IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008-409-000722

BETWEEN	CHESTERFIELD PRESCHOOLS LTD First Plaintiff
AND	DAVID JOHN HAMPTON Second Plaintiff
AND	CHESTERFIELDS PARTNERSHIP Third Plaintiff
AND	CHESTERFIELDS PRESCHOOLS PARTNERSHIP Fourth Plaintiff
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 23 April 2009
(Heard at Wellington)

Counsel: M Andrews for Plaintiffs
MSR Palmer and E Aspey for Defendant
D J Hampton (In Person)

Judgment: 1 May 2009

JUDGMENT OF FOGARTY J

Introduction

[1] This judgment deals with some of the issues consequent upon the delivery of the judgment in the second judicial review proceedings delivered on 25 November 2008. It deals with the award of costs in respect of the first ((2007) 23 NZTC 21,125) and second ((2009) 24 NZTC 23,148) judicial proceedings, excluding a number of disputed costs following upon applications for interlocutory orders. Second, it deals with the Commissioner's application for stay of execution of the second judgment. Third, it deals with a request to borrow $16,000 to be charged against some unencumbered assets.

First issue: Costs

[2] This subject is discussed at the end of the second review judgment as follows:

> [111] The plaintiffs have succeeded in this application for judicial review. They are entitled to costs. I classify these proceedings as category 2.
>
> [112] The volume of materials in this case has been enormous. Indicatively I would expect that most of the steps in this litigation warrant a classification of Band C. The Commissioner will have to persuade the Court why Band C would not apply to a particular step. I am also of the view that this is a case where r 48C applies. This is because these proceedings have vindicated the plaintiffs' complaint that the Commissioner has not followed the directions of this Court in the earlier December judgment. I am of the view that at the minimum the Court should make an increased costs order as contemplated by r 48C(1)(a), applying r 48C(3)(d).
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> [113] However, I will hear submissions as to whether or not the Court should order the Commissioner to pay the plaintiffs' indemnity costs on the grounds that the Commissioner has ignored the directions of this Court in the December judgment, being an application of r 48C(4)(b) which provides:
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> > **48C Increased costs and indemnity costs**
> >
> > …
> >
> > (4) The Court may order a party to pay indemnity costs if—
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> > …
> >
> > (b) The party has ignored or disobeyed an order or direction of the Court or breached an undertaking given to the Court or another party to the proceeding; or

> …
>
> [114] I am satisfied that the Commissioner has not deliberately disobeyed any order or direction of the Court. But I consider arguable that the Commissioner has "ignored" the directions of the Court. I would need submissions as to whether the findings in this case mean that standard applies.
>
> [115] When costs have been quantified the sum will be payable by the Commissioner without any right of set off by the Commissioner, except against any cost orders the Commissioner might obtain. For some time prior to the proceedings I have been endeavouring to accommodate the Commissioner's concern to have security over assets in the event that it finally obtains judgments against the right of the plaintiffs to the benefit of competent counsel to argue the case against the Commissioner. It is not necessary to refer in detail to the history of this matter. But it is important in my view that where possible, consistent with the law of insolvency or liquidation, the plaintiffs recover a significant proportion, if not the whole, of their costs.
>
> [116] If the parties cannot agree the costs within ten working days of release of this judgment they are to file submissions, limited to seven pages for each counsel, within 13 working days of this judgment, together with an application for an oral hearing, if either or both counsel seek the same. These submissions should be exchanged in draft by the 12th working day so that there is no need for submissions in reply.
>
> [117] The parties can also apply for costs as reserved in the December judgment, and where appropriate in respect of the other interlocutory judgments. If so, the application and submissions in reply are to be treated as separate but on the same terms as to length and timing.

Sub-issue (a): Indemnity costs on second review

[3] The plaintiffs seek indemnity costs in respect of the second judicial review proceedings. The figure sought is the sum of $98,858.78 representing approximately 247 hours attendances, or approximately "*five solid weeks of one partner's time, and one and a half weeks of an intermediate solicitor's time*".

[4] The plaintiffs rely on r 14.6(4)(b) and (f) which provide as follows:

> **14.6 Increased costs and indemnity costs**
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> …
>
> (4) The court may order a party to pay indemnity costs if—
>
> …

> (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or
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> …
>
> (f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[5] Mr Andrews recognised that indemnity costs are only rarely awarded and have never been awarded against the Crown. Normally they are only awarded in the face of flagrant misconduct (*Bradbury v Westpac Banking Corporation* (2008) 18 PRNZ 859) or where has been some manipulation or abuse of the Court process (*Fotheringhame v Singh Farms New Zealand Limited* High Court Auckland CIV 2008-404-002215, 5 November 2008 John Hansen J.

[6] Given I found that the Commissioner's officers did not disobey the directions in the first judgment Mr Andrews had to make a submission that in context the word "*ignore*" in the phrase "*ignored or disobeyed*" can also mean failed to consider as well as meaning intentionally disregard. He argued "*ignore*" can mean intentional disregard (Oxford English Dictionary in Websters). It can also mean "*to pay no attention to*" (Websters).

[7] Mr Palmer argued that close attention should be paid to the phrase "*ignored or disobeyed*". Used in that manner he said it is not possible to take a meaning of ignored identifying doing something in ignorance and therefore the rule was addressing a deliberate decision to ignore. In context he argued that is the same thing as a deliberate decision to disobey.

[8] I agree that the phrase requires deliberate conduct. I think in this case the Departmental officers did not intend to ignore or disobey the formal directions. Rather, they did not consider that they were obliged to adopt the reasons underpinning those directions. The relevant findings in the second review are set out in paragraphs [49] and [50]:

> [49] The inescapable conclusion is that the Commissioner's officers did not accept this reasoning. It may explain why the judgment is sometimes

> described by the officers as merely the Judge's perspective or view: see above paragraph [24] from Mr Brighty which opens with the words:
>
> > Eventually the Judge gave his view of the situation …
>
> The same language is repeated in the first line of Mr Brighty's paragraph 25:
>
> > Finally in paragraph [155] Justice Fogarty gives us his views.
>
> [50] It is a constitutional error of law to treat a judgment of the High Court as simply the "views" of one person. It is a judgment of the Court, which binds the parties. The Commissioner is obliged to accept and adopt the reasoning of the Court when discharging his obligations to reconsider matters as directed by the Court in the remedies.

[9] It would be a very extraordinary set of facts for indemnity costs to be awarded against the Crown. This Court would be loathe to make a finding that officers of the Crown were deliberately ignoring decisions of this Court, and I do not.

[10] I turn then to consider whether there is some other reason which exists justifying this Court in making an order for indemnity costs. Mr Andrews relied on a number of reasons to be taken cumulatively.

[11] He relied on the finding in paragraph [90]:

> [90] The Commissioner's officers were in breach of s 4(6) of the JAA by not having regard to the Court's reasons for giving the directions, and erroneously construing those directions. Non-compliance pervaded the analysis and decision making that went to the Commissioner's purported compliance with the directions.

[12] I was left with the clear impression from reading the working papers that the Inland Revenue Department officers, including two of the solicitors, had not appreciated the implications of s 4(6) of the Act. They had focussed on the directions at the end of the first judgment treating them as their directions to be read without regard to the detailed reasoning which set up the conclusions which in turn led to the directions. That was a significant error of law and in my view was one of the principal reasons for the need for the second judicial review.

[13] However, the first judgment was complex and to a degree open to interpretation. I do not think that the failure of the Commissioner's officers to give

appropriate consideration to the reasoning can be wholly laid on his officers. With the benefit of hindsight it would have been better if in my first judgment I had made it plain that the directions were to be carried out faithful to the reasoning and were there to be any doubt as to the application of the reasons that the Commissioner should have come back to the Court.

[14] Mr Andrews also relied on the incomplete disclosure of the Aronsen notes over the years from 1999 to 2006. I was satisfied during the first proceedings that there had been late disclosure of the Aronsen file notes. I have been satisfied from then on that this caused a degree of difficulty for the plaintiffs. It delayed the assembling of their case and the force of their arguments. It compounded their difficulties.

[15] Mr Andrews also relied on a failure on the part of the officers to seek further directions and to discuss their review exercise with Mr Hampton. This point is complicated by a lack of clarity as to the extent of the request. Taking the best view of these points advanced by Mr Andrews I do not think that they gather sufficient weight in combination to justify indemnity costs. I keep very clearly in mind that indemnity costs are awarded only rarely, and it would appear, at least in New Zealand, have never been awarded against the Crown. To be sure, the plaintiffs have suffered unnecessary costs. But to some extent High Court litigation can never pretend to offer a perfect outcome. There are many costs in which for one reason or other costs could have been lower had the proceedings run more efficiently and that includes more prompt and focussed disclosure and discovery by the other party. The fact that that does not happen is not of itself a ground for indemnity costs. Taken in the round I am simply not satisfied that the plaintiffs should obtain indemnity costs in the second proceedings.

Sub-issue (b): Increased costs on second review

[16] Mr Palmer criticised paragraph [114]. He submitted that a blanket band C classification is not possible. He relied on *McLachlan v Mercury Geotherm Firm Limited (In Receivership)* CA 117/05:

> [62] It is inconsistent with the principles of the costs regime in the High Court Rules to make a blanket order for costs on a 3C basis. Rule 48 contemplates a categorisation of the proceeding. A blanket category 3 is unexceptional. Rule 48B(2)(c) contemplates a determination by reference to band C where a comparatively large amount of time is considered reasonable for a particular step.
>
> [63] It is only open to a Judge to determine that costs on a 3C basis are appropriate where the Judge is satisfied that every step took a comparatively large amount of time compared with normal. That will rarely be the case. Although category 3 will apply across the proceedings, individual assessments will be required in respect of different steps.

[17] Moreover, he argued that it is necessary for the party claiming to costs to establish why in respect of each individual step a comparatively large amount of time is reasonable. He relied both on *The Beach Road Preservation Society Inc v Whangarei District Council* (2001) 16 PRNZ 13 at paragraphs [8] and [9] and also upon *Holdfast NZ Limited v Selleys Pty Limited* (2005) 17 PRNZ 897.

[18] In the course of these proceedings, both the two substantive hearings and the numerous interlocutory hearings, it became abundantly clear to me that the submissions I was receiving from counsel for the applicants was the distillation of a lot of analysis of a massive quantity of documents.

[19] Mr Andrews sought increased costs relying on r 14.6(3):

> **14.6 Increased costs and indemnity costs**
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> …
>
> (3) The court may order a party to pay increased costs if—
>
> > (a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
> >
> > (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
> >
> > > (i) failing to comply with these rules or with a direction of the court; or
> > >
> > > (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
> > >
> > > (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

> (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or
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> (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or
>
> (c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or
>
> (d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

[20] As *Holdfast* explains, normally the uplift does not go beyond 50% because of the logic that the basic scale is two-thirds of the appropriate daily rate so an uplift of 50% recovers the whole of the appropriate daily rate. We all know that normally the appropriate daily rate falls far short of recovery of the actual daily rate. So uplifting to 50% is by no means awarding indemnity costs. Indeed, increasing costs above 50% will usually result in a sum well short of indemnity costs.

[21] Relying on [115] Mr Andrews sought on behalf of his clients the maximum uplift possible to a point that would give them 90% of their reasonable costs. This is because he submitted that the defendant's conduct was egregious and inappropriate, contributing unnecessarily to the fact of the second proceeding as well as to its time and expense. Of course by reference to [115] his argument also relies on the fact that the Commissioner has obtained orders, currently an undertaking, preventing the plaintiffs from dealing with their assets without approval of the Court.

[22] I have no doubt that the findings of the second judgment mean that costs were incurred by the plaintiffs because the Inland Revenue Department (IRD) officers failed to comply with the directions of the first judgment and took unnecessary steps. Rule 4.6(3)(b)(i) and (ii) apply.

[23] As to (ii), it was inevitable following the directions of the first judgment that a lot of work had to be done by the IRD officials. Nonetheless I was surprised by the

voluminous material that had been put together. In large part this flowed from an error of law, identified in the second proceedings. The Inland Revenue officers failed to appreciate that they should have followed the directions in the light of the findings that were made and interpretations of the powers of discretion contained in the judgment.

[24] As I had occasion to explain a number of times in the second judgment they did not do this and indeed fell back upon Departmental policies as to remission of penalties. Such policies are no doubt reasonable all other factors being equal. But the setting of this case was unusual. Delays on the part of the audit office were coupled with conduct allaying the fears of the taxpayer. That is why the taxpayer obtained extraordinary remedies by way of judicial review. The Departmental officers did not appreciate that these remedies are extraordinary, and can often, and in this case did, override normal Departmental practices. For this reason much of their laborious work was unnecessary. It follows that there were unnecessary costs imposed on the plaintiffs in the second proceedings mounting their challenge. Because of the way that Mr Budhia was provided with supporting materials it took a lot of analytic work by counsel for the plaintiffs to identify the legal methods being followed and so the errors.

[25] Rule 46(3)(d) also applies. This is an exceptional case. It justifies the reversal of the onus set out in paragraph [112]. I am acutely aware that this was a case which to a degree Minter Ellison has taken on in circumstances where they could not be sure of being paid. I very much doubt that there was any unnecessary work undertaken by Minter Ellison. I agree that in the normal course one does not consider the actual costs invoiced. But this is not a usual case. In any event, I am functus officio as to what I said in paragraph [115].

[26] The plaintiffs have provided two schedules endeavouring to collect the work done against items in Schedule 3. The first schedule was provided on the basis of invoicing and the second schedule, at the end of the oral hearing, was provided on the basis of time allocations under Band C. Perusal of those schedules has reassured me that this is a case where Band C should apply. I did mistakenly think that there

might be a case for going beyond Band C based on r 46(3)(a). But I do not pursue that.

[27] Using the second spreadsheet provided by Mr Andrews, calculating costs on a 2C basis against the items in the schedule, the standard time allocations total 30 days including attendance of second counsel (which I certify for) on a standard recovery of $49,120.

[28] A period of 30 days (six weeks) compares with Mr Andrews' estimate of the time actually taken, as I said before, five weeks of a partner's time and one and a half weeks of an intermediate solicitor's time. That is a reassuring comparison.

[29] A 50% uplift would result in the sum of $73,680. In his second schedule Mr Andrews increased time allocations in slightly different ways reaching an uplift of $75,520.

[30] In *Holdfast* the Court of Appeal criticised Harrison J for utilising the actual invoices when he formed a view as to appropriate fees. The Court said:

> [40] That is not the correct way to approach an award of "increased costs". An order for increased costs is defined in r 48C(1)(a) as an order "increasing costs otherwise payable under [rr 47-48B]". Rules 47-48B establish the scale; thus, the court uplifts from scale. It is not a question of awarding a percentage of actual costs.
>
> [41] There are very good practical reasons why a "percentage of actual" approach should not be sanctioned. Not all judges have recently been litigation lawyers and thus familiar with the current charging of litigators. Many judges have been commercial lawyers or academics or lawyers in the public service. Even those who have been litigation lawyers quickly get out of touch with current rates after appointment to the bench. There cannot be one approach to costs if the judge happens to be a recent appointment from the bar and another approach for judges who happen not to be. The approach must be uniform and cannot be based on a judge's own assessment of the reasonableness of fees based on his or her recollection of what prevailed at the bar in his or her time.
>
> [42] It is in any event well nigh impossible even for a judge who has recently been in practice to assess the reasonableness of a party's legal fees from a cursory review of what appears on the court file. Here the judge assessed Selleys' costs as "high". But on what basis was that assessment made? There were no fee notes or time records. He did not know what hourly rates were being used. This shows the dangers of judges becoming involved in the assessment of the reasonableness of a party's actual costs.

> Such an assessment may be unavoidable where indemnity costs are considered appropriate, although even there judges may well find it more sensible, in the event of a dispute as to reasonableness, for costs to be taxed by the registrar.

[31] The situation discussed in [42] is not the situation here. I know from long intimate acquaintance with the case including numerous conferences and interlocutory hearings that Mr Andrews has stayed the course in what any managing partner would describe as an unprofitable environment. It is highly unlikely Mr Andrews wasted any time. The approach, however, that I forced Mr Andrews on to at the end of the oral hearing does follow the requirements of the Court of Appeal to start from the steps and time allocations in Schedule 3.

[32] When it comes to an increase on those scale costs the Court of Appeal in *Holdfast* said this:

> [46] Where subcl (3)(b) conduct is made out, the court's normal response should be to provide an uplift on scale costs to what the rules contemplate a reasonable fee for that step to be. Mr Marriott submitted that logically an uplift under r 48C(3)(b) should not be more than 50%. That is because the Rules Committee has determined what, *for costs purposes*, the appropriate "daily rate" is: it is the "daily recovery rate" in Schedule 2 to the High Court Rules, plus 50%. The current daily recovery rate for category 2 proceedings is $1,450 a day. We know, by reason of r 47(d), that that represents "two-thirds of the daily rate considered reasonable in relation to [a category 2] proceeding". That in turn means that the underlying daily rate was $2,175 ($1,450 plus 50%).
>
> [47] An increase of 50% on scale costs should therefore grant the costs-claiming party a fair recovery for the step unnecessarily forced on it, assuming that the time allocated to the step has been reasonably calculated under the bands or under r 48C(3)(a). Any greater recovery than that would mean that the party paying costs is contributing to the other party's choice of special counsel.
>
> [48] We are not to be taken as saying that an uplift of more than 50% can never be justified under r 48C(3)(b), as there may be circumstances where the court considers a higher award to be justified. What we are saying is that the above approach is what is logically required by the scheme of the rules, and in particular by the principles applicable to every determination of costs. Awards of increased costs must comply with the general principles in r 47, except to the extent that the specific requirements of r 48C dictate otherwise. The principles in r 47(c) and (d) are clearly modified by r 48C(3)(b), but r 47(e) is not so modified. Where increased costs (as opposed to indemnity costs) are being considered, the focus remains on the notional solicitor or counsel appropriate for the category of proceeding, not the actual solicitor or counsel involved or the costs actually incurred by the party claiming costs.

[33] In this case I think an uplift of more than 50% is justified. This is litigation forced on the plaintiffs by the error ridden response of the Commissioner's officers when attempting to give effect to the first judgment. The second judicial review was unavoidable. I take judicial notice that the scale in fact has not been reviewed for many years. That does not require any judgment of familiarity with the current charging of litigators. An uplift of 50% above the current scale cannot pretend to come close to current charging. This is a set of circumstances where I consider a higher award than 50% is justified. However, it is too much to go to a lift of 90% which would take it close to the actual billings. I must avoid providing indemnity costs by the backdoor. In my view this case justifies a 75% uplift on scale which is the sum of $85,960. The plaintiffs are awarded that sum together with the undisputed disbursements totalling $2,858.78, a total of $88,818.78.

Costs in the first proceedings

[34] Costs were reserved by me in the first proceedings. I made no specific directions as to quantum.

[35] In the second judgment I provided:

> [117] The parties can also apply for costs as reserved in the December judgment, and where appropriate in respect of the other interlocutory judgments. If so, the application and submissions in reply are to be treated as separate but on the same terms as to length and timing.

[36] The plaintiffs seek costs on a 2C basis. I refer to their second spreadsheet filed after the oral hearing on this subject which allocates time according to the items in Schedule 3. This time totals 42 days. The cost recovery on that basis amounts to $82,200.

[37] In this case I think that an uplift of 50% is justified. Rule 14.6(3)(a) applies. That is because in my view the time allocation for a claim of this complexity in the schedule items 1, 7.1, 4.10, 4.5, 4.6 and 4.7 would in fact exceed the allocated time of 28 days. Mr Andrews actually seeks an increase of time allocation of 45 days. I allow that sum. In respect of items 7.1 and 7.2, preparation of authorities, submissions and affidavits, the time allocation in the schedule is ten days. That is

simply not enough by any stretch. He seeks an allocation of 20 days. I agree. He seeks five days for amendments to the statement of claim, an item 1 entry. I agree. He also seeks another half day in respect of items 4.12 and 4.14 as an equivalent for the OIA and Privacy Act requests and reviewing the Aronsen file notes. I also agree to that uplift. He did not appear at the trial but I allowed two days of his time for his background assistance. In the end I allow a total of 76½ days which at $1,600 a day computes to $122,400. The next question is whether or not that sum should be reduced by a percentage on the basis that the plaintiffs largely recovered but were not wholly successful.

[38] The Crown submitted that the terms of the judgment of 15 December reflected findings of the Court whereby the plaintiffs were only partially successful. In submissions filed after the oral hearing they elaborated on that view.

[39] Certainly at the end of the first hearing I did not make an order of entitlement for costs. I invited the application at the end of the second hearing when it had become clear to me from that hearing that the plaintiffs had been largely successful in the first hearing.

[40] In oral argument the Crown submitted that I had shifted my view from <u>partial</u> success to <u>largely</u> successful.

[41] The Commissioner relies on paragraphs [24] and [25] of my judgment dated 31 October 2007:

> [24] The High Court judgment of 26 December was a decision upon an application for judicial review of various decisions that had been made by departmental officers over the years. At the time the judgment was delivered the Court estimated that the total by November 2006 had arisen to about $4 million. Now, approximately an year later, the Court is informed the total is about $3.7 million. <u>The reason for the reduction in the total is that the plaintiffs were partially successful</u> in those proceedings. As part of that decision the Commissioner was directed to do certain things:
>
> …

> [25] The Commissioner did that and the result was that the total indebtedness is reduced by the order of $700,000. However, with the accumulating penalties since that time the debt is back up to $3.7 million.
>
> (Emphasis added)

[42] The Commissioner is taking the word "*partially successful*" as appears in paragraph [24] out of context. If one reads the whole of the decision it is quite plain that I was expressing a prima facie view that IRD officers had not followed the directions and reasoning of the 2006 decision. It does not in any way reflect a judgment that the reduction in the debt as a result of the purported discharge of the directions of the 2006 judgment was appropriate.

[43] The reference to "*largely successful*" appears in the 2008 judgment in paragraphs [1], [71] and [75]. That evaluation followed a more detailed consideration of the decisions made in the 2006 judgment.

[44] There was no occasion within the 2006 judgment to make a judgment as to degree of success for costs were reserved. I have now received detailed submissions from both the Commissioner and the plaintiffs as to the degree of success in the first set of proceedings. The Commissioner's submissions do so by analysis of the relative success in the six "causes of action" separated out in the statement of claim. The submissions in reply by the plaintiffs, to a degree, follows that demarcation but not wholly.

[45] The judgment on the first review does not separate out and follow six causes of action. Rather, it treats the facts as a continuum. It then analyses relevant decision making in chronological order. To a degree it examines the issues as opposed by the parties, such as: were their "arrangements".

[46] However, in substance the reasoning of the judicial review follows the task always set in any judicial review which is to examine whether the decision making is reviewable on any one of the established grounds of review.

[47] Given that the second judgment is under appeal I think so far as possible I should avoid any glossing of the first and second review judgments.

[48] It is sufficient to find that calculating the degree of relative success of the parties to the first proceedings by separating out the six causes of action as independent components of the case is in my view quite inappropriate and produces a misleading result. Second, it cannot be done anyway. Third, I am quite satisfied now that the plaintiffs were largely successful in the first judicial proceeding.

[49] They did clearly fail to bring home the proposition that the 1990 arrangement with Mrs Thornley had included the June 1990 GST debt and had been satisfied. They also failed to find an error of law in the Commissioner's decision to decline the s 183A application dated 9 June 2004. But in considerable measure their overall objective was sustained. Mr Andrew's submissions have far more resonance with what actually happened than does the Commissioner's analysis. Inasmuch as some discount is appropriate from whatever the total costs are I think it should be 20%.

[50] Accordingly, the aforesaid sum of $122,400 is reduced by 20% resulting in a total recovery of $97,920 plus disbursements to be fixed by the Registrar (which sum is also to be reduced in due course by 20%). In the event of a dispute as to disbursements the costs are to be paid in any event before resolution of the disbursements. There may be a complication with disbursements because two law firms were involved.

Issue 3: Stay

[51] In reliance upon r 12 of the Court of Appeal (Civil) Rules 2005 the Commissioner seeks an order staying the execution of the judgment in the second judicial review proceedings and any further step in the proceeding pending determination of the Commissioner's appeal (CA 800/2008) to the Court of Appeal against the whole of that judgment.

[52] Rule 12(3) provides:

> **12 Stay of proceedings and execution**
>
> …

> (3) Pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on application,—
>
> > (a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or
> >
> > (b) grant any interim relief.
>
> …

[53] Counsel for the Commissioner argued that the application for stay should be heard logically before I resolved questions of costs. I have deliberately proceeded in reverse because there is a history in this case of Mr Hampton and his family losing the benefit of counsel due to their inability to fund counsel. For example, the first judicial review hearing commenced in July 2006 without the benefit of counsel. Two prominent law firms had provided legal advice and assisted preparation of the case but by the time the matter came on for hearing had withdrawn. As various interlocutory judgments have recorded from time to time I have always benefited from the assistance of Mr Matthew Andrews of Minter Ellison and later by Mr Peterson of the same firm. I have been acutely aware that for significant periods these counsel and their firm have been providing legal services to the Hampton family against real possibilities that they would not be paid fully. At the present time about $140,000 of invoices has not been paid and Mr Andrews has advised he will not continue through to the Court of Appeal without further funding. For these reasons I considered that I should ascertain what costs are payable (without regard to this consideration of continued availability of counsel) before considering the question of stay. However, when considering the question of stay continued support from counsel on appeal is relevant when considering both the merits of an order of stay of the whole or part of the proceeding and/or the grant of any interim relief.

[54] It is common ground that in determining a stay application counsel is required to balance two principles:

1. A successful litigant should not be deprived of the fruits of his or her litigation.

2. An appellant should not be deprived of the fruits of a successful appeal.

[55] The factors that can eventually be taken into account in balancing these competing interests are helpfully compiled by McGechan on Procedure at paragraph CR 12.01(1)(c):

> **CR12.01 Principles**
>
> **(1) General approach**
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> …
>
> (c) A non-comprehensive list of the factors conventionally taken into account in balancing these competing interests was collected by Hammond J in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA) at para 9. This list, implicitly endorsed by the Court of Appeal in its judgment in *Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd* (1999) 13 PRNZ 48 (CA), reported immediately after Hammond J's, and expressly in *New Zealand Insulators Ltd v ABB Ltd (above)* at para 11 is:
>
> (i) Whether the appeal may be rendered nugatory by the lack of a stay. This factor is not determinative: *Cousins v Heslop* [2007] NZCA 377 at para 10.
>
> (ii) Whether the successful party will be injuriously affected by the stay.
>
> (iii) The bona fides of the applicant as to the prosecution of the appeal.
>
> (iv) The effect on third parties.
>
> (v) The novelty and importance of questions involved.
>
> (vi) The public interest in the proceeding.
>
> (vii) The overall balance of convenience and the status quo.

[56] The Commissioner argued that the appeal would be rendered nugatory by the lack of a stay because the Commissioner would have to act yet again on the December 2006 judgment, pay costs in the absence of any security risking non-recovery in the future of those costs should the appeal be successful, and be obliged to have the Anolbe sham issues set down for hearing before the High Court "*contrary to the jurisdictional argument he wishes to advance on appeal*" (which I understand to be the proposition that the sham issues should be resolved within the established dispute resolution procedures under the tax statutes). The Commissioner submitted that the successful parties would not be injuriously affected by a stay

because they are insolvent at the present time anyway. The Commissioner submitted that this was a bona fide appeal and that there was public interest in examining those aspects of the judgment which required proportionality in the remission of penalties and interest. The Commissioner's argument went on to lay the basis of a sufficiently arguable point to be considered on appeal.

[57] In response, Mr Andrews acknowledged that in the ordinary course of events it would be normal for the Court to grant a stay. It has already been noted, however, this was an exceptional case.

[58] He submitted that if stay is granted absolutely he will withdraw leaving the plaintiffs unrepresented which is obviously not in the interest of the plaintiffs.

[59] Furthermore, the National Bank has advised, by letter of 8 April:

> As discussed The National Bank has allowed time for the matter before the Court to be resolved on the basis that in the event you were awarded costs this would enable you to clear the overdraft debt and loan arrears [respectively $160,663.86 and $54,016.44].
>
> If you were not awarded costs and therefore unable to clear the lending default you had agreed to immediately list and actively market the properties over which The National Bank has mortgages to achieve early sales and repayment of all debt secured by the mortgages.
>
> Should clearance of the lending defaults not be resolved to The National Bank's satisfaction by 30 April 2009 The National Bank intends to instruct its legal representatives to commence recovery action under the mortgages held by The National Bank to obtain payment of the defaults.

[60] As to the novelty and importance of the questions involved, Mr Andrews submitted that he accepts that the matters determined in the December 2006 judgment were novel and important but submitted that the November 2008 judgment was largely a reapplication of the principles and findings of the 2006 judgment against which the defendant did not appeal.

[61] By cross reference to the grounds of appeal against the second judgment Mr Andrews argued that in truth the Commissioner is seeking to use the right of appeal against the November 2008 judgment in order to re-litigate the 2006

judgment. He also noted that the findings of the 2008 judgment were that the defendant had failed to implement the 2006 judgment.

[62] Finally, he finished with the rhetorical proposition:

> What value does the rule of law have in this case if the plaintiffs cannot rely on two substantive judgments in their favour?

He submitted the overall balance of convenience clearly favoured the plaintiffs who are:

> … ordinary citizens who have endured this dispute over many years and are suffering significant ongoing financial difficulties, and great personal stress. The Crown on the other hand (and the interests of the public revenue) can much more reasonably be expected to overcome whatever difficulties may arise from refusing the defendant's application.

Analysis

[63] It is useful to begin by noting that the Commissioner does not seek a stay in any order of payment of costs in respect of the first judgment, which he did not appeal. The application for stay is confined to the execution of the judgment in the second judicial review. To the extent that the appeal against the second judgment is in truth a belated appeal against the 2006 judgment the case for a stay in the execution of the second judgment may fall away.

[64] Therefore, in my view it is of first importance to examine the merit of the contention that the appeal against the 2008 judgment is in truth an appeal against the 2006 judgment. I do this by examining the grounds of appeal. There are 17 particular grounds of appeal which develop the general pleading that the Court erred by failing to consider all relevant matters, being manifestly wrong, failing to exercise the Court's jurisdiction properly.

1st Ground of appeal

[65] Ground number 1 does not appear to be a ground at all but rather a prayer for relief.

2nd Ground of appeal

[66] Ground number 2 contends that the Court became involved in the merits of the exercise of statutory discretion and not in the process. That is a ground clearly confined to the reasoning of the second decision.

3rd Ground of appeal

[67] Ground number 3 pleads a failure of the Court to have regard to the failure of the taxpayers to pay tax, to their cavalier attitude towards the payment of tax, to their history of late filing of tax returns, delaying tactics and obfuscation of the facts and their claims.

[68] This was a matter raised and resolved in the first judicial review. There are numerous references to these considerations in that judgment. Without pretending to exhaustively collect all the paragraphs discussing this I refer to the following paragraphs: [1] [132]-[136] [140] [142] [144]- [151] [153] and [155].

4th Ground of appeal

[69] The fourth ground of appeal refers to the Court finding there was a lack of any schedule setting out core tax, penalties and interest owing when such evidence was available in summary judgment proceedings and an application to set aside a statutory demand.

[70] The 2006 judgment begins in paragraph [2] by examining the current state of the tax payee accounts splitting out core tax from penalties and interest owing.

[71] In the course of litigation I have found it difficult to get both parties on the same page, as it were, separating out these items. However, this difficulty was not a reason for relief on either the first or the second judicial reviews.

5th Ground of appeal

[72] The fifth ground of appeal is as to the order preventing the Commissioner from taking enforcement action and proper steps to recover the tax and other sums payable under the Inland Revenue Acts.

[73] The order preventing this was made as part of the directions in the first judicial review, continuing existing adjournments. The first judicial review took place against a context of applications by the Commissioner to obtain judgment. This is referred to in the first judicial review in paragraph [141] and is directly addressed in the relief in the first judicial review.

> [159] In respect of Anolbe the Commissioner's decision of December 2004 is set aside. The Commissioner is directed to:
>
> …
>
> > 8. The debt collection proceedings continue to be adjourned, pending the outcome of the above directions.
> >
> > …

The effect of the second decision was to continue this order.

6th Ground of appeal

[74] The sixth ground of appeal is against the finding that Mr Budhia when addressing the first judgment and examining and claims by Anolbe for input tax credits did not correctly apply the sham test when he decided certain transactions were shams. That is a determination under the second review. See [27]-[31].

7th Ground of appeal

[75] The seventh ground of appeal is against the Court setting down the sham issues for trial in the High Court thereby disregarding the mandatory statutory objection in challenge procedures prescribed by the Tax Administration Act 1994

(TAA) and the legislative consequences of the defendants not having availed themselves of it.

[76] This is a challenge to the order made in the second judicial review. See [97]-[101].

8th Ground of appeal

[77] The eighth ground of appeal simply contends that the Court incorrectly interpreted the first judgment.

9th Ground of appeal

[78] The ninth ground of appeal contends the Court sought to rewrite that judgment in critical respects declaring what was said in the first judgment meant something else and indicating "*findings of arrangements*" as between the plaintiffs contrary to the rulings in the first judgment that specifically and correctly did not find arrangements or conduct giving rise to any legitimate expectation or estoppel.

[79] Mr Andrews strongly disputed this point and relied on the following three paragraphs of the 2006 judgment which I set out:

> [153] Broadly, between 1993 down to at least 1998 the officers responsible for debt collection did not feel it was ethical to attempt debt collection while audit was examining the merit of the input claims. If these input claims were recognised they would carry interest calculated from the date they would have been paid but for the investigation. Further, they would have been credited against debits in various of the associated taxpayer accounts. Further, there was an undoubted readiness on the part of the officers to wipe penalties pertaining to those debit accounts, the payment of which would have been significantly resolved had the GST refunds been acknowledged.
>
> [154] It was never the intention of Parliament that the Commissioner could place GST refund claims under investigation, indefinitely. Mr Aronsen used the words unethical, but in legal parlance it was conduct contrary to the purpose of giving the Commissioner power to investigate refund input claims with a view to rejecting them.

Conclusion

> [155] The Commissioner of Inland Revenue has to accept some responsibility for the state of these taxpayer accounts, in particular the accrual of penalties. On any view of it the level is disproportionate to the seriousness of the breach.[1] In particular the Commissioner has to accept that his officers have from time to time countenanced recognising input tax refunds under the GST Act and the application of those refunds to debits arising under the same and related accounts. Furthermore, his officers have taken the opportunity to refer the input tax claims for examination thus avoiding the obligation to pay them within 15 days, but the Audit Department has not made decisions. Finally, the Commissioner's officers had an opportunity to respond constructively to the request on 23 March 2000 for the re-registration of Anolbe and to process the associated input claims. Taken together, these past events create a positive duty now on the Commissioner to exercise his discretionary powers, including the power to remit penalties on equitable grounds, so as to achieve an outcome where the penalties in fact sought to be collected are proportionate. That duty may also be overlaid by the recent deterioration in the value of the business and call for a judgment under s 6 and 6A of the TAA as to what in fact can be collected.
>
> [156] I am satisfied that these neglects by the officers amount to a failure to exercise the powers given to the Commissioner to collect tax. Those powers have to be exercised for their proper purpose. The various neglects or failures cumulatively justify intervention by this Court by way of judicial review directing the Commissioner to complete processing input claims, and to consider associated reduction of penalties and interest payments.

[80] I do not think the second judgment did subsequently recategorise those findings by indicating "*findings of arrangements*", formal findings of "*legitimate expectation*" or "*estoppel*". But I leave that for counsel to explore if this matter is taken further to the Court of Appeal. However, I note that embedded in that argument is the premise that there can be no obligation on the Commissioner in favour of the taxpayer unless there are "*arrangements*". That proposition is a direct challenge to the 2006 judgment which imposed obligations for the reasons summed up in paragraphs [153]-[155] of that judgment, none of which depended upon findings of arrangements.

[1] s 139(c) TAA, see above paragraph [28]

10th Ground of appeal

[81] This ground of appeal contends an error by the Court accepting as a fact at paragraph [104] of the second judgment that the Aronsen notes were not initially discovered by the appellant.

[82] The complaint as to late discovery of those notes was a grievance aired in the first judicial review, as is recorded in paragraph [104] of the second judgment. My recollection is that the Commissioner's position was that those notes were always discoverable and/or may have been amidst some bundles of materials provided. It is true that I had formed the impression by the time of the first judicial review that there could have been earlier disclosure of those notes but it was not a factor taken into account nor did it affect the use of those notes in the analysis in the first judgment which appears in paragraphs [86]-[89].

11th Ground of appeal

[83] This ground challenges what is alleged to be a finding in the second judgment that the Departmental officers should have interpreted the first judgment in the way the Court rewrote the first judgment and the second judgment. Obviously I make no comment.

12th Ground of appeal

[84] This is a ground that in the second judgment the Court iterated and/or failed to correct the mistaken views expressed in the first judgment as to the meaning and applications of ss 182 and 182A of the TAA.

[85] I note that obviously here the Crown is taking up an opportunity made available by the second judgment to appeal findings made in the first judgment, which opportunity was not taken during the period for appeal in early 2007.

13th Ground of appeal

[86] This is against the finding that the Departmental officers failed to interpret the first judgment correctly.

14th Ground of appeal

[87] This is contending the second judgment sought to rewrite the first judgment so as to incorporate a proportionality principle and a related positive duty on the Commissioner as to remission of penalties.

[88] Both propositions are set out in paragraph [155] of the first judgment which I have had occasion to set out above.

15th Ground of appeal

[89] This is that in finding such a proportionality principle and positive duty to implement it the Court departed from judicially settled meaning of the Commissioner's care and management functions under ss 6 and 6A of the TAA.

[90] Plainly that is a proposition which could have been advanced in an appeal of the 2006 judgment, as that judgment invites the Court to use ss 6 and 6A. See paragraph [155] of the judgment already set out above. Though it is fair to say that in the second judgment I explained that those sections could be used to overcome any limitations in the discretionary powers contained in other sections of the TAA. See paragraphs [80] to [89].

[91] I would regard this 15th ground of appeal as available to be taken under the first judgment but more obviously available under the second judgment.

16th Ground of appeal

[92] This contends an error in the Court rescinding Mr Budhia's report for failure to observe and implement such proportionality principle.

[93] This is a ground obviously specifically relating to the second judgment. But as I have observed in respect of the 14th ground of appeal, the point of proportionality aspects of the reasoning were clearly open to appeal from the 2006 judgment.

17th Ground of appeal

[94] This ground is under the heading of "*Others*". It is a broad contention that the Court failed to have regard to and take into account and apply the relevant statutory provisions and scheme of the TAA and its statutory restraints on remission of penalties and use of money interest and "*iterating in the second judgment views expressed in the first judgment that are mistaken in law*".

[95] As is obvious this 17th ground seeks to advance matters that could have been appealed from the first judgment.

[96] Grounds 2, 6-11 and 13 can be understood as confined to the second review judgment. However, they are not grounds relied upon by Mr Palmer when emphasising the importance of pursuit of an appeal as being in the public interest.

[97] The grounds relied upon as being of importance to the public interest are those addressing proportionality and the scope of the Commissioner's power to grant relief to the accumulation of penalties and interest: grounds 12, 14, 15, 16 and 17.

[98] Mr Palmer repeatedly supported the public interest in pursuing the appeal by both judgments' reliance on proportionality. He advised me that an article has been published on these judgments and the proportionality point is of considerable concern to the Commissioner.

[99] The Commissioner had a clear opportunity to appeal the December 2006 judgment finding both as to proportionality and as to there being a positive duty of the Commissioner to exercise the available discretionary powers, in the manner summed up paragraph [155].

[100] Second, and rather surprisingly, Mr Palmer advised that the Commissioner intended to take to the Court of Appeal a challenge to the very use of the judicial review powers of the High Court in these proceedings, as being in derogation of the statutory objection and challenge to procedures prescribed by the TAA. I understood him not to confine that argument to the challenge to the order that the sham issues be set down for trial in the High Court. Mr Palmer said he would rely on recent decisions of the Court of Appeal and the Supreme Court saying that judicial review was an exceptional process given the availability of the statutory objection in challenge procedures. (He did not refer specifically to any decision but referred loosely to *Westpac Banking*.)

[101] I do not apprehend there to be anything new in this. That was the law at the time I heard the first judicial review. It is a longstanding policy of the High Court to be ready to reject applications for review when there is an available statutory procedure, and that is not confined to tax disputes.

[102] As I have already occasion to mention, the context of the first judicial review was against applications by the Commissioner to obtain judgment on what he considered to be indisputable tax liabilities. That is tax liabilities that could no longer be challenged through the statutory objection and challenge procedures. I cannot recall there being any challenge by the Commissioner to this Court hearing the applications for the first or second judicial review. This was the first time that I recall hearing a submission from the Commissioner that these judicial review proceedings should not have been entertained. Had that argument been made at the commencement of these judicial review proceedings it would, of course, have been examined and considered in the light of the longstanding position of the Court on judicial review informed by such cases as *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 and *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665. This ground of appeal,

if that is what it is going to become, was one plainly available in respect of the first judicial review proceedings.

[103] I have been left with the conclusion that the principal reason the Commissioner wishes to appeal the second judgment is to challenge in the Court of Appeal the findings that I made in paragraph [155] of the first judgment.

[104] It is now abundantly clear that the Commissioner's officers handling this file do not want to act on the obligations set out in paragraph [155] (however it be interpreted) until their contentions can be tested in the Court of Appeal. This means that in truth they are seeking a stay of the first judgment. In the guise of seeking a stay of the 2008 judgment the Commissioner is in fact seeking a stay of the obligation to carry out the duties imposed on the Commissioner in paragraph [155] of the 2006 judgment. He is arguing those obligations have been changed by elaboration or re-interpretation in the 2008 judgment. But in fact he is resisting any obligation of proportionality at all, as Mr Palmer made clear.

[105] It is important to dwell for a moment on the implications of a stay. The reader needs to recollect that the plaintiffs have a number of assets. Some of these assets are not charged with any securities to third party lenders. They are unencumbered. However, they cannot be dealt with because of a complex undertaking by Ms Sisson, a solicitor, who is in control of these assets, essentially freezing the plaintiffs' rights to deal in their assets pending this litigation. This set of undertakings replaced a set of pre-judgment charging orders.

[106] It needs to be kept in mind that the Courts impose pre-judgment charging orders with some reluctance. These and the substitute undertaking have now been in place effectively for years. The Commissioner submits that it does not matter because the plaintiffs are insolvent. That is a bland and facile proposition because it contains within it the proposition that they are insolvent because of the huge amount of tax, due to penalties and interest which the Commissioner contends they owe. Yet we do not know how much they owe to the Commissioner. One thing is clear. The "core tax" that they owe is a relatively modest amount. By core tax I exclude accumulated penalties and interest. The Commissioner refuses to approach the

matter that way, relying on the proposition that once interest and penalties are debited by operation of the statutory provisions they become uncollected tax. That is right in one sense but obscures the issues defined in [155] following findings of fact that for considerable periods of time the Commissioner's officers failed to comply with statutory timetables to assess claims, and considered it unethical to attempt recovery proceedings, etc, as is more fully set out in the first judgment.

[107] Consider the present predicament of the plaintiffs. They have the means to meet the immediate requirements of the National Bank if they can complete the consolidation of three properties, which are unencumbered, and sell them, or alternatively sell them now. But because of the undertaking they cannot sell them without the approval of the Court.

[108] The Commissioner does not want to pay the legal costs accruing against the Department to date without security for repayment, knowing that it is not possible in this context for the plaintiffs to provide additional security for all their assets.

[109] I do not think that the Commissioner has made out a case for stay. Furthermore, it would be positively wrong to grant a general stay when the real goal of the Commissioner, at the least of those officers currently entrusted with the case, is to avoid recognising the proportionality obligations set out in paragraph [155] of the first judgment, however it be interpreted.

[110] I have considered the merit of a limited stay in respect of the Anolbe sham issues. Certainly, the Commissioner could not possibly be suggesting that the High Court does not have the capacity to decide whether a transaction is a sham or not. Rather, the reason being advanced is that this bypasses the normal statutory procedures. This argument sails right past the context of this case, which was of the Commissioner seeking judgments on debts it said were indisputable, that is, not susceptible to the statutory dispute resolution provisions, and had come to the District and High Courts to seek judgment. Indeed, all the litigation pending in the Taxation Board of Review, and I think District Court, has now been transferred to the High Court. The immediate effect of sending the sham issues back to the

statutory disputes mechanisms will be to impose more delay which needs to be appreciated in the context of the undertaking.

[111] The Commissioner cannot have it both ways. If the Commissioner is demanding a slower more lengthy adjudication process it hardly justifies the Commissioner to continue to obtain the benefits of the undertaking which was put in place on the basis pending judgments from this Court, assuming they would be acted upon.

[112] I have considered whether or not there should be a qualified stay in respect of payment of costs. In the course of argument I mentioned two possible qualifications: one being payment of part of the costs awarded in respect of the first judgment. This was to be on the basis that there may be a distinction between a view the Commissioner said I originally took that the plaintiffs were [only] partially successful; and, a later view that they were largely successful. I have rejected that argument.

[113] The second qualification I entertained in oral argument requiring a proportion of the costs to be paid, sufficient to enable to the plaintiffs to continue to afford competent legal representation. This qualification was made when I had not decided whether there was any merit for stay. Indeed, as counsel will appreciate, at the end of Mr Palmer's address I thought there was a case for stay in the public interest, at which time I had not been taken through the grounds of the notice of motion of appeal on the 2008 judgment. For the reasons I have already set out I see no basis for any qualified stay.

[114] Mr Palmer has sought an interim stay pending appealing this judgment to the Court of Appeal. There are problems here. Mr Andrews has plainly indicated that he will withdraw from the case unless funds are made available to enable his firm to be paid their outstanding costs, let alone continuing costs.

[115] Second, it is important to keep in mind that I am leaving the undertakings in place in the meantime. These undertakings protect for the Commissioner assets which it can charge, if it obtains judgments.

Issue 3: Application to borrow $16,000

[116] This is an application to borrow $16,000 in order to complete consolidation of titles on three properties. There is no need to go into the detail. I am satisfied that this expenditure can be funded from the award of costs.

Other issues

[117] This judgment does not deal with costs arising out of interlocutory hearings, of which there have been many, and some significant. I do encourage the parties to try to reach a settlement in respect of those items. In the event that they come to Court for resolution and if I am not the Judge care needs to be taken to ensure there is no double recovery of costs.

[118] I am conscious that there is another set of proceedings by way of judicial review which has been filed but, I think, has not been subject to case management. I refer to this set briefly as the “misfeasance proceedings”.

[119] Finally, there are likely to be ongoing applications for relief from the terms of the undertakings from time to time. There may indeed be an application for a significant amendment of those undertakings. It is now nearly six months since the second judgment. I mention these matters in case, as is likely, this judgment is taken on appeal.

Costs in these proceedings

[120] The plaintiffs are entitled to costs in respect of these proceedings. If the parties cannot agree costs I will receive submissions limited to five pages each and exchanged in draft before filing.

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