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 date: 2 December 2016 (CIT)

Decision: 25 January 2017 (NZT)

Appearance: On the papers

JUDGMENT OF GRICE J (Costs)

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1. This is an application for costs by Mr Samatua following a judgment in his favour delivered on 3 June 2014 awarding him public law damages and granting him a declaration that his constitutional rights had been breached.

2. Mr Samatua's claim included a number of causes of action based on false imprisonment, misfeasance in public office and breaches of his constitutional rights. Claims in negligence were abandoned at the hearing.

3. The claims were based on events which were set in train on the island of Penrhyn in May 2006. They covered a period starting with Mr Samatua's imprisonment in Penrhyn and Rarotonga in 2006 and finishing with his final release from prison in 2008.

4. The constitutional breaches were serious. Mr Samatua was not given a fair trial. The consequences for Mr Samatua were significant. He was imprisoned first in Penrhyn and then in Rarotonga for over two years. He was then required to stay in Rarotonga under parole supervision for a further nine months.

5. The Crown in its submissions on costs accepted that the relevant breaches were committed. It denied them all at trial.

6. The High Court quashed the criminal convictions in 2010. Mr Samatua appeared for himself at that hearing. Mr Samatua had briefed counsel from New Zealand and paid him a reasonably substantial amount for his services.[1] The lawyer did not appear but the Court was critical of his documentation and noted that the lawyer did not appear to have the required expertise to act in the matter.[2]

7. Mr Samatua filed the proceedings in this matter personally. He later instructed Mr Russell who took over the conduct of the litigation. Before Mr Russell's involvement Mr Samatua had consulted a number of lawyers. He seeks to recover a contribution to the costs of those lawyers.

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[1] Not his present lawyers
[2] *Samatua v Attorney General* [2015] CKHC 14; Plaint 5/12 (7 July 2015)

8. The following orders were made in the judgment:

> "(a) 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 Penrhyn and Rarotonga following the Penrhyn convictions and the second period of imprisonment in Rarotonga until his release;
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> (b) Damages: An award of public law damages of $35,000.00;
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> ..."

9. The factual issues were difficult to establish due to:

(a) the length of time that he collapsed since the incidents which were the subject of the claim;

(b) the lack of documentary evidence. For instance, the police records from Penrhyn including note books and office records had been lost; the Penrhyn court records were located just in time for the hearing and were produced at the beginning of the trial. They were flawed and of little assistance in ascertaining exactly what had occurred at the crucial court hearings in front of the Justices of the Peace in Penrhyn[3];

(c) The incidents were spread over a long period, they were wide ranging and involved serious allegations against numerous officers and public officials.

10. In my judgment I expressed my preliminary view that costs should follow the event and I put in place a timetable for the filing and service of submissions if an application for costs was to be pursued. The final submissions were due on or before the 3 July 2015. The present application was not made until well over a year after that date.

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[3] supra at para 92

Counsel for the Plaintiff had been unable to obtain instructions. I understand that Mr Samatua had changed addresses without advising counsel and did not make contact despite attempts by counsel to reach him.

11. The matter was placed in the list for the December 2016 sitting. Counsel were excused from appearance and the application for costs has been dealt with on the basis of the written submissions filed by the parties.

Principles applying to costs awards

12. The general principle is that costs follow the event. In the usual course the award provides a reasonable contribution to the fees of the successful party. Both parties accept this principle.

13. The Court's discretion in awarding costs must be exercised judicially having regard to pertinent earlier decisions and what is fair and reasonable in the circumstances. The award should provide for a reasonable contribution to costs reasonably incurred.[4]

14. The practical approach adopted in this jurisdiction is to take as a starting point for the quantum for an award of two thirds of the actual and reasonable legal fees together with full reimbursement of actual and reasonable disbursements[5].

15. Section 92 of the Judicature Act 1980-81 gives the court discretion to make such orders as it thinks fit for the payment of costs. Regulation 8 of the High Court fees, Costs and Allowances Regulations 2005 allows the court to fix such additional costs to those prescribed as are fair and reasonable in the circumstances of each case. The 4th schedule to those Regulations prescribe a scale of costs for judgments which exceed $20,000 and allow $150.00 for preparation of the Statement of Claim and 7% of the claim for appearances at the hearing.

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[4] *Morton v Douglas Homes Ltd* (No. 2) (1984) 2 NZLR 620.

[5] *Tupangia v Taakoka Island Villas Limited* CA 02/2006, 27 April 2007, 47 – 50; Papera v Hoskings (2012) CkHC (27/7/2012); George v Crown (2010) CkHC 1.

16. The Cook Islands Court of Appeal has also noted that costs may be allowed to reflect the higher cost of New Zealand counsel where it is appropriate to brief New Zealand lawyers.[6]

17. The practice of awarding two thirds of actual costs is not a guiding principle. McGechan J in the New Zealand case of *Holden v Architectural Finishes Ltd*[7] noted that the adoption of any percentages as a norm is erroneous. However he said a costs award in the range of 40 to 70% of actual costs provided some comfort that the costs were in the acceptable range. The New Zealand approach to costs before the introduction there of the High Court costs schedules was similar to the present Cook Island's approach.[8] In *Holden*, His Honour referred to a 'shopping list' of factors to be taken into account in assessing costs. These include the length of time of the hearing, the amount of money involved, complexity of case, the time required to prepare and whether the arguments lacked substance.

18. In this case, it is relevant that there were a large number of witnesses. As is often the case in these types of matters, particularly after a long time has elapsed, much of the evidence on crucial matters was inconsistent and conflicting. The witness statements and affidavits were prepared well after the events occurred. This was made worse by the lack of records.

19. The legal issues were difficult. Constitutional claims of the nature advanced had not been dealt with in this Court. They required a careful analysis of constitutional and human rights cases from a number of jurisdictions including the New Zealand Bill of Rights' (BORA) cases. Assessing the appropriate level of damages was not a straight forward exercise. There was no precedent for such an award in the Cook Islands. The consideration required an in-depth review of cases from other jurisdictions as well as of local conditions.

20. The case required an analysis of law as it applied here in relation to the misfeasance in public office cases and an examination of the events and evidence to reach a conclusion as to whether there was bad faith involved. This also entailed a detailed

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[6] *Hill Cosmos International Limited & Ors v Ocean Fishery Cook Islands Limited &* Ors, Plt no 105/2008, Justice Paterson 10 April 2010.
[7] *Holden v Architectural Finishes Ltd (*1997) NZLR 143.

consideration of the criminal and procedural requirements in existence at the time of the events. Mr Samatua's claims based on false imprisonment and misfeasance did not succeed. Nevertheless they did not fall into the category of hopeless claims. There was a factual basis for those claims. I do not consider that the plaintiff's failure on these claims nor the abandonment of the claims in negligence should have costs implications for Mr Samatua.

21. The events upon which claims were based occurred over the period from 2006 to 2008. Those matters were set out in the Agreed Statement of Issues filed by the parties before trial. They involved 45 separate issues or incidents each of which had to be dealt with separately. The length of the judgment at 445 paragraphs reflects the number and complexity of the allegations.

22. Mr Samatua engaged Mr Russell who was assisted by Ms Jones. Mr Russell is a relatively senior lawyer with experience in the area of public law. Miss Jones provided assistance as junior counsel. A second Counsel was justified given the length of the trial and the nature of the proceedings.

23. Mr Samatua had had difficulty in obtaining and retaining lawyers. I understand that at one stage Crown counsel assisted him to find New Zealand lawyers with suitable expertise willing to take on the conduct of these proceedings. He had retained a New Zealand lawyer at an earlier application he made to quash the Penrhyn convictions, however as I indicated earlier, the High Court was not impressed with that lawyer's contribution. The lawyer did not actually appear, and the court described his involvement as 'inscrutable" as well as noting from the state of the papers filed that he did not have the required expertise to conduct the case.

24. Mr Samatua referred to being unable to secure the assistance of a local lawyer when he faced charges relating to breach of his probation.[9]

25. There are certainly some Cook Islands' lawyers competent to conduct this type of litigation. Nevertheless they are few. Even the Crown retains New Zealand lawyers

[9] Para 226 of the substantive judgment supra

in significant litigation.[10] Given the nature of this case the need for expertise in public and constitutional law and the limited pool of local lawyers with the expertise and the resources to conduct this litigation as well as ensuring that no conflicts emerged in the course of the proceedings, Mr Samatua was entitled to instruct New Zealand lawyers.

26. The fact that Mr Russell was not resident in the Cook Islands and may have had to familiarise himself with the Cook Islands conditions, the constitution and the laws did not provide any added difficulty nor lengthen the proceedings. The use of interpreters from Cook Islands Maori to English is standard practice in the Cook Islands courts. In this case the interpreters used were Ministry of Justice staff as is the usual practice.[11]

27. Mr Russell conducted the case in accordance with his obligations as a lawyer. He was competent and well supported in the conduct of the litigation. He faced some difficulties in that his instructions were difficult to obtain at times but he was persistent. Indeed in the weeks leading up to the hearing Mr Russell was unsure as to whether he was going to be able to obtain sufficient instructions to proceed. He did so and I am of the view that without his assistance the case may not have been able to proceed on the allocated dates and is likely to have taken far longer than a week. I am satisfied that the engagement of New Zealand lawyers and including junior counsel was justified and in the circumstances expedited the disposal of the proceedings.

Conduct of Proceedings, Negotiations and Calderbank Offers

28. A Calderbank offer is an offer to settle a dispute, putting the other side on notice that if the ultimate judgment is less favourable to the other side compared to the offer then the party making the offer is entitled to more of their costs being recovered. It is relevant to the quantum of costs if the offer betters the judgment and the rejection of the offer can be demonstrated to be unreasonable. Today Calderbank offers are powerful tools for triggering favourable costs sanctions.

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[10] As for instance in the recent constitutional case of *Aorangi Timberlands v Minister of the Cook Islands Superannuation Fund* (2016) UKPC 32. New Zealand counsel appeared for the Crown.in the High Court and Court of Appeal

[11] A Penryhn dialect interpretor was also required for some witnesses.

29. In this case the Calderbank[12] offer made before the hearing of the substantive action did not better the judgment obtained. The Crown made a Calderbank offer in October 2014, following unsuccessful negotiations at a Judicial Settlement Conference (JSC) on 28 September. The offer was for the payment of the sum of $30,000.00 inclusive of a contribution to costs incurred to the date of the offer in full and final settlement. An important shortcoming of the offer compared to the remedies granted in the judgment was the lack of any apology or other formal acknowledgment of the breaches. The judgment included a declaration that Mr Samatua's constitutional rights had been breached. This was an important element of the judgment from Mr Samatua's point of view. It provided strong vindication for him that his rights had been disregarded.

30. Therefore the offer made in October 2014 is not matter to be taken into account against the plaintiff when assessing costs.

31. Following judgment the Crown made a further Calderbank offer in July 2015. It proposed a payment of $58,000.00 inclusive of any contribution to costs. After taking into account the damages award of $35,000.00 the offer includes a contribution of $23,000 to Mr Samatua's actual costs and disbursements. His legal costs and disbursements total approximately $126,000 which includes disbursements of some $11,000. Taking that into account the offer provides a contribution toward fees of $10,000 or close to 8% of the fees net of disbursements. I note that the crown withdrew the Calderbank offer of July 2015 in its submissions on costs.[13]

32. As will be apparent this contribution toward Mr Samatua's costs is substantially less than my award and is significantly below the lower end of the range which would be appropriate in this case. The offer is not better than my actual award, therefore the July 2015 offer does not quality as an offer relevant to my assessment of costs in this case.

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[12] So called after the English Court of Appeal decision in *Calderbank v Calderbank* [1975] 3 All ER 333

[13] Para 16 of the Crown's Submissions

33. The Crown submitted that the fact Mr Samatua did not make any counteroffers is relevant to costs. Mr Samatua did participate in the JSC. Therefore this is not a case where one of the parties refused to engage in settlement negotiations or a settlement conference. He did what was required of him in that regard. Negotiations and discussions exchanged at the JSC are confidential. The conduct of the parties in those discussions and how far they were prepared to move in negotiations are not considerations that I am entitled to take into account. In circumstances where the party did participate in the conference the court cannot look behind the process and assess who was and was not unreasonable in the negotiations. It would be an impossible job for the court to attempt to assess the degree of enthusiasm or engagement of each of the parties in settlement negotiations. Therefore, Mr Samatua's stance in negotiations and whether or not he made a counteroffer are not matters that are material to the award of costs in this case.

34. The Crown also submits that the fact that Mr Samatua acted with a collateral purpose was an abuse of process and should be taken into account. I pointed out in the judgment that Mr Samatua was focussed on trying to right the injustice he thought had been done to his father in relation to a land claim. Mr Samatua's actions which resulted in the original criminal charges were designed to bring attention to that claim. However, what followed and the breaches of Mr Samatua's rights are separate issues. The reasons for Mr Samatua's original behaviour do not excuse the disregard of his rights within the justice system nor should they affect any costs award in these proceedings.

35. The Crown also points out that in the course of the proceedings the Plaintiff's damages claim started at $175,000 and climbed first to $1,014,000 and then to $1.059,000. It says these amounts were unrealistic and inflated and there was little prospect that Mr Samatua would be awarded damages anywhere near those levels, even if he had succeeded in all his claims. I accept that a damages award at those levels was highly unlikely. The income level of most Cook Island as is well below those in New Zealand and compensation awards even when made are relatively modest. In this case Mr Samatua's claim included compensation for a business venture that he had been planning but which I found was speculative at best.

36. Nevertheless there was no precedent available for the quantum of public law damages in this jurisdiction. The nature of public law damages for constitutional breaches is such that they are not only to go some way to compensate the claimant but also are to incentivise the Crown and relevant state agencies not to repeat the conduct. It marks society's disapproval.

37. The amounts claimed did not require the Crown to do any work over and above what it needed to do in order to respond to the amended Statements of Claim and to deal with the issue of quantum, in any event. I do not consider the level of the damages claim is a matter which should be taken into account in assessing costs.

38. The Crown also says that there was delay in disposing of the proceedings attributable to the plaintiff. It says Mr Samatua had numerous different lawyers and that he drafted the first statement of claim himself which was subsequently amended and so put the Crown to extra work. It also says that the plaintiff's affidavit of documents was not filed until 10 August 2013 despite being due in June 2013.

39. These proceedings were filed in late May 2012. The hearing was in December 2014. The hearing was for this jurisdiction a relatively lengthy for a civil matter. It occupied approximately 10% of the civil High Court hearing time for 2014.

40. A period of two years to bring a matter of this nature to hearing is not excessive particularly given that a JSC presided over by the Chief Justice in September 2014 .

41. The issues were not straightforward and there are numerous witnesses including a number who required interpreters and gave evidence by Skype.

42. The process of getting any matter ready for hearing often includes the refinement of the pleadings and crystallisation of the issues. This continues during the trial. This matter was complex, novel and required a large number of witnesses. It was inevitable that the matter would take some time to bring of the hearing. In the circumstances two years does not appear unreasonable.

43. Nor is the plaintiff's approach to a number of different lawyers at the outset likely to have contributed significantly to delays or added to the work required by the Crown to the extent that it should be taken into account in assessing costs.

44. The plaintiff's failure to meet the timetable for filing the affidavit of documents is unlikely to have caused any further work for the Crown. No application was made to the court for a further direction. Unfortunately it is not unusual in proceedings of this nature that there are lapses in meeting timetables and their obligations. For instance the Crown did not produce some important documentary evidence relating to court records from Penrhyn until the beginning of the trial. It should have produced them in discovery and inspection. I have no doubt the omission was not the fault of counsel. The court may impose costs sanctions on parties who cause delays and blatantly fail in their obligations to progress matters in a timely and efficient way. This is not a case which falls into this category. In fact without the cooperation of both counsel the matter could not have been dealt with in the time allocated.

45. The Crown also submits that the plaintiff opposed the taking evidence by Skype. The application was dealt with in the week preceding trial by way of teleconference. Costs were not fixed. The application was a pre-trial application which was successful. It warrants no separate consideration by way of costs. Both counsel cooperated to develop a protocol for the taking of the Skype evidence for this trial and ensured the successful use of the process here.

46. The only matter that the plaintiff can be criticised for in the conduct of proceedings was his failure to adhere to the timetable for making submissions on costs and his substantial delay in making this application. This delay is likely to have added to the Crown's costs. In responding to the submissions counsel had to return to the trial file and take the time to again familiarise herself with the case after a long period. Returning to a matter after such a long time necessarily adds to the time required to review the case and prepare the submissions. I am of the view that there should be a cost's implication because of Mr Samatua's delay in bringing the costs application.

47. Aside from the fact that Mr Samatua could not be contacted as he had apparently changed his address, there was no explanation as to why Mr Samatua did not make contact with Counsel to give him instructions. Counsel was therefore unable to progress the costs application. Mr Samatua must have known this matter would

need to be attended to by him. He no doubt received a copy of the judgment which clearly set out the timetable for making this application and submissions.

48. It is not only counsel for the Crown that has been put to extra work but the Court itself. The demands on the High Court's time and resources in this jurisdiction are significant. Timetable orders are one way in which it is able to manage its business and hearing time efficiently. If these are totally disregarded for significant periods of time there will be some sanction in costs. It is appropriate that the plaintiff's award of costs be discounted by an amount both to recognise the effect of the delay on the Crown and for disregard of the timetabling order.

49. I do not consider that this should attract a significant deduction. The sum of $200.00 would serve both as recognition of the likelihood that the Crown took extra time to prepare the costs submissions as well as disregard of the Court's timetable.

50. The legal costs and disbursements must be reasonably incurred and reasonable in amount. I accept the Crown submission that the costs sought for Mr Samatua's earlier lawyers should be disregarded. At least two of the invoices refer to an "appeal". This is likely to be the application resulting in the quashing of the convictions rather than these proceedings.[14] One of the invoices refers to research and drafting an opinion, however there is no indication that the opinion was relevant, of use or even made available to counsel in the present proceedings. It is not apparent that any of the legal work was sufficiently related to these proceedings to qualify as costs related to these proceedings. I therefore put those invoices to one side.[15]

51. The total actual costs and disbursements of $126,263.84 include $116,952.50 for fees and the balance for disbursements. These figures appear reasonable for the preparation and conduct of this litigation. I have earlier listed the factors that made this a difficult and complicated case. The Crown did not specifically criticise the level of actual costs or disbursements, other than submit that local counsel would likely be less costly. I have dealt with that point. The total sum is well within the range that I would have expected from my experience of litigation costs. I am satisfied that

[14] No application for special damages for these fees was pursued at trial.
[15] The Crown in its summaries also refers to another three or four lawyers who were involved at various times but who do not feature in the invoices.

the legal costs and disbursements as invoiced are at an appropriate level. The disbursements appear reasonable on their face.

52. In this submissions Mr Russell says the contribution toward legal costs he seeks equates to 75% of the sum of his invoices of $126,263.84, and $46,100 being the costs of the other lawyers. I accept the Crown's submission that there was an arithmetical error and the total amount set out in the invoices attributable to the other lawyers was $45,100.

Conclusion

53. The settling of an award of costs is ultimately a balancing exercise to determine a reasonable contribution toward costs in the circumstances. The relevant factors to be considered need to be weighed and applied. There is a range within which a reasonable costs award will sit.

54. I accept that in this case an appropriate starting point is two thirds of actual fees. I have found that Mr Russell's fees and disbursements are reasonable in the circumstances.

55. This was a constitutional case with important issues at stake. The New Zealand Courts have made the point that human rights cases, such as this, call for a generous approach to be taken to costs. The public law damages award made was $35,000. The damages award was substantially less than Mr Samatua spent pursuing his claim however I also granted a declaration that Mr Samatua's rights had been breached. This is a powerful vindication for Mr Samatua. As the New Zealand Court of Appeal has pointed out it is important that in cases of this nature plaintiffs does not face disincentives to the bringing of these actions.[16]

56. The constitutional breaches were blatant, inexcusable and had significant consequences. These breaches have now been acknowledged by the Crown in its submissions on costs.

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[16] *Attorney General v Udompun* (2005) 3 NZLR 204

57. In *Udompun* the Hammond J in the NZ Court of Appeal commented:

> *Costs*
> **[219]** This is an issue of real significance in the future of BORA litigation.
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> **[220]** For a discussion of some of the economic problems associated with the costs of public interest litigation generally, see Settle and Weisbrod, "Financing Public Interest Law", in Weisbrod, Handler and Komesar, *Public Interest Law: An Economic and Institutional Analysis* (1978) at p 532, albeit that discussion is directed to a regime with much less emphasis on "costs shifting" than is the case in New Zealand.
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> **[221]** In *Manga* I suggested that very serious consideration should be given to Mr Manga's costs being met on a solicitor and client basis (para [155]). I did not there have to finally decide the issue.
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> **[222]** Conceptually, costs are today seen as a form of remedy. In my view, the plaintiff in this case should have her (reasonable) indemnity costs. Again, the Calabresi distinction resonates with me. It is a mistake to think of this as a "liability" situation. What the Court is concerned with here is upholding the "inalienability" of certain kinds of BORA values. The allocation of costs should reflect that recognition. When a citizen – or for that matter a non-citizen – establishes (as here) a distinct and serious breach of BORA by a relevant agency of the state, that agency should be expected to stand fully behind the claim, in costs.
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> **[223]** In principle, BORA should not be watered down by leaving persons with no incentive or an inability to bring proceedings. This is because BORA places an affirmative obligation on the "judicial branches of the government of New Zealand" (s 3(a)) to "affirm, protect and promote" (preamble to BORA) the provisions of that enactment. An obligation of that strength is not discharged by the application of "usual" costs rules.
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> **[224]** There is some indication in the case law that although, generally speaking, to date Courts have tended to assert that merely because litigation is of a "public interest" or "test case" variety that is not a licence to depart from the "usual" regime for costs, where there is a government (or government agency) involved in a case involving fundamental human rights, that may be a circumstance to alter the usual exercise of a costs discretion (see *Ahnee v Director of Public Prosecutions* [1999] 2 WLR 1305 at p 1315 (PC), per Lord Steyn and *Nuredine v Minister for Immigration and Multicultural Affairs* (1999) 91 FCR 138 at p 145).

58. Indemnity costs are not sought in this case. Nonetheless the above comments equally apply to cases involving breaches of constitutional rights cases, such as the present one. They support a proposition that costs in constitutional breach cases should recognise the significance of the need not to disincentivise claims to enforce the respect for basic rights by the state and its agencies. This is one of those cases.

59. Accordingly I consider there should be some uplift from the starting point of two thirds of actual costs, given the nature of the case and that it involved serious constitutional breaches. I consider an appropriate level to fix the quantum is at 70% of the actual fees invoiced by Mr Russell less a deduction of $200.00 for the plaintiff's delay in making this application, together with full reimbursement of the disbursements as claimed.

60. The range suggested by the Crown would equate to approximately $36,000.00 to $48,000.00 toward costs (excluding disbursements). I have accepted the Crown's submission and I put aside the invoices of the previous lawyer's. I also accept there should be some deduction for delay in making this application. This would have caused further work for the Crown. However the other matters that the Crown raise in relation to delay and conduct of the proceedings, did not add to the cost, lenght or the difficulty of the proceedings. For reasons which are set out above I am of the view that given the nature of the case, the complexity and the need to have appropriate counsel and proper preparation I consider an award in excess of 66% is appropriate and I set the award at 70%.

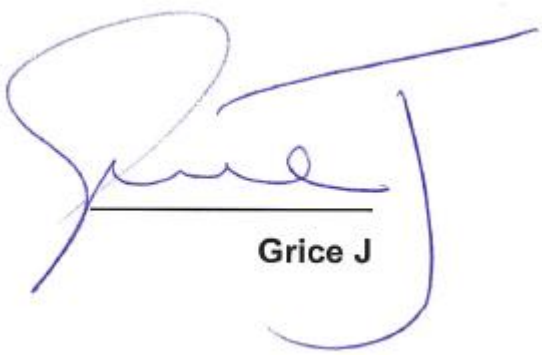
61. This award fits within the "comfort range" suggested in *Holden* of 40%-70%. It is at the high end of that range to reflect the rights based aspects of the case.

62. I will leave counsel to do the arithmetic. Leave is reserved for any further directions if required.

Orders

63. The defendant pay to the plaintiff costs in the sum of:

    i. An amount equal to 70% of the fees claimed in the Chen Palmer invoices attached to the plaintiff's submissions.
    ii. Actual disbursements as claimed.
    iii. Less the sum of $200.00 to be deducted from the total amount awarded.



Grice J