IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA **CR NO's 724-727/2019**
(CRIMINAL DIVISION) **136-139/20**

BETWEEN **TEOKOTAI NOO GEORGE**
Informant

AND **HENRY TUAKEU PUNA**
Defendant

AND **MARK STEPHEN BROWN**
Defendant

CR NO's 308-315/2020

BETWEEN **PAUL RAUI ALLSWORTH**
Informant

AND **HENRY TUAKEU PUNA**
Defendant

AND **MARK STEPHEN BROWN**
Defendant

Hearing dates: 21 and 22 March 2022

Counsel: Mr WC Pyke for Mr T N George, and in his personal capacity to oppose.
Mr B P Mason for Mr WOP Rasmussen (granted leave to withdraw)
Mr N George in his personal capacity and for Mr Allsworth to oppose.
Messrs K Raftery QC and B Marshall for defendant/applicant Puna in support
Messrs K Raftery QC and T Arnold for defendant/applicant Brown in support

Date: 18 May 2022

JUDGMENTS OF HUGH WILLIAMS, CJ
(No. 1 re. COSTS)

[0275.dss]

For the reasons discussed throughout these Judgments, the following orders are made:

1. In T N George v. Puna & Brown, the applications for the payment of the legal costs and disbursements charged to the defendants in relation to the private prosecution issued against them by Mr T N George are disposed of as follows:

(a) Mr T N George is to pay 75% of those legal costs and disbursements incurred between 6 December 2019 – 16 March 2020 and any "wrap-up" costs following the withdrawal of his third set of informations; and

(b) Mr N George is to pay 25% of those legal costs and disbursements incurred between 17 February 2020 – 13 March 2020; and

(c) The application for Messrs Pyke and Rasmussen to pay part of those legal costs and disbursements is dismissed.

2. In Allsworth v. Puna & Brown, Mr Allsworth is ordered to pay, on an indemnity basis, all the legal costs and disbursements incurred by the defendants in relation to the private prosecution issued by him incurred from 22 July 2020 down to the present time other than the legal costs and disbursements incurred by the defendants in relation to their unsuccessful stay application and Mr Allsworth's proceedings in the Court of Appeal.

3. That within 20 working days of delivery of these judgments leave is reserved for memoranda to be filed covering calculation of the matters discussed in paragraphs [181], [194] & [224]ff of the judgments, the form of the orders to be filed under s 414(4) of the Crimes Act 1969 and whether any part of the judgments should be redacted before the judgments are issued publicly, with distribution of the judgments before the expiry of 30 working days being restricted to those listed in paragraph [237]

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PART I

Introduction and Costs Applications

[1] Between December 2019 and December 2021, Messrs Puna and Brown, the above-named defendants/applicants and at all relevant times respectively the Prime Minister and Deputy Prime Minister of the Cook Islands[1] and the Leader and Deputy Leader of the Cook Islands Party[2], faced sets of informations issued against them by private prosecutors, first the above-named Mr T N George and, secondly, the above-named Mr Allsworth, alleging that, in the aftermath of the 14 June 2018 General Election and in the circumstances described in these and other judgments on the matter, they breached s 280 of the Crimes Act 1969 – conspiracy to defraud – and s 64(2)(d)(i) of the Ministry of Finance and Economic Management Act 1995-6[3] – procuring improper payments of public money.

[2] Analysed later, the earliest set of informations was issued by Mr T N George on 6 December 2019. That set was followed by two others. His last set was withdrawn on his instructions on 16 March 2020.

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1 In September 2021 Mr Puna resigned as Prime Minister and as an MP and became Secretary-General of the Pacific Islands Forum and Mr Brown became Prime Minister.

2 "CIP".

3 "The MFEM Act".

[3] A further set of informations was issued by Mr Allsworth on 22 July 2020, and was dismissed on 19 March 2021 at the conclusion of the prosecution's case at trial, on the basis that the evidence was insufficient to make out a case for the defendants to answer[4]. His application for leave to appeal against the defendants' consequent acquittals was dismissed[5] and an appeal against that finding was also dismissed[6].

[4] The earlier informations having been withdrawn, and they having been acquitted on the last set, Messrs Puna and Brown were in the position of being able to apply for costs.

[5] They jointly applied for indemnity or "just and reasonable" costs against Mr T N George on 24 March 2020 and on the same basis against Mr Allsworth on 31 March 2021[7].

[6] Those applications led Mr T N George, on 30 April 2020, to seek orders that any costs awarded against him should be paid "on a joint and several basis by his previous counsel", Mr N George[8], and "for an order for indemnity of the informant" by Mr George. The grounds were that Mr T N George was no more than a "vehicle" for the bringing of the informations and relied on Mr George's advice and guidance throughout. The application said that Mr George "advanced allegations of conspiracy to defraud and improper conduct against the defendants that had insufficient foundation in the evidence and information available" thereby breaching his obligations to the Court.

[7] Mr George filed a notice of intention to defend on 2 June 2020 saying that, in instructing that his informations be withdrawn, Mr T N George acted on his own without consulting the group who instructed Mr George; that, as Mr Rasmussen, then substitute solicitor for Mr T N George, "took instructions to drop the charges from Mr Pyke[9], he should apply for Mr Pyke to give him indemnity;" and that "I cannot be responsible for Mr Rasmussen's mistakes; therefore he is not entitled to claim indemnity from me".

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4 *Allsworth v Puna & Brown* Judgment, 19 March 2021 & Summary of Judgment, 1 April 2020.

5 *Allsworth v Puna & Brown* Judgment, 1 September 2021.

6 *Allsworth v Puna & Brown* CA 3/2021, 3 December 2021. No application for leave to appeal to the Privy Council has been filed.

7 The defendants have acted in tandem throughout, instructed one counsel through separate firms of solicitors with differing roles, and have assumed mutual responsibility for all costs regardless of where or by whom they were incurred.

8 "Mr George" to distinguish him from Mr T N George.

9 Mr Pyke was called in by Mr Rasmussen to advise, but it is questionable if Mr George's application lies against Mr Pyke as he was not admitted to the Cook Islands' Bar until 4 August 2020.

[8] He followed that with a further application, dated 9 November 2020, saying that Mr T N George "was an innocent victim of both Wilkie Rasmussen and Mr Warren Pyke who should have to bear the costs of their mistakes"; that the applicants did not apply for costs against the CAC group[10] but that Messrs Pyke and Rasmussen "raided and seized this private prosecution"; "manipulated" Mr T N George by "unduly influencing him to the effect that there was no evidence to proceed with the charges and that he stood to be ordered to pay costs of huge proportions"; and that "by their ruthless behaviour in seizing and taking over the private prosecution, both Mr Rasmussen and Mr Pyke accepted unconditionally all risks and costs" and have "completely eliminated Norman George and the CAC group from any costs liabilities"[11].

[9] No similar pleading complexities affect the application for costs against Mr Allsworth.

[10] Despite the level of Crown Law's involvement, it makes no application for costs[12].

Legal principles

[11] Although all parties took deeply different stances as to their application to the facts, there was no great disagreement as to the legal principles applying to applications such as these.

[12] The principal statutory bases for awards of costs in criminal cases are, first, s 414(3) of the Crimes Act 1969 which provides:

> (3) Where any person is acquitted by the Court of any offence, the Court may order the prosecutor to pay to that person such sum as it thinks just and reasonable towards the costs of his defence.

and s 46(2) of the Criminal Procedure Act 1980-81 which provides:

> (2) On the withdrawal of an information the Court may award to the defendant such costs as it thinks reasonable, and any costs awarded may be recovered as if the costs were awarded on a conviction.

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10 The group which included Messrs T N George, Allsworth and, possibly, Mr George (T N George undated affidavit at 11). It called itself "Citizens Against Corruption" and became an Incorporated Society under that name on 18 January 2021. There is no application for costs against Citizens Against Corruption Inc.

11 In similar vein see Mr George affidavit, 6 November 2020, at 10.

12 Bell memo, 1 June 2021, at 2.

[13] Also relevant are s 92 of the Judicature Act 1980-81 which, though subject to the Crimes Act 1969, empowers the Court to make "such order as it thinks just" for the costs of any proceeding, such orders being discretionary, and s 3 of the Criminal Procedure Act 1980-81 which provides that in any matters of criminal procedure for which no Cook Islands' special provision has been made, New Zealand law as to criminal procedure is to be applied if not inconsistent with Cook Islands' law.

[14] It was common ground that the leading decision on the award of costs in Cook Islands' criminal cases is Judgment (No.6) of Nicholson J in *R v. George, Koronui and Vaile*[13]. This was a costs application by the three defendants in the longest criminal trial in the Cook Islands following their acquittal on all charges against them. After referring to s 414(3) and the Costs in Criminal Cases Act 1967 (NZ) and its Regulations, Nicholson J held[14] that while it would be appropriate to have regard to the factors in s 5(2) of the New Zealand Act "as providing part of a framework of factors to be considered in exercising the costs discretion granted by s 413(3)" it would be "inappropriate to directly apply" the New Zealand legislation when exercising the discretion.

[15] The judgment recounted the early Common Law position and New Zealand and UK authority and then cited[15] passages from the New Zealand Committee on Costs in Criminal Cases' report of 12 September 1966 where the following appeared:

> "25. We think everyone would agree that if a prosecution is brought either maliciously or unreasonably the defendant should receive his costs. On the other hand none of us consider that a defendant should expect costs merely by virtue of his acquittal; nor do we think this would commend itself to legal or public opinion generally. There is a substantial class of cases where in the popular phrase the accused is 'lucky to get off' – the prosecution has not quite clinched the case or the exacting standard of proof in criminal cases is not quite satisfied. Alternatively the accused may by his misconduct or lack of candour contribute to his own misfortune – he has "brought it on himself". In our opinion it would ordinarily be wrong to award costs in these sorts of cases.
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> 26. There is however a middle group and it is here that the application of the present law can give rise to criticism. We refer to cases where, although the police (if it a case of police prosecution) were diligent and acted reasonably in bringing a charge

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13 CRs 286-9/08, 292/08, 739-746/08, 771/08, 331-6/08, 257/08, 270-1/08, and 736-738/08, 10 December 2010 (NZT).
14 At [22].
15 At [35]-[37].

> in the light of the facts as they knew them, the defendant has nevertheless shown his innocence or the probability of his innocence. He has "cleared himself" either by discrediting the prosecution case or showing its insufficiency or by bringing credible witnesses of his own who have thrown a different light on the circumstances.
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> 38. It is our view that the law and practice with regard to the award of costs to successful defendants in criminal cases should be based on the principle that ordinarily costs should be granted were [sic] in one way or another the defendant has shown his innocence, and of course in cases where the prosecution has for one reason or another been brought improperly or negligently. The most difficult part of our task however has been to suggest a way in which this principle can be accorded legal effect without making the award of costs an almost general consequence of acquittal. As we have said we think this would be undesirable."

[16] The judgment referred to the observations of the NZ Court of Appeal in *R v. Connolly*[16] to the effect that significant awards of costs against prosecutions "could have the unintended consequence of acting as a disincentive for that agency to bring similar prosecutions in the future" but that "the possibility of an adverse costs order being made is likely to operate as an incentive for prosecuting agencies to keep standards of investigation and prosecution at an appropriately high level".

[17] After dealing with Cook Islands' authority, the judgment quoted with approval passages from the High Court of Australia decision in *Latoudis v. Casey*[17]where the following dicta appear:

> Mason CJ said:
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> "In ordinary circumstances it would not be just or unreasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs. As the Report of Committee on Costs in Criminal Cases (NZ) (1966), para 30 stated:

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16 At [39], (2007), 23 NZTC 21,172.
17 (1990) 170 CLR 534.

> "Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences."

It will be seen from what I have already said that, in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings: *Cilli v. Abbott* (47). Most of the arguments which seek to counter an award of costs against an informant as if it amounted to the imposition of a penalty or punishment. But these arguments only have force if costs are awarded by reason of misconduct or default on the part of the prosecutor. Once the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings.

The argument that police and other public officers charged with the enforcement of the criminal laws will be discouraged by the apprehension of adverse orders for costs from prosecuting cases which should be brought is without substance and is no longer accepted by the courts.

…

In similar vein, Toohey J said:

"If a prosecution has failed, it would ordinarily be just and reasonable to award the defendant costs, because the defendant has incurred expense, perhaps very considerable expense, in defending the charge. What Kirby P, said in *Acuthan v. Coates* of defendants to committal proceedings is apposite:

> "The section recognises that persons accused of criminal offences can be put to a great deal of expense in defending themselves. Unlike civil litigation, they cannot simply compromise the matter. Their liberty, reputation and pocket are, or may be, at risk."

It is unnecessary to speak in terms of a presumption; it is enough to say that ordinarily it would be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket."

[18] Following that Nicholson, J concluded[18]:

"To have a fair hearing in a defended criminal trial, particularly if it is long and complex, generally requires that a defendant be represented by an experienced criminal lawyer. This is likely to be at considerable personal financial cost if the defendant is not granted

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18 At [50].

legal aid. I agree with the rationale and current reality in a democratic society, such as the Cook Islands, of the quoted views of Mason CJ and Toohey J in the *Latoudis* case. A person who is deemed innocent by the law should generally not be substantially out-of-pocket for all the costs paid by him or her to successfully defend a criminal charge. …

… Consequently, and applying the interpretation principles stated in Article 65 of the Constitution of the Cook Islands, I do not consider that in exercising the discretion given by section 414(3) of the Cook Islands Crimes Act 1967 [sic], the Court should apply or be strongly influenced by the New Zealand Costs Act and its Regulations and the New Zealand cases on them."

[19] Then, after referral to the wide discretion in s 414(3), the judgment held[19]:

"For clarity and convenience, I state the principles that I find to apply to the exercise of the successful defendant's discretion under section 414(3) of the Cook Islands Crimes Act 1967 [sic]. The Court may order the prosecutor to pay to the successful defendant such sum as it thinks just and reasonable towards the costs of his or her defence. In ordinary circumstances an order for costs should be made in favour of a defendant against whom a prosecution has failed. In deciding whether to grant costs and the amount of any costs granted, the Court should have regard to all relevant circumstances and in particular (where appropriate) to –

(i) Whether the prosecution acted in good faith in bringing and continuing the proceedings;

(ii) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;

(iii) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty;

(iv) Whether generally the investigation into the offence was conducted in a reasonable and proper manner;

(v) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;

(vi) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;

(vii) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.

(viii) Whether the proceedings were lengthy, complex and/or of special difficulty.

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19 At [56].

(ix) The costs which the defendant has incurred with relation to the proceedings."

[20] That the Court has jurisdiction to order costs, including costs on an indemnity basis, against lawyers acting in particular cases as an exercise of the Court's inherent jurisdiction is now well-established[20] where a serious dereliction of the practitioner's duty to the Court is established. Counsel may be in jeopardy for costs if they do not act with reasonable competence, take reasonable and practicable steps to avoid unnecessary expense, waste the Court's time, fail to observe the profession's Codes of Ethic or make allegations of fraud or criminal guilt without a proper basis for so doing[21].

[21] That jurisdiction was affirmed for the Cook Islands by the Court of Appeal in *George v. Teau, Marii, Ratumu and Browne*[22] where what was in issue was whether costs, including on an indemnity basis, could be awarded against counsel who had advanced unfounded allegations of fraud. The Court of Appeal held that full indemnity costs were ordinarily reserved for a case wholly lacking in merit and "pursued in a way that could be described as reprehensible", though those steps were not mandatory.[23] It accepted dicta from *White Industries (Qld) Pty Limited v. Flower & Hart* (a firm)[24] where it was held that:

> "As a matter of principle an unwarranted allegation of fraud by a solicitor or, putting the matter more precisely, an allegation of fraud where there is no factual basis for it is sufficient, in my view to constitute a serious dereliction of duty or serious misconduct by a solicitor which will enliven the jurisdiction to order costs against the solicitor."

[22] In *George,* the Court of Appeal confirmed that in the Cook Islands, as elsewhere, costs may be ordered personally against the lawyers involved, especially those advancing unfounded allegations of fraud and cited *Guo v. Minister for Immigration and Multicultural Affairs*[25] that the "possibility" of there being fraud "is not enough to warrant the making of such a serious allegation" and that "legal practitioners have a duty to the Court to ensure that unsubstantiated allegations of such import are not made", a passage on which Mr Raftery QC, Senior Counsel for the defendants, strongly relied.

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20 *Myers v. Elman* [1940] AC 282, *Harley v. McDonald* [2001] 2 AC 678, 701-4, PC.
21 *Medcalf v. Weatherill* [2002] UKHL 27, [2003] 1 AC 120, *Orlov v. NZ Lawyers & Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606, at [207].
22 CA 2/2012, 20 February 2013.
23 At [68], *Counties Manukau Limited v. Pack*, Auckland Registry AEC 69/2005, October 2002.
24 (1998) FCA 806.
25 [2000] FCA 146, at 23.

[23] Also in *George*, the Court of Appeal adopted R 14.6(4)(f) of the NZ High Court Rules to the effect that indemnity costs may be ordered where allegations of fraud are made knowing them to be false or irrelevant; where there has been particular misconduct that causes loss of time to the Court and other parties; where proceedings are commenced or continued for an ulterior motive or in wilful disregard of known facts or clearly established law; and where allegations are made which ought never have to have been made, or unduly prolonging a case by groundless contentions, the "hopeless case" test[26], again a passage on which Messrs Raftery and Pyke, counsel for Mr T N George, strongly relied.

[24] As summarised by Mr Pyke[27] there is jurisdiction to award costs against lawyers to reimburse the client and indemnify the injured party, here the defendants, for costs caused by that counsel if there has been a "serious dereliction of duty" to the Court, or "gross neglect or inaccuracy in a matter which is inexcusable", with that jurisdiction being available even when counsel is not a party to the proceeding. Mr Pyke submitted that any costs order against counsel should only be against Mr George because Mr Rasmussen was retained only at a late stage and did not act for Mr T N George when the bulk of the costs were incurred, with Mr Pyke not acting at all as counsel up to the date of withdrawal of the informations, but only being an adviser[28]. He noted that Mr T N George had made no application for costs against either Mr Rasmussen or himself.

Procedural

[25] There are several costs applications to be dealt with, but, because the authorities and a fairly large proportion of the factual narrative is common to all, although the two matters are legally separate the issues are linked and sequential, rather than issue two separate judgments duplicating large passages in both, it has been decided to deliver one consolidated judgment covering all applications. Separate orders under s 414(4) of the Crimes Act 1969 will be required for the separate parts of the consolidated judgment.

[26] Though there was no order to that effect, at this hearing all parties referred to and relied on all parts of all the files concerning the private prosecutions – including all evidence, the

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26 At [74].
27 Submissions of 15 January 2021, at 13.
28 See fn 9 supra.

bundles of documents filed by the defendants[29] and the Court of Appeal file – regarding it all as relevant to, and admissible in, the costs applications. In view of that, these judgments adopt that approach.

Matters Common to All Applications: Up to 16 March 2020.

Background

[27] Though detailed later, there are two streams of events which, broadly put, gave rise to the matters pleaded in the two private prosecutions.

[28] The first is that, following the 14 June 2018 Cook Islands' General Election and the official declaration of the results by the Chief Electoral Officer on 28 June 2018, and before election petition judgments affected the results, the Democratic Party, the main opposition party in the 2014-18 Parliament, held 11 of the 24 seats in the Cook Islands Parliament; the CIP, the main governing party in the 2014-18 Parliament, held 10 seats; the One Cook Islands Party held one seat and the remaining two seats were held by candidates who stood as independents. One of the independents was Mr Robert Tapaitau who defeated the CIP incumbent, Mr Willie John, for the Penrhyn seat.

[29] It was therefore clear that, for the leader of either of the two main parties to be able to claim to H.E. Queen's Representative that they were "likely to command the confidence of a majority of the Members of Parliament",[30] in the usual fashion for political parties not given a majority by the electorate, the Democratic Party and the CIP had to negotiate a coalition or confidence and supply agreement with the three successful MPs who were not members of their parties to enable them to form a government for the ensuing four year Parliamentary term. Commencing immediately after the election, both did that assiduously.

[30] The second stream of events is that, on 30 June and 3 July 2018, Air Rarotonga flew two charter flights, Rarotonga-Penrhyn return and Rarotonga-Pukapuka return[31]. The flights

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29 Not all of which was otherwise in evidence.

30 Art. 13(2) of the Constitution.

31 Originally there was to be only one round trip, Rarotonga-Pukapuka-Penrhyn return, but, for operational reasons, the one flight became two. Nothing hung, or hangs, on that.

cost $24,886 and $22,770 gross respectively, all of which was paid from Government funds[32]. The passengers on the Penrhyn flight included Mr and Mrs Tapaitau, Mr and Mrs John and the John's granddaughter. The passengers on the Pukapuka flight included the newly elected CIP Member for Pukapuka-Nassau, Mr Tingika Elikana and his wife, and the retiring MP, Mr Willie Lazaro and his wife.

[31] A small number of voters – mainly Democratic Party supporters or unsuccessful Democratic Party candidates – almost immediately took the view that not only were those two streams of events connected, but that Messrs Puna and Brown were instrumental in arranging the charter flights, instrumental in ensuring that the charter fees were paid from Government sources, instrumental, for Government-forming purposes, in ensuring that Messrs Tapaitau and Elikana were passengers on the flights and that, in all those circumstances, their actions might amount to a fraudulent conspiracy to commit criminal conduct to the benefit of the CIP through the improper use of public funds[33].

[32] Of the group, Messrs Beer and T N George, both unsuccessful Democratic Party candidates in the election, and Mr Allsworth, decided to investigate. Mr Allsworth said he had become:

> "…. suspicious that some unlawful and inappropriate activities were going on behind the scene, activated by the two leaders of the CIP, PM Henry Puna and DPM Mark Brown … [that their actions] were unlawful and criminal [as] both defendants were completely barred from having access to public funds!"[34]

[33] Mr Beer lodged a request under the Official Information Act 2008[35] but was "hampered by the slow responses" and Mr Allsworth complained to the police on 14 January 2019 "when convinced that a serious crime of conspiracy to defraud public funds had been committed"[36].

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32 The net cost after payments from other sources was never quantified in evidence.
33 Allsworth affidavit, 9 March 2020, at 15ff.
34 Ibid, at 8 & 13. Emphasis in original.
35 "OIA".
36 Ibid, at 29: see also 64.

[34] Having received no satisfaction from either quarter, Mr Allsworth decided he could "no longer trust the Commissioner of Police to do anything about my complaint."[37] He "gave up when I realised the Commissioner was just covering up for his friend PM Henry Puna."[38]

[35] Mr T N George reached the view that obtaining the truth about the rumours was "futile or impossible under the guise of national security or probably compromised or instructed by someone in power not to comply with any request for access to material information"[39].

[36] His narrative of what preceded the withdrawal of his third and last set of informations reads[40]:

> "11. After the election, I was approached by several people asking if I was interested in becoming the informant in a case being prepared against the Prime Minister of the Cook Islands, Henry Puna, and the Deputy Prime Minister, Mark Brown. I believe that Mr Norman George was the organizer of this group. When I was approached, I was told that preparation for a private prosecution had already been started.
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> 14. After the initial approach, I attended several meetings at Norman George's house, where the case was discussed. It was clear who was in charge, Mr Norman George. Norman George said that he had worked night and day on the proposed case and that there were several people who were deployed to collect information towards the case.
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> 15. When the charges were ready to be filed, Mr Norman George asked me to accompany him to the Registry for me to sign relevant documents. I recall that the Registrar told Mr Norman George that I was not the person to sign the documents but himself, that is Norman George. Mr Norman George proceeded to sign these documents and file them with the Registrar. These were the first lot of documents.
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> 16. Sometime later, we had another meeting organised and chaired by Mr Norman George. Issues to do with raising funds for the case were discussed, particularly for the group to pay for Mr Norman George's legal fees. Mr Norman George had also acquired further documents, which I was not given to examine.
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> 17. Mr Norman George and I went to the Registry for a second time, to file further documents. I was asked to sign a document which was witnessed by the Registrar of the High Court. I do not recall what was in this document. I relied on Mr Norman George for directions whether to sign documents.
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37 Ibid, at 36.
38 Allsworth affidavit, 29 August 2020, at 5.
39 T N George affidavit in support of ex parte discovery, 17 December 2019, at 10.
40 Undated affidavit (November 2020?), at 11ff.

19. There were several other meetings at Mr Norman George's house. Mr Norman George did most of the talking. I understood very little of what he said, since he addressed the whole group, not me individually. He made speeches at these meetings.

20. I was not sure what I was getting myself into. Mr Norman George showed his authority, that he was in charge of the case, and that we should have faith in him. However, differences were emerging between him other people involved, both about the focus of the case and about funding to pay for the costs. Mr Norman George became forceful when addressing these concerns.

21. After this point, I was left out in the cold by Mr Norman George. I was not being kept informed about the implications of this case to me personally, to my financial interests, and to my businesses …

22. Mr George talked up the case all the time. Mr Norman George was determined to take the case to trial come what may.

23. I started to feel that I was being used to enable this prosecution to occur, because that was what Mr Norman George and some others wanted to happen.

24. I observed Mr Norman George becoming more and more dictatorial. He would become angry when questioned, and I could see his interest in the case was more about politics than anything else.

…

26. … I became very, very anxious about my position. I emphasise that Mr Norman George did not explain to me that in the event of this prosecution not succeeding that I would be liable for the defendants' costs.

[37] Then, after referring to instructing Messrs Pyke and Rasmussen, Mr T N George said:

31. I have been served with applications for costs by the lawyers for the defendants. I say that Mr Norman George ought to pay any costs awarded in favour of the defendants because he used me to be the person to file this case, for his own purposes, and to advance a political agenda, and because he permitted me to sign documents making allegations of criminal conduct and conspiracy without ensuring there was a proper basis in the evidence to make them.

32. At all times when taking steps to file and pursue this case I relied on Mr Norman George's statements that the defendants had to be held accountable. I had only a vague understanding of how the case was to achieve this, and of the expenses issue. I relied on Mr Norman George's legal advice that this was a claim that was proper to bring, to hold the defendants accountable. I believed him that wrongdoing had occurred and this was the right thing to do.

33. Bringing the private prosecution was Mr Norman George's idea and his idea alone, not mine. When I took Mr Norman George's word that the defendants had acted wrongly, he did not say that this was a private prosecution. Mr George said that case was strong, that the travel expenses were not legally available and that it was the defendants who were legally accountable for this. Mr Norman George used strong language, saying that the defendants had acted corruptly, and they knew they were

> not entitled to authorise the expenses. Mr Norman George was so confident and convincing that I went along with what he recommended.

[38] Mr Allsworth formed the group of concerned citizens and, in mid-late November 2019, approached Mr George to ask him to act for the group in a private prosecution with him acting as prosecutor[41].

[39] Aspects relevant to the *George* criteria are that, in the run up to the filing of the first set of informations, Mr Allsworth said that on 5 December 2019, and again on 9 December, they approached the Democratic Party caucus and, after Mr George had given its members a full briefing[42]:

> "We tried to get the Democratic Party to support and finance our cause. All we received was their moral support. They in fact did not make a decision whether to support the private prosecution or not.[43]"

Informations

[40] The result was the first set of informations against Messrs Puna and Brown[44]. They were dated 6 December 2019 and signed by Mr George[45].

[41] Under s 16 of the Criminal Procedure Act 1980-81 informations must "contain such particulars as will fairly inform the defendant of the substance of the offence with which he is charged" including the "time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed".

[42] The defendants were entitled to know the precise nature of the charges which they faced and the particulars as set out in s 16, so the varying nature of the informations against them requires a degree of analysis.

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41 Mr T N George said it was he who approached Mr George and gave him all the material he had: affidavit of 17 December 2019, at 9 & 10.

42 Allsworth Affidavit, 20 August 2020, at 16-22, 32-5.

43 Allsworth Affidavit, 9 March 2020, at 42 & 43.

44 CRN 724-727/19.

45 Apparently at the direction of the Deputy Registrar under the extended definition of "informant" in s 2 of the Criminal Procedure Act 1980-81.

[43] The first set, in two pairs, one against each defendant, alleged offences against s 280 of the Crimes Act 1969 in conspiring with each other between 14-16 June 2018 [sic] by fraudulent means to defraud the Queen by participating in a scheme:

> "to bring new newly elected and former Members of Parliament together with their wives from the island of Pukapuka and Penrhyn islands by chartering an Air Rarotonga jet aircraft for the sum of … $32,000 by fraudulently using public funds designated for the emergency evacuation of critically sick patients when no such emergency existed".

[44] The other pair of charges were under s 64(2)(d)(i) of the MFEM Act alleging that the defendants as caretaker ministers between the same dates did an act to procure for themselves or their political party, the CIP:

> "the improper payment of public money namely the sum of … $32,000 for the charter of an Air Rarotonga jet aircraft to fly to islands of Pukapuka and Penrhyn to uplift newly elected but unconfirmed Members of Parliament and former Members of Parliament and their wives under the pretext of an emergency medical evacuation when no such medical emergency exist [sic]."

[45] However, on 6 February 2020 the first set were withdrawn and eight new informations[46] replaced them. In essentially two quartets they alleged that between 14-30 June 2018 [sic]:

(a) The defendants conspired to defraud the Crown by participating in a scheme to bring the "newly elected but unconfirmed" MP for Penrhyn, Mr Tapaitau and his wife, "who were not entitled to such travel' under "ss 6(a) and 7 of the Civil List Tribunal Order 2009/04" [sic[47]] by "fraudulently entering into an arrangement to have Mr Willie John as a sick patient requiring an emergency evacuation when the circumstances of his illness did not meet the criteria for such" being an offence under s 280 of the Crimes Act 1969[48];

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46 CR 71-78/20.

47 The references should have been to the Civil List Act 2005 and the Remuneration Tribunal (Queen's Representative and Members of Parliament Salaries and Allowances) Order 2009/04.

48 The charge against Mr Brown includes reference to "chartering an aircraft with public funds", a passage which is absent from the comparable charge against Mr Puna.

(b) Similar charges under s 280 of conspiracy to defraud the Crown by bringing to Rarotonga "newly elected but unsworn MP" for Pukapuka, Mr Tingika Elikana and his wife and former MP Tekii Lazaro and his wife (all residents of Rarotonga) who were not entitled to such travel under ss 6(a) and 7 of the Civil List Tribunal Order 2009 by "fraudulently chartering an Air Rarotonga aircraft with public funds from the Civil List";

(c) Charges under s 64(2)(d)(i) of the MFEM Act 1995-96 by acting for the purpose of procuring for themselves or for the CIP the improper payment of public money by chartering a flight to bring the newly elected but unsworn Mr Tapaitau and his wife" and former MP Mr Willie John and his wife" who were not entitled to such travel under the Civil List Tribunal Order 2009" under the "pretext of an emergency medical evacuation";

(d) Similar charges that for the purpose of procuring for themselves or for the CIP the improper payment of $22,770 of public money for the charter of an Air Rarotonga jet to Pukapuka to fly to Rarotonga newly elected but unsworn MP Mr Tingika Elikana and his wife and former MP Mr Tekii Lazaro and his wife (all residents of Rarotonga) who were not entitled to such travel under ss 6(a) and 7 of the Civil List Tribunal Order 2009.

[46] The 6 February 2020 informations were withdrawn on 2 March 2020 and replaced with four others[49] which, again in pairs, in essence charged the defendants with, between 14-30 June 2018 [sic]:

(a) Conspiracy to defraud the Crown by participating in a scheme whereby public money was "fraudulently used for private purposes, namely the charter of an aircraft paid for by cash from Ministry of Health Medevac Scheme under the false pretence of a sick patient evaluation" for the purpose of transporting Mr Tapaitau and his wife, "to secure his support for the Cook Islands Party and the personal benefit of the defendants", that being alleged to be an offence under s 280 of the Crimes Act 1969;

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49 CR 136-9/20.

(b) Conspiracy to defraud the Crown by participating in a scheme whereby public money was fraudulently used for private purposes, namely the charter of an aircraft paid for under the Civil List Act 2005 for the purpose of flying the newly elected MP for Pukapuka, Mr Tingika Elikana, "in order to create political unity and stability in the CIP when Mr Elikana needed to be pacified and consoled for missing out on a Cabinet post", together with former MP Tekii Lazaro and their wives (all residents of Rarotonga) who were not entitled to such travel, also charges under s 280 of the Crimes Act 1969;

(c) Charges under s 64(2)(d)(i) of the MFEM Act of acting "for the purpose of procuring for themselves or for the CIP" the improper payment of $24,886 of public money for the charter of an Air Rarotonga jet to Penrhyn to fly Mr Tapaitau and his wife and former MP Mr John and his wife (all residents of Rarotonga) who were not entitled to such travel under ss 6(a) and 7 of the Civil List Tribunal Order 2009;

(d) Similar charges under s 64(2)(d)(i) of the MFEM Act of "acting for the purpose of procuring for themselves or any organisation namely the Cook Islands Party" the improper payment of $22,770 of public money for the charter of an Air Rarotonga aircraft to Pukapuka to fly to Rarotonga the newly elected but unsworn MP Mr Tingika Elikana and his wife and former MP Mr Tekii Lazaro and his wife (all residents of Rarotonga) who were not entitled to such travel under ss 6(a) and 7 of the Civil List Tribunal Order 2009.

[47] Those are the essentials of the informations filed. Even disregarding the repeatedly superfluous wording, the numerous grammatical errors, the incorrect dates alleged and the altering phrasing of the charges, not least that the original set of informations were based on there only being one flight when the fact there were two was publicly known, there is weight in Mr Raftery's submissions that the remainder of the informations did not fully comply with s 16.

[48] The prosecution obviously requiring active management, a preliminary conference with counsel was called on 17 December 2019. That was followed by a series of other conferences leading up to a fixture, scheduled to begin on 23 March 2020. However, during a conference

on 16 March 2020, Mr T N George, by then acting through Messrs Pyke and Rasmussen, obtained leave to withdraw his third set of informations on the basis that there was insufficient evidence to proceed to trial and the informations should never have been issued.

[49] Other than the foregoing analysis of the varying forms of the informations against the defendants, the question of disclosure and details of the discussions between Crown Law and Messrs George and Allsworth it is unnecessary to recount the detail of the matters discussed in the conferences; it is all in the Minutes.

Disclosure

[50] As far as disclosure was concerned, Mr George issued a wide-ranging series of letters to Government departments, Vodafone and others to obtain details of text messages involving the defendants and Mr Taipatau and other material which was thought might be useful to the prosecution. He followed up the letters with an application dated 16 December 2019 for production of the documents, brought on an ex parte basis because of the "real, actual and imminent threat" of documents being destroyed. Mr George was critical of the fact that the recipients of his demands did not fully and immediately comply with them.

[51] Ms Bell, then the senior prosecutor at Crown Law, heard of the informations, took over the collection and dissemination of the information the informant required, treated Mr George's demands as requests under the OIA and coordinated obtaining and distributing the discoverable material.

[52] Because some matters of disclosure remained contentious, that aspect of the prosecution was diverted to Doherty J who dealt with the search warrant applications which by then had been filed, in a series of teleconferences over the period up to 10 March 2020 when he issued seven search warrants and, at the Crown's request, clarified the terms of issue in a further conference held on 12 March 2020. Disclosure remained incomplete at 16 March 2020.

[53] An aspect of disclosure which continued to loom large during this period and throughout the second prosecution was that "three boxes of evidence" which Mr George and the group had accumulated had been given to Mr Rasmussen on 12 and 14 March 2020 and had not been returned when the first prosecution ended. On 22 March 2020, Mr George

applied, again ex parte, for the boxes' return to enable the charges to be re-laid and because Mr Rasmussen "might destroy the evidence in those boxes".

Discussions: Bell, George & Allsworth

[54] The defendants' costs applications were supported by an affidavit from Ms Bell[50].

[55] After learning of the first set of informations, she spoke with Messrs George and Allsworth on several occasions with increasing knowledge of the matter as disclosure and preparation for trial proceeded.

[56] On 7 January 2020 they made an informal request for Crown Law to take over the prosecution. She told them the Solicitor-General had not then ruled it out but asked for a formal request, commenting that conspiracy was difficult to prove. They provided her with Mr Allsworth's affidavit of disclosure materials of 23 December 2019 listing the documents and witness statements, all made after 6 December 2019, in the informant's possession. She told them the "statements and documents provided were insufficient to prove the charges and were deficient in disclosing a sufficiently credible factual narrative".

[57] After sending all parties the first tranche of disclosure information on 27 January 2020[51], she formed the view that the material provided a "good picture of what had taken place" from which she concluded that the then charges "could not be sustained" and told Messrs George and Allsworth so.

[58] She was also concerned with credibility issues concerning two of the witnesses, a Mr Glassie and a Ms Maunga. Mr George claimed Mr Glassie's signature on a document had been forged, an allegation he repeated[52] and which resurfaced during the March 2021 trial. Ms Bell informed him she thought the assertion unfounded, but would refer it to the Police were it true.

[59] Ms Bell reviewed the second affidavit of disclosure materials[53] but concluded:

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50 All quotes from Bell affidavit, 23 April 2020.
51 21 June 2021 defendants' Bundle, at 44-104.
52 Mr George memo, 3 February 2020, at 8.
53 Allsworth, 3 February 2020 which contained some duplicates.

> "None of the new information provided was sufficient to cure the prosecution or change the factual narrative that had already been established by the earlier provision of official information."

[60] Shortly afterwards, Messrs George and Allsworth again asked Crown Law to take over the prosecution, a request which led Ms Bell to tell them that she "had reviewed all the material and we would not be taking it over as in our view it did not meet the test for prosecution" for reasons she indicated. She said she:

> "advised them that if they continued with the prosecution and were unsuccessful that there would be consequences, one of them being costs. I said to them that if they withdrew the charges now then we would be happy to support them in respect of any costs application as we appreciated that there had been failures on the part of the government both in terms of earlier requests for official information and the police inaction to the initial complaint. I also advised them that if they continued with the prosecution and were unsuccessful we would support the defence with any application for indemnity costs".

[61] In that comment she was:

> "trying to give them a way out of the prosecution so that the group of people behind the prosecution could retain some credibility. I was also trying to help them to avoid some of the possible consequences that might have emanated from the prosecution if it proceeded through to trial".

[62] They next met on 17 February 2020, mainly concerning the Crown's opposition to the search warrant applications. She:

> "told them again that the Crown did not view that there was a case however Norman [George] told me that I was wrong. I asked him to explain why we were wrong but he refused to do so".

[63] Then, on 10 March 2020, she was contacted by the Secretary of Health whom Mr George had approached. After a comment from the Secretary, replying to something a member of the group had said, she told Mr George that the "health charter was not pre-planned by the PM or DPM". This was advice highly relevant to the Penrhyn charges.

[64] Ms Bell's view was that withdrawal of the charges was a "sensible action by the prosecution".

General re this period

[65] Several other affidavits are relevant to application of the *George* criteria to these applications.

[66] Two are affidavits from Mr T N George[54] dated 16 December 2019 and 9 November 2020.

[67] The earlier, sworn in support of the ex parte application for production of documents, began by summarising rumours circulating after the June 2018 election and detailed – mostly hearsay – the course of events earlier reviewed until the approach to Mr George and concluded as to Mr T N George's motivation in acting as informant:

> " … having given this matter a lot of thought especially the consequences to my person, family and business and whether I should pursue my civil duty to seek the truth of these allegations of corruption against the two defendants, I came to the conclusion that it is my duty to issue private prosecution against the two defendants for my own personal peace of mind and the silent majority of concerned citizens of this country".

[68] Mr T N George continued that because nearly all the witnesses to be subpoenaed as prosecution witnesses were public servants "then cooperation with the private prosecution team are expected to be hostile as their loyalty is to the government of the day".

[69] The second amplified the evidence already recounted saying that at the original meeting in Mr George's house "I made it clear that I did not want my name involved" despite the urgings of the other group members. He then deposed to conflicting advice he received from members of the public that, despite Mr George's positive attitude, he might become liable for costs. Mr Pyke was the "first person who sat down and carefully explained to me what it meant to be an 'informant' and that he "believed my case as informant could not succeed", advice given orally and in writing, when "for the first time I realised I could be facing very large legal costs" [and] at this point I became very, very worried". Repeating that his instructions to Mr Rasmussen were to "put an end to this in whatever way he could" he said he trusted him and that Mr Rasmussen had "done exactly what I wanted him to". He said[55]:

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54 16 December 2019, at 3-12, especially 11.
55 9 November 2020, at 3-21, especially 19.

> "to begin with I was just along for the ride, going to the meetings. I thought I had my back covered, but I realised I had some sort of role of my own when I was asked on the second time going to the Registry, to sign the documents".

[70] Mr Allsworth's affidavit[56] repeated much material from his previous affidavits, but amplified some issues, including that if the police had investigated the matter Crown Law would be involved and "our lawyer Norman George would not be accused of political bias which Wilkie Rasmussen and counsel for the defendants have done, unfairly". He concluded:

> "There is no political motive in what we do and are doing, we are acting in the public interest to protect the integrity of what ought to be the principles of good governance. The facts are crystal clear, both defendants had no right to use public funds to finance two private charter flights at the cost of the Cook Islands Tax Payers of $47,586. In doing so, they both commit [sic] the criminal offences they are accused of [and that] this application for costs against Norman George and our group have been filed by strangers who have no right to be involved; therefore, they should be made to pay for their mistakes."

[71] He elsewhere asserted that Mr T N George is easy to persuade as he is "street smart business-wise but not very smart with legal matters unless it is slowly and thoroughly explained to him in Maori'[57].

[72] Another member of the group, a Mr Dyer who was Mr T N George's election campaign manager, said in an affidavit[58] that once Mr George was instructed he acted as "lawyer, chief of operations in charge of supervising how the investigations were carried out" as no-one else had the experience, though some of the group interviewed witnesses. He concluded:

> "Wilkie [Rasmussen] and Mr Pyke acted unilaterally to hijack our case, they lacked the competence to assess the evidence thoroughly and ended up facing these claims for costs. I compare their actions to setting a house on fire, then expecting us to put out the fire. They should do it themselves."

[73] Mr George did not appear to take issue with others' descriptions of his approach to the prosecutions. In an affidavit he said[59] he had "no political interest or conflict in this private prosecution', and the instructions "came as a complete surprise" but that:

> 6. Once I accepted the brief, I tore into it in the style that I am accustomed to.

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56 6 November 2020, at 24-28, 35.
57 20 August 2020, at 29.
58 6 November 2020, at 21-2.
59 6 November 2020, at 4-9.

7. I combined all my investigative skills as a former police detective in the Auckland CIB directing interviews of witnesses, drafting search warrant applications, appearing at all conference call hearings before the Chief Justice and filing submissions as required.

8. We obtained a wealth of evidence from interviewing witnesses.

9. There is no doubt in my mind that the weight of the evidence we have and the telephone text messages between the defendants and Tapaitau and each other, yet to be obtained, will advance our case where we aim it to be, to prove all charges beyond reasonable doubt.

PART II

16 March 2020 – 19 March 2021: Puna & Brown v Allsworth

[74] As mentioned Mr T N George's latest set of informations were withdrawn by leave on 16 March 2020, Mr Rasmussen acknowledging they should never have been laid and the prosecution had no evidence likely to lead to conviction. That largely ended Mr T N George's involvement in matters relevant to these applications.

[75] That notwithstanding, on 31 March 2020 Mr George was reported[60] as saying that the remaining members of the group had instructed him to relay the charges. Beyond that comment, there is no evidence of the remaining members of the group – even Mr Allsworth – undertaking any reassessment of the material in their possession in light of Mr Rasmussen's concessions, or even getting any information, including Ms Bell's opinions, on which to undertake that exercise.

[76] In fact, there is no evidence of any action being taken in accordance with the group's instructions until 22 July 2020 when Mr Allsworth swore out eight informations[61] which were described in a 23 December 2020 judgment refusing the defendants' application for permanent stay of the informations in the following way:

> [2] The eight informations – effectively two quartets[62] – allege that:
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> (a) Between 14-30 June 2018 they did any act to procure for themselves or the Cook Islands Party the improper payment of public money, $24,886, for

60 *Cook Islands News.*
61 CRN 308-315/2020.
62 The informant elected not to proceed with the MFEM charges: Judgment 19 March 2021, at [3], [139].

the charter of an Air Rarotonga flight to Penryhn to uplift the newly elected Member for that constituency, Mr Robert Tapaitau – elected as an Independent – and his wife and the former Member for that constituency Mr Willie John, and his wife, none of whom were entitled to free transport under the Civil List Order 2009-004 thereby committing an offence under s 64(2)(d)(1) of the Ministry of Finance and Economic Management Act 1996.

(b) The second pair of informations also allege offences against the same section of the MFEM Act but between 14 June – 3 July 2018, with the public monies said to be $22,700, to charter an aircraft to Pukapuka to uplift the newly elected CIP Member for the Pukapuka-Nassau constituency, Mr Tingika Elikana, together with his wife and the former Member for that constituency, Mr Tekii Lazaro, and his wife when such persons were not entitled to free travel under the Civil List Order 2009-004.

(c) The third pair of informations alleges breach of s 280 of the Crimes Act 1969 in that between 14-30 June 2018, the defendants are alleged to have conspired with each other to defraud the Crown by deceit or fraudulent means by participating in a scheme whereby Crown money was fraudulently used for private purposes, namely the charter of an aircraft with cash from the Ministry of Health Medevac Scheme under the false pretence of a sick patient evacuation by the Penryhn flight to secure Mr Tapaitau's support for the CIP and the personal benefit of the defendants.

(d) The fourth pair of informations also allege an offence under s 280 of the Crimes Act 1969 in relation to the Pukapuka flight alleging that the charter was paid for under the Civil List Act 2004 with cash to "create political unity and stability in the Cook Islands Party when Mr Elikana needed to be pacified and consoled for missing out on a Cabinet Post."

[77] What then occurred is detailed in the 23 December 2020 but as the detail is to be regarded as incorporated into this judgment only a brief resume is necessary.

[78] On 7 August 2020 the defendants applied for permanent stay of the Allsworth informations on the grounds that they were an abuse of the Court's processes or that the defendants were deemed to have been acquitted in the T N George prosecution.

[79] The stay application was heard on 7 December 2020 and, on 23 December 2020, dismissed.

[80] Relevant as far as the application of the *George* criteria to these costs judgments are concerned:

(a) Following delivery of the 23 December 2020 judgment, a number of teleconferences took place, mainly of housekeeping issues leading to a fixture for the week beginning 15 March 2021 but also including the issue of search warrants, prosecution disclosure and other pre-trial requirements including delivery of the necessary statement of the overt acts of the defendants said to constitute the conspiracy and the evidence on which the informant did not intend to rely;

(b) Discovery, in the sense of the required witness depositions, took place in three stages on 12, 17 and 26 February 2021[63]. The delivery by the prosecution of the statement of the overt acts said to constitute the conspiracy occurred on 25 February 2021. Discovery included delivery of the three boxes of evidence held by Mr Rasmussen and, on 12 February 2021, Crown Law sending Mr George the text messages which became an exhibit at trial on which the prosecution heavily relied.

15-19 March 2021

[81] The defendants' trial took place in the week beginning 15 March 2021 with the presentation of the prosecution's case occurring up to 18 March 2021, following which the defendants submitted that there was no case to answer and that the defendants should therefore be acquitted, applications which were granted in the oral judgment delivered on 19 March 2021.

[82] Again for the purposes of these costs judgments, the detail in the judgment of 19 March 2021 need not – save for the following summaries – be recounted as the judgment is to be regarded as incorporated into these judgments as are the evidence and exhibits on which the judgment was based.

[83] The exceptions are:

63 With a number of the depositions being unsigned as the deponents declined to endorse them.

(a) The discussion as to the entitlement of MPs and former MPs to publicly funded travel under the Civil List Act 2005 and the Remuneration Tribunal (Queen's Representative and Members of Parliament Salaries and Allowances) Order 2009/04 which highlighted the misreading – admittedly the widespread misreading – of the enabling provisions and which culminated in the following passage:

> [115] The legal position is now clear given the interpretation earlier in this judgment and it may well be that such mistakes or misapprehensions do not reoccur. But in terms of bearing on whether the prosecution has proved the questions of conspiracy, fraud and deceit in relation to the Pukapuka matter in this case, the fact is that Mr and Mrs Elikana were entitled to constituency travel after the Section 78 Declaration and while Mr and Mrs Lazaro may not have been entitled it was funded in accordance with the mistaken belief which had been in force since at least the 2010 General Election.
>
> [116] All of that confirms the earlier findings that in relation to the Pukapuka informations for the reasons earlier summarised, the prosecution has not shown that there was fraud or deceit sufficient to raise a prima facie case, still less that the arranging and funding of the Pukapuka flight occurred as part of the unpleaded conspiracy to infringe s 280.

(b) The discussion concerning the Penrhyn flight and the contemporaneous discussions between Mr Tapaitau and Messrs Puna and Brown and between Mr Tapaitau and Mr Willis of the Democratic Party, coupled with the discussion concerning the source of payments for the flight, which culminated in the following:

> [133] In those circumstances, while, as mentioned, it is not difficult to understand the suspicion those outside the email chain would muster assuming, though without evidence, that Mr John's ailment did not warrant a Medivac flight but was merely a convenient ruse to get Mr Tapaitau to Rarotonga at public expense, it is clear that the Penrhyn flight was in fact a true Medivac flight of the type requiring management and not urgent treatment with the cost being defrayed between the Ministry of Health for Mr John and as was by then appropriate, with the fares for the Tapaitau's being paid from Parliamentary Services. The granddaughter's flight was paid for privately.
>
> [134] That falls precisely within the regime for the setting up Medivac flights of that type at MOH cost, defraying as much of the expense as

> possible to Parliamentary Services and the offering of any spare seats on the flight to other members of the wider Government to further reduce cost.
>
> [135] So the conclusion must be, in the light of all of that, that the suggestion in the informations that the Penhryn flight was a false pretence of a sick patient evacuation for Mr John with the real purpose being to bring Mr Tapaitau to Rarotonga for CIP purposes is unsubstantiated. The flight was irrefutably a Medivac flight with the cost to the MOH being laid off as far as possible in favour of persons who were by then entitled to free air travel pursuant to the 2009/04 Order.

(c) All that led to the following:

> [136] Rounding all that off, and dealing first with the Pukapuka flight, the finding is that it has not been shown to the required standard that the circumstances amounted to the furtherance of a criminal conspiracy between Messrs Brown and Puna to commit a crime within the meaning of the authorities. No conspiracy was alleged and no crime proved, whether under s 280 or otherwise. In part, their actions as proved may have been legally erroneous but no part has been shown to have been founded in deceit or in other fraudulent means or with the intention of defrauding the public, and accordingly it has not been shown that the defendants have any case to answer in relation to the Pukapuka flight. There being no case to answer, the consequence of that is that informations 311/20 and 315/20 must be dismissed as having no possible basis for success. The defendants are therefore acquitted on those informations and verdicts of "Not Guilty" are entered on the same.
>
> [137] In terms of the Penrhyn flight, again it has not been shown to the required standards that Messrs Brown and Puna entered into a conspiracy to commit a crime within the terms of the authorities, either under s 280 or otherwise. It has not been shown that their actions in respect of that flight were motivated by deceit or other fraudulent means and it has not been shown that such actions of theirs as were proved to have occurred were intended to defraud the public.
>
> [138] Accordingly the orders will be that those two informations must also be dismissed as being incapable of leading to a verdict of guilty. The defendants are therefore acquitted on informations 310/20 and 314/20 and verdicts of "Not Guilty" are entered on the same.

[84] The plethora of issues with which the judgment was required to deal and the pivotal passages just recounted bear on the complexity and difficulty of the prosecution, factors which are relevant to *George (viii)*.

Events after 19 March 2021

[85] On 27 April 2021, Mr Allsworth, acting on his own and not through Mr George, filed an application for leave to extend the time for him to file a notice of appeal against the acquittals but chose a civil form. The application lapsed.

[86] However, on 6 July 2021 Mr Allsworth, by then again acting through Mr George, applied for leave to appeal the 19 March 2021 judgment and extend the time for him so to do.

[87] That application was heard substantively on 23 August 2021 and dismissed in a judgment delivered on 1 September 2021 which held:

> [74] The result is:
>
> (a) That there is no jurisdiction for informants to appeal to the Court of Appeal judgments of the High Court holding there is no case for defendants to answer on informations brought against them, dismissing the informations against them and acquitting them accordingly;
>
> (b) That even were there jurisdiction for the informant to appeal the oral judgment of 19 March 2021 in this matter to the Court of Appeal, for the reasons set out in this judgment the facts and the law do not disclose sufficient basis for extending the time for the informant to seek leave to appeal to the Court of Appeal or to make an order in the informant's favour in that regard and the applications for orders to that effect are accordingly dismissed;

[88] As elsewhere recorded Mr Allsworth's appeal against the refusal of leave was dismissed by the Court of Appeal[64]on 3 December 2021 with costs of $1,500 to the present applicants[65].

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64 CA 3/2021.

65 The CA declined to award indemnity costs on the grounds of public interest in "this novel threshold issue", described its award as "relatively modest", and gave no indication as to the appropriate approach to costs in this Court: at [59] & [61].

PART III

Submissions re Puna & Brown v T N George; T N George v N George; N George v Pyke & Rasmussen

[89] In support of all the costs applications counsel for the defendants filed two principal sets of submissions, 24 April 2020 and 21 June 2021[66], carefully analysing the progress of the prosecutions, together with bundles of documents and additional memoranda and submissions and put forward the case for the award of indemnity costs or, if that failed, just and reasonable costs orders against Mr T N George.

[90] In his oral presentation[67], Mr Raftery did not repeat the full sweep of those submissions but focussed on aspects of the evidence which he submitted fitted the criteria in *George* and should lead to orders in favour of the defendants. Though relying on all the *George* criteria, he stressed *(ii)-(iv)* to submit that, at the commencement of the prosecution on 6 December 2019, those behind the laying of the original informations had far from sufficient evidence to support the defendants' conviction and failed to take proper steps to investigate matters which might have suggested the defendants' innocence. He submitted that those deficiencies were especially pointed in this matter given it was a private prosecution being brought against the then Prime Minister and Deputy Prime Minister of the country by those who were, almost exclusively, their political opponents. As the prosecution, if successful, had the potential to require a new election, the stakes could hardly have been higher so, despite members of the group repeatedly asserting their actions were taken in the public interest, those factors, he submitted, placed a particular duty on the group to demonstrate good faith in bringing and continuing the proceedings in accordance with *George (i).*

[91] The submissions first sought full costs and followed that with submissions concerning a reasonable contribution to the costs and the disbursements, submitting that a higher level of costs is often reasonable where New Zealand counsel are briefed[68], with travel costs to be

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66 The latter intituled in the Allsworth application.

67 Transcript 6-56.

68 *Hill Cosmos International Ltd v. Ocean Fishery Cook Islands Ltd*, Plt 105/08, cited in *Samatua v. Attorney General* (Costs), Plt 5/2012, 25 January 2017, Grice J.

included if the circumstances of the claim justify that step[69] and with costs awards being greater according to the importance of the issues to the parties, the demand for skill and care, the complexity of the case and the time required for preparation[70].

[92] Awards of reasonable costs, he submitted, usually start at two-thirds of the actual fees charged plus full recovery of disbursements but the two-thirds starting point is not a "hard and fast" principle.

[93] Dealing with the absence of evidence, the submissions noted Mr Rasmussen's acknowledgment that the informations should never have been laid and submitted the changing phrasing of the informations demonstrated the lack of evidence, both at commencement and in continuation of the proceedings, to support the defendant's convictions, points on which Mr Raftery elaborated.

[94] The submissions were to the point that the defendants acted in a manner consistent with past parliamentary practice and in an open and transparent fashion, issues canvassed at trial, and that, as Mr George had "direct personal knowledge and experience of that practice and procedure … the issues of ulterior motive/abuse of process/vexatious prosecution … come into stark relief"[71].

[95] In furtherance of the submission that ulterior motives/abuse of process/vexatious prosecutions were in play, while the submissions acknowledged the defendants' openness to be held accountable, the implication that the prosecutions were politically motivated was reinforced by the necessity for orders to be made protecting the defendants' fair trial rights[72] coupled with the "startling" proposition that the mere fact of the prosecutions was capable of giving rise to suspension of the Prime Minister under Article 40(7) of the Constitution[73]. Mr Marshall's submissions also drew attention to Press statements by Mr George.

[96] It was submitted that the prosecution was launched and conducted unprofessionally with a number of discovery applications after the informations were laid, including some made

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69 *Nicholas v. Apex Agencies Ltd* [2012] CKLC 15, 26 April 2012, at [4]. *Tepaki v. Rarotonga Resorts Management Ltd* [2011] CKHC 28, Plt 25/2010, 21 April 2011, at [16].

70 *Maina Traders v. Ranginui* (Costs) APP 225/2011, 1 February 2013, Isaac J, at [18](4).

71 Submissions of 24 April 2020, at 55.2.

72 Minute (No.1), 17 December 2019, at [20]; and Minute (No.2), 19 December 2019, at [4](f).

73 Informant's memorandum, 3 February 2020, at 10-12.

ex parte, and requests to Government departments and the defendants to provide evidence, including evidence which might have breached the privilege against self-incrimination. Some of the requests were for documents in the public domain. The submissions also relied on matters dealt with at the various teleconferences analysed by Mr Raftery, the lack of sworn depositions, even a week before trial, and the inadequate statement of the overt acts said to constitute the conspiracy. Disclosure of evidence not to be relied on by the informant was also slow.

[97] Much of the detail to flesh out those submissions and support Mr Raftery's submissions was in a detailed chronology, and further enlarged upon in the defendants' fifth memorandum and the submissions and bundle of documents filed in the Allsworth matter[74].

[98] Mr Raftery focussed on the changing nature of the varying sets of informations issued in Mr T N George's name, correlating his submissions with various affidavits beginning with Mr Allsworth's sworn on 23 December 2019 in which, having described himself as the "lead investigating consultant in this private prosecution", he said the investigation was "extensive and still under way" and listed the 18 items then in the group's possession. The aim, Mr Allsworth said, was to comply with the "spirit" of the orders for disclosure made following Messrs Marshall and Arnold pressing for the same. Seven were 1 page witness statements made between 16-22 December 2019, all after the first set of informations had been filed. Inferring that the balance of the material must have been that on which the informations were based, some was public and the provenance of others such as Willie John's medical records and emails between Mr Brown and Mrs Maunga was not disclosed.

[99] That said, the Willie John allegation provided, Mr Raftery submitted, no basis for the informations. It was the documents produced at trial by the defence which, in conjunction with the other evidence on that topic, showed the Penrhyn flight was a non-urgent Medevac flight paid for by the Ministry of Health. That squared, Mr Raftery submitted, with the omission of any plea of medical pretext in the first set of informations and thus went no distance in proving the conspiracy alleged.

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74 Schedules 2 in Bundles of 24 April 2020 & 21 June 2021.

[100] Mr Raftery submitted that the situation disclosed by Mr Allsworth's 23 December 2019 affidavit bore significantly on *George (i)-(iii)* and that not only had the prosecuting group insufficient evidence to commence the prosecution, it failed to consider whether it was in the public interest so to do.

[101] Basing his next submissions on Ms Bell's affidavit, Mr Raftery also focussed on Mr Allsworth's second disclosure affidavit[75]which listed some 25 documents disclosed to defendants' counsel that day, largely gathered as a result of Ms Bell's actions, but including five 1 or 2 page witness statements dated between 23 December 2019 – 9 January 2020. That was followed by the 6 February 2020 second set of informations which first mentioned the Civil List allegation, was based on two flights not one, and first alleged the medical pretext claim.

[102] Mr Raftery submitted the way the prosecution initially approached the matter ignored the relevant *George* criteria so the fraudulent conspiracy allegation was baseless, though the matter may have been rectified by the 2 March 2020 set of informations. He pointed out that Mrs Maunga had correctly outlined the position in her first statement dated 20 December 2019[76], but submitted the prosecution paid no attention to her description of MPs and former MP's travel allowances and her question mark over Mr Lazaro's entitlement. He submitted that the February and March informations misrepresented what should have been known about the Civil List entitlement and led to a totally inadequate investigation and prosecution with no real concentration on the legal or factual issues, a situation which was relevant to *George (iii)*. Messrs Pyke and Rasmussen rapidly revised the situation but their conclusion was one which the prosecution should have recognised before even the first set of informations were filed.

[103] As to Mr T N George's position, Mr Raftery submitted that the effecting of his instructions to withdraw the charges should, contrary to Mr Pyke's submission, give him no credit as the trial was aborted solely to avoid trial costs.

[104] The content of Mr T N George's affidavits led Mr Raftery to submit that he "is not the complete wallflower that he would have you … believe when it comes to trying to say that I should really have little if any costs awarded against me".

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75 3 February 2020, 21 June 2020 Bundle, 105-116. Many of which were duplications.
76 21 June 2021 Bundle, 20ff.

[105] In those circumstances Mr Raftery submitted that the starting point under *George* and the authorities relied on in that decision is indemnity costs unless defendants have contributed to their own misfortune, something absent from this matter.

[106] Mr Raftery also drew on the exhibits to Mr T N George's affidavits, Mr Beer's OIA and Mr Allsworth's police complaint and the authorities refusing to comply with the requests as supporting his submission that the prosecution had almost no evidence to support the laying of the first set of informations, coupled with his earlier submissions, especially that the 6 December 2019 charges seemed unaware of there being two flights. All those matters impacted, he submitted on *George (iv).*

[107] Mr Raftery then drew attention to some articles in the media, particularly a statement by Mr George in the "*Cook Islands News*" issue of 3 December 2019, three days before the initial set of informations was laid and two and six days before the Democratic Party was invited but declined to support the group, saying the Democratic Party would seek a High Court declaration as to the legality of the post-election charter from the Northern Group.

[108] After a number of hyperbolic paragraphs Mr George was reported as saying that Mr Brown directed the Clerk of Parliament to arrange payment for the charter from the Civil List, but was frustrated and turned to Medevac funds to pay for it, but there was no medical emergency in Pukapuka or Penrhyn. Mr George is recorded as saying he would be seeking a declaration that Mr Brown was "wrong to use public funds for the post-election plane charter".

[109] He also referred to an article in the *"Cook Islands News"* of 31 March 2020, eleven days after the last set of informations had been withdrawn, in which Mr George was reported as saying the charges would be re-laid and again recounting his version of events including, of Mr Rasmussen's withdrawal of the charges, "Was it subversion? Hijack? Sabotage? We owned the case. This has to be a historical farce".

[110] Mr Raftery then turned to two further affidavits sworn by Mr Allsworth in relation to the search warrant applications.

[111] In the earlier[77], Mr Allsworth said that this was "an action by concerned citizens against two corrupt men misusing their positions to gain access and dishonestly use public funds" and then detailed his inquiries over the six month period July-December 2018. He acknowledged that the two defendants' actions were "conducted in the open, though both acted as though what they were doing organising the charter flights were legitimate government charter flights". The affidavit, like Mr George's interviews, again asserted that there was no sick patient to evacuate from Penrhyn, something which, Mr Raftery submitted, the group had ample evidence was untrue.

[112] All those matters, in Mr Raftery's submission, bore on the probable political motivations for the group's actions which, in its turn, should affect consideration of the *George* criteria.

[113] Referring to *George v. Teau, Marii, Ratumu & Browne*, Mr Raftery submitted that there was nothing in the defendants' behaviour which impacted on the indemnity costs application but accepted that, after giving instructions to withdraw the informations, Mr T N George did all he could to limit his costs' liability.

[114] He relied on the dicta in *White Industries* as to the necessity to have strong evidence before pleading fraud. The falsity of that allegation should have been known to Mr T N George, Mr George and the group from the information obtained to which they were privy.

[115] This, he submitted, was an object lesson in prolonging a "hopeless case based on groundless contentions", a submission he repeated in different ways, characterising the whole course of the prosecutions as "utterly irresponsible", "disgraceful on the part of the prosecution", "completely without any foundation in law", commenced and continued with a "zeal that has been blind to the law and blind to the evidence" and one wholly based on no more than rumour,

[116] He concluded that:

> "all the criteria in paragraph 56 of Justice Nicholson's Judgment are … resoundingly in favour of the applicants in this case and every one tells in favour of making an award of

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[77] Sworn on 9 March 2020.

> costs in their favour. There is absolutely nothing in the evidence that was being put before you, or nothing in any of the material in relation to the conduct of this first prosecution that suggests there should be any diminution from the starting principle of full indemnity costs and there is nothing that erodes that in any way".

[117] Mr Pyke[78] filed comprehensive submissions and commenced his oral submissions by demurring from Mr Raftery's contention that, under the *George* criteria, indemnity costs are the starting point under s 414. The starting point in his submission was a just and reasonable figure for costs. Indemnity costs, according to his research, had never been awarded in a Cook Islands' criminal case. That perspective was, he submitted, borne out by all the cases to which Nicholson J and Mr Raftery referred.

[118] He also took issue with the submission that Mr T N George had benefited by virtue of the withdrawal of the informations, making the point that the defendants' preparation to that point was also utilised in the Allsworth prosecution. The fees needed to be divided into pre-withdrawal and post-withdrawal.

[119] Turning to the *George (i)(ii)* criteria, Mr Pyke submitted there was no evidence Mr T N George acted in bad faith. He went along with Mr George's assessment of the legality of the charges and the inherent probabilities. He pointed out that Mr T N George never spoke to Ms Bell.

[120] He submitted that the withdrawal decision was made in compliance with the principles, followed in the Cook Islands, of the NZ Solicitor-General's Prosecution Guidelines. He also made the point that in alleged conspiracies it has to be proved that each defendant joined in the conspiracy as a joint enterprise, following which actions by all participants become evidence against the others, making the point that no officials had been charged[79].

[121] He also relied on Mr Rasmussen's affidavit[80] that there was no evidence of an agreement to defraud the public purse, especially in relation to Mr Puna in respect of whom there was no evidence whatever on that aspect. He strongly relied on Ms Bell's affidavit.

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78 Transcript 56-65.
79 *R v. Humphries* [1982] 1 NZLR 353, CA; *R v. Messenger* [2008] 3 NZLR 779.
80 Sworn 7 August 2020, at 8-11, 14; submissions at [16].

[122] In terms of *George (viii)*, Mr Pyke submitted the case was, on careful analysis, fundamentally not particularly complex.

[123] He made the point that political motivations are not the equivalent of bad faith in terms of *George* (*i*) with Mr T N George's 17 December 2019 affidavit couched in the "voice of an advocate" rather than his client.

[124] As to the application for any costs award against Mr T N George to be passed on to Mr George, Mr Pyke submitted that despite Ms Bell's repeated advice to Messrs Allsworth and George and the information not providing a strong basis for the prosecution the "assessments were all squarely ones for Mr George as the prosecutor, rather than the lay informant who was entitled to rely on the legal advice he was given, which is what he said is precisely what he did"[81].

[125] After analysing the relevant evidence – all of which has been canvassed previously and was detailed in the 19 March 2021 judgment – he said that "while there was unauthorised travel there was no evidence of criminality on the part of the defendants", hence the withdrawal.

[126] He submitted with reference to *George (iii)(iv)* that it was Messrs George's and Allsworth's responsibility to investigate matters which might have indicated the defendants were not guilty and that, for his part, Mr T N George took all proper and responsible steps available to him, particularly following the change of counsel. The defendants' acquittal was not on a technical point.

[127] As to the quantum of the applicants' costs – *George (ix)* – Mr Pyke conceded they were entitled to retain Senior Counsel given the case's importance but that should not lead to indemnity costs as opposed to those which are just and reasonable.

[128] He cautioned against the possibility of duplicated effort between Messrs Marshall and Raftery but accepted Mr Arnold's bills as reasonable.

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81 Transcript 60.

[129] He initially accepted that a costs split of two-thirds/one-third Mr T N George/ Mr George of whatever costs were held justified was reasonable, a division he later modified to 20%/80% Mr T N George/Mr George.

[130] Mr Pyke described Mr George's application for costs to be visited on Mr Rasmussen and himself as having no legal or evidential basis and was "retaliatory, premised on an allegation of flawed advice given to Mr T N George and the group". None of those had any relationship or duty to Mr Rasmussen or Mr Pyke on which to base such a claim. They acted solely for Mr T N George after he had terminated Mr George's retainer and their advice was borne out by the decision in the March 2021 trial.

[131] In summary Mr Pyke submitted Mr George breached his duty to the Court not to lend his name to allegations of fraud and improper purpose when he had insufficient basis on the available evidence to do so, and breached his duty to the Court by continuing, as counsel, to pursue those allegations when information came to hand which contradicted them.

[132] When this hearing began, Mr George asked[82] if he might absent himself for the first day but elected to remain once it was pointed out that, on the pleadings, findings were open that any liability attributed to Mr T N George might be wholly or partly passed on to him.

[133] When it came to time for Mr George to make submissions he asked for the hearing to be adjourned to the following day, an application which was granted.

[134] On the morning of 22 March 2022, Mr George[83] did not attempt any detailed refutation of the painstaking analyses in the submissions made by Messrs Marshall, Raftery and Pyke, but largely repeated the main elements of his opening speech at the March 2021 trial. He spoke of the defendants' "lust for power after facing defeat in the 2018 General Election which led to their actions to use public funds and facilities to arrange two charter flights to Penrhyn and Pukapuka"; he again invoked the March 1978 "fly in voters" matter; he repeated aspects of the text messages put in evidence which "set off events leading to what we decided was a conspiracy between the two defendants to use public funds to fly Robert Tapaitau to Rarotonga to help create a working majority for both defendants to become government again"; he

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82 Transcript 5-6.
83 Transcript 65-72.

submitted the Penrhyn flight "went through another twist and it was changed to a medical evacuation"; and he was critical of what he regarded as improper inaction on the police's part.

[135] In response to the suggestion he was the "ringleader" he said that "in a prosecuting role the lead counsel have to lead from the front and that was the role I played". He instanced trying to "interest the Democratic Party but failed" and that once their private investigations were commenced:

> "suddenly invisible walls of obstruction started acting against us from all Government departments on the island … no one wanted to talk to us. Questions went unanswered. Public servants feared for their jobs and tried to avoid us and refuse to help".

[136] He detailed his personal role, interviewing witnesses and undertaking investigations, doing legal research, drafting court documents including search warrant applications, paying disbursements personally and consulting with Crown Law. Saying that "our relationship with the Crown Law Office was not rosy" he said Ms Bell's affidavit was:

> "just placing everything on record to protect herself. [Refusals to take over the prosecution] matched the behaviour of other government departments and in her opposition to some of the search warrant applications that she was playing an adversary role to our activities, she wasn't really there to help us".

[137] As to the allegations that the prosecution had no evidence, Mr George submitted:

> "We had very powerful telephone text messages of discussions between the two defendants and Robert Tapaitau and Tingika Elikana. The text messages contained evidence of the charter flights being agreed to by the two defendants. With the Penrhyn flight switched to a medevac charter, well after the first charter flight was agreed to at a meeting – at a discussion of the parties – and their activities met the elements of a conspiracy to misuse public funds".

which led him to state that "there was evidence and we didn't act without evidence".

[138] He asserted that Messrs Rasmussen and Pyke acted prematurely after only checking half the evidence, with his dismissal notice being arranged and orchestrated by Mr Rasmussen and with them "acting with extreme negligence and haste by not negotiating a cost settlement with the defendants before withdrawing the charges" opening Mr T N George to the present application. In arranging the change of counsel, Messrs Rasmussen and Pyke "relieved all responsibility as to the costs from me and accepted it unconditionally". Thus Messrs Pyke and

Rasmussen should bear the costs, if awarded, because the private prosecution was conducted in good faith and to maintain the "integrity and good reputation of our country".

[139] He then, though without submissions as to applicability, recited the criteria from *George* and concluded:

> "I respectfully submit that no costs should be awarded to the two defendants as they should be considered lucky to be acquitted of the charges.
>
> ,,, awarding costs will also endanger the future of private prosecutions in this country. No one will do it for fear of being hit with enormous costs. When the government is corrupt, all corruptions spread to public servants, to police, and the government services. Organisations like CAC will only survive to fill the gap and survive if they receive protection from the courts against crippling costs. There is also a requirement for private prosecution to act with prudence and care and maintain a high and respectful reputation.
>
> I submit … that our group paid due diligence to our lawful duties under the law, that we acted responsibly and we only did so because our police force did not want to do it and we had no other assistance. We were on our own and facing a very hostile environment.
>
> I now conclude … by asking that the Court not award any costs."

[140] In reply, Mr Pyke submitted that where there was no basis for the informations there was no opportunity to negotiate a costs agreement.

Submissions: Puna & Brown v Allsworth

[141] Mr Raftery's submissions on the Allsworth matter[84] relied on his earlier submissions but again emphasised Mr Allsworth's description of himself as the "lead investigating consultant" of a team investigating the matter from almost immediately after the 14 June 2018 General Election through his police complaint, his leadership of the group and the informations he laid on 22 July 2020. He repeated the submissions about Crown Law's involvement and the memorandum of 11 March 2020 seeking clarification of the search warrants drawing attention to s 8(4) of the Civil List Act 2005. He submitted Mr Allsworth, in issuing his informations, while knowing of, had chosen to ignore, Ms Bell's warnings.

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84 Transcript 74-84.

[142] He detailed Mrs Maunga's various written statements, emphasising the differences between them, but all of which drew attention to s 8(4) dealing with Mr Lazaro's entitlement. Her third statement also dealt with the Civil List Act entitlement using the same wording which, Mr Raftery submitted, showed no attempt had been made by the prosecution to improve the quality of the investigation.

[143] Mr Raftery was critical of the depositions given just before trial being unsigned and merely drafts. He submitted that "tells us something about how much thorough investigation had been conducted by the prosecution team in preparation for the second trial" and that they got "a few statements cobbled together in a very lacklustre fashion and there had been no real investigative effort, just there is this complete fixation which … Mr George's submissions this morning still seems to be possessed of by the prosecution team".

[144] Mr George's submissions[85] again made no attempt to rebut the detail of the defendants' submissions. His were "basically a repeat of what I said earlier." The reason the statements were unsworn was "really time in getting to the Court or to a JP to witness the statements" and that "we could always get a signed copy if it was contested" but that "defence were fortunate to get copies of what these people had to say to help with their defence". Counsel for the defendants had "high expectations of the performance of three people to put everything together to the standard that he is probably accustomed to in New Zealand". He concluded by saying:

> "our prosecution team are not full time prosecutors. Our team was just put together for the event to cover the situation as we saw necessary and I am hoping we may never come across a situation requiring intervention but the feeling of the prosecution team is that we did what we had to do. Our conscience would not allow us to let go of the situation. It was a challenge. It was done in good faith and we certainly did not think that we didn't have the evidence. We were confident we did. And that feeling remains today, and despite the outcome, maybe if we had presented it differently we might have got a better result.
>
> … we were also overcome with a lack of support staff. We were all exhausted at the time of the trial and maybe there were a lot of fatigue during the hearing, and it didn't quite do as well as we expected. But all in all … we accept what happened. We want to get on with our lives, but we still want to maintain the integrity of our electoral system. We will still watch out and the CAC organisation continues and despite not having any resources,

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85 Transcript 82-3.

> the finance part, it's the principle that drives us, it's our love for our country that drives us and we will continue to do so."

PART IV

Discussion & Decision: All applications, especially T N George v Puna & Brown.

[145] In combination, s 414(3) and the decision in *George*, including the cases canvassed in that judgment, show the Court has a discretion, following acquittal, to order the prosecution to pay "such sum as it thinks just and reasonable" towards the costs incurred by the defendants, with an order for costs being made in ordinary circumstances in favour of the defendant in that situation and with the discretion being exercised in accordance with para [56] of that judgment. Mr Pyke was correct that, if costs are to be awarded, the starting level should be "just and reasonable" with the percentage of the defendants' costs and whether the circumstances justify an order for indemnity costs being made as an exercise of that discretion and in accordance with those criteria.

[146] To clear away the aspects of *George* which require no further discussion, there was, and could be, no suggestion the defendants' acquittals arose by reason of a technicality; after 6 December 2019 they did all they could to ensure their ultimately successful defence of the matter, but their actions were no more than those of any defendant seeking to protect themselves when facing serious criminal charges, convictions on which would have a serious impact on their future; and, as the judgment amply demonstrated, although the proceedings were moderately lengthy and the judgment was required to cover a wide range of issues, at bottom the trial was not of intrinsic complexity or difficulty, even though the stakes could hardly have been higher.

[147] The authorities earlier discussed show costs applications are to be seen from defendants' perspectives, with whether awards should be made and, if so, at what recovery level and on what basis – just and reasonable, indemnity or another percentage – having the underlying precept that defendants should not finish up substantially out of pocket, particularly where the case against them should never have been brought. Indemnity costs, including indemnity costs against counsel, are reserved for cases having elements of serious dereliction of duty, incompetence, abuse of process such as failure to take steps to avoid unnecessary

expense, time-wasting, breach of ethical duties, unfounded fraud allegations, ulterior motives or pursuing hopeless cases in a way open to be seen as reprehensible.

[148] The crucial issues in relation to these costs applications arise from *George* (*i)-(iv),(vi) & (ix)* in relation to which divisions need to be made in and between the time leading up to withdrawal of the final set of informations lodged by Mr T N George and what occurred afterwards.

[149] Dealing first with the period up to 6 December 2019, it is noteworthy that, within five days of the s 78 Declaration of the successful MPs of the 2018-2022 Election, the Prime Minister's Office had issued a public statement that charter aircraft would be used at public expense to fly successful MPs to Rarotonga[86].

[150] Messrs T N George, Allsworth and their supporters were, even then, almost convinced there was something fraudulent in the way the flights were organised and paid for and who were the passengers and commenced their investigation. That, in its turn, led to Mr Beer's OIA request and Mr Allsworth's police complaint.

[151] As part of their suspicions, the group seems to have decided that there was something untoward, even criminal, in Messrs Puna and Brown's negotiations with Mr Tapaitau, and the way he became a passenger on the flight, a view which has persisted throughout these matters, with the group choosing to ignore both the fact that such negotiations are standard in any democracy following an election where no one party obtains a majority and that the Democratic Party was also actively negotiating with Mr Tapaitau during the same period.

[152] The group's efforts to obtain information and stir the police to action continued until they approached Mr George in mid-late November 2019 and instructed him to act. That led to Mr George's press statement in the *"Cook Islands News"* of 3 December 2019 which, shorn of its hyperbole, largely advanced the beliefs the group then held, (though speaking of litigation for declarations as well as a private prosecution).

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86 RNZ International Pacific News, 3 July 2018.

[153] On 5, and again on 9, December 2019 the group approached Mrs Browne and the Democratic Party caucus, provided them with a "full briefing", but were unable to persuade the party to support them or meet their costs, this from a body which, more than any other, would stand to benefit from a successful prosecution. Caucus may have been doubtful about the likelihood of success.

[154] Despite that, the result was the filing of the first set of informations on 6 December 2019. They were seriously deficient in form as the earlier analysis showed. In addition, when the schedule to Mr Allsworth's disclosure affidavit of 23 December 2019 is analysed, it is telling that none of the witness statements were dated before the initial set of informations was laid and at that date the group had none of the text messages on which the prosecution heavily relied at trial. The prosecution would have failed had Mr T N George gone to trial on the first set of informations.

[155] The members of the group have repeatedly asserted throughout these matters that their actions in commencing the initial investigation, and then commencing and continuing both prosecutions, were all in the public interest and without political motivation.

[156] In terms of good faith, the commencement of the prosecution could only be seen as having been in good faith in the sense it was based on the group's belief. A slight gloss on Nicholson J's wording is that the good faith mentioned in that criterion must be objectively, not subjectively, assessed. Seen in that light, even though Messrs T N George, Allsworth and members of the group may have genuinely believed at the time in their cause, that does not amount to good faith in all the circumstances for their commencing the proceedings, let alone continuing them in the light of the emerging disclosure and Ms Bell's advice. The evidence strongly suggests they never contemplated that the defendants were not guilty.

[157] Assertions of a lack of political motivation assertions should also be seen in the light of the fact that Messrs T N George, Beer and Teariki Heather – a significant group funder – were all unsuccessful candidates in the Democratic Party's interests in the 14 June 2018 Election and Mr Dyer had been Mr T N George's campaign manager. Of the other members of the

group, only Mr Allsworth's political affiliations are unstated, but his affidavits show[87] that, by early 2019, he was "convinced" the defendants' actions were criminal.

[158] Further, while the group may have considered they were acting in the public interest, it can only have been the public interest as they defined it as they failed to attract support from the Democratic Party or many members of the public[88].

[159] Further again, given most were Democratic Party candidates or supporters investigating matters arising out of the 14 June 2018 General Election, an election in which the Democratic Party had narrowly failed to unseat the CIP and effect a change of government, it is highly likely that group members were not unmindful of the fact that, were their prosecutions to end in the defendants' conviction on the s 280 charges[89], both would lose their seats and be ineligible to stand again for five years[90]. Given the CIP's one seat majority, this would be likely to have resulted in the fall of the Government and a further General Election. That, too, bears on whether Messrs T N George and Allsworth as informants, and the group, commenced and continued their prosecutions in good faith, objectively assessed. Despite their denials, their actions are open to the possible view of their not being *bona fide* but being actuated by what for prosecution purposes is an ulterior motive, namely political motivation.

[160] In terms of the criteria in *George*, those findings show that Mr T N George, Mr George and the group, had little justification for commencing the proceedings on 6 December 2019, diminishing justification for continuing with those proceedings once Ms Bell became involved and the evidence emerged and no justification for carrying on with the prosecution after 17 February 2020 without reconsideration. They did not have enough evidence to lead to the defendants' conviction at or shortly after the commencement of the proceedings, they took no proper steps to investigate matters coming into their hands – especially from Ms Bell – which indicated the defendants were innocent and, for the reasons outlined, did not conduct either the investigation or the prosecution in a reasonable and proper manner between 6 December 2019 – 17 February 2020, nor between that date and 16 March 2020.

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87 Eg. Search warrant application affidavit 9 March 2020, at 64; Leave to appeal affidavit 6 July 2021, at 15-19; affidavit of 14 January 2019, at 29.

88 George memorandum, 22 November 2021, to Court of Appeal re. Costs, at 5-10.

89 The maximum penalty under s 280 is imprisonment for 5 years.

90 S 9(1)(h) of the Electoral Act 2004, Article 28B(1)(d) and Part II of the Second Schedule of the Constitution.

[161] Seen from a different angle, but bearing on whether proper steps were taken in the investigation, disclosure and the obtaining of search warrants became an issue. The group took the view that Government officials and others who were the recipients of their requests for information were not only deliberately obstructive but were doing so because they were beholden to the defendants[91].

[162] Whatever the position in that regard, Ms Bell took over the collection and dissemination to all parties of the information to which the group was entitled by treating all the requests as official requests under the OIA, and later collaborated in formulating the terms in which the search warrants would be issued and executed, including by assisting Doherty J in that regard.

[163] The group is critical of Ms Bell – they say she adopted a "judicial" role requiring them to justify their requests[92] – but it rather seems she is to be commended for doing all she could within the law to get the appropriate information for Mr George in a practical and timely fashion without hampering progress by resort to legal niceties.

[164] The chronicle of contact between Messrs George and Allsworth and Ms Bell then becomes highly important.

[165] The first meeting was on 7 January 2020. They asked Crown Law to take over the prosecution. They were told to make a formal request. Ms Bell told Messrs George and Allsworth that conspiracy was a hard charge to prove, a comment Mr George dismissed.

[166] At that meeting, the pair gave Ms Bell a copy of Mr Allsworth's 23 December 2019 affidavit and the exhibited material. She told them the "statements and documents provided were insufficient to prove the charges".

[167] She then obtained and disseminated the first tranche of disclosure material on 27 January 2020. That gave her "a good picture of what had taken place and it was apparent from

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91 It seems more likely that officials were cautious about disclosing official information to persons demanding it "out of the blue", whose motives were unknown, when they had no Court order protecting such disclosure.

92 George submissions, 24 February 2020, at 2-4.

that information that the charges that had been proffered by the prosecution could not be sustained". There were significant credibility issues with two witnesses.

[168] Over the following days, Ms Bell was told of Mr George's assertion that Mr Glassie's signature on his statement was a forgery. She rebutted that.

[169] She then received additional information but concluded that none "was sufficient to cure the prosecution or change the factual narrative that had already been established by the earlier provision of official information". She passed on her conclusion.

[170] Following that she received the second request for the Crown to take over the prosecution. She told them she had "reviewed all the material and we would not be taking it over as in our view it did not meet the test for prosecution" for reasons she detailed. She warned them of the possible costs consequences of pressing on and the rather benign stance the Crown would take. Limited discussion followed but when Ms Bell was explaining to Mr Allsworth why there was no evidence of conspiracy "Norman George cut us off and indicated that at that point there was no longer anything to discuss with Crown Law".

[171] The next contact was on 17 February 2020. Again Ms Bell "told them again that the Crown did not view that there was a case, however Norman [George] told me that I was wrong. I asked him to explain why we were wrong but he refused to do so."

[172] When that narrative is analysed in terms of *George* (*i*)-(*iv*), while the conversation between Messrs George, Allsworth and Ms Bell on 7 January 2020 may have been general in nature, the material provided immediately led Ms Bell to the conclusion that it was insufficient to support a successful prosecution, a view which firmed by 27 January 2020 and later firmed further as she obtained and disseminated the information she gathered.

[173] Ms Bell was blunt in her advice to Messrs George and Allsworth in their conversation shortly after 3 February 2020 following the receipt of the additional statements and other documents. She told them the material did not meet the test for prosecution and that costs would be an issue if they proceeded with the prosecution, though the Crown would take the stance she described.

[174] She followed that up on 17 February 2020 telling Messrs George and Allsworth that they had no case. Mr George brusquely rejected her opinion.

[175] Throughout this period, Ms Bell was the most senior and experienced prosecutor in the country, certainly with more recent experience in that role than Mr George, so knew intimately the difficulties prosecutors have to surmount. She knew all the details of the varying sets of informations. She had seen and analysed all the disclosure material, including the witness statements so was as familiar with that aspect as Mr George and the prosecuting group. She was unpersuaded that the Crown should adopt its conventional role in taking up private prosecutions which have merit. As her costs comment shows, she was not unsympathetic to their cause. She was therefore a fully informed, but completely disinterested, advisor to Messrs George and Allsworth and she told them repeatedly their case would fail and, if they persisted and were unsuccessful, as she forecasted, might face a claim for indemnity costs.

[176] In terms of *George* (*i)-(iv)*, Ms Bell's opinions, especially that of 17 February 2020, to Messrs George and Allsworth should have resulted in wholesale re-evaluation of their case and thorough reconsideration of the law, the evidence they had and the wisdom of continuing the prosecution beyond that point. It received only Mr George's curt dismissal of Ms Bell's opinion, a dismissal which occurred before he reflected in any way on her views. There is no evidence that the advice provoked any "second thoughts" on the part of Messrs George or Allsworth, or the slightest review of the sufficiency of their case. They did not contemplate the possibility the defendants might not be guilty.

[177] However, it must be noted that there is no evidence that Ms Bell's view was, at any stage up to 16 March 2020, shared with Mr T N George or other members of the group and it was around 17 February 2020 or a little later that Mr T N George was informed by outside sources he was in jeopardy of substantial costs in the event the prosecution went ahead in his name and was unsuccessful. That led him to seek Mr Rasmussen's advice in early March 2020 and to his 13 March 2020 dismissal of Mr George, but only because he was worried about possible costs' liability, not because he had any doubts about the sufficiency of the evidence. Indeed, not having been told of Ms Bell's views, he could not have had concerns on that score.

[178] As far as Mr T N George's personal position is concerned, while his affidavits attempt to paint him as an innocent dupe in the hands of Mr George and the other members of the

group, the evidence indicates that he is not as ingenuous, tractable or unworldly as he made out. He described himself as a "self-employed business operator for 19 years"[93]. He did not contradict a defendants' memorandum which listed him as director and shareholder of three food companies plus a taxi company and a shipping company and did not respond to their call for him to disclose all his financial records[94]. That, in combination with Mr Allsworth's description of him, suggests a reasonable degree of business competence. He was politically knowledgeable enough to have stood for Parliament in the Democratic Party's interests. He had sufficient personal disquiet about the rumours he was hearing after the election to join the group and participate in its discussions. Importantly, though perhaps acquiescent in the face of Mr George's advice, experience and rhetoric on this, a quintessentially legal issue, he nonetheless agreed to be the informant not just in the first, but in all three, sets of informations issued in his name against the defendants, but he did that as a "civil duty" and as part of his having a "role of my own", all of which does not suggest he was overborne or lacked autonomy. Then, as events showed, while initially motivated by costs' fears, he had sufficient understanding and retained sufficient independence to decide to disassociate himself from the group, exercise the right of all litigants to seek alternative legal advice, act on it and give instructions to withdraw the informations.

[179] While, for the reasons elsewhere discussed, the periods before and after 17 February 2020 attract different results, there is, on the evidence, no basis on which to exonerate Mr T N George from an order for costs on the footing that he was not, or was not capable of being, a fully participating individual member of the group at all times up to 16 March 2020. Though the evidence suggests neither he, nor any members of the group other than Mr Allsworth, were made aware of Ms Bell's opinion, in the latter part of that period he took all responsible steps to terminate the prosecution, but for costs reasons, not because he came to the view that there was insufficient evidence to lead to convictions. That does not exonerate him. It merely limits the costs he must be found liable to pay.

[180] Assessing Mr T N George's position in the light of all of that, and subject to what follows, the appropriate conclusion is that he should be ordered to pay costs, not on an indemnity basis, but on the footing that he pays a just and reasonable sum towards the costs

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93 Affidavit in support of ex parte discovery application, 17 December 2019, at 1-3.
94 Defendants' fourth memorandum, 14 January 2021, at 9-13.

and disbursements incurred by the defendants from the filing of the 6 December 2019 informations until withdrawal of the informations on 16 March 2020, and in the "wrap up" consequent on the withdrawal. Had he been told of Ms Bell's views and pressed on regardless, an award of indemnity costs may have been justified, at least for part of the period, but his ignorance of her opinions saves him from that conclusion.

[181] As to the percentage of the defendants' costs which Mr T N George should be ordered to pay, the usual start point is 66.6% but here he and the group were obliged to give the most careful consideration to ensuring there was a solid foundation to their actions before launching a private prosecution inevitably raising the highest stakes. Despite that, the deficiencies discussed in the group's entire conduct of the matter from 6 December 2019 – 16 March 2020 were so egregious, especially when set against the emerging evidence and Ms Bell's repeated opinions, that an increase in the usual percentage is justified. As defendants' counsel said, Messrs Puna and Brown do not seek to escape public scrutiny of their political actions, but, even so, they should not be left substantially out of pocket through costs incurred in doing what was required to defend themselves against a prosecution which arguably should never have been commenced and, after 17 February 2020 at the latest, should never have been continued. Mr T N George is ordered to pay 75% of the defendants' costs and disbursements incurred from the commencement of his prosecution to its withdrawal, and any subsequent "wrap up" costs.

[182] Mr T N George may say he is being made the scapegoat for the actions of the group, and that it should share the responsibility, but he, as the informant, is the only member of the group who can be ordered to pay costs to the defendants and it is the price he must pay for participating in the matter and repeatedly lending his name to the prosecution.

[183] As far as concerns Mr T N George's claim for Mr George to meet all, or a proportion of, the costs awarded against him, the evidence shows that the latter was the driving force in Mr T N George's activities and that of the group up to the date he was replaced as counsel. This was only to be expected. He was the only lawyer advising the group, the only one familiar with the Court's requirements to launch and carry on a prosecution and prepare for trial, the only one who could apply for search warrants and superintend the interviewing of witnesses and therefore the only one who could fulfil those roles.

[184] That raises the issue as to whether the Court's power to order costs against counsel is derivative or secondary in the sense that such costs can only be awarded if costs against the client are awarded or whether orders against counsel can be made directly[95]. As recorded earlier, Mr T N George's application against Mr George appears to be premised on both bases.

[185] The authorities indicate that the power to award costs against counsel is direct and is a jurisdiction designed to free litigants from all or part of the costs they have incurred. It can be a punitive power[96] as exemplified in *George v. Teau Marii Ratumu & Browne* where the Court of Appeal specifically addressed[97] whether costs should be ordered against the appellant or counsel following the finding that the appeal in that matter was a hopeless case. The decision largely revolves around the making of allegations of fraud for which there was no basis but might equally apply to the conduct involved in pursuing a meritless, time and resource-wasting claim which was carried on in a manner which might, not unjustly, be described as reprehensible.

[186] Considering fraud, fraud can be an element of charges under s 280 and was pleaded in this case, so underlay the entire prosecution. In that sense, as Mr Raftery submitted, Mr George, in pursuing what turned out to be a case not even reaching the *prima facie* level, was pursuing an allegation of fraud for which there was no sound foundation.

[187] In the Pukapuka flight case the fraud pleaded was fraudulently using public funds to charter the aircraft to pacify and console Mr Elikana on missing out on Cabinet rank. That charge was disposed of largely as a matter of interpretation, but Mr Elikana's robust denial of seeking a Cabinet post and his explanation[98] showed that, if the justification were to be regarded as a component of the fraud, it could never have been proved, and must have been no more than supposition by the framers of the information. Pleading it on that footing and not withdrawing it was therefore prolongation of a fraud pleading without foundation. This impacts on Mr George's liability.

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95 A point discussed in terms akin to Civil procedure in Minute (No.17) of 24 December 2020, in *George v. Puna & Brown*.

96 *Myers v. Elman* [1940] AC 282, as discussed in *Holden & Co v. Crown Prosecution Service* [1990] 2 QB 261, at 268-9.

97 At [75]-[108].

98 E193. The Bundle contains no deposition from Mr Elikana.

[188] The basis of the Penrhyn charge was the allegedly fraudulent use of public funds to charter an aircraft to fly Mr Tapaitau to Rarotonga under the pretext of a non-existent medical evacuation to secure his support for the CIP. The defendants' central role both in organising the flight, getting Mr Tapaitau on the passenger list and arranging for it to be improperly charged to Government sources was an element of the charge. Not only was there no evidence of Mr Puna's participation in any of that, but, as Ms Bell told Messrs George and Allsworth on 10 March 2020, the charter was "not pre-planned by the PM or DPM", the correctness of which was demonstrated by the document trail produced at trial. For Mr George, in his brief time remaining as counsel in the T N George prosecution after that advice, not to consider withdrawing the fraud pleading in the Penrhyn charge was, as also demonstrated by his raising the same allegation in the Allsworth trial, prolonging an unfounded fraud allegation. That, too, affects his exposure to costs.

[189] For completeness, fraud and forgery were also raised as possibilities in relation to Mr Glassie's statement[99] but, Mr Glassie having passed before trial, while forgery looked unlikely it could not be finally determined and was held, in any case, not to be determinative[100]. In view of that, the conclusion is that Mr George has not been shown to be acting in breach of his duty as counsel in raising the questions of fraud and forgery relating to Mr Glassie's statement; it remained an open question on the evidence.

[190] An important point in relation to Mr George's conduct and Mr T N George's application is his reaction – and inaction – in response to Ms Bell's opinions and the ongoing disclosure. He (and Mr Allsworth) were repeatedly told by one who knew the law, knew the documents, knew the witness statements, knew the hurdles prosecutors face and knew Mr T N George's case did not reach the proper standard for prosecution, that their case would fail. Yet Mr George's reaction on each occasion was a brisk dismissal of Ms Bell's opinion with no discussion, no research, no reconsideration of the wisdom of proceeding, no thought as to whether the defendants might not be guilty and no communication of Ms Bell's conclusions to Mr T N George or other members of the group, except Mr Allsworth. The correctness of Ms Bell's advice was demonstrated by Messrs Pyke and Rasmussen's review and their advice

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99 And raised, but not pursued, in relation to the documents signed by Dr Teapa; Allsworth search warrant affidavit of 3 March 2020, at 5 d.d.

100 Judgment 19 March 2021, at [51]-[53], [57]-[59], [66]-[76].

to Mr T N George to withdraw the charges plus, of course, the outcome of the trial itself and all the other litigation which has followed.

[191] In terms of Mr George's duty and capacity to give independent advice, it is relevant that he, too, had been an unsuccessful candidate at the 2018 General Election[101] and that, in the fairly recent past, had been a long-term Democratic Party Member of Parliament. Those factors, in combination with the affidavits – especially his own – describing his relationship with, and his actions on behalf of, the group, lead to the conclusion that in acting for Mr T N George up to 13 March 2020 and then for Mr Allsworth – though only the narrative is relevant as he faces no costs claim by Mr Allsworth – Mr George was not acting in the appropriate fashion of counsel for a litigant. His lengthy defence background, his zeal in pursuing the prosecutions, his repeated applications ex parte because, conjecturally, others – including Government officials and another lawyer – might destroy evidence, his refusal to recognise any view contrary to his own – especially Ms Bell's – his approach to the matter throughout as exemplified by his affidavit, the hyperbolic tone of his Press statements and in his submissions on the costs applications, even his meeting the litigants' disbursements to ensure the prosecution continued and foregoing what would obviously have been a substantial fee[102], strongly suggest that in these matters Mr George went beyond the loyal and fearless defence of the informants' cases and into the area where he compromised his independence and his duty and ability to give impartial, dispassionate, disinterested advice[103]. One of the most fundamental responsibilities for lawyers is their ability and duty, when fully informed of the intricate details of clients' affairs, to give knowledgeable but independent advice to clients as to the best course for them to follow. All the factors mentioned, when measured against the evidence, show that, in the T N George matter, Mr George went well beyond the traditional roles of lawyers and, in the metaphor commonly used, descended into the arena where the dust obscured his vision.

[192] While Mr George's enthusiasm for the case may have been his habitual *modus operandi*, all those factors, particularly his repeated and outright rejection of Ms Bell's opinions, his failure to consider that she might be right coupled with his failure after 17 February 2020 to undertake any reassessment of what he should have realised was a deficient

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101 Though not standing in the interests of the Democratic Party.
102 Memorandum of 22 November 2021 to Court of Appeal re. Costs, at 6-8.
103 Law Practitioners' Act 1993-94, Code of Ethics, at 2, 7, 11, 14 & 22.

case and any reconsideration of the propriety of proceeding means his actions shadow into dereliction of his duty as defined by the authorities, and have resulted in significant usage of court time which might have been available to other litigants and, in consequence, the incurring by the defendants of very substantial sums in legal costs which might have been avoided if Mr George had properly taken the overall insufficiency of the evidence and Ms Bell's opinions into account. That all leads to the conclusion he should be ordered to contribute to the defendants' costs.

[193] While the initial set of informations ought not to have been issued in the form they were, the subsequent obtaining of documents, the gathering of evidence and the refining of the informations gives Mr George a certain degree of justification for continuing with the prosecution at least up to 17 February 2020 but, after that, he should have reconsidered the matter and recommended to Mr T N George that he take the prosecution no further, beyond withdrawing the then current charges.

[194] In those circumstances, there is no justification for ordering Mr George to pay any percentage of the costs awarded against Mr T N George up to 17 February 2020 but, from that point onwards to 13 March 2020 when his retainer was terminated, he should be ordered to pay the difference, 25%, between the costs and disbursements awarded against Mr T N George for the 17 February-13 March 2020 period and the costs incurred by the defendants for that period in order to ensure the defendants are not out of pocket for the costs incurred as a result of his inaction. To make that plain, it is for Mr T N George alone to meet the ordered percentage of the costs which were incurred by the defendants up to 16 March 2020, and subsequently in relation to his prosecution. and it is for Mr George to meet 25% of the costs and disbursements incurred during the 17 February-13 March 2020 period.

[195] As mentioned in previous judgments and as is now confirmed, Messrs Pyke and Rasmussen's actions were entirely proper and professional once they had been instructed by Mr T N George. They reviewed the law and all the witness statements and documentary evidence – including that in the three boxes. They gave Mr T N George advice, both in writing and orally, explaining their advice in a way he could understand and received his instructions to withdraw the informations. They undertook the correct procedure for terminating Mr George's retainer. Acting in accordance with their instructions and in light of the paucity of evidence they acted appropriately in advising and bringing Mr T N George's prosecution to

an end. There is therefore no basis for ordering either of them to make any contribution towards the costs awarded against Mr George[104] and the latter's application for orders in that regard is therefore dismissed[105].

Puna & Brown v Allsworth

[196] Turning to the defendants' costs application against Mr Allsworth, the narrative covering the period up to 16 March 2020 and between that date and the present needs to be seen in sections. That earlier period is relevant to Mr Allsworth's potential liability as it reflects on his intensive involvement throughout, the application of the *George* criteria and the level of costs which might be awarded.

[197] The defendants' costs up to 16 March 2020 have already been dealt with. They appear to have incurred little further in the way of costs between 16 March 2020 – 22 July 2020. Because Mr Allsworth was not a party to any prosecution before 22 July 2020 there is no basis for allowing the defendants' costs against him for any period before that date.

[198] The application for permanent stay of his informations was filed on 7 August 2020 and, after the adduction of evidence and various teleconferences, was heard on 7 December 2020 and dismissed in the 23 December 2020 judgment.

[199] Presumably because the informations were going to trial, there was no application for costs but, the defendants having failed in the stay application, had costs been awarded, they would have been in favour of the informant. Though it is not now open to make any order in Mr Allsworth's favour concerning the stay application, in those circumstances it would be inappropriate to allow the defendants costs in relation to it. That means that all costs incurred by the defendants in relation to the stay application between filing on 7 August 2020 and dismissal on 23 December 2020, plus any "wrap up" costs, should not be allowed in the overall claim.

[200] That leaves for consideration the periods 22 July 2020 – 7 August 2020, 23 December 2020 – 19 March 2021, the date of the trial judgment, 19 March 2021 – 1 September 2021, the

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104 Mr T N George has made no application for costs against either of Messrs Pyke or Rasmussen.

105 See fn 9.

date on which Mr Allsworth's application for leave to appeal was dismissed, and the period from that date down to the present time, excluding proceedings in the Court of Appeal as that Court dealt with costs in its judgment.

[201] In considering the defendants' application for costs against Mr Allsworth in all those periods other than the unsuccessful stay application and the appeal, and considering whether costs should be allowed to the defendants for any or all of those periods and, if so, on what basis, in the light of the *George* criteria the following matters are important.

[202] The first is that the case which went to trial in the week beginning 15 March 2021 appeared, in its general outlines, not to be greatly different from the case which the prosecution was readying for trial beginning on 23 March 2020. Mr Allsworth's informations do not greatly differ in their essentials from Mr T N George's last set. However, after that date, Mr Allsworth's case was improved in that Messrs George and Allsworth obtained what they regarded as a significant amount of additional information by way of the contents of the boxes of evidence Mr Rasmussen held[106] and the disclosure, on 17 February 2021, of the text messages which it regarded as pivotal to the case. They certainly made it easier for the prosecution to prove the defendants' stratagem to persuade Mr Tapaitau to ally himself with the CIP and decline the overtures of the Democratic Party but, in association with the 3 July 2018 public announcement, Dr Herman's 29 June 2018 email and the document trail, the texts did essentially nothing to assist the prosecution prove that Mr Tapaitau's passage to Rarotonga was the result of the defendants' fraudulent conspiracy to have the flight paid for by the improper use of public moneys.

[203] While it is impossible to know how the evidence at the March 2020 trial may have emerged, the likelihood is that the evidence given at the March 2021 hearing would not have differed to any major extent from what would have been the main thrust of the case in March 2020 once discovery was completed. Put another way, it is not as if the main allegations in the March 2020 case changed radically as the result of the further information which became available after that date. The main thrust of the March 2021 case would have been the main thrust of the March 2020 case. To Mr Allsworth's knowledge, Ms Bell and Messrs Pyke and

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106 Defendants' counsel said the contents were meagre

Rasmussen concluded that Mr T N George's case was inadequate in 2020 and so it proved at the March 2021 hearing.

[204] Mr Allsworth therefore cannot escape the finding that a searching re-evaluation of the prosecution and the justification for continuing with it, culminating, probably, in withdrawal of the charges, should have followed the meetings he and Mr George had with Ms Bell, especially that on 17 February 2020. That should have occurred before he filed his informations. Yet he issued them and carried on with the prosecution without deviation from the course he, the group and Mr George had plotted. Apart from the successful defence of the stay application, the prosecution was unsuccessful at every stage, a factor which resonates when the *George* criteria are considered.

[205] The second aspect is that, starting from a suspicious standpoint, Mr Allsworth was the lead investigator for the group from almost immediately after the 30 June 2018 s 78 Declarations. He remains so. He was intimately involved with, and knowledgeable of, every single detail of the matter, including being present and assisting Mr George in almost every hearing concerning his informations. He attended all group meetings, helped with evidence gathering, and was present at all meetings between Mr George and Ms Bell so knew the detail of, and reasons for, her opinions. There is no evidence he or Mr George undertook any reconsideration of the case at any time thereafter. He was, of course, the informant in the case which went, unsuccessfully, to trial.

[206] Though he has maintained throughout this matter that he, and the others, did what they did in good faith actuated solely by the public interest, the objective credibility of that stance has earlier been doubted. In all those circumstances, Mr Allsworth's unwavering pursuit of what turned out to be a "hopeless case" against the defendants opens him not just to an award of costs but to an award of indemnity costs.

[207] Seen in that light, Mr Allsworth did not have good faith, objectively assessed *(George (i))*, in commencing and continuing the informations he issued on 22 July 2020. He knew at that stage that all three impartial assessments by lawyers skilled in the criminal field were unanimous that the prosecution could not succeed and, were he to carry on, the defendants would be acquitted. Neither he nor Mr George took proper steps to investigate that, or even recognise the possibility the defendants might not be guilty. Their investigation was inadequate

and not founded on proper steps having been taken *(George (iii))*. Even after the texts became available, he pressed on with no consideration that the prosecution would fail *(George (iii)).* He knew from Ms Bell's comments that continuing the prosecution might jeopardise the informants in costs. He issued the informations notwithstanding that minatory warning[107] and continued with it to, and beyond, their dismissal. The dismissal at trial was more brought about by the defence's careful analysis, incisive cross-examination and production of many relevant documents not put in evidence by the prosecution, so in terms of *George* (*vi*) the defendants' acquittal was mainly through their counsel's efforts rather than the inadequacy of the evidence adduced by the prosecution.

[208] Mr Allsworth's persistence with his prosecution in all those circumstances leads to the conclusion that he should be held liable to indemnify the defendants for all their substantial *(George (ix))* costs incurred after 22 July 2020, other than in respect of the two matters previously referred to, all as defined in the quantum section of these judgments.

[209] There will be an order to that effect.

PART V

Quantum

[210] Some general observations relating to costs need to be made before considering the calculation of the amounts to be awarded.

"Just and Reasonable"

[211] There are several aspects of the costs charged to the defendants to be considered in relation to whether those costs are "just and reasonable".

[212] The first is that Little & Matysik PC and Tim Arnold PC have charged for their services at $280 and $300 per hour respectively.

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107 And the opinions of Messrs Pyke and Rasmussen.

[213] Having regard to the hourly rates charged by senior practitioners in the Cook Islands and Messrs Marshall and Arnold's experience and expertise, those hourly rates are to be regarded as "just and reasonable".

[214] The second point is whether it was "just and reasonable" for the defendants to instruct Senior Counsel from New Zealand.

[215] There was no serious argument that it was not "just and reasonable" to instruct Senior Counsel in the context of private prosecutions alleging serious criminal offences, with serious consequences if convicted, against the then Prime Minister and Deputy Prime Minister of the country, particularly in circumstances where neither Mr Marshall nor Mr Arnold have extensive recent experience in criminal defence work. Briefing someone with the expertise and experience of Mr Raftery QC is held to have been a reasonable step for the defendants to take.

[216] It follows that Mr Raftery's fares, accommodation and the disbursements paid by Little & Matysik for his temporary admission to the Cook Islands' Bar should be allowed as part of the costs award.

Quantum of Charges

[217] The amounts to be awarded to the defendants are to be the fees actually charged, not those which might have been.

[218] That comment is necessary, first because there is an element of concession built into some of the invoices but, more importantly, because Mr Raftery normally charges $800 per hour but for the purposes of this case discounted his hourly rate to $600 per hour. Even so, in his invoice dated 21 March 2022 covering the costs hearing, he charged $4,000 per day which, arithmetically, meant either that he was not charging $600 per hour or not charging for an eight hour day. It accordingly should be the fees actually charged which form part of the costs awards.

Value Added Tax

[219] The general rule in costs awards is that VAT is not included[108]. However, VAT is, as required, included in Little & Matysik's and Mr Arnold's accounts and the defendants seek to have VAT included in the costs award on the basis that neither is registered for VAT and will consequently be out of pocket for the VAT charged to them if the award does not include VAT[109].

[220] Amongst the reasons that VAT is not normally included in costs awards is that those subject to costs orders are often in commerce, corporates or sole traders, and accordingly their overall VAT trading history needs to be considered before the impact of VAT on the judgment can be assessed. The defendants, however, are individuals and it is considered that, as a gloss on the normal rule, it is just and reasonable that the VAT charged to them by their solicitors should be added to the costs award in order that they not be out of pocket in that respect. There will be an order to that effect.

[221] A minor point in relation to VAT is that, while Mr Arnold charged VAT on the amount of his fees, Little & Matysik added VAT on the whole of their account including disbursements, most of which were themselves VAT inclusive.

[222] That raises the question as to whether VAT is properly chargeable on funds outlaid by, here, Little & Matysik, when they have provided no services for them but merely passed on the VAT inclusive amount charged to them with their amount of VAT added. This is a common problem in relation to VAT (or GST).

[223] However, the amounts are comparatively minor alongside the amount of the fee invoices and accordingly it is not considered necessary to deal with Little & Matysik's invoices by deducting their VAT from their disbursements.

Invoices

[224] As far as Mr Raftery's invoices are concerned:

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108 *Maina Traders v. Ranginui* (Costs), at [20].

109 Mr Raftery's invoices were zero rated for NZ GST.

(a) The earliest is dated 2 June 2020[110] and covers the period 1 January 2020- mid-March 2020. The period to 27 January 2020 was charged at $800 per hour with the balance of the account being at $600 per hour, (some time being "written off") and the total rounded. The account of $6,400 for the period 1-27 January 2020 is allowed to 75%, namely $4,800. The account for the balance of the period is not divided between services before and after 17 February 2020 but perusal of the narrative suggests that most of the account for $45,300 would have been incurred after that date so, assuming three-quarters of the account was incurred after 17 February 2020, the earlier quarter, $11,375, is allowed as to 75%, say $8,500, and the balance is allowed, for the rest of the period at 75% payable by Mr T N George with the balance of the fees charged for the 17 February-13 March 2020. period being payable by Mr George[111].

(b) Mr Raftery's next account is dated 31 March 2021 and covers the period 1 August 2020 – 31 March 2021 of which $4,500 relates to the stay application – and is therefore disallowed – with the balance being for 9-19 March 2021 including preparation for the trial and the trial itself, $36,000, being allowed in full as is the $932.20 for airfare and $1,319.63 for accommodation.

(c) Mr Raftery's third account is dated 21 March 2022 and covers the period 1 February – 31 March 2022 (with some time "written off") for preparation and hearing of the costs applications. The fee actually charged is $15,200 and is allowed in full as is the $470 for airfares and $950 for accommodation, (both those disbursements being halved as Mr Raftery was in Rarotonga for other clients as well as the defendants).

[225] Turning to Little & Matysik's accounts, the following appears to be the position:

(a) Accounts 16104, 31 December 2019 covering 1-31 December 2019 and account 16192, 31 January 2020 covering 1-31 January 2020 are both allowed as to 75%.

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110 This account followed a request for particulars of Mr Raftery's account dated 12 February 2020 for the period 12 December 2019-12 February 2020. In the 2 June 2020 account the December time was "written off".

111 See paragraph [181].

(b) Account 16240, 29 February 2020 covering 1-29 February 2020 would appear from the narrative to be approximately equally divided between attendances before and after 17 February 2020 and accordingly $5,700, approximately half the fees charged, is allowed as to 75% with the balance being allowed but with payment divided as per paragraph [224](a).

(c) Accounts 16253, 17 March 2020 covering 1-17 March 2020 and Account 16283, 22 April 2020 covering 18 March – 21 April 2020 are both allowed as per paragraph [224](b).

[226] All those are referable to the T N George prosecution.

[227] Of the Little & Matysik invoices attached to their 21 June 2021 costs submissions, subject to what later appears:

(a) Account 16523, 31 July 2020 covering 10 June – 31 July 2020 relates to "second criminal prosecution" appears all to arise before the stay application and is allowed in full.

(b) Account 16573, 31 August 2020 covering 1-31 August 2020 though headed "second criminal prosecution" seems from the narration to relate wholly to the stay application and is disallowed.

(c) Accounts 16647, 30 September 2020 covering 1-30 September 2020, 16684 31 October 2020 covering 1-31 October 2020, 16762 30 November 2020 covering 1-30 November 2020 and 16802 31 December 2020 covering 1-31 December 2020 all appear to relate to the stay application and are disallowed.

(d) Account 16838, 31 January 2020 covering 1-31 January 2021 appears from the narrative to be partly concerned with a possible appeal against the stay judgment and partly relating to the second criminal prosecution. Of the fees of $5,684 it appears reasonable to disallow $2,000 and allow the rest.

(e) Accounts 16901, 28 February 2021 covering 1-28 February 2021, 16919 31 March 2021 and 16976 3 May 2021 are all concerned with preparation for the

March 2021 trial, its aftermath or preparation for the costs hearing and are allowed in full.

(f) Account 17058, 18 June 2021 covering 1 May – 17 June 2021 appears to be a wrap-up invoice following the trial and attendances concerning the costs hearing and is allowed in full.

[228] However, attached to the defendants' fifth memorandum, also filed on 21 June 2021, is another set of fee notes, Accounts 16350, 16398, 16454, 16533, 16636, 16761, 16807, 16834 and 17059 covering the period 1 April 2020 – 17 June 2021. From the narrative, it would appear that at least some of the work charged in those invoices may have been charged for in the invoices attached to the defendants' 21 June 2021 submissions. If the fact of there being no duplication between the two sets is demonstrated, consideration will be given to whether the invoices attached to the fifth memorandum should be allowed.

[229] The following are the Little & Matysik invoices handed in at the costs hearing:

(a) Two accounts dated 30 June 2021, Accounts 17084 and 17083, the former being said to relate to the T N George matter – though the narrative does not make that clear – and the latter to the Allsworth matter. They will be allowed, the former as to 75% and the latter in full.

(b) Accounts 17139, dated 31 July 2021 covering 1-31 July 2021, 17191 dated 31 August 2021 covering 1-31 August 2021, 17245 dated 30 September 2021 covering 1-27 September 2021, 17418 dated 31 December 2021 covering 1-31 December 2021, 17451 dated 31 January 2022 covering 1-31 January 2022, 17512 dated 16 March 2022 covering 1 February – 15 March 2022 and 17513 dated 21 March 2022 covering 16-22 March 2022 all appear to be related to the costs application and are allowed in full.

[230] All the above are chargeable to Mr Allsworth.

[231] The first account from Tim Arnold PC, dated 10 February 2020, covers the period 9 December 2019 – 31 January 2020 is for $3,105 including $2,700 for fees and is allowed as to 75% against Mr T N George.

[232] The second account dated 6 April 2020 for $8,625 including $7,500 for fees for the period 1 February – 31 March 2020 from the narrative would appear to have been incurred about 25% before 17 February 2020 with the balance afterwards and is accordingly allowed as to 75%, say $1,400 of $6,100, for the earlier period with the periods 17 February – 13 March and 14 March – 16 March 2020 being allowed for payment as per paragraphs [181], [194] and [224](a).

[233] The third account dated 22 April 2020 covering the period from 1 April 2020 to date for $1,725 including $1,500 for fees, appears from the narrative to relate to matters consequent on the withdrawal of the informations and is accordingly allowed in full.

[234] The fourth account dated 18 June 2021 covering the period from 22 April 2020 to the "conclusion of the Allsworth trial" is subdivided into $1,500 plus $225 for VAT for matters relating to the Allsworth prosecution and is accordingly allowed in full, $1800 plus $270 for VAT for the stay application is disallowed and $22,500 plus VAT of $3,375 all relating to the Allsworth prosecution is allowed in full.

[235] Although updated invoices for Mr Raftery and Little & Matysik were presented during the hearing of the costs application, there was no updating invoice from Mr Arnold for any work undertaken by him following the March 2021 trial but as all the memoranda concerning the costs applications were prepared by Little & Matysik and Mr Arnold was only present for a small portion of the costs hearing, it is assumed he does not intend to charge for any attendances since March 2021.

[236] Unless abbreviated by Minute, **within 20 working days** of delivery of these judgments, memoranda are to be filed:

(a) Covering the calculations required by the findings in paragraphs [181], [194] and the calculation of all items under the heading "Quantum"; and

(b) Counsel involved in the costs hearings are to collaborate and submit a draft of the orders to be sealed (s 414(4) of the Crimes Act 1969) incorporating the findings in the judgments; and

(c) If Counsel or any party wishes to submit that any detail in the "Quantum" section should be redacted before the judgment is released publicly.

[237] To allow time for the necessary calculations to be completed, for memoranda under paragraph [236] to be considered and for any further directions, distribution of these judgments is restricted to the parties, their immediate families and all counsel listed in the intituling for 30 working days after initial delivery of the same, after which it is intended that these and any subsequent judgment containing the calculations consequent on the findings be available to the public.

Hugh Williams, CJ