissions should also address the steps taken to bring the infringing conduct and the orders and declaration made to the attention of the relevant state authorities.

[191] Note: Clerical error corrected by inserting missing words. See Minute of Grice J dated 18 June 2015 (NZT).

h. Such further and/or other submissions and information as counsel consider relevant.



Grice J

Schedule 1

Agreed Statement of Issues for Determination

"*BREACH OF THE CONSTITUTION AND REQUIREMENTS OF CRIMINAL PROCEDURE*

[1] Were the plaintiff's right under the Constitution breached when he:

a. Appeared in Court on 23 May 2006, was convicted and sentenced to three months hard labour ("the first Court appearance")?

b. Appeared in Court on 29 June 2006, was convicted and sentenced to six months imprisonment at Aorangi Prison ("the second Court appearance")?

c. Was arrested on 4 July 2006 by Constable Rangi Ben, Kahu Kirikava and workers from the Ministry of Outer Islands Development?

d. Appeared in Court on 4 July 2006, was convicted and sentenced to three months imprisonment at Aorangi Prison ("the third Court appearance")?

e. Was detained in a lockup outside the courthouse from 4 July 2006 until approximately 28 July 2006?

f. Was detained on the ship MV Maungaroa during his transport from Penrhyn to Rarotonga ("the ship detention") from approximately 28 July 2006 to early August 2006 (4-6 days on board)?

g. Served his first prison sentence between approximately August 2006 and June 2007?

h. Appeared in closed Court on 10 July 2007, was convicted of breaching his probation, and was sentenced on 20 July 2007 to three month's imprisonment?

i. Served his second prison sentence between approximately July 2007 and October 2007?

j. Was on probation for approximately nine months after his release from prison in approximately October 2007?

k. Was exiled from Penrhyn for approximately 12 months after his probationary period ended?

FALSE IMPRISONMENT

[2] Was the plaintiff falsely imprisoned in respect of:

a. His first Court appearance?

b. His second Court appearance?

c. The TRMC assault?

d. His third Court appearance?

e. The lockup detention outside the courthouse?

f. The ship detention on MV Maungaroa?

g. His first prison sentence?

h. His second prison sentence?

MISFEASANCE IN PUBLIC OFFICE

[3] In respect of the plaintiff's first Court appearance, did the following parties act in misfeasance of public office?

a. The Police;

b. Ben Samuel JP.

[4] In respect of the plaintiff's second Court appearance, did the following parties act in misfeasance of public office?

a. The Police;

b. Ben Samuel JP.

[5] In respect of the TRMC assault and the plaintiff's third Court appearance, did the following parties act in misfeasance of public office?

a. The Police, deputies, and Kahu Kirikava;

b. Fana Ivirangi JP.

[6] In respect of the ship detention, did the following parties act in misfeasance of public office?

a. Constable Mita Soa Tini;

b. Constable Rangi Ben.

[7] In respect of the first prison sentence, did the following parties act in misfeasance of public office?

a. Constable Mita Soa Tini and/or Prison officials.

[8] In respect of the second prison sentence, did the following parties act in misfeasance of public office?

a. The Justice of the Peace who sentenced the plaintiff;

b. Prison officials;

c. Edward Browne.

NEGLIGENCE

[9] In respect of the first Court appearance, were the following parties negligent?

a. The Police;

b. Ben Samuel JP.

[10] In respect of the second Court appearance, were the following parties negligent?

a. The Police; and

b. Ben Samuel JP.

[11] In respect of the TRMC assault and the third Court appearance, were the following parties negligent?

a. The Police, deputies, and Kahu Kirikava;

b. Fana Ivirangi JP.

[12] In respect of the lockup detention, were the following parties negligent?

a. The Police and/or the person known as Tangaroa.

[13] In respect of the ship detention, were the following parties negligent?

a. Constable Mita Soa Tini;

b. Constable Rangi Ben.

[14] In respect of the first prison sentence, were the following parties negligent?

a. Constable Mita Soa Tini and/or Prison officials.

[15] In respect of the second prison sentence, were the following parties negligent?

a. The Justice of the Peace who sentenced the plaintiff;

b. Prison officials;

c. Edward Browne."

Schedule 2

List of particulars by reference to Amended Statement of Claim (dated 31 May 2013) (extracts)

FIRST CAUSE OF ACTION – BREACH OF THE CONSTITUTION AND REQUIREMENTS OF CRIMINAL PROCEDURE

"47 The defendant, through its agents, breached arts 64 and 65 of the Constitution, given effect by the Criminal Procedure Act 1990-1991.

Particulars

(a) In respect of the first appearance, the plaintiff:

i. Was not given the opportunity to instruct a lawyer without delay;
ii. Was arbitrarily detained;
iii. Was not given the opportunity to elect a trial by jury;
iv. Was prevented from making his case to the Court;
v. Was not provided evidence on which the charges against him were based; and
vi. Was not provided with a written statement of the prosecution witness or tendered in lieu of a written statement of that evidence and reasons as to why no written statement was obtained.

(b) In respect of the second appearance, the plaintiff:

i. Was not given the opportunity to instruct a lawyer without delay;
ii. Was arbitrarily detained;
iii. Was not given the opportunity to elect a trial by jury;
iv. Was prevented from making his case to the Court;
v. Was not provided evidence on which the charges against him were based; and
vi. Was not provided with a written statement of the prosecution witness or tendered in lieu of a written statement of that evidence and reasons as to why no written statement was obtained.

(c) In respect of the TMRC assault, the plaintiff:

i. Suffered a cruel and unusual punishment and was treated in an inhumane manner when he was assaulted by Kahu Kirikava; and
ii. Was arbitrarily detained.

(d) In respect of the third appearance, the plaintiff:

i. Was not given the opportunity to instruct a lawyer without delay;

ii. Was arbitrarily detained;

iii. Was prevented from making his case to the Court;

iv. Was not provided evidence on which the charges against him were based; and

v. Was not provided with a written statement of the prosecution witness or tendered in lieu of a written statement of that evidence and reasons as to why no written statement was obtained.

(e) In respect of the lockup detention, the plaintiff:

i. Suffered a cruel and unusual punishment and was treated in an inhumane manner when he was denied medical attention and food;

ii. Suffered a cruel and unusual punishment and was treated in an inhumane manner when he was chained to the lockup grille; and

iii. Was arbitrarily detained due to the unacceptable conditions in which he was kept.

(f) In respect of the ship detention, the plaintiff:

i. Suffered a cruel and unusual punishment and was treated in an inhumane manner when he was handcuffed to the ship railing;

ii. Suffered a cruel and unusual punishment and was treated in an inhumane manner when he was kept below deck;

iii. Suffered a cruel and unusual punishment and was treated in an inhumane manner when he was denied food;

iv. Was arbitrarily detained due to the unacceptable conditions in which he was kept.

(g) In respect of the first prison sentence, the plaintiff:

i. Was arbitrarily and unlawfully detained;

ii. Suffered a cruel and unusual punishment and was treated in an inhumane manner and without respect for the inherent dignity of the person when he was detained in unhygienic conditions, deprived of food, and assaulted by other inmates, the assault being permitted by a Prison official; and

iii. Was deprived of his right to apply for a writ of habeas corpus.

(h) In respect of the second prison sentence, probation, and exile, the plaintiff:

i. Was deprived of his right to be sentenced in open court;

ii. Was arbitrarily and unlawfully detained;

iii. Suffered a cruel and unusual punishment and was treated in an inhumane manner and without respect for the inherent dignity of the person when he was detained in unhygienic conditions, deprived of food; and

iv. Was deprived of his right to apply for a writ of habeas corpus.

48 Each of these Constitutional breaches amounted to a breach of the plaintiff's right to the protection of the law and his right not to be detained except in accordance with the law."