ORDER PROHIBITING PUBLICATION OF PARTICULARS OF CERTAIN ITEMS SEIZED BY POLICE IN [24].

IN THE COURT OF APPEAL OF NEW ZEALAND

CA320/2013
[2015] NZCA 22

BETWEEN	THE ATTORNEY-GENERAL Appellant
AND	BRUCE VAN ESSEN Respondent
AND	PETER GIBBONS Second Respondent

CA339/2013

AND BETWEEN	JASON PATTERSON Appellant
AND	THE ATTORNEY-GENERAL First Respondent
	GRAHAM SCOTT Second Respondent

CA593/2013

AND BETWEEN	PETER GIBBONS Appellant
AND	BRUCE VAN ESSEN Respondent

CA594/2013

AND BETWEEN	GRAEME SCOTT Appellant
AND	JASON PATTERSON Respondent

Hearing:	25 November 2014 and 1 December 2014 (further submissions received on 11 December 2014)
Court:	Ellen France P, Stevens and French JJ
Counsel:	F R Sinclair, P D Marshall and I McArthur for Appellant in CA320/2013 and First Respondent in CA339/2013 A Shaw and F E Geiringer for Respondent Van Essen in CA320/2013 and for Appellant Patterson in CA339/2013, for Respondent Van Essen in CA593/2013 and Respondent Patterson in CA594/2013 D P Robinson for Respondent Gibbons in CA320/2013, for Respondent Scott in CA339/2013, for Appellant Gibbons in CA593/2013 and for Appellant Scott in CA594/2013
Judgment:	24 February 2015 at 3.00 pm

JUDGMENT OF THE COURT

CA320/2013 and CA339/2013:

A The appeals and cross-appeal by the Attorney-General are allowed.

B The cross-appeal by Mr Van Essen is dismissed.

C The order that the Attorney-General pay Mr Van Essen public law damages of $10,000 is quashed.

D The appeal by Mr Patterson is dismissed.

E The order that the Attorney-General pay Mr Van Essen and Mr Patterson's indemnity costs (and reasonable disbursements) less 20 per cent is quashed.

F The order that the Attorney-General pay Mr Gibbons and Mr Scott indemnity costs is quashed.

G The Attorney-General must pay both Mr Van Essen and Mr Patterson indemnity costs (and reasonable disbursements) only in respect of all attendances up to the commencement of the High Court trial. The parties are to endeavour to agree quantum. In the event of any disagreement the outstanding issues are remitted to the High Court for determination. The

remaining costs and disbursements of and incidental to the High Court trial are to lie where they fall.

H As between the Attorney-General and Mr Gibbons and Mr Scott, costs in the Court of Appeal are to lie where they fall.

I As Mr Van Essen and Mr Patterson are legally aided, there will be no order for costs against either of them in the Court of Appeal.

J Order prohibiting publication of particulars of certain items seized by Police, as set out in paragraph [24].

CA593/2013 and CA594/2013:

K The appeals by Mr Gibbons and Mr Scott are allowed.

L All questions of costs as between Mr Gibbons and Mr Van Essen and Mr Scott and Mr Patterson in the High Court are remitted to the High Court for determination under ss 45 and 46 of the Legal Services Act 2011.

M As Mr Van Essen and Mr Patterson are legally aided, there will be no order for costs against either of them in the Court of Appeal.

REASONS OF THE COURT

(Given by Stevens J)

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Introduction

[1] These appeals concern the outcome of a joint proceeding brought in the High Court by two Accident Compensation Corporation (ACC) beneficiaries, Mr Van Essen and Mr Patterson.[1] Upon suspicion of fraudulently claiming entitlements, their homes were searched by police officers (in the presence of civilian assistants) at the request of ACC. The searches were conducted in 2006 pursuant to search warrants obtained by the police. Information supporting the warrant applications was provided to the police by two investigators, Mr Gibbons and Mr Scott, who had been contracted by ACC to conduct investigations into the business activities of the two beneficiaries.

[2] Some four years after the searches occurred Mr Van Essen and Mr Patterson separately filed proceedings against the Attorney-General claiming that their right to be free from unreasonable search and seizure under s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA) had been breached. They also made various claims the police officers involved had committed misfeasance in a public office and trespass to land and goods in the course of searching their homes and subsequently seizing property. Mr Van Essen further claimed the police officers had maliciously procured the search warrant. Tortious allegations for trespass to land and goods were made separately against Mr Gibbons (in Mr Van Essen's case) and Mr Scott (in

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1 *Van Essen v Attorney-General* [2013] NZHC 917, [2013] NZAR 809 [liability judgment].

Mr Patterson's case).[2] Mr Gibbons and Mr Scott had, in addition to providing information supporting the warrant applications in each case, assisted police officers at the searches of the homes of each at the request of the police. It was alleged the police officers involved in obtaining and executing the warrants – as well as Mr Gibbons and Mr Scott – had acted in bad faith.[3]

[3] Prior to the High Court trial, counsel for the Attorney-General acknowledged that each search warrant contained significant flaws and was accordingly unlawful and that each claimant was entitled to a declaration of a breach of s 21 of the NZBORA.[4] Thus the Attorney-General accepted that both Mr Van Essen and Mr Patterson were entitled to a declaration of breach of s 21. However the Attorney-General contended that no further relief was required.

[4] In the High Court Mr Van Essen and Mr Patterson failed to establish bad faith on the part of either the police officers involved or the investigators.[5] The private law claims in tort against the police also failed.[6] The trespass claims against Messrs Gibbons and Scott were also dismissed, on the basis that each was protected by statutory immunities.[7] In respect of both plaintiffs, Whata J granted a declaration that their right to be free from unreasonable search and seizure was breached.[8] He awarded Mr Van Essen $10,000 in damages for breach of the NZBORA, but Mr Patterson's claim for damages failed.[9]

[5] On costs, the Judge sought further submissions from the parties on possible "indemnification" of the private investigators by the Attorney-General. In a separate costs decision, the Judge ordered indemnity costs (including reasonable

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2 All these claims were initially made against a number of other police officers and ACC employees involved in the searches, but were later abandoned and not appealed to this Court.

3 It seems that the bad faith allegations arose as somewhat of an afterthought (on the third day of the High Court trial). These were belatedly advanced to assist the claimants, as a necessary element in overcoming the various statutory immunities relied upon as affirmative defences by the Attorney-General and Messrs Gibbons and Scott.

4 On the authority of *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207. Counsel for the Attorney-General noted that *Williams* had been decided after the warrant in each case had been applied for.

5 Liability judgment, above n 1, at [78]–[85].

6 At [108]–[109].

7 At [110]–[116].

8 At [126].

9 At [127].

disbursements) in favour of Mr Van Essen and Mr Patterson against the Attorney-General less 20 per cent.[10] He awarded indemnity costs (including reasonable disbursements), as well as costs for "executive time reasonably spent by them in preparing for and attending the hearing" to Mr Gibbons and Mr Scott against the Attorney-General.[11] This was a combined liability from the High Court proceedings requiring payment in excess of $200,000 by the Attorney-General.

[6] The Attorney-General now appeals to this Court on behalf of the police against the awards of:

(a) $10,000 to Mr Van Essen as public law damages;

(b) indemnity costs to Mr Van Essen (less 20 per cent); and

(c) indemnity costs to Mr Gibbons and Mr Scott against the Attorney-General.

[7] Mr Van Essen cross-appeals on the adequacy of the $10,000 award and the failure to recognise his claim in trespass against Mr Gibbons.

[8] Mr Patterson appeals against Whata J's refusal to award him public law damages and the failure to recognise his claim in trespass against Mr Scott. The Attorney-General cross-appeals against the award of indemnity costs (less 20 per cent) in favour of Mr Patterson.

[9] The issues on appeal are as follows:

(a) As to liability:

(i) Was the Judge wrong to award public law damages to Mr Van Essen?

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10 *Van Essen v Attorney-General* [2013] NZHC 2016, [2014] NZAR 11 [costs judgment] at [43](b).
11 At [43](a).

(ii) If the Judge was correct to award public law damages, was the quantum of that award appropriate?

(iii) Was the Judge wrong not to award public law damages to Mr Patterson?

(iv) Are Messrs Gibbons and Scott liable in trespass in relation to their assistance in the police searches?

(b) As to costs:

(i) Was the Judge correct in declining to award costs to Mr Gibbons and Mr Scott against Mr Van Essen and Mr Patterson in application of ss 45 and 46 of the Legal Services Act 2011 (the LSA)?

(ii) In that context, was the Judge wrong to include in the award of costs executive time to Messrs Gibbons and Scott?

(iii) Was the Judge wrong to award indemnity costs (less 20 per cent) to Messrs Van Essen and Patterson against the Attorney-General?

(iv) Correspondingly, was the Judge wrong to order indemnity costs to Messrs Gibbons and Scott against the Attorney-General in respect of their defence to claims brought by Mr Van Essen and Mr Patterson?

Background

[10] In 2005 the ACC was concerned about fraudulent claims. The Examining Officer for ACC in Christchurch, Mr Clark, was responsible for investigating particular allegations. Where preliminary inquiries gave cause for concern, the established practice was to commence an official inquiry and to issue instructions to an externally contracted investigator.

[11] Messrs Gibbons and Scott were contracted to investigate Mr Van Essen and Mr Patterson respectively. They are both former members of the Dunedin Central Investigation Branch and between them had more than five decades of police service. They worked for a firm called Mainland Information Consultants (Mainland). They charged by the hour. In carrying out their investigations they were initially reliant, to a significant extent, on information provided to them by ACC. They would not necessarily have been aware of all of the contents of the individual ACC case files.

[12] Arrangements concerning the contracts with private investigators such as Messrs Gibbons and Scott were handled in Wellington, separately from Mr Clark's responsibilities. We were shown an example of an agreement for private investigation services used by ACC when contracting with investigators such as those at Mainland. The supplier of the services is recorded as an independent contractor. The terms of engagement contain a specific provision that nothing contained or implied in the agreement is to be construed as creating or implying a relationship of employer/employee, partnership or principal/agent. Each party is required to indemnify the other against all claims, costs, liabilities and other losses suffered or incurred as a result of any act or omission by one party or any alleged breach of the law. The supplier is also obliged to arrange and maintain public liability insurance for a sum of not less than $1,000,000, as well as professional indemnity insurance for a similar amount.

[13] Where an ACC investigation pointed to the need for a further, more comprehensive search warrant, police involvement was required to procure one. Police practice was not to execute a warrant obtained by another party. Requests for police assistance to obtain and execute a warrant was conveyed through a Combined Law Agency Group (CLAG), a forum of Government agencies and other entities with law enforcement responsibilities. Mr Clark was a member of CLAG and conveyed requests by ACC for help to the police.

The Van Essen warrant application

[14] We adopt the thorough description of the factual background given by Whata J.[12] In early 2006, Mr Clark instructed Mr Gibbons to commence an investigation into the personal affairs of Mr Van Essen. In a wide-ranging investigation, Mr Gibbons obtained information about Mr Van Essen's work at the local Abbotsford School, his trading in Zippo lighters and his work with various companies including Universal Computer Services, Tech Pacific and Golden Leaf International, indicating he may be earning income undisclosed to ACC. Mr Gibbons reported this information to Mr Clark in February 2006, recommending that Mr Van Essen be interviewed. He did not recommend at this stage a search warrant be obtained. At the same time, Mr Gibbons' completed investigation file was returned to ACC.

[15] The file was then reviewed internally by ACC and a decision was made to apply for a search warrant. Mr Gibbons was contracted to assist with this task. He prepared the draft application, including what he considered to be the detailed grounds in support, and sent it to ACC for approval. Mr Clark forwarded the draft to a supervisor, who gave authority on behalf of ACC to obtain the warrant. Mr Clark sent a copy of the draft application to Detective Senior Sergeant Croudis in Dunedin, together with a memorandum explaining the background. Detective Senior Sergeant Croudis had responsibility for the process of obtaining warrants. All requests from external agencies were processed through him.

[16] After some initial delays Detective Senior Sergeant Croudis allocated responsibility for the application to Sergeant Kindley and Constable Henderson. Constable Henderson is Mr Gibbons' son-in-law. The Detective Senior Sergeant was aware of this relationship and the potential for conflict. He was nonetheless satisfied that processes were in place to manage the risk of a conflict of interest through oversight by him and Sergeant Kindley. In fact, it transpires the Detective Senior Sergeant neither reviewed any primary information supporting the application for the search warrant, nor did he check the affidavit in either its draft or final form. He

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[12] Liability judgment, above n 1, at [6].

relied on Sergeant Kindley to undertake that task, but Sergeant Kindley did not review the material supporting the application or check the affidavit either.

[17] In early August 2006 Constable Henderson contacted Mr Gibbons to discuss the warrant application. Mr Gibbons provided Constable Henderson with a draft form of the affidavit and took him through his file to show the record of inquiries he had made. Mr Gibbons also confirmed the basis of the allegations contained in the draft application with reference to the primary materials. Sergeant Kindley was present in the same open-plan office when this discussion took place. He observed the process of review but did not actively participate in it or the subsequent drafting process.

[18] After the meeting Constable Henderson redrafted the affidavit, largely adopting the content of the first draft provided by Mr Gibbons. The final version of the affidavit contained the following two additional paragraphs:

> 31 VAN ESSEN has committed criminal offences punishable by imprisonment. These include making a false statutory declaration, using a document for pecuniary gain.
>
> …
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> 35 Making a false statutory declaration using a document for pecuniary gain is an offence punishable by imprisonment under the Crimes Act 1961.

[19] These paragraphs were included by Constable Henderson without reference to or reliance on Mr Gibbons or his investigation file, or anyone else. It seems that neither Constable Henderson nor Mr Gibbons had any clear recollection of sighting a declaration (such as a medical certificate) by which Mr Van Essen would notify ACC of any income earned, constituting an offence of the kind listed.

[20] Three draft affidavits in similar form were prepared by Constable Henderson for three search locations: Mr Van Essen's property, the premises of the firm Golden Leaf International and Abbotsford School. In late August, Constable Henderson swore the three affidavits. The same day the Registrar issued three search warrants for the above locations.

[21] The search warrant for Mr Van Essen's property was executed on 1 September 2006 by Sergeant Kindley and Constable Henderson together with Kelly Knight (a police IT specialist). They were assisted by Mr Clark from ACC and Mr Gibbons at Constable Henderson's request. He considered their assistance would better enable the police quickly to identify any materials relevant to the ACC investigation. Constable Henderson retained overall responsibility for the search.

[22] The execution of the search was summarised by Whata J as follows:

> [18] The police initially spoke to Mrs Johanna Van Essen (Mr Van Essen's mother) and Constable Henderson advised her of the reason for their presence and showed her a copy of the warrant. Mrs Van Essen was very upset at the time. Approximately 10 minutes later, Mr Van Essen arrived at the premises. He was agitated and upset. He was shown a copy of the warrant but he was plainly very angry at the presence of the police, and does not recall seeing the search warrant.
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> [19] Initially Mr Van Essen did not notice either Mr Gibbons or Mr Clark, but when he did, he ordered them to leave his property. He was advised that he had no proper basis for requiring them to leave as they were required to assist the police in the search. Mr Van Essen could not recall whether he actually saw Mr Clark or Mr Gibbons searching without supervision of the police, but he had a distinct recollection of Mr Gibbons and Mr Clark walking into the lounge while he was discussing matters with the police.
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> [20] Given Mr Van Essen's agitated state, Constable Henderson remained with Mr Van Essen throughout the search. Meanwhile the other police officers, Mr Clark and Mr Gibbons conducted the search of the property. For the most part Mr Clark and Mr Gibbons remained in reasonably close contact with the other police officers. But they searched the garage and Mr Van Essen's car without obvious police supervision. Mr Gibbons identified a number of items that needed to be exhibited. In addition, while searching Mr Van Essen's car, he noted a gold credit card, and an EFTPOS card, both in Mr Van Essen's name. He noted the details of these numbers as he thought they were significant in relation to the inquiry. At that point Mr Van Essen came outside and told Mr Gibbons to 'fuck off' and called Mr Gibbons a 'fuckwit'. Mr Gibbons then discontinued the search and left it to the police to complete it.

[23] The Judge noted numerous items were uplifted from Mr Van Essen's property, including computer hard drives, paper documents and an unspecified number of USB drives, some of which contained "very personal information". The electronic materials were cloned by IT specialists, following which property was returned to Constable Henderson. Whata J noted that there was a delay of "some considerable time" before the property was returned to Mr Van Essen.

[24] Given the nature of some of this personal information obtained in the course of this search, at the request of counsel for Mr Van Essen, we make an order suppressing the publication of the particulars of this information. We will refer to it in this judgment, as agreed at hearing, as "intimate material".

The Patterson warrant application

[25] Mr Clark was also responsible for Mr Patterson's ACC file. He instructed Mr Gibbons to commence an investigation, which produced information to indicate Mr Patterson was operating surfing classes with employed assistants and advertising classes in local media. Mr Gibbons also observed Mr Patterson operating his surf school. Inquiries through the surfing community disclosed that Mr Patterson was physically able to take part in surfing himself, both recreationally and competitively, and that Mr Patterson had won surfing competitions. Mr Patterson also instructed surfing at a local high school.

[26] Mr Gibbons submitted a report to ACC outlining this. ACC requested Mr Patterson attend an interview. He declined. Mr Gibbons assisted ACC in preparing a draft statutory declaration for completion by Mr Patterson. This was forwarded to Mr Patterson who provided the relevant answers to ACC. Mr Gibbons reviewed these and recommended further inquiries into Mr Patterson's activities. Responsibility for this further investigation was handed to Mr Scott, another investigator at Mainland. His report was sent to Mr Clark who discussed it with his superiors at ACC and instructed Mainland to prepare a draft application for a search warrant. This was prepared by Mr Scott and Mr Gibbons and sent to Mr Clark for review. Authority was granted by ACC to seek a search warrant, following which Mr Clark again sought assistance directly from Detective Senior Sergeant Croudis in the application process. The Detective Senior Sergeant forwarded that request on to Sergeant Kindley.

[27] In December 2006 Mr Scott went to the Dunedin Police Station to meet with Constable Preece, who had been tasked with completing the warrant application. Constable Preece was aware of issues that had arisen for Constable Henderson in dealing with the Van Essen search warrant application and was initially apprehensive

about becoming involved in an ACC matter. It seems these concerns were overcome and Sergeant Kindley helped him prepare and execute an application for a search warrant for Mr Patterson's property.

[28] Constable Preece met with Mr Scott to review the information provided by him for the purposes of preparing an affidavit in relation to the search warrant. He was familiar with Mr Scott, having been aware of his previous police service. Mr Scott had a reputation as having been a thorough and proficient Detective Sergeant and Constable Preece trusted the information provided by him. He formed the view the information demonstrated Mr Patterson had been receiving income in excess of his ACC entitlement. He concluded the content of the affidavit provided a sufficient basis for seeking a search warrant.

[29] Constable Preece prepared an application for two warrants based on the information assembled by Mr Scott. These included detailed allegations about Mr Patterson's activities with Southern Coast Surf Clinic and other information, including declarations in medical certificates about his injury. While the applications contained a statement that using a document for pecuniary advantage and making a false statutory declaration are offences punishable by imprisonment, no statutory references were specified.[13]

[30] Constable Preece then presented the application to the Deputy Registrar together with two draft search warrants: one for Mr Patterson's home, the other for his accountant's office. The Constable's affidavit was filed with the Deputy Registrar who then wrote on all of the documents. When Constable Preece received his copy of the warrants, he did not review them to be sure the Deputy Registrar had signed them. In fact the search warrant for Mr Patterson's home was not signed. None of the persons executing the warrant were aware of this defect. Subsequently Constable Preece, Constable Henderson and Sergeant Kindley, assisted by Mr Scott, executed both search warrants.

[31] Initially the house at the property was open and no one was at home. Mr Scott took an active role in searching the house under the broad supervision of

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[13] In similar terms to that set out in Mr Van Essen's search warrant above at [18].

Constables Preece and Henderson. A number of boxes were found that appeared to contain records from the Southern Coast Surf Clinic. During the search Mr Patterson arrived home. He objected to Mr Scott's presence, who returned to the police vehicle.

[32] Upon completion of the search, seized items were handed to Mr Scott. He was advised by police that they would not hold on to the exhibits and they were signed over to him as agent for ACC. Mr Scott retained control of these exhibits until ACC requested that they be returned to its office in Christchurch.

[33] Analysis of the exhibits obtained from Mr Patterson's home resulted in the preparation of a warrant application for Mr Patterson's bank. This was forwarded to ACC and a warrant obtained. This search resulted in the seizure of a significant amount of banking information. Whata J noted this information appeared to show that Mr Patterson was earning additional income from his surfing-related activities, on top of his ACC benefit. It later transpired there was an anomaly on Mr Patterson's file and an inquiry within ACC was initiated. It became clear Mr Patterson's ACC entitlements had been abated for work prior to May 2005. Mr Scott had not been aware of this and had not been provided with this information when he drafted the earlier warrant applications.

The flaws in the warrants

[34] The Attorney-General properly accepted prior to trial the warrant applications in both cases were flawed. Based on the guidance then available from this Court in *R v Williams*, counsel accepted that the resulting searches were unlawful and unreasonable.[14] This was not in dispute in the High Court and Whata J adopted counsel's "succinct summary" of the key flaws in each case. For the Van Essen warrant, these were:[15]

> (a) The allegations of false declaration for pecuniary gain at paragraphs 31 and 35 were erroneous. The nature and type of the alleged criminality was not properly defined as making a false declaration and using a document for pecuniary gain are separate offences under the Crimes Act 1961;

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14 *R v Williams*, above n 4, at [21]–[24].
15 Liability judgment, above n 1, at [41].

(b) There was no description of any statutory declaration or documentary evidence of one;

(c) No document was produced allegedly used for pecuniary gain;

(d) The sources of the information were not properly qualified and the reliability of Mr Gibbons was not properly established;

(e) Not all relevant information was disclosed, including Constable Henderson's familial relationship with Mr Gibbons;

(f) The grounds for granting the warrant were not scrutinised by reference to applicable statutory criteria.

(g) The warrant application was not checked by a superior officer.

[35] Mr Van Essen claimed at trial that the affidavit contained material inaccuracies and irrelevant information. Whata J rejected these criticisms. He was satisfied the relevant inculpatory statements formed a sufficient basis for an affidavit in support of the search warrant, notwithstanding the errors in drafting the eventual applications.[16]

[36] Mr Patterson made similar criticisms.[17] Additionally, one of the warrants was not signed by the Registrar. However, again, the Judge was satisfied the affidavit supporting the application for a search warrant was based on sufficient supporting information.[18]

The police response and IPCA report

[37] Prior to issuing the proceedings, Mr Van Essen lodged an internal complaint with the police involved, and both Mr Van Essen and Mr Patterson complained to the Independent Police Conduct Authority (the IPCA).

[38] Mr Van Essen lodged a complaint on the day his house was searched. Police National Headquarters was notified and the IPCA investigation waited for the outcome of that internal investigation. This internal review concerned the conduct of the police in executing the search warrant and was reviewed by an external reviewing officer. Its outcome was released in November 2006, dismissing

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16 Liability judgment, above n 1, at [42].
17 At [43].
18 At [44].

Mr Van Essen's complaints. The IPCA reviewed this report and determined it was deficient, in that it failed to address the grounds for the warrant and failed to address the potential conflict situation between Mr Gibbons and Constable Henderson.

[39] The Southern District Operations Manager, Inspector Todd, conducted a reinvestigation of Mr Van Essen's complaints in 27 June 2007. This was conducted alongside the IPCA's own independent investigation, which commenced on 20 June 2007. Inspector Todd investigated the warrant and its execution, concluded the warrant application was flawed and acknowledged the police errors in respect of Mr Gibbons and Constable Henderson's relationship.

[40] Inspector Todd met with Mr Van Essen and his support person, Mr Warren Forster about his findings and reported these to the IPCA. In a file note recorded by Inspector Todd, he noted Mr Van Essen "expressed gratitude at the findings and [was] satisfied with the recommendations". It also recorded that the meeting concluded with an acknowledgement that "in their view Constable Henderson had not done anything wrong, and that ACC had several systemic failings which they were still seeking redress on". Mr Van Essen's counsel said he denies making comments to that effect.

[41] Subsequently Inspector Todd wrote to Mr Van Essen in November 2007 officially recording the outcome of his complaint and advising him of the course of action recommended in response to deficiencies identified. These were as follows:

> 1. Conflicts of interest in terms of investigations are referred to in R.16 of the Commission of Inquiry into Police Conduct. The importance of independence of investigations has been added to District Directives when internal investigations are assigned to Area Commanders.
>
> 2. National Manager, Operations, Police National Headquarters to reassess General Instructions A294, to have a wider context also including conflict of interest issues referred to in R.16 Commission of Inquiry.
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> 3. National Manager, Operations, Police National Headquarters to reassess General Instructions S052, to have a wider context to include information contained in attached Draft Policy Pointer *"Action in respect of privately obtained search warrants."*
>
> 4. Proposed training at District level for staff involved in requests from members of the public to obtain search warrants:

4.1 establish a Police file
4.2 recording of documentary evidence on Police file
4.3 identification and response to conflicts of interest.

[42] The IPCA issued its final report on its investigation in September 2008 (the IPCA Report).[19] Goddard J conducted the inquiry and her report runs to 38 pages. It addressed a number of issues including the search warrant application and supervision (issues five and six) the procedures where ACC (or other agency) seeks a search warrant (issue four), the adequacy of the police procedures for addressing conflicts of interest (issue seven), the failure to introduce the private investigators at the search (issue one), whether a copy of the search warrant was shown to Mr Van Essen (issue two) and the supervision of the ACC assistants at the search (issue three).

[43] The IPCA directly considered the relationship between Constable Henderson and Mr Gibbons.[20] It noted the Dunedin police were aware of the importance of managing potential conflicts of interest and had taken some steps to manage the apparent conflict of interest.[21] It rightly concluded the police should have more actively managed the conflict of interest.[22] The IPCA was critical of the existence of personal relationships of that nature in relation to the application for the search warrant. Nonetheless, it stated:

> 112. It is important to emphasise that there is no evidence of an actual conflict of interest or that Constable Henderson had any financial interest in the outcome of the search warrant applications. Nor is there any evidence of impropriety.

[44] With respect to Mr Patterson's case, the following paragraph from the IPCA report into Mr Van Essen's complaint is relevant:

> 113. Perceived conflict of interest questions may also arise when former police officers – such as Mr Gibbons – deal on a professional basis with former close colleagues who still work for police. In simple terms, the risk is that members of the public might perceive that the former police officers are being 'looked after by their mates'.

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19 Independent Police Conduct Authority *Report on the complaint of Bruce Van Essen* (September 2008) [IPCA Report].
20 IPCA Report, above n 19, at [105] onwards.
21 At [106]–[107].
22 At [127].

[45] The IPCA noted the 2007 Commission of Inquiry into Police Conduct, which recommended that police develop a policy for independence of such investigations, including guidelines and procedures for managing conflicts of interest in such situations.[23] The IPCA also referred to the Auditor-General's 2007 report managing conflicts of interest.[24] It noted that in February 2008 a new Police Code of Conduct had come into effect, implementing some elements of the recommendations in the Auditor-General's report. The IPCA Report then stated:[25]

> 126. At the time the warrant to search Mr Van Essen's home was issued, there was no clear national guidance for police on handling conflicts of interest.
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> 127. However, police management in Dunedin knew of the relationship between Constable Henderson and Mr Gibbons and should have more actively managed that relationship to avoid any perception of a conflict of interest. Either Constable Henderson should have been assigned to duties that would not involve professional dealings with Mr Gibbons, or any professional dealing he had with Mr Gibbons should have attracted additional oversight and reporting requirements. This did not happen.
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> 128. The Authority stresses that, in making this finding, it has found no evidence of actual bias on the part of Constable Henderson, whether in the form of corruption or attempting to pervert the course of justice. **Nor is there any evidence of misconduct or neglect of duty by Constable Henderson**. It is notable that Constable Henderson himself raised with his superiors the fact that his appointment to the 'ACC desk' would involve direct dealings with his father-in-law. He received assurances that the relationship did not prevent him fulfilling that role.
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> 129. Finally, the Authority acknowledges that the Code of Conduct adopted early in 2008 now provides general guidance for police on dealing with conflicts of interest.
>
> *Recommendation*
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> 130. In developing detailed guidance on managing conflicts of interest, Police take into account the Auditor-General's guidance on managing conflicts of interest in public entities.

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23 At [115]; Commission of Inquiry into Police Conduct *Report of the Commission of Inquiry into Police Conduct* (Vol 1, March 2007, Wellington).

24 Office of the Auditor-General *Managing Conflicts of Interest: Guidance for public entities* (1 June 2007).

25 Emphasis added.

[46] The Commissioner of Police agreed with the recommendations of the IPCA.[26] In correspondence the Commissioner advised that, following *R v Williams*, a work programme had been developed to address relevant issues highlighted in that decision. He added: "This work is well advanced and includes the re-write of the manual of best practice chapter on search and seizure …". The Commissioner undertook to ensure that relevant matters highlighted in the IPCA report were included in the re-write. With respect to search warrants the Commissioner confirmed work was underway to revise the "online forms" for search warrant applications. This would provide "improved guidance for staff on standards of evidence needed for an application" and would also "provide for an internal checking and approval process".

[47] The Commissioner outlined other measures taken, including policies on assisting other agencies with search warrants and their involvement in executing search warrants, as well as policies on leaving copies of search warrants with occupiers of houses. He observed that the issue of conflicts of interest had been the subject of an earlier recommendation from the Auditor-General stating that it:[27]

> … forms part of the [Commission of Inquiry] work programme. The responsibility to implement this recommendation rests with the National Manager: Professional Standards and is scheduled to be completed by June 2009.
>
> In addition, the Police Code of Conduct … also provides guidance [on] conflict of interest. "*Employees avoid situations that might compromise, directly or indirectly, their impartiality or otherwise calls into question an employee's ability to deal with a matter in a fair and unbiased manner. Employees inform their managers where any actual or perceived conflict of interest could arise."*

[48] Finally, in respect of Mr Patterson's complaint, the IPCA prepared a written report addressing the issues he raised. It concluded that Constable Preece's failure to ensure that the warrant was signed by the Registrar was "an oversight and did not amount to misconduct or neglect of duty". The report found that, although Constable Henderson's involvement in the execution of the search warrants gave rise to a "perceived conflict of interest", he had not assisted in the applications for the

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[26] There is a mandatory statutory requirement for a response from the Commissioner of Police to all reports of the IPCA: Independent Police Conduct Authority Act 1988, s 29.

[27] Emphasis in original.

warrants in Mr Patterson's case. There was accordingly no misconduct or neglect of duty.

The findings in the High Court

Factual findings

[49] First we summarise the findings of Whata J on a number of key factual disputes. In relation to the conduct of the police and Messrs Gibbons and Scott, it was established:[28]

(a) There was a proper basis for the police to seek the warrants. This was provided by the information supplied by Messrs Gibbons and Scott in which key allegations were cross-referenced to primary material discovered by them or directly observed made by them.

(b) Neither Mr Gibbons nor Mr Scott intentionally omitted any exculpatory information. It was difficult to understand what such information might have been "given the fractured state of ACC files".[29] However there was nothing of substance to suggest that either Mr Gibbons or Mr Scott knew about, or knowingly failed to bring to the attention of the police, information that might have assisted Mr Van Essen or Mr Patterson.

(c) While various allegations in the affidavits were contestable, there was a sufficient basis for them by reference to primary material or direct observation.[30]

(d) The police were not aware of the flaws in the applications or, in Mr Patterson's case, the absence of the Registrar's signature on the warrant.[31]

[50] These findings are supported by the following conclusion:

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28 Liability judgment, above n 1, at [70].
29 At [70](b).
30 At [70](c).
31 At [70](e).

> [84] … allegations of intentionally misleading conduct were not established by the plaintiffs. Indeed the plaintiffs did not [come] close on these allegations. The short point is that both Mr Gibbons and Mr Scott presented objectively reliable information to the Constables supporting the relevant allegations, all suggesting that Messrs Van Essen and Patterson had received undeclared income in addition to their ACC payments in the relevant periods.

[51] The Judge concluded the potential conflicts of interest were not actively managed by the police.[32] The first arose from Constable Henderson's familial relationship with Mr Gibbons and the second from the prior status of Mr Gibbons and Mr Scott as police officers in Dunedin.

[52] Whata J found further Mr Gibbons was not directly supervised at all times during the search of Mr Van Essen's property.[33] He also found that a significant amount of personal property was seized from Mr Van Essen's home, some of which was irrelevant to the alleged criminal activity.[34] Finally the Judge found that information seized from Mr Patterson's home was improperly handed over by the police to Mr Scott.[35]

[53] The Judge then assessed the reasonableness of the police conduct. In Mr Van Essen's case the Judge accepted the officers knew about Constable Henderson's conflict of interest and did nothing of substance to manage it.[36] Neither Detective Senior Sergeant Croudis nor Sergeant Kindley supervised Constable Henderson and neither took steps to satisfy themselves independently there was a proper basis for the warrant. Moreover, on the issue of Mr Van Essen's alleged criminality, heavy reliance was placed by Constable Henderson on assertions made by Mr Clark and his father-in-law Mr Gibbons, without sighting the key medical certificates or other primary material that might prove or disprove that alleged illegality.[37]

[54] The Judge found that the actions of the police in both cases failed to adhere to minimum standards of independence expected of the police in the conduct of their

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32 At [70](d).
33 At [70](f).
34 At [70](g).
35 At [70](h).
36 At [72].
37 At [72](a).

investigations, including for the purpose of obtaining and execution of search warrants.[38] As the Judge put it, the police:[39]

> (a) failed to appear to be acting independently of the ACC and its investigators – Constable Henderson's familial relationship with Mr Gibbons, the prior status of Mr Gibbons and Mr Scott, and the almost rote adoption of affidavits drafted by them raises serious doubts about the independence of the police in the mind of the objective observer.
>
> (b) failed to put in place measures to avoid and/or manage the actual and apparent conflict of interest presented by Constable Henderson taking drafting instructions from his father-in-law.
>
> (c) failed to avoid and/or to manage the apparent conflict of interest presented by Constable Preece taking instructions from Mr Scott, a recently retired and very senior officer.
>
> (d) failed to secure possession of seized items, and wrongly yielded possession to a third party without express lawful authority.

[55] The Judge found no improper conduct on the part of Messrs Gibbons and Scott. They adopted a professional approach to their investigations, consistent with the methods they would have likely employed as experienced police officers. The allegations made by them about each of Messrs Van Essen and Patterson were supported by appropriate information they had obtained and had a reasonable basis.[40] In contrast to the private investigators, the Judge noted in passing that ACC too readily adopted processes that were highly invasive of the privacy of their clients and had arguably failed to recognise the rights of its clients obligations under the NZBORA.

[56] The Judge confirmed factually the searches were both unlawful and unreasonable.[41] It was then necessary for the Judge to assess the significance of the above breach of s 21 and the appropriate response.

Legal findings

[57] The first issue for determination identified by Whata J was whether bad faith had been established on the part of the police and investigators. The parties had

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38 At [73].
39 At [73](a)–(d).
40 At [74].
41 At [75] (as conceded by the Attorney-General before trial).

accepted the definition of bad faith set out by the Judge in *R v Miles*.[42] Whata J also considered the definition of bad faith for the purposes of a remedy as discussed by the majority in *R v Williams*.[43] Irrespective of which approach was applied, the Judge held that he could not say the conduct of the police or Messrs Gibbons or Scott, individually or collectively, manifested the type of deliberate disregard of rights and/or standards necessary to qualify as bad faith.

[58] Secondly, he was additionally satisfied that the relevant collective and individual failures to adhere to expected standards of competence and of independence did not amount to the type of "deliberate" disregard for rights or obligations necessary to constitute bad faith. Rather they fell more squarely into the category of a careless failure to adhere to relevant standards. It was the absence of a formal process of checking and securing oversight of junior officers that was the key problem, rather than an intention to disregard the duty to remain independent.[44] Moreover, there was no evidential basis to suggest Constable Henderson intentionally sought to assist or obtain the warrant for the improper benefit of his father-in-law. The Judge concluded:[45]

> … On the contrary, I accept the evidence that Constable Henderson thought that there was a proper and reasonable basis for the warrant, and that in his own mind, the search warrant was necessary to obtain evidence that might support criminal charges. Mr Gibbons was also a very experienced former police officer, and there was nothing to suggest, on the information before me, that Mr Gibbons deliberately sought to rely on his relationship with the Constable or held an improper motive for seeking the warrant, or if there was one, made it known to Constable Henderson.

[59] Next, the Judge held that there was even less substance to the suggestion Constable Preece deliberately disregarded the requisite standards of independence in preparing the application for a search warrant in respect of Mr Patterson. There was no suggestion Mr Scott deliberately sought to use his former senior police position to influence the Constable. The Judge was satisfied that Mr Scott simply followed the instructions he was given by ACC to assist Constable Preece in conducting the investigation and did so professionally and competently.[46]

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42 *R v Miles* [2012] NZHC 1820 at [14].
43 At [77], citing *R v Williams*, above n 4, at [116].
44 At [80].
45 At [81].
46 At [82].

[60] Finally the Judge found that Sergeant Kindley did not fully appreciate the risk of a conflict associated with Constable Henderson's relationship with Mr Gibbons and saw nothing in the fact that ACC sought the warrants directly or that Messrs Gibbons and Scott were former police officers. However, despite this oversight, Sergeant Kindley was not motivated by any improper purpose. He, like the others, was pursuing what he thought was a valid line of inquiry and relied on the junior officers to verify the validity of the warrant applications.[47]

[61] Accordingly, no bad faith was established either on the part of the police officers or on the part of Messrs Gibbons or Scott.[48] Neither Mr Van Essen nor Mr Patterson appealed against these findings.

Public law damages

[62] The Judge next addressed the question of a discretionary award of damages for breach of the NZBORA. He framed the key issue as whether declarations were sufficient to vindicate the rights of the plaintiffs. The Judge referred to the factors identified by Blanchard and Tipping JJ in *Taunoa v Attorney-General*.[49]

[63] First, Whata J first observed the type and level of intrusion involved was very significant.[50] He then considered any aggravating and mitigating factors. In Mr Van Essen's case, he concluded:[51]

> [92] … the failure to properly manage the actual and apparent conflict of interest arising from Constable Henderson's relationship with Mr Gibbons is seriously aggravating misconduct. The police should not have allowed the warrant application to be made by an officer whose family member was, in effect, seeking the warrant; at least not without active supervision by a senior officer so as to avoid or mitigate any conflict. The unchecked odour of improper influence and the potential for abuse of police powers for personal benefit is a matter of significant public concern. While I am satisfied that no actual abuse occurred in this case, the failure to avoid and then mitigate the obvious conflict was serious misconduct.

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47 At [83].

48 As this Court has made clear in *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* [2007] 1 NZLR 721 (CA) at [89], apparently not addressed in the High Court, "a party alleging bad faith must discharge a heavy evidential burden commensurate with the gravity of the allegation".

49 At [86], referring to *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [243] per Blanchard J and at [302] and [319] per Tipping J.

50 Liability judgment, above n 1, at [90], noting it featured "almost forensic interrogation into the most private space and affairs" of the claimants.

51 Footnote omitted.

> [93] The failure also to properly identify the criminality and supporting documentation is another aggravating factor. I do not accept however that the conduct of the search was unreasonable or an aggravating factor. While Mr Gibbons was not directly supervised all of the time, he was quite properly retained to assist to identify information that might be relevant.

[64] In Mr Patterson's case, Whata J found the apparent conflict of interest presented by Mr Scott as a former senior police officer to be a "comparatively minor aggravating factor".[52] While the appearance of cronyism should be avoided, it did not concern the public conscience in the same way as the risks posed by the relationship between Mr Gibbons and Constable Henderson. The Judge was satisfied that Mr Scott's major influence in the course of the investigation was the professional presentation of the material he had assembled to support the warrant. Thus, any apparent conflict was just that.

[65] The Judge next assessed the seriousness of the consequences of the breach involved.[53] He assessed the response of the Attorney-General in light of the IPCA report into Mr Van Essen's complaint. He concluded:

> [100] … the unlawful breaches of Mr Van Essen and Mr Patterson's rights to be free from unreasonable search and seizure are significant matters, both in terms of the nature of the privacy interests affected and the level of intrusion into those interests. The illegality attached to that intrusion was not however in the highest category, but the mismanagement of the conflict of interest was, at least in Mr Van Essen's case, a seriously aggravating factor, as was the nature and impact of the intrusion on his privacy.
>
> [101] Overall I have reached the view that a declaration alone is not enough in relation to Mr Van Essen. A public law remedy of damages is necessary because of the injustice to him and as a mark of the Court's disapproval.
>
> [102] I do not have the same level of concern about the breach of Mr Patterson's rights. The nature of the conflict does not trigger the same sense of injustice, and the intrusion into Mr Patterson's private affairs was not so deep (though perhaps only fortuitously so). The proper remedy in his case remains a declaration and subject to hearing submissions from counsel, costs.

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52 At [94].
53 At [96]–[97].

[66] Based on these findings, Whata J awarded Mr Van Essen $10,000 in public law damages in addition to the declaration of breach.[54] He rejected Mr Patterson's claim for public law damages.

The private law claims

[67] The claims of misfeasance in public office and malicious procurement on the part of the police failed. Whata J found the plaintiffs "have fallen well short of showing the requisite intent to injure, deliberate or reckless conduct in excess of police powers or improper purpose" to support a claim in misfeasance.[55] The malicious procurement claim failed because there was reasonable and probable cause to make the applications and no malice was shown.

[68] The claims for trespass to land and goods against Messrs Gibbons and Scott turned on the applicability of any statutory immunity. The Attorney-General had relied, in respect of the tortious allegations against the police, on s 27 of the Crimes Act 1961, s 39 of the Police Act 1958 and/or s 198(3) of the Summary Proceedings Act 1957.[56] Messrs Gibbons and Scott argued they were at all times agents of the police and therefore entitled to the same immunity from any tort or other claim consequent upon the execution of the warrants.

[69] Whata J accepted Messrs Gibbons and Scott were agents of the police for the purpose of any applicable statutory immunity.[57] He also accepted that the private investigators were on the premises in each case "at the request of the police and they were assisting them with the execution of police warrants". He noted it was clear their entire authority to be on the premises derived from the police. The Judge referred to ss 38 and 39 of the Police Act, concluding these provisions afford protection to the police and their "assistants", who enjoy the same rights, powers and authorities as the police member in respect of the execution of a warrant.[58] The relevant immunity provided by s 39 of the Police Act was therefore also available to

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54 At [107].
55 At [108].
56 There was also an initial defence based on s 6(5) of the Crown Proceedings Act 1950. Argument was not centred on this statutory ground, however, and in light of our other findings, it is not necessary to consider it further.
57 At [112].
58 At [114].

Messrs Gibbons and Scott as assistants to the police officers, acting in obedience to warrants issued by a judicial officer, within the terms of that provision.[59]

[70] Accordingly the claims in trespass against both the police and the investigators were dismissed.[60]

The costs judgment

Costs for Messrs Van Essen and Patterson

[71] Whata J acknowledged Messrs Van Essen and Patterson failed to prove any of their allegations of bad faith in respect of the police officers or investigators.[61] Mr Van Essen's claims for misfeasance and malicious procurement against the police failed and Mr Van Essen and Mr Patterson's claims for trespass against the investigators also failed. Declarations were made, on the basis of the Attorney-General's concession of breach of s 21 of the NZBORA, but only Mr Van Essen succeeded in his claim for public law damages.

[72] Whata J awarded Mr Van Essen indemnity costs less 20 per cent against the Attorney-General.[62] This was apparently on the basis he had succeeded in his NZBORA damages claim. In respect of Mr Patterson, even though his claims for public law damages were unsuccessful, the Judge considered it remained valid for him to "thoroughly test the integrity of the ex parte warrant process".[63] This served "the wider public interest in transparency and fairness". Indemnity costs less 20 per cent against the Attorney-General were therefore justified. In both cases Whata J made broad reference to the public interest in such claims being brought, the importance of incentivising the claims and ensuring costs in BORA litigation was not prohibitively expensive.[64]

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59 At [115].
60 At [118].
61 Costs judgment, above n 10, at [35]–[36].
62 At [38].
63 At [39].
64 Referring to the statements of principle in *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [186]–[187] and *Taunoa v Attorney-General*, above n 49, at [334] per Tipping J.

Costs for Messrs Gibbons and Scott

[73] It followed that Messrs Gibbons and Scott were entirely successful in their defence of claims brought against them by Mr Van Essen and Mr Patterson. The Attorney-General, having acknowledged a declaration was appropriate prior to hearing, was substantially successful in the remainder of its claims, apart from the award of public law damages made to Mr Van Essen. Nevertheless, Messrs Gibbons and Scott failed in their claim for costs against the plaintiffs.[65] This was because the Attorney-General should have treated them the same as the police officers executing the warrants and they had actively participated in a breach of the NZBORA.

[74] Whata J turned to address the claim by Messrs Gibbons and Scott for indemnification by the Attorney-General. The claimed entitlement to indemnification was put on four bases:[66]

(a) indemnification from the operation of s 38 of the Police Act;

(b) because they acted at all times as agents for the police;

(c) indemnification from the plaintiffs under s 39(2) of the Police Act – because at the time they were acting as members of the police; and

(d) indemnification on the basis that exceptional circumstances exist such that an award of costs is justified against the plaintiffs.

[75] The claim for indemnification succeeded. The Judge found that, as Messrs Gibbons and Scott attended the searches at the specific request of the police, their entire authority for being at the site of the searches derived from instructions to assist the police in the execution of the warrants.[67] The Judge relied on the provisions of s 38 of the Police Act to support his conclusion. The Judge pointed to the words in s 38(2) of the Police Act, that:

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65 At [25].
66 Summarised at [4].
67 At [18].

> … and every member and his assistants shall have the same rights, powers, and authorities for and in the execution of any such process, as if the same had been originally directed to him or them expressly by name.

[76] Accordingly, as Messrs Gibbons and Scott enjoyed the same legal status as a member of the police for the purposes of the execution of the warrant, they were logically imbued with the statutory immunity afforded by s 39 to "any member of the police" from civil claims based on a flawed warrant.[68] Whata J held:

> [21] … I do not think there is a principled basis for the Attorney-General's objection to indemnification of Messrs Gibbons and Scott. My position might be different if the flaws in the warrants could be substantially attributed to the fifth defendants. But as I observed in my judgment, the fifth defendants acted with appropriate professionalism and had a proper basis for requesting the warrants sought by the ACC. I have also found the fifth defendants did not seek to use their connections to the Police (familial or otherwise) to influence the warrant process.

[77] The Judge was satisfied this indemnity of Messrs Gibbons and Scott arose by operation of statute alone.[69] When they assisted the police, the investigators assumed the rights of a member of the police in relation to their assistance in the execution of the warrant. There was no reason to exclude from that bundle of rights the right to indemnification.

[78] Whata J added that their right to indemnification extended to costs for "time that Messrs Gibbons and Scott have reasonably incurred for the purposes of their attendances relating to the proceedings".[70] No authority was cited for this provision of "executive time".

Public law damages

[79] The correctness of the award of public law damages and whether the quantum of any such awards was appropriate may be considered together. It is convenient to address the cross-appeal by Mr Patterson first. Before doing so we briefly summarise the approach to public law damages in the NZBORA context mandated by the Supreme Court in *Taunoa v Attorney-General*.[71]

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68 At [18].
69 At [23] – as opposed to from the Crown granting an indemnity directly to them.
70 At [24].
71 *Taunoa v Attorney-General*, above n 49.

Approach to public law damages – Taunoa *methodology*

[80] The focus of an inquiry into the appropriateness of an award of public law damages is on what order(s) or package of relief is necessary to provide an effective remedy for the breach of right concerned in all the circumstances in question.[72] Elias CJ emphasised that, while the adjective "moderate" does not greatly assist in the determination of the appropriate quantum, any award should not be "extravagant".[73] The remedy must fit the case.[74] It will be necessary to consider whether relief is "within an appropriate range", not only adequate to compensate for any suffering or harm caused, but also to vindicate the important rights breached.[75] Thus the method of achieving vindication of the right adopted in any case must "recognise the importance of the right and the gravity of the breach".[76]

[81] Blanchard J also emphasised the guiding principle of the need to provide an effective remedy. The primary task is "to find an overall remedy or set of remedies which is sufficient to deter any repetition by agents of the state and to vindicate the breach of the right in question".[77] Blanchard J stated:

> [255] In undertaking its task the court is not looking to punish the State or its officials. For some breaches, however, unless there is a monetary award there will be insufficient vindication and the victim will rightly be left with a feeling of injustice. In such cases the court may exercise its discretion to direct payment of a sum of monetary compensation which will further mark the breach and provide a degree of solace to the victim which would not be achieved by a declaration or other remedy alone. This is not done because a declaration is toothless; it can be expected to be salutary, effectively requiring compliance for the future and standing as a warning of the potentially more dire consequences of non-compliance. But, by itself or even with other remedies, a declaration may not adequately recognise and address the affront to the victim. Although it can be accepted that in New Zealand any government agency will immediately take steps to mend its ways in compliance with the terms of a court declaration, it is the making of a monetary award against the State and in favour of the victim which is more likely to ensure that it is brought home to officials that the conduct in question has been condemned by the court on behalf of society.

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72 At [107] per Elias CJ.

73 A point emphasised by the agreement of most of the Judges to revise the quantum of damages awarded at first instance downwards.

74 *Taunoa v Attorney-General*, above n 49, at [108] per Elias CJ.

75 At [111] per Elias CJ.

76 At [112] per Elias CJ.

77 At [253].

> [256] It may be entirely unnecessary or inappropriate to award damages if the breach is relatively quite minor or the right is of a kind which is appropriately vindicated by non-monetary means …
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> [257] In other cases, however, non-Bill of Rights damages may not be available since the only actionable wrong done to the plaintiff is the Bill of Rights breach. Then a restrained award of damages may be required if without them other Bill of Rights remedies will not provide an effective remedy.

[82] Accordingly the question of remedy first requires consideration of the non-monetary relief that can be or has been given. The Court will assess whether that is enough to redress the breach and any relevant injury.[78] Only if the breach in question requires something more to vindicate it will an award of damages be considered necessary. The quantum of those damages does not necessarily proceed on the basis of any equivalence with quantum of awards in tort (though that may be a useful guide in some cases). Nonetheless, as Blanchard J observed:

> [258] … The sum chosen must, however, be enough to provide an incentive to the defendant and other state agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach.
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> [259] But equally, it is to be remembered that an award of Bill of Rights Act damages does not perform the same economic or legal function as common law damages or equitable compensation; nor should it be allowed to perform the function of filling perceived gaps in the coverage of the general law, notably in this country in the area of personal injury. In public law, making amends to a victim is generally a secondary or subsidiary function. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law by governmental agencies and officials, which is the primary function of public law. Thus the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings.

[83] Factors that feed into this consideration might include the promptness in which the State has brought the wrongful conduct to an end, any measures put in place to rectify systemic issues causing the problems, administrative steps to prevent recurrence and whether there has been an apology to the individual affected in appropriate terms. Tipping J also emphasised that the existence of conduct by the party in breach undertaken to repair or remedy the breach would be relevant to any

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[78] At [258]. This will include taking into account any non-Bill of Rights Act damages concurrently awarded (if any).

remedial action required from the Court.[79] Tipping J noted that in reality there are two victims where a NZBORA right is infringed – the individual concerned and society as a whole.[80] The Court must consider what is necessary by way of vindication to protect the interests of society in the observance of fundamental rights and freedoms. With respect to the nature of the remedy, the key is what is "necessary to compensate effectively for the breach".[81]

[84] Finally, Tipping J noted that relief in this field is discretionary, rather than as of right. He commented briefly on the possibility that the availability of an award of solicitor-client costs could be "an ingredient of [the] provision of an effective remedy".[82]

[85] Tipping J's position that public law damages are inherently discretionary is consistent with the observation of McGrath J that public law damages are a matter of "principled choice in the exercise of judicial judgment".[83] A rights-centred approach does not necessarily require compensation to be part of the remedy.[84] As to the scope of relief, McGrath J said:[85]

> [368] The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that *there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective*.

[86] We bear in mind this methodology as to the application of appropriate principles in exercising this Court's discretion to award damages when considering

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79 At [300].
80 At [317].
81 At [318].
82 At [334]; see also at [366] per McGrath J.
83 The discretionary nature of the remedy is referred to by Lord Nicholls in *Attorney-General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 (PC) at [18]; *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 (HL) at [56] per Lord Woolf CJ, emphasising that the Court has "a wide discretion in respect of the award of damages for breach of human rights".
84 At [372].
85 Emphasis added.

the appropriateness of compensation provided to Mr Patterson and Mr Van Essen. We also apply the methodology when assessing the factors allegedly said to have been overlooked by Whata J, or to have been irrelevant to the Judge's analysis.

Mr Patterson's damages claim

[87] The first general point raised by Mr Shaw was the need to incentivise potential NZBORA claimants to bring claims for breaches of their rights. Mr Shaw cited dicta of Blanchard J in *Taunoa* in support of this proposition.[86] He also relied on the long title to the NZBORA, referring in particular to the words "affirm, protect and promote human rights and fundamental freedoms". He contends an award in favour of Mr Patterson ought to have been granted on that basis.

[88] We acknowledge the importance of the long title in the context of legislation concerning rights and freedoms. We also note the statement in art 23(3) of the International Covenant on Civil and Political Rights 1966 requiring judicial authorities "to develop the possibilities of judicial remedy".[87] However that statement follows sub-paragraph (3)(a) of the same article, which requires a State Party "to ensure that any person whose rights or freedoms … are violated shall have an effective remedy". This is precisely what the Supreme Court sought to achieve in *Taunoa* and in *Baigent's Case*.[88] The passages summarised above describe the approach of the various Judges of that Court to assessing the various remedies available, to ensure an effective remedy is provided to the claimant concerned. We do not read the observations of Blanchard J, cited by Mr Shaw, as mandating an incentivisation of claimants by lowering the standard for the granting of monetary awards, to the exclusion of ensuring the efficacy and sufficiency of any appropriate, holistic remedy.

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86 At [264], referring to Dr Rodney Harrison QC "Remedies for Breach of the New Zealand Bill of Rights Act 1990: The New Zealand Experience – Recognising Rights While Withholding Meaningful Remedies" in *Using Human Rights Law in Litigation* (NZLS CLE Intensive, June 2014) 107 at 116. The article made reference to an increasing judicial conservatism at an appellate level in relation to remedies in this area and opined that remedies for NZBORA breaches had been "significantly curtailed, rather than developed".

87 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 22 March 1976), art 23(3)(b).

88 *Taunoa v Attorney-General*, above n [49]; *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

[89] In this context Mr Shaw referred to the dicta of Lord Nicholls, speaking for the Board in *Attorney-General of Trinidad and Tobago v Ramanoop,* as to the need for a monetary remedy to "go some distance towards vindicating the infringed constitutional right".[89] Lord Nicholls added the fact that the right violated in that case was a constitutional right "adds an extra dimension to the wrong". We agree that the rights in the NZBORA are important and of constitutional significance. But as Lord Nicholls also acknowledged, the award of damages is discretionary. So too, in New Zealand. Any exercise of that discretion is to be guided by principle, specifically those laid down in *Taunoa*.

[90] Secondly, Mr Shaw submitted the fact that one of the warrants used to search Mr Patterson's property was not signed by the Registrar meant it was a nullity and ought not to have been used by the police. This was advanced to the apparent end of emphasising or enhancing the gravity of the breach of s 21 exacted upon Mr Patterson, and therefore warranting an award of damages to effectively vindicate it.

[91] We note first, Whata J did not find any of the police officers involved in either search were aware of any of the flaws in the applications. In Mr Patterson's case specifically, they were not aware of the absence of the Registrar's signature on the warrant.[90] Neither Mr Patterson nor anyone else occupying the property examined the warrant at the time of the search, meaning that at no point was this deficiency in the warrant brought to the attention of the police officers or assistants conducting the search. Nor were those searching asked to desist following an inspection of the warrant, revealing the absence of the Registrar' signature. The search proceeded on the basis that the warrant was indeed a regular, duly-signed document. It cannot be said, therefore, the search was conducted by the police and investigators in the clear knowledge, or in spite of knowledge, the warrant was defective.

[92] Second, we do not consider the absence of the Registrar's signature constitutes a legal defect of such gravity or of such radical quality to render the

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89 *Attorney-General of Trinidad and Tobago v Ramanoop*, above n 83, at [19].
90 Liability judgment, above n 1, at [70](e); noted above at [49](d).

warrant void and therefore a nullity.[91] It is a defect of a formal, procedural quality – it was a technical error, which did not inhibit the ability of any individual to understand the warrant or its purpose. Its absence elicits no cause for concern that the intended bounds of the warrant were or may have been misunderstood by any individual.[92] Its absence did not substantively detract from the legal imprimatur conveyed through the process of warrant application and actual grant by the Registrar.[93] The key elements of a valid warrant were present and the meaning and purpose of the warrant were clear notwithstanding.[94] In our view this technical legal defect is not of a nullifying quality.[95]

[93] The High Court decision of *R v Rogers* was referred to by Whata J and also by counsel in advancing this submission.[96] That case concerned the admissibility of evidence seized by police pursuant to a search warrant. The issuing officer did not sign the warrant. The question was whether the warrant could be said to have been validly "issued".[97] Stevens J found that, generally a signature on the part of an issuing officer will be an official indicator of the validity of the warrant.[98] But the absence of a signature on a warrant is not necessarily fatal. Much turns on whether the warrant was validly issued "in the sense of having been adopted or authenticated", the determination of which depends on all the circumstances in which the search warrant has been endorsed by the issuing officer and issued to the applicant.[99]

[94] The warrant was held to have been validly issued, notwithstanding the absence of a signature in *Rogers*. For present purposes we emphasise two points:

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91 Applying the test in *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178 at 184; see also *New Zealand Institute of Agricultural Science Inc v Ellesmere County* [1976] 1 NZLR 630 at 636.

92 *R v Blackmore* CA209/1995, 25 October 1995 at 5 per Henry J.

93 *R v Rogers* HC Auckland CRI-2006-044-4426, 9 July 2008 at [77]–[78].

94 *R v Sanders* [1994] 3 NZLR 450 (CA) at 454 per Cooke P and 462 per Fisher J; see also *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [27]-[36].

95 For as discussion as to the distinction between a statutory process or outcome being rendered "void" or instead, merely "voidable" as a result of non-compliance with prescribed statutory requirements in the civil context, see *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 186–190 and see also *Wang v Commissioner of Inland Revenue* [1995] 1 All ER 367 (PC).

96 *R v Rogers*, above n 93.

97 At [61].

98 At [70].

99 At [74].

the decision in *R v Rogers* turned substantially on its own facts. This is not a case in which it is appropriate to undertake a review of that decision. Secondly, in any event, the conclusion in that case is largely consistent with the view we have reached on the warrant's formal validity in this case: namely, it was affirmed and authenticated by the Deputy Registrar. Accordingly, we reject Mr Shaw's invitation to review it.

[95] Further, as to the effect of the absence of the Registrar's signature, we see s 204 of the Summary Proceedings Act as a complete answer. That provision operates to cure a warrant held invalid by any reason of defect, irregularity or omission unless there has been a miscarriage of justice. As this Court confirmed in *R v Sanders*, it is the legal implication of the message ultimately conveyed by the document that must be focussed upon, in determining whether s 204 should save a warrant.[100] If reliance upon the document in its defective form results in a miscarriage of justice, s 204 cannot be invoked to protect it.[101] Here, the scope and purpose of the search (notwithstanding the difficulties conceded by the Attorney-General) were not inhibited by the absence of signature. Its absence was not an indicator of a lack of formal judicial authority for the warrant, nor did it denote an abuse of process in procuring the warrant.[102] We are satisfied the Registrar's failure to sign the warrant is an irregularity cured by s 204.

[96] The present case might have been different if the circumstances were that the absence of a signature was noted at the time and an objection had been taken to the police continuing the search of the property, despite this fact having been drawn to their attention. This would have brought the case closer to the circumstances in *Baigent's case* where the police carrying out the search were aware that the property being searched was the wrong address.[103] There, knowledge of the defect was clearly sheeted home to the police. That constituted a far more grave breach of s 21,

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100 *R v Sanders*, above n 94, at 454.

101 This has happened, for example, in situations where the framing of the warrant is unreasonably vague and unspecific. See for example *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA) at 737 per McCarthy P. Although the warrant in that case was not a nullity, as the wording complied with statutory requirements, the legal defect in expression of the warrant could not be cured, for it frustrated the meaning and comprehensibility of the search powers it granted.

102 Plausibly, these could be connotations that absence of a Registrar's signature may point to – the process leading to the warrant's issue in this case and the evidence we have heard about that process do not lead to that conclusion.

103 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

justifying the award of damages for its vindication. Mr Shaw's attempts to bring the present case on all fours with that situation, however, are not compelling. We are satisfied the circumstances are materially different, and reject that submission.

[97] The third element allegedly overlooked by Whata J in assessing the gravity of the breach was the failure to refer in the application for the search warrant to the existence of the abatement of ACC payments to Mr Patterson during part of the investigation. Mr Shaw submits the Judge failed properly to take into account the existence of this abatement, and the express permission Mr Patterson had to work from ACC.

[98] This issue must be viewed in the factual context established before Whata J. At the time of trial, the evidence established the police had a proper basis to seek the warrants, in reliance on information obtained by the investigators.[104] Mr Gibbons and Mr Scott were not found to have intentionally omitted any exculpatory information and their affidavits and the draft documents were supported by the primary materials they were given by ACC and which they themselves later obtained.[105]

[99] The absence of the abatement information was brought to the Judge's attention during trial. Whata J found Mr Scott had readily accepted he did not refer to information about Mr Patterson's abatement in 2005.[106] He acknowledged the abatement should have been taken into account when drafting the affidavit, even though it did not span the entire period of the investigation. He found, nonetheless, there existed a proper basis to seek the warrant. In any event, the Attorney-General had already conceded the warrants were unlawful prior to the High Court trial. In light of that concession, we are satisfied that the Judge did not err as a matter of principle in his declining to treat this as increasing the gravity of the breach of Mr Patterson's s 21 right.

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104 Liability judgment, above n 1, at [70](a); noted above at [49].

105 At [70](b). We noted earlier how, to a large extent, the investigators were reliant on the files provided to them by ACC.

106 At [66](a).

[100] Finally, Mr Shaw submits that the police should have assessed the case for a search warrant more carefully. He submits that this demonstrates a lack of independence which was "responsible for the omissions of exculpatory information". This submission cannot assist Mr Patterson, in view of the Judge's findings of fact. The Attorney-General at trial had admitted there were flaws in the search warrant application. We are not satisfied a lack of independence was the reason for that. There was no evidence to support it. Given the factual findings of Whata J, this aspect adds nothing in terms of the unlawfulness of the search warrant or the gravity of the breach of s 21 occasioned.

[101] Although not raised by Mr Shaw, there is an additional finding of Whata J we address, lest it be thought relevant to the question of public law damages. It concerns the finding that "[i]nformation seized from Mr Patterson's home was improperly handed over to Mr Scott".[107] Whata J provides no relevant factual context for this finding but it seems to respond to paragraph 11.2 of Mr Patterson's amended statement of claim, alleging "All items seized were placed in the possession of [Mr Scott]". The amended statement of claim does not plead any particular consequence of this allegation. It may be that, somewhat obliquely, Mr Patterson was alleging there had been a breach of s 199(1) of the Summary Proceedings Act, requiring a constable retain custody of things seized pursuant to a warrant under s 198.

[102] This Court considered a similar issue in *Gill v Attorney-General*.[108] The case involved a search of a medical practice under investigation by the Ministry of Health. The practice was suspected of fraudulently claiming bulk public health care payments in respect of patients who were inappropriately enrolled as long-term patients. A search warrant was obtained and executed at the medical practice. Officials of the Ministry packaged and took a large number of files which were then placed securely in a manner organised by Ministry officials, rather than the police. The storage and subsequent examination of the seized material was not under the direction and control of the police. It was said that the requirements that anything

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[107] At [70](h).
[108] *Gill v Attorney-General* [2010] NZCA 458, [2011] 1 NZLR 433 at [105]–[110].

seized under a search warrant be "retained under the custody of a constable" had been breached.[109]

[103] In determining that issue, this Court referred to *Rural Timber Ltd v Hughes,* in which the police had allowed Ministry of Transport personnel to have materials that had been seized for examination purposes under a warrant obtained under s 198 of the Summary Proceedings Act.[110] This Court found the Ministry held the materials "on behalf of and subject to the direction and control of the police".[111] On that basis there was no breach of s 199. "Custody" was interpreted liberally to make the section workable. Similarly, in *Gill* this Court held the Ministry of Health officials were lawfully assisting the police in the execution of the search warrant. While the records were placed in the custody of the Ministry, this was as lawful agent of the police. Retention on an agency basis was to ensure that the Ministry protocols were complied with to protect patient confidentiality. The appellant's challenge was rejected as misconceived.[112]

[104] If the finding of Whata J, regarding information seized from Mr Patterson's home being improperly handed over to Mr Scott, is intended to represent a breach of s 199 of the Summary Proceedings Act, we do not agree that any such breach occurred. First, there are no relevant findings to justify such a conclusion. Whata J found Mr Scott was lawfully assisting (and was even an agent of) the police.[113] Second, Mr Scott's firm, Mainland, and hence Mr Scott, had been contractually retained by ACC for the purposes of an investigation and to assist the police in obtaining and executing a search warrant. Third, Mr Scott was present at Mr Patterson's house at the request of the police and at the behest of ACC. Finally, there is no proper basis upon which it could be said, to the extent Mr Scott retained information seized from the home, it was other than for the purposes of the investigation. Mr Scott's obligations to conduct the investigation had been contractually set out in the agreement between ACC and Mainland and we are satisfied these extended to holding the materials seized as the need arose.

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109 Summary Proceedings Act 1957, s 199(1).
110 *Rural Timber Ltd v Hughes*, above n 91.
111 At 186.
112 *Gill v Attorney-General,* above n 108, at [75].
113 Liability judgment, above n 1, at [112].

[105] We consider therefore the finding of Whata J that information was improperly handed over to Mr Scott takes the matter no further. We are also satisfied Mr Patterson has not shown any error of principle, or that the Judge was plainly wrong in his exercise of discretion.[114] Whata J correctly acknowledged that the right concerned, to be free from unreasonable search, was significant but held in Mr Patterson's case a declaration was sufficient to vindicate its breach.[115]

[106] In order to test the position fully, we have carried out a survey of awards of public law damages setting out the amounts awarded and the nature of the conduct giving rise to the award.[116] We briefly comment on the practice of awarding public law damages in New Zealand courts. First, in most cases in which damages are eventually awarded, the conduct concerned has involved physical restraint, direct infliction of physical harm, or a prolonged or significant deprivation of liberty. These cases span in seriousness from physical detention, handcuffing, to inappropriate solitary confinement and physical violence in prison similar situations. The seriousness of the circumstances is reflected in the quantum awarded to acknowledge the gravity of the breach in each case.[117]

[107] Conversely there are very few cases in which public law damages have been awarded where no physical damage or interference with liberty has occurred. Where damages have been awarded in such cases, this has typically been to reflect equivalence with tortious claims, or on the basis of clear pecuniary loss arising directly from the breach of the right itself.[118] The largest awards to date have been

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114 Applying the standard in *May v May* (1982) 1 NZFLR 165 (CA).

115 At [102].

116 Our survey is attached to the judgment as Appendix 1.

117 See for example *Dunlea v Attorney-General* [2000] 2 NZLR 136 (CA): physical searches, physical detention, handcuffs drawing blood; *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC): physical detention; *Taunoa v Attorney-General,* above n 49: solitary confinement, strip searching); and *Falwasser v Attorney-General* [2010] NZAR 445 (HC): sustained pepper spray in a prison cell and baton usage. Although serious breaches do not have to involve physical harm or restraint, historically many have.

118 *Wilson v New Zealand Customs Services* (1996) 5 HRNZ 143 (HC): detention of car, resulting in financial loss, calculated with reference to number of months without her car; *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 220: initial substantial award based on loss of income due to detention of helicopter overturned on appeal; *Binstead v Northern Region Domestic Violence Approval Panel* HC Auckland M1629-PL01, 6 June 2002: indicated willingness to calculate loss of income for period between decision not to reregister and consent order, but held most important issue being breach of natural justice rectified by simply quashing the decision and not by a calculation of pecuniary loss. All of these were pre-*Taunoa.*

justified with dual reference to tortious or common law compensatory principles. These were predominantly prior to *Taunoa.*

[108] The *Taunoa* decision itself featured a comprehensive review of international human rights jurisprudence on the issue of remedies. In addition, and in the period since *Taunoa,* there have been recent cases in the United Kingdom offering damages for breach of human rights, extending to compensation for the frustration and anxiety experienced by the individual suffering such a breach.[119] Again, however, those damages awards were justified expressly with reference to the gravity of the breach of the right involved, namely the "precarious nature of the deprivation of liberty" in the case of prisoners serving a mandatory sentence.[120]

[109] In light of those observations, applying the *Taunoa* methodology to Mr Patterson's case, we emphasise the availability of a declaration proffered by the Attorney-General prior to the trial. Although there was an accepted breach of s 21 of the NZBORA, there was a lawful basis for the search conducted. We consider Whata J erred in characterising the breach as aggravated by the factors identified in his judgment. Further, any systemic issues contributing to the breach were identified, examined and the subject of recommendations by the IPCA. The need for procedural and internal changes was accepted and steps taken for their implementation. We also take into account our findings later in this judgment that Mr Patterson will be entitled to an award of indemnity costs for part of his costs of bringing the proceeding. In these circumstances, a declaration was the appropriate remedy.

[110] For these reasons we dismiss the cross-appeal by Mr Patterson.

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[119] *R (on the application Kaiyam) v The Secretary of State for Justice* [2014] UKSC 66, [2015] 2 WLR 76; *R (Faulkner) v Secretary of State for Justice* and *R (Sturnham) v Parole Board and another* [2013] 2 AC 254 (SC). The quantum of the awards in these cases (£500 and £600 for two appellants, no breach for the remaining in *Kaiyam*; £6,500 for the appellants in *Sturnham* for a ten month deprivation of liberty) are broadly consistent with the guidance provided in *Taunoa.*

[120] *Secretary of State for Justice and R (Sturnham) v Parole Board and Another,* above n 119, at [87].

Mr Van Essen's damages claim

[111] The public law damages award of $10,000 to Mr Van Essen was based on two factors: the mismanagement of the conflict of interest by police and the "seriously aggravating" factor of the nature and impact of the intrusion on his privacy.[121]

[112] Whata J considered the privacy intrusion, noting that "matters of deep personal information were unveiled".[122] He considered this illustrated the "scale and effect" of unlawful intrusion. This was supported by a second factual finding, that the privacy invasion involving the unveiling of "private information of an intimate nature".[123] It is this privacy invasion that elevated the breach to one warranting damages, in Whata J's assessment.

[113] This information was apparently contained on one or both of two USB drives. This allegation emerged in an affidavit filed less than two weeks prior to the commencement of the High Court hearing, in which Mr Van Essen referred to two USB drives, one of which was said to contain intimate material. Mr Van Essen said that he had previously asked the police about these two USB drives but was told that they did not have them.

[114] The question of these missing USB drives was a feature of Mr Van Essen's dispute with ACC and the police from its inception. Two weeks after the police executed the search warrant at Mr Van Essen's house, Sergeant Kindley sent a copy of an exhibit inventory to Mr Van Essen, specifying two USB drives had been seized. Mr Van Essen immediately challenged this, claiming four had been uplifted from his house. The IPCA report, in its investigation of Mr Van Essen's complaint, addressed his claim, being that three USB drives had been taken from his house.

[115] Mr Van Essen complained about these "lost" USB drives, alleging claims of theft against the police and raising the issue in his various official complaint

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121 At [100].
122 At [90].
123 At [96].

procedures.[124] Mr Van Essen's theft complaint was the subject of Inspector Todd's reinvestigation.[125] At a meeting with Mr Van Essen on 16 November 2007, there was discussion about "two missing pen-drives". Mr Van Essen expressed the view that they were seized by Mr Gibbons and not accounted for by the police. The file note of that meeting records: "However [Mr Van Essen and his lawyer] emphasised they did not consider police had done anything wrong". Inspector Todd's final report on his investigation concluded there was no evidence to suggest police seized the two additional USB drives referred to by Mr Van Essen.[126] Throughout this investigation, there was no mention of the content of those USB drives.

[116] In his official complaint to the IPCA, Mr Van Essen again recorded that two USB drives had been "stolen" and unaccounted for. He also expressed concern in early 2006 through his barrister that some of the computer hard drives seized had "sensitive information" on them. This was, specifically, information about an ACC support group of which he was a member. He was concerned such personal information about the group's members would fall in the hands of ACC. This was the first indication of any "sensitive information". These two concerns are addressed by the IPCA report. It directly criticised the police's failure to address frankly the dispute as to the number of USB drives seized. It also criticised the failure of the police to implement practices to ensure sensitive information contained on the computer hard drives was not inappropriately revealed to ACC during the cloning process. It did not refer to any sensitive information held on the USB drives, nor did it refer to any sensitive information having been in fact viewed by ACC or the police, or the police IT specialists. No sensitive information, outside of those details contained on the computer hard drives, was raised with the IPCA or was the subject of its investigations.

[117] The only sensitive information noted prior to trial, therefore, was this ACC information, held on a number of computer hard drives. When Mr Van Essen filed a statement of claim in November 2010, no mention of private, intimate information

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124 Noted above at [37]–[48].

125 There are a number of references to meetings with Mr Van Essen, notably on 4 July 2007 with his lawyer, and a further job sheet documenting a discussion between Inspector Todd and Mr Van Essen on 16 November 2007.

126 This reflected the prior investigations, conducted by Sergeant Roberts and Detective Sergeant Inglis.

held on the "stolen" USB drives was pleaded.[127] It was only on 23 November 2012, in a supplementary affidavit, that Mr Van Essen alleged that four USB drives were "stolen", and specified the contents of each. One was said to contain this "intimate" personal material, relating to himself and his wife. In evidence at trial, Mr Van Essen accepted that he had never before described the contents of the USB drive in the way outlined in this late affidavit.

[118] Counsel for the Attorney-General did not accept at any point in the proceeding that any USB drives had been wrongfully taken and mislaid, but noted police had offered $57.00 for any allegedly missing items. At trial, counsel emphasised there was no evidence any police staff had viewed any intimate photographs of Mr Van Essen, or indeed that any material existed. Counsel accordingly challenged the finding of any "unveiling" of intimate information by the trial Judge as an aggravating element of the police's search.

[119] Counsel submitted further the search warrant for Mr Van Essen's house authorised the seizure of evidence of financial transactions or of various computer hardware business transactions which might be held on electronic storage devices, such as computer hard drives.[128] Some such items may contain irrelevant material of a personal nature; however offsite examination was the only realistic option.[129] Counsel submitted nonetheless the seizure and removal of a USB drive, allegedly containing intimate material, was authorised by the terms of the warrant and was reasonable for the police to do in executing the warrant.

[120] Even if the flaws in the warrant application had been removed, the search executed pursuant to it would still have involved the "privacy invasion" alleged to have occurred, as it fell within the reasonable execution of the terms of the warrant. On that basis, counsel submitted the acquisition of intimate material arising from the

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127 It refers only to alleged irrelevant material seized by the police in the course of the search. This was described as papers belonging to Mr Van Essen's children and relating to his deceased father's estate. These claims were repeated in two subsequent amended statements of claim, on 31 January 2012 and 17 August 2012. There was no mention of private, intimate material in either subsequent amended pleadings.

128 We note that in *Attorney-General v Dotcom [Search Warrants],* above n 94, at [107]–[109] this Court has regarded a computer drive as "a single thing" which might contain both relevant and irrelevant items.

129 As described in *Attorney-General v Dotcom [Search Warrants]*, above n 94, at [72].

search should not have been seen as a seriously aggravating factor that distinguished the Van Essen search from that of the Patterson search.

[121] Mr Shaw, conversely, seeks to uphold Whata J's finding and submits the quantum of damages awarded to Mr Van Essen should be increased, to give accurate weight to this seizure of intimate material.[130]

[122] We do not consider Whata J was correct to treat the alleged unveiling of intimate material to have been a factor elevating the gravity of the breach of s 21 for Mr Van Essen. There are a number of reasons for that. First, no evidence was provided or shown to us suggesting the police or the private investigators knew, at the time of the search, that intimate material was potentially contained on the USB drives. It was a persistent matter of unresolved dispute how many USB drives were uplifted by the police. In any event, two have been returned, and an offer of recompense made for a further.

[123] At the time of the search, Mr Van Essen expressed concern about ACC-related sensitive information on one of his hard drives. He did not raise concerns about this alternative intimate material at that time. Neither did he raise it in any of his complaints to the police, the IPCA nor when the reinvestigation by the Southern District Commander was commenced. When Mr Van Essen met with Inspector Todd in November 2007 to discuss the alleged "theft" of two USB drives, the issue of intimate material contained on them was not raised. It was not a feature of the IPCA report. It was not raised in any of three amended sets of pleadings filed before the hearing. The allegation came only in a late affidavit, filed very much as an afterthought prior to hearing. Mr Van Essen accepted he had never described his concerns as they were put in this affidavit, nor is there any evidence any police staff viewed, or even located, this intimate material. In view of the above factors, we do not consider there was sufficient evidence to support any finding an "unveiling" of

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[130] Mr Shaw also contended that an application for a search warrant has to satisfy a judicial officer granting the warrant that any computers will contain what the police are looking for. We do not consider that submission in any great detail: first, to the extent that this relates to a challenge to the substance on which the warrant was granted, we have already dealt with and adopted Whata J's assessment as to the validity and reasonable grounds on which the warrant was granted, and this does not succeed. Second, the substance of this complaint is answered by our reference above to *Search Warrants*, which answers Mr Shaw's concern in this regard.

intimate material occurred.[131] Even if such material existed, there was no evidence any police officer or assisting IT specialist actually located or saw it.

[124] Therefore, the revealing of any intimate material was an unsubstantiated submission, and one which we do not consider to be an aggravating factor concerning the search warrant itself. It was not an operative element of the search or of the treatment of the exhibits after the search. It was not brought to the police's attention until six years after the search had been conducted, materials seized and subsequently returned by the police. We consider it was irrelevant and incidental to the search itself. It cannot, after the fact, increase the gravity and seriousness of the initial breach of rights. We do not consider it could properly be an aggravating factor justifying the award of public law damages.

[125] The second seriously aggravating factor Whata J considered justified the award of public law damages is the Henderson-Gibbons relationship.[132] We agree with Mr Sinclair's submission for the Attorney-General that this brings into focus the significance in public law terms of internal administrative measures to investigate and rectify problems – in this case, the internal review mechanisms and IPCA procedure. This report was referred to by Whata J under a subheading "Response". The Judge said:[133]

> The response of the first defendant is also somewhat difficult to assess. I surmise that the police now (endeavour to) follow *R v Williams*, (as recommended by the report of the Independent Police Conduct Authority into Mr Van Essen's complaint.) I also understand that the policy for dealing with third party requests for warrants has changed, though again I cannot draw a link between that change and the flaws with the processes adopted by the police in the cases now before me.

[126] These findings are difficult to follow. Upon release of the IPCA report, the Commissioner wrote to the IPCA outlining the steps by police following the decision of this Court in *Williams*.[134] The letter described both the existing and prospective policies on dealing with agencies such as ACC. The Judge made no reference to this letter. Neither did the Judge mention the internal police investigation conducted by

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131 The existence of this material on the evidence is itself doubtful. So too, these additional USB drives themselves.

132 Described at [53]–[55] above.

133 At [98] (footnote omitted).

134 *R v Williams*, above n 4.

Inspector Todd.[135] The omission to deal with this investigation and the resulting correspondence with Mr Van Essen is important because it suggests the Judge overlooked the fact all Mr Van Essen's complaints were investigated and acted upon, with follow-up action recommended. The response was tailored to the situation experienced by Mr Van Essen, addressed his concerns specifically, and sought to rectify in a tangible, meaningful way the aspects of police governance allowing them to occur.

[127] Further, the Judge did not, as required by *Taunoa*, address the later IPCA report as having already exposed the deficiencies in the warrant application, as well as the supervision failings and, significantly, the perceptions that arose from Detective Senior Sergeant Croudis directing Constable Henderson to work with Mr Gibbons. The IPCA report emphasised that the Code of Conduct 2008 by then provided general guidance on dealing with conflicts of interest. Further, this was all set in train in response to Mr Van Essen's experience, directly.

[128] Mr Sinclair submitted the report was comprehensive. We agree. Each of the issues raised by Mr Van Essen was dealt with in the careful review of Goddard J. The report resulted in remedial steps being taken by the police accordingly. As the public law interest lay in exposing the underlying problem and limiting the risk of recurrence, it was necessary for the Judge to assess how far the steps already taken by the police and the IPCA report had gone to vindicate the NZBORA right breached. Mr Shaw made the further point no public apology was given to Mr Van Essen and Mr Patterson. However both were personally contacted directly by the IPCA through the course of the complaint, and Mr Van Essen interviewed throughout the police investigation of his complaints.[136]

[129] Finally, the IPCA report concluded there was no evidence of misconduct or neglect of duty by Constable Henderson. The IPCA report also cleared Constable Henderson of any actual bias and found no evidence of an actual conflict of interest or other impropriety. Although these findings were directed specifically at Constable Henderson, it seems the IPCA did not consider that there was misconduct

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135 Outlined at [37] and [41] above.

136 We observe also that neither Mr Van Essen nor Mr Patterson were eventually prosecuted by ACC.

attributable to other police staff, outside of the general lack of oversight and conflict management protocols. In respect of the need for conflict management process, this was a part of the IPCA's recommendations and such processes have since been implemented by the police.

[130] The High Court litigation seems not to have led to the identification of any new matters relevant to the Henderson-Gibbons relationship. Yet the Judge held that the police's failure to avoid and then mitigate the conflict was "serious misconduct".[137] In addition the judgment referred in several places to an actual, as opposed to an apparent, conflict of interest. In some passages of the judgment, there is an express conclusion there had been an actual conflict of interest. For example, the costs judgment notes "… the circumstances of the breach in relation to Van Essen were particularly aggravating involving an actual and ostensible conflict of interest …".[138] This is to be compared with the liability judgment, noting "[t]he conflicts of interest (actual and apparent) were not actively managed".[139] Later in the liability judgment Whata J notes, "the police … failed to put in place measures to avoid and/or manage the actual and apparent conflict of interest …".[140] Whata J found no actual abuse occurred, before noting "Constable Henderson was placed in a position of conflict …" and later stating "[t]he police appeared to act without the requisite independence."[141] We consider this overstates what took place.

[131] Whata J concludes that this relationship created "the odour of improper influence and the potential for abuse of police powers for personal benefit" which is a "matter of significant public concern".[142] We agree with that observation. However, the correct focus is on the breach of Mr Van Essen's rights and the appropriate vindication. This must be assessed in light of the circumstances as a whole (particularly the earlier internal police investigation and the IPCA report) and how the particular concerns ought best to be rectified.

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137 At [92].
138 Costs judgment, above n 10, at [1].
139 Liability judgment, above n 1, at [70](d).
140 At [73](b).
141 At [106] and [128](a).
142 At [92].

[132] The IPCA investigated and found no impropriety on the part of Constable Henderson. The report adverted to the fact that a perceived conflict of interest could significantly undermine public trust and confidence in police work, even where there is no actual conflict or where an actual conflict is properly managed. The IPCA emphasised this factor and recommended measures through which the police could prevent similar risks from occurring again, and prevent the public trust in fact being undermined. As the Commissioner of Police responded, he concurred with the conclusions and recommendations and advised that the issues raised "will be addressed". He then outlined how the specific recommendations had either been addressed or were the subject of ongoing action and review.

[133] Having reviewed the way in which the Henderson-Gibbons relationship was dealt with in the High Court, it is apparent that no new matters were raised before us. The absence of bad faith was not challenged.[143] Whata J found convincingly the collective and individual failures fell "more squarely into the category of careless failure".[144] This is consistent with the views of the IPCA report.

[134] We are satisfied that both the internal police investigation and the IPCA report (and the police response it engendered) should have been regarded as substantially vindicating Mr Van Essen's breach of s 21, implementing steps to prevent it happening again, and substantively achieving the relevant public law response required. It follows that we conclude the Henderson-Gibbons relationship cannot be said to have given rise to a seriously aggravating factor.

[135] Having addressed the findings of Whata J in the light of the Attorney-General's appeal, it remains for us to consider whether, absent the two seriously aggravating factors relied on by the Judge, the award of public law damages of $10,000 can stand. This issue can be considered together with Mr Van Essen's cross-appeal seeking an increase in the award.

[136] The starting point is that, in broadly similar circumstances, the Judge made no award in favour of Mr Patterson. For the reasons outlined earlier, we upheld that

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143 Dismissed in the liability judgment, above n 1, at [78]; discussed above at [57]–[61].
144 Liability judgment, above n 1, at [57].

outcome.[145] Second, we take into account our findings later in this judgment that Mr Van Essen will be entitled to an award of indemnity costs for part of the costs of bringing the proceeding. Third, we have compared the key findings of Mr Van Essen's case (summarised at [49]–[50] and [53], [58] and [60] above) with the conduct found in other cases of breach of NZBORA rights.[146] Next, we have had regard to the internal police investigation conducted by Inspector Todd and its outcome. Finally we have considered whether the concerns of the Judge about "improper influence and the potential for abuse of police powers for personal benefit" have been assuaged by the IPCA investigation, the publication of the IPCA report and the unqualified adoption of the recommendations (as well as the guidance in *R v Williams*[147]) by the Commissioner.[148]

[137] There is no doubt the preparation of the search warrant applications involved careless work and lack of attention to detail on the part of the constable involved. Moreover, the known conflict was not managed as it should have been. Nonetheless, having regard to all of the above factors we are satisfied an effective remedial package in the circumstances of this case did not require an award of public law damages.

[138] It follows that the appeal by the Attorney-General is allowed. The cross-appeal by Mr Van Essen is dismissed.

Liability in trespass

[139] The issue here concerns whether the allegations against Mr Gibbons and Mr Scott for the torts of trespass to land and goods can succeed. We have already referred to the finding of Whata J that both Mr Gibbons and Mr Scott were entitled to rely on statutory immunity to defeat the claims for tortious liability.[149] The relevant factual findings by the Judge were:[150]

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145 At [87]–[110].
146 Specifically, the cases listed in the Appendix.
147 *R v Williams,* above n 4.
148 Discussed above at [45]–[46].
149 Liability judgment, above n 1, at [108]–[118] discussed above at [68]–[70].
150 At [112].

> … the fifth defendants were agents of the police for the purpose of any applicable statutory immunity. They were plainly on the plaintiffs' premises at the request of the police and they were assisting them with the execution of police warrants. That they were also there for the ACC is irrelevant. Their entire authority to be on the premises derived from the police.

[140] The Judge concluded, on the basis of these provisions, that Mr Gibbons and Mr Scott both enjoyed the same rights, powers and authorities as a member of the police in respect of the execution of a search warrant. On appeal Mr Robinson, for Mr Gibbons and Mr Scott, sought to uphold the Judge's finding of statutory immunity on the basis of ss 38 and 39 of the Police Act.[151]

[141] Although essentially related to their appeal on the issue of costs, Messrs Gibbons and Scott contend they are protected from any liability arising from their actions in the execution of the search warrants by the operation of ss 38 and 39 of the Police Act. They submit they were present at the searches purely at the behest of the police and this made them "assistants", falling within the ambit of the provisions. Any defaults on their part were purely actuated by the police; they acted pursuant to police instruction and are therefore protected as police assistants. The bad faith required to overcome these statutory immunities has not been proved.[152] Accordingly, they have a complete answer to liability arising from their involvement in the police activity.

[142] We do not agree that ss 38 and 39 are available to provide a statutory immunity to Mr Gibbons and Mr Scott. Section 38 is an empowering provision and affords to assistants of a member of the police executing a warrant or process "the same rights, powers and authorities *for and in the execution of any such process*, as if the same had been originally directed to him or them".[153] Thus the rights, powers and authorities granted to assistants is limited by the plain words of the statute to actions taken in the execution of a search warrant. This does not advance the issue of what recourse there may be against those assisting the police, if in the use of available powers, they breach an individual's rights.

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151 They also alleged they are protected by the statutory immunities found in s 27 of the Crimes Act 1961 and s 6(5) of the Crown Proceedings Act 1950. We address those provisions later.

152 Nor was the absence of bad faith appealed against by Mr Van Essen or Mr Patterson.

153 Emphasis added.

[143] The protection or immunity provided for in s 39, conversely, applies only to members of the police and not to their assistants. It provides that no member of the police doing anything in obedience to any process issued out of any court shall be responsible for any irregularity in that process. Section 39(2) provides for the specific immunity from suit relied upon by Mr Gibbons and Mr Scott. However, the sub-section is expressly limited to members of the police (omitting any reference to their assistants). Its terms are different from s 38 – instead of referring to "any right, power, or authority for or in the execution of" a court process, the protection applies only in relation to subsequent actions against police in court.[154] The provisions address different elements of police authority and liability. Although s 38 empowered Mr Gibbons and Scott to assist the police, s 39 does not extend its protections to them in the same terms.

[144] For the above reasons we agree with Mr Sinclair that s 39 of the Police Act cannot clothe Mr Gibbons or Mr Scott with statutory immunity for the trespass claims.

[145] Rather, we consider the appropriate focus of protection for Messrs Gibbons and Scott is s 27 of the Crimes Act. That is one of a suite of provisions dealing with execution of a process or warrant. It provides:

> **27 Execution of erroneous sentence or process**
>
> If a sentence is passed or a process is issued by a court having jurisdiction under any circumstances to pass such a sentence or issue such a process, or if a warrant is issued by a court or person having jurisdiction under any circumstances to issue such a warrant, the sentence passed or process or warrant issued shall be sufficient to justify the execution of it by every officer, prison manager, or other person authorised to execute it, and by every person lawfully assisting him or her, notwithstanding that—
>
> (a) the court passing the sentence or issuing the process had no authority to pass that sentence or issue that process in the particular case; or
>
> (b) the court or other person issuing the warrant had no jurisdiction to issue it, or exceeded its or his or her jurisdiction in issuing it, in the particular case.

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[154] Section 39(2) relevantly provides: " … the Court trying any action against any member of the Police in respect of any act done in obedience to the [warrant] process shall find a verdict for that member, and the member shall recover his costs of suit".

[146] The word "justified" is defined by s 2 of the Crimes Act as meaning "not guilty of an offence and not liable to any civil proceeding".

[147] Mr Shaw sought to argue a limited reach for s 27. He submitted the concept of "want of jurisdiction" featured in s 27 and subs 27(a) should drive the application of the immunity. Specifically, because the warrant in this case was lawfully issued, and was not illegal for want of jurisdiction, s 27 cannot operate to protect the investigators. It is only when the warrant is erroneously issued (in the sense of from the wrong judicial body) that s 27 protects those operating in obedience to it.

[148] Such an interpretation would limit the effect of s 27, and would seemingly ignore the protection it extends outside of that narrow interpretation. For example, subs 27(a) expressly extends protection to an individual executing a warrant, notwithstanding the body issuing it had no authority to do so in the particular case. This is a broad protection which protects officers and those assisting them, despite illegality based on the circumstances leading to the warrant itself. When ss 27, 28 and 29 are taken together, they provide for a comprehensive set of protections, dealing with a number of potential irregularities or errors in the issuing of warrants. These provisions and the different grounds they cover satisfy us s 27 extends further than Mr Shaw submits.

[149] We accordingly reject these submissions. Section 27 provides statutory immunity for Mr Gibbons and Mr Scott in respect of the trespass claims and we therefore reach the same conclusion as Whata J, but on a different statutory basis.

Costs – Mr Patterson

[150] We address the appeals of the Attorney-General against the costs awards in the High Court in respect of each claimant separately. We commence with Mr Patterson.

[151] The starting point must be that Mr Patterson was entitled to a declaration of breach before the trial commenced. He was unsuccessful against the defendants on all live issues at trial, including his claim for damages for the defendants' bad faith, either in tort or under the NZBORA.

[152] We have already referred in our discussion of the *Taunoa* methodology to the relevance of a costs award to the required broader package of adequate relief.[155] This Court in *Attorney-General v Udompun* made the following observations about costs in a NZBORA context:[156]

> [186] In our view, the Judge was not wrong in principle to award indemnity costs, even though not all of Mrs Udompun's claims succeeded before him. In this area it may not always be appropriate to allow costs to follow the event. It is important to remember that *Baigent* damages are awarded only where other remedies are not sufficient and awards are, in any event, modest. Applying the normal costs rules in such circumstances may discourage litigants from bring BORA claims. This would clearly have the result of weakening BORA protections. Indemnity costs could also, in suitable cases, be seen as necessary for a proper vindication of the right. This does not mean, however, that indemnity costs are to be awarded as a matter of course in BORA cases.

[153] This Court was of the view in that case, that if the plaintiff established breaches of the NZBORA "sufficiently comprehensively", indemnity costs would have been appropriate. But, this conclusion would turn on all the circumstances of the case. It does not follow as of right. Given the success of the Attorney-General on appeal in *Updompun*, however, this Court remitted the question of costs to the High Court, commenting that it would be "inappropriate … for the Police to bear the costs of Mrs Udompun's unsuccessful claims against the Immigration Service".[157]

[154] Mr Sinclair cited comments of the learned authors of *The New Zealand Bill of Rights Act: A Commentary* dealing with arguments for and against awards of costs against unsuccessful plaintiffs in a BORA context:[158]

> On the other hand, Courts are an expensive means of airing grievances, not just for the plaintiff but also for the Crown defendant. Why should taxpayer resources be consumed on defending BORA litigation, when citizens have so many other equally effective and less costly means of vindicating breaches of rights — such as, for example, a complaint to the Ombudsmen, the Police Complaints Authority … and so on?

[155] We acknowledge that the courts should be aware that exposure to costs may act as a disincentive against bringing proceedings. But reference to other equally

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155 At [80]–[86] .
156 *Attorney-General v Udompun*, above n 64.
157 At [187].
158 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [33.4.5].

effective and less costly means of vindicating rights is also important. It is consistent with the *Taunoa* methodology that the most appropriate administrative and social vindication of a breach ought to be achieved, whether that is internal review, administrative change, or damages. As Tipping J noted, whether costs should be awarded and on what scale will be a question turning on the "overall circumstances of the case and the elements of the remedial package otherwise provided".[159] We therefore consider Mr Patterson's claim in the light of the need to achieve an effective remedy in the round, with costs being a possible ingredient.[160]

[156] Mr Shaw sought to support the Judge's award of indemnity costs for the whole High Court proceedings (less 20 per cent). He contended generally for a NZBORA-claim specific approach to costs, in which fulsome costs are awarded to ensure claimants are not discouraged from bringing claims. In relation to each claimant in this case, Mr Shaw contended indemnity costs are needed to ensure the awards of damages are efficacious and not undermined by prohibitive costs liabilities. Mr Shaw argues this position is supported by a burgeoning NZBORA-costs jurisprudence.

[157] We are not convinced by these submissions. During the pre-trial phase Mr Patterson received advice from the Crown of the availability of a declaration acknowledging the breach of his s 21 right. In pursuing this declaration, the only remedy ultimately granted by the High Court, he also pressed additional claims and was unsuccessful on all grounds. Those are the same claims advanced in this Court.

[158] As set out above, costs in NZBORA cases are awarded in light of the totality of the remedy appropriate, to be assessed in each case. It is contrary to this principle to award indemnity costs (or full costs) automatically to a claimant merely because the claim raises a NZBORA issue. While we acknowledge the need to balance the incentives involved, so as not to discourage claims seeking compensation for

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159 *Taunoa*, above n 49, at [319] and [334].

160 *Taunoa*, above n 49, at [334]. It is for that reason also, that we do not generally endorse the approach of severing the award of public law damages as a matter of "liability" and the awarding of "costs" in a distinct costs decision. These are, for present purposes, both relevant aspects of the overall vindication of the right concerned. Ideally these should be assessed together, and both factors contribute to the conclusion as to the adequacy of an award or otherwise.

NZBORA violations, this is not necessarily achieved by making extensive costs awards as a matter of course.[161]

[159] Rule 14.6 of the High Court Rules sets out factors a Judge must consider when awarding increased or indemnity costs. One such factor is acting unnecessarily in pursuing or continuing a proceeding. It is relevant that, despite a declaration being available, Mr Patterson nonetheless pursued and lost a number of additional claims in the High Court against all parties.

[160] Considering the matter in the round, and having regard to the need for an effective package of relief, we consider that the appropriate award of costs should have been indemnity costs up until the start of the trial. Mr Sinclair submitted that the cut-off should have been the date, several weeks before trial, when the availability of a declaration was accepted by the Attorney-General. This was approximately six weeks after Mr Patterson had filed an amended statement of claim setting out relevant particulars. We consider however an appropriate indemnity award should include the costs of and incidental to preparation up to the date of the commencement of the trial. By the start of the trial (at the latest) Mr Patterson and his counsel would have had ample time to assess the evidence and the prospects of success in the light of the proffered declaration. Any lesser period of time would not adequately allow for Mr Patterson to have obtained a declaration in Court.[162] Although the circumstances are not appropriate for an award of public law damages, we are prepared to accept (without intending to lay down a principle capable of general application), and taking all the circumstances together, Mr Patterson ought to recover costs expended up to the commencement of the trial in which a declaration was made.

Costs – Mr Van Essen

[161] Many of the same considerations in relation to Mr Patterson apply to the claim by Mr Van Essen for indemnity costs. Counsel for the Attorney-General

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161 To do so would be contrary to the principle established by this Court in *Udompun*, above n 64, at [186].

162 If Mr Patterson had accepted the offer of a declaration from the Crown, some further (albeit limited) attendances of counsel, as well as placing the matter before the High Court Judge, would have been required.

accepted that the outcome of the costs appeal would be contingent on the findings of this Court in relation to the award of public law damages. We have allowed the Attorney-General's appeal and consider the question of costs in that light.

[162] Mr Shaw sought to justify the award of full indemnity costs (less 20 per cent) made in the High Court on a similar basis to that of Mr Patterson. He also contended that a deduction of 20 per cent was unduly harsh in the case of Mr Van Essen, due to the quantum of public law damages awarded. He reiterates, as above, the need to ensure costs support and supplement the awarded remedies and to not discourage potential claimants by making NZBORA litigation financially untenable.

[163] Given that as a result of the appeal Mr Van Essen, like Mr Patterson, has failed on all issues against all parties, we see no basis for differentiating between the award of costs of the two claimants.

[164] Accordingly we allow the appeal and quash the award made in the High Court. In its place we award Mr Van Essen costs on an indemnity basis up to the commencement of the High Court trial.

[165] This outcome is supported by the fact that the Attorney-General acknowledged Mr Van Essen's entitlement to a declaration for breach of s 21 on 10 September 2012. This was some nine weeks before the start of the High Court trial. However, on balance and having regard to the need for an effective package of relief, we fix costs on the same basis indicated for Mr Patterson.

Mr Gibbons and Mr Scott

[166] As earlier described Mr Gibbons and Mr Scott were entirely successful in the defence of all claims brought by Mr Van Essen and Mr Patterson against them in the High Court.[163] In particular the allegations of bad faith against them failed and the claims for tortious liability also failed. However the Judge found nevertheless Mr Gibbons and Mr Scott were not entitled to costs against the plaintiffs. His reasons were as follows:[164]

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[163] See above at [57]–[70].
[164] Costs judgment, above n 10, at [35].

> … I decline to make an order of indemnity costs against the plaintiffs in favour of the fifth defendants. First, the Attorney-General should have treated Messrs Gibbons and Scott in the same way they treated the Police Officers executing the warrants. This would have avoided the need to join them separately. Second, the plaintiffs were successful in establishing a substantive breach of the NZBORA, and the fifth defendants actively participated in that breach. This in my view offsets the claim to indemnity costs based on the operation of s 39. Third, given the balance of considerations (including those that I will come to below), costs should lie where they fall as between the plaintiffs and the fifth defendants.

[167] We address two issues. First, whether the Judge was correct to decline to assess whether to award costs to Mr Gibbons and Mr Scott against Mr Van Essen and Mr Patterson in the application of ss 45 and 46 of the LSA. Second, whether, in the context of such costs award, it would be wrong to include executive time in respect of the defence of the claims by Mr Gibbons and Mr Scott.

[168] The starting point is that Mr Van Essen and Mr Patterson joined Mr Gibbons and Mr Scott to their proceedings of their own volition. This was so even though an arguably adequate remedy could have been had against the Attorney-General without joining the two investigators. Normally the consequences of joining a party in an unsuccessful suit should lie with the party who joined them.

[169] Under r 14.2(a) of the High Court Rules, costs in the ordinary course would have followed the event and Mr Van Essen and Mr Patterson would have been ordered to pay the costs of Mr Gibbons and Mr Scott respectively. This is subject only to the fact that both plaintiffs were legally aided. We address this aspect shortly.

[170] First, we address Whata J's finding that "[t]he Attorney-General should have treated Messrs Gibbons and Scott in the same way they treated the Police Officers executing the warrants. This would have avoided the need to join them separately".[165] We agree with Mr Robinson that this conflates two issues: the issue of Messrs Gibbons and Scott being joined as parties, and the separate question of the conduct of the Attorney-General in relation to the actions of Messrs Gibbons and Scott (and accordingly whether the Attorney-General should have assumed the conduct of the case in the High Court on behalf of Messrs Gibbons and Scott). We

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[165] Costs judgment, above n 10, at [25].

accept Mr Robinson's submission that whether or not the Attorney-General should have assumed the conduct of the case on behalf of Messrs Gibbons and Scott in the High Court is irrelevant to the primary costs liability of Messrs Van Essen and Patterson. As they joined the investigators to the litigation, costs ought to be determined by the outcome of the merits of the claims and the ultimate result.

[171] We do not understand the Judge's reference to "this would have avoided the need to join them separately".[166] The Judge may have been seeking to lay blame for Messrs Gibbons and Scott being joined at the feet of the Attorney-General. But it is not apparent to us that the Attorney-General would have needed to join the investigators at all, outside Mr Van Essen and Mr Patterson's desire to obtain further recourse against them directly.

[172] We also refer to the Judge's comments that "the fifth defendants actively participated in the [NZBORA] breach". It is not clear what the Judge is referring to when he refers to such active participation. The point requires identification of how such participation occurred and what statutory immunities were available in respect of such conduct. The observations also appear to contradict the Judge's earlier findings that Messrs Gibbons and Scott were under no liability to Messrs Van Essen and Patterson (and indeed it was the warrant applications as prepared by the police that effected the breaches).

[173] We consider that the Judge has confused the respective roles of the police officers (for the conduct for which they were responsible) and the actions of Messrs Gibbons and Scott. Any assessment of costs in relation to Messrs Gibbons and Scott must focus solely on their actions and the actions of the parties who joined them in the litigation.

[174] This was a clear case in which costs of Mr Gibbons and Mr Scott should have followed the event. As Mr Van Essen and Mr Patterson were both legally aided it followed that the provisions of s 45 of the LSA should have been applied. Although that provision was cited to the Judge (at least by counsel for the Attorney-General), it seems to have been overlooked.

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[166] At [25].

[175] The award of costs in a civil proceeding where a party is legal aided is governed by the following provision of the LSA:

> **45 Liability of aided person for costs**
>
> (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
>
> (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
>
> (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
>
> (a) any conduct that causes the other party to incur unnecessary cost:
>
> (b) any failure to comply with the procedural rules and orders of the court:
>
> (c) any misleading or deceitful conduct:
>
> (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
>
> (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
>
> (f) any other conduct that abuses the processes of the court.
>
> …

[176] If an order is made under s 45, the provisions of s 46 become relevant. This provision provides:[167]

> **46 Costs of successful opponent of aided person**
>
> (1) This section applies if an order is made under section 45 that specifies that an aided person would have incurred a liability, or a greater liability, for costs if that section had not affected his or her liability.

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[167] With respect to s 45(3) the term "exceptional circumstances" was discussed in *Awa v Independent News Auckland Ltd (No 2)* [1996] 2 NZLR 184 in relation to the Legal Services Act 2011's predecessor, Legal Services Act 1991, s 86 (featuring the same term), and in turn, the Legal Aid Act 1969, s 17(2)(e).

> (2) If this section applies, the party to the proceedings who is prejudiced by the operation of section 45 (in this section, the **applicant**) may apply to the Commissioner in the prescribed manner for payment by the Commissioner of some or all of the difference between the costs (if any) actually awarded to that party against the aided person and those to which that party would have been entitled if section 45 had not affected the aided person's liability.
>
> (3) In considering any such application, the Commissioner must have regard to the following matters:
>
> (a) the conduct of the parties to the proceedings:
>
> (b) the court's findings under section 45(2):
>
> (c) the hardship that would be caused to the applicant if the costs were not paid by the Commissioner.
>
> …

[177] We heard some argument, particularly from Mr Robinson for the investigators, as to why there should be an award of costs under s 45 of the LSA based on the existence of exceptional circumstances. It is inappropriate to burden this judgment with a summary of the factors suggested. This is because we are in no position to make an assessment of the existence or otherwise of exceptional circumstances, or their impact on the litigation. These are quintessentially a matter for the trial Judge who heard the cases and who would be more familiar with the conduct of them both at trial and then the interlocutory stages in the High Court.

[178] For the above reasons, we allow the appeals in respect of the costs judgment. We direct that all questions of costs between Mr Gibbons and Mr Scott and Mr Van Essen and Mr Patterson in the High Court are remitted to that Court for determination under ss 45 and 46 of the LSA.

[179] In case it becomes relevant to the consideration by the High Court of costs as between Mr Gibbons and Mr Scott and Mr Van Essen and Mr Patterson, we deal briefly with the second issue concerning executive time. The High Court held that the Attorney-General was liable not only for the legal costs of Messrs Van Essen and Patterson (amounting to some $80,000) but also for over $25,000 in "executive time" expended in preparing their case and attending the trial.[168] This was opposed

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[168] Costs judgment, above n 10, at [24].

on appeal by Mr Sinclair for the Attorney-General but may nonetheless be relevant to a consideration of costs under ss 45 and 46 of the LSA.

[180] We note that Hammond J in *Francis v Police*, observed that "loss of executive time of that character has never compensable in costs".[169] There is authority in the High Court of Australia to similar effect:[170]

> … the accepted basis for an award of costs is that they are by way of indemnity. They are intended to reimburse a litigant for costs actually incurred; they are not intended to compensate for some other disadvantage or inconvenience suffered by the litigant.

[181] We note that this has reflected seemingly settled law since 1278.[171] We see no good reason to change the rule, without compelling principled reasons for doing so.

Indemnification by Attorney-General

[182] Whata J awarded indemnity costs of Mr Gibbons and Mr Scott against the Attorney-General.[172] The Judge relied on the statutory immunities in ss 38 and 39 of the Police Act and concluded these provisions "logically imbue" Mr Gibbons and Mr Scott with the statutory immunity afforded to "any member of the Police".[173] We have already found this conclusion to be erroneous.[174]

[183] The Judge then found there was no principled basis for the Attorney-General's objection to indemnification of Messrs Gibbons and Scott.[175] The Judge considered he was not assisted by s 65ZC of the Public Finance Act 1989 relied on by the Attorney-General:

> [23] Reliance on this section by Mr Sinclair misunderstands, in my view, the nature of the claim made by the fifth defendants. They seek indemnity as "assistants" conferred by s 38 with the same rights, powers and authorities as

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169 *Francis v Police* HC Hamilton AP 3/01, 26 March 2001 at [24].
170 *Cachia v Hanes* (1994) 179 CLR 403 at 414.
171 Upon the enactment of the Statute of Gloucester 1278 (UK) 6 Edw I c 1, which first introduced the notion of costs to the common law, providing for them on the basis of partial indemnity for professional legal costs, and not comprehensive compensation suffered by the litigant: see *Cachia v Hanes*, above n 170, at 410.
172 Costs judgment, above n 10, at [17]–[24].
173 At [19].
174 At [142]–[144] above.
175 Costs judgment, above n 10, at [21].

> a member of the Police for and in the execution of a warrant. Their entitlement therefore arises, not from the grant of a guarantee or indemnity on behalf of the Crown, but by operation of statute; that is, it arises from the fact that when they assisted the Police, they assumed the rights of a member of the Police in all respects in respect of execution of the warrant. I can see no reason to exclude from that bundle of rights, the right to indemnification.
>
> [24] Accordingly, I am satisfied that the claim for indemnification made by the fifth defendants against the Attorney-General in respect of their actions as assistants to the Police is properly made out. On that basis, the fifth defendants are entitled to indemnification of their costs by the Attorney-General, including in that respect the time that Messrs Gibbons and Scott have reasonably incurred for the purposes of their attendances relating to the proceedings. In this regard I accept the submissions made on behalf of the fifth defendants that those costs would have been incurred inevitably by agreement in order to fully defend the Police case. …

[184] We consider these conclusions are incorrect. The provisions of ss 38 and 39 of the Police Act (as well as s 27 of the Crimes Act) create statutory immunities. Such immunities prevent civil proceedings being taken against those entitled to the benefit of them. We agree with Mr Sinclair's submission that any such immunity should not be conflated with an indemnity. As a matter of law, an immunity does not imply a right of indemnity. There is a stark difference between the two concepts as the Law Commission recently explained:[176]

> … If the employee is immune, no proceedings can be taken against the employee, so he or she will not be named as a defendant in litigation. Immunity also means that any judgment resulting from the litigation will not be made against them personally. By comparison, an employee who is indemnified is still able to be sued and named as a party, and judgments can be made against the employee individually, even if the cost is actually met by another through the indemnity.

[185] It is also true that, even if Messrs Gibbons and Scott enjoyed "the same rights afforded to police officers for the execution of a warrant",[177] those rights do not include an indemnity on the basis that it flowed from an immunity accorded to the police.[178]

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176 Law Commission *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014) at [6.29].

177 Liability judgment, above n 1, at [119]; costs judgment, above n 10, at [19].

178 As to the common law right of indemnity owed by an employer to an employee see *Katz v Mana Coach Services Limited* [2011] NZCA 610, [2011] ERNZ 186 at [9], citing *Christchurch City Council v Davidson* [1997] 1 NZLR 275 (CA) at 294. Such an indemnity is limited to employees who are acting "in reasonable performance of [their] duties".

[186] Messrs Gibbons and Scott sought to argue they were entitled to an indemnity on a broader basis, namely that they acted as agents for the police. We agree, however, with Mr Sinclair's submission that it is not consistent with the legislative scheme to treat the police as their principals, responsible for costs incurred in conducting their separate defence.[179]

[187] We have already referred to the contractual relationship between Mainland and ACC. There was no such relationship between Mainland and the police. Further, as the contractual arrangements between Mainland and ACC demonstrate, private investigators would normally be expected to ensure against professional liability claims of this nature and Mainland had both public liability and professional indemnity insurance.

[188] In alternative to claiming costs against Mr Van Essen and Mr Patterson, Mr Robinson seeks to uphold the indemnity by the Attorney-General. Given the defaults of the police, it was appropriate for the Attorney-General to meet the investigators' costs. This submission relied on the proposition that costs are discretionary. Here, Messrs Gibbons and Scott acted entirely appropriately and it was only the defaults of the police that gave rise to this action. Essentially, this was a valid exercise of the Judge's discretion to award costs against the Attorney-General for the investigators.

[189] We disagree. Although costs are discretionary, the exercise of that discretion must be guided by principle. We do not consider there is any basis for an indemnity of Messrs Gibbons and Scott by the Attorney-General. Sections 38 and 39 of the Police Act provide no basis on which to ground a claim to indemnity costs. Similarly, s 27, although barring liability, is silent as to indemnity and cannot alone imply indemnification for present purposes. Mr Marshall, for the Attorney-General, contended further that, in the absence of clear statutory indemnification, s 65ZC of the Public Finance Act precludes finding indemnification in the manner of Whata J.

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[179] We also agree with Whata J's conclusion that s 65ZC of the Public Finance Act 1989, relating to the Crown's grant of indemnities in certain cases, does not assist the analysis when assessing the propriety of court-ordered indemnities.

[190] Outside of statutory provisions, Mr Marshall also addressed and sought to disprove the other heads on which the investigators sought to uphold the indemnity costs – namely as agents of the police or as joint tortfeasors in the breach of a statutory duty. Mr Marshall submitted correctly that contribution as a joint tortfeasor concerned the payment of damages, not costs. Further, Messrs Gibbons and Scott were not agents of the police and any indemnity available at common law does not apply here. There was no alleged contract of agency, or implied term of restitutionary or indemnificatory effect by the police as principals.

[191] We are satisfied that none of the alternative bases for indemnity referred to by Mr Marshall in argument apply on the facts of this case. We conclude that there was, in the circumstances of this case, no basis for an indemnity to apply. Whata J was in error to find to the contrary.

[192] It follows that we allow the Attorney-General's appeal in respect of this issue.

Result

[193] The result of these appeals is as follows:

CA320/2013 and CA339/2013

(a) The appeal and cross-appeal by the Attorney-General are allowed.

(b) The cross-appeal by Mr Van Essen concerning public law damages is dismissed.

(c) The order that the Attorney-General pay Mr Van Essen public law damages of $10,000 is quashed.

(d) The appeal by Mr Patterson is dismissed.

(e) The order that the Attorney-General pay Mr Van Essen and Mr Patterson indemnity costs (and reasonable disbursements) less 20 per cent is quashed.

(f) The order that the Attorney-General pay the indemnity costs of Mr Gibbons and Mr Scott is quashed.

(g) The Attorney-General must pay both Mr Van Essen and Mr Patterson indemnity costs (and reasonable disbursements) in respect of all attendances up to the commencement of the High Court trial. The parties are to endeavour to agree quantum. In the event of any disagreement the outstanding issues are remitted to the High Court for determination. The remaining costs and disbursements of and incidental to the High Court trial are to lie where they fall.

(h) As Mr Van Essen and Mr Patterson are legally aided, and as there are no exceptional circumstances in respect of either appeal or the cross-appeal, there will be no order for costs against either of them in the Court of Appeal.

(i) An order is made prohibiting publication of particulars of certain items seized by Police, as set out in paragraph [24].

CA593/2013 and CA594/2013

(j) The appeals by Mr Gibbons and Mr Scott are allowed.

(k) All questions of costs between Mr Gibbons and Mr Scott and Mr Van Essen and Mr Patterson in the High Court are remitted to the High Court for determination under ss 45 and 46 of the Legal Services Act 2011.

Costs in this Court

[194] As between the Attorney-General and Mr Gibbons and Mr Scott in this Court we consider that costs should lie where they fall. While in this Court the Attorney-General was successful to a significant extent, the main focus of the Attorney-General's appeal was to clarify the position on damages as against Mr Van Essen and Mr Patterson. As between the Attorney-General and Messrs

Gibbons and Scott, the point in issue occupied a relevantly small portion of hearing time and ultimately clarified the legal position on costs. We are therefore satisfied that costs as between the Attorney-General and Messrs Gibbons and Scott should lie where they fall.[180]

[195] As between Mr Van Essen and Mr Patterson and the Attorney-General, as Mr Van Essen and Mr Patterson are legally aided, and as there are no exceptional circumstances in respect of these appeals, there will be no order for costs against either of them in the Court of Appeal. We make a similar order in respect of both sets of appeals.

Solicitors:
Crown Law Office, Wellington for Attorney-General
Christopher B Morrall, Christchurch for Mr Van Essen and Mr Patterson
Gallaway Cook Allan, Dunedin for Mr Gibbons and Mr Scott

[180] See *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 167 at [41]–[45].

PUBLIC LAW COMPENSATION – QUANTUM OF AWARDS

Pre-*Taunoa *cases

Case	Conduct	Section breached	Award	Type of effect	Costs
Dunlea v Attorney-General HC Christchurch CP48/96, 30 November 1996.	Armed Offender Squad callout to incorrect house. Two men instructed to lie face down on the ground, handcuffed and searched. Detained in handcuffs for around 15 minutes, searched again. Remaining three inhabitants ordered to leave flat, pat-searched by AOS and police, house searched.	Two men B & G – s 21 in respect of unreasonable search of the person, "shading into" arbitrary detention. Three others – s 21. Owners of the flat – s 21	B - $18,000 ($12,000 for BORA, $6000 exemplary). G - $16,000 ($11,000 for BORA and $5000 exemplary). Concurrent common law damages for trespass and false imprisonment of $12,000 and $11,000 respectively (indicative only, in case his BORA awards were overturned). Remaining plaintiffs - $2000, concurrent common law damages of the same for trespass to the person. Occupants of the flat - $1500 each for unreasonable search.	Non-pecuniary: Humiliation, indignity, inappropriate treatment, unjustifiable invasion of privacy.	No order for costs.

Case	Conduct	Section breached	Award	Type of effect	Costs
Dunlea v Attorney-General [2000] 3 NZLR 136 (CA) (Richardson P, Blanchard, Gault, Keith and Thomas JJ).	Appeal from HC. Three plaintiffs appealed against refusal for relief for assault, pat down search and detention. Crown cross-appealed against finding of liability for actions of AOS in handcuffing B and G and liability of the police for pocket searches of three plaintiffs.	Overturned: B and G – no breach of s 21 in respect of searches and no arbitrary detention in respect of initial handcuffing by AOS. Upheld finding of unreasonable search and detention by police thereafter Remaining plaintiffs – overturned s 21 finding.	Exemplary awards quashed, but total awards for B and G remain in respect of the continued detention of them by police ($18,000 and $16,000). Quashed award for three other plaintiffs. (Note: majority justified the quantum of all awards with analogy to tortious liability. No discussion in principle as to correct approach to setting damages outside of following tort, just affirmed the Court below).	Non-pecuniary: Humiliation, indignity, inappropriate treatment, unjustifiable invasion into privacy.	No order for costs in CA.
Kerr v Attorney-General (1996) 4 HRNZ 270 (DC),	Suspected gang member stopped at road block for 10 minutes; if he attempted to pass he would be arrested.	Section 18 – No finding of arbitrary detention, but nominal breach of freedom of movement, despite police acting in good faith.	$20	Non-pecuniary: vindication of breach of freedom of movement.	Scale costs and disbursements, fixed by Registrar.
Upton v Green (No 2) (1996) 3 HRNZ 179 (10 October 1996).	Plaintiff sentenced without opportunity to be heard by the District Court.	Section 25(a) – loss of chance to persuade Judge to impose a lighter penalty.	$15,000	Non-pecuniary: inappropriate treatment, fair trial rights.	Costs in favour of plaintiff.

Case	Conduct	Section breached	Award	Type of effect	Costs
Attorney-General v Upton 2 July 1998 CA205/1996 (Gault, Thomas Keith JJ).	Same as above	Upheld.	Declined to reduce the quantum even though it was described as "rather generous".		
Attorney-General v Hewitt [2000] 2 NZLR 110 (Randerson, Neazor JJ)	Domestic disturbance, police arrested the plaintiff, held, without bail for 7.5 hours. District Court held trespass, unlawful arrest arbitrary detention and false imprisonment. On appeal, overturned trespass, but police had exercised no discretion on whether to use their powers of arrest, despite there being ample time to do so, determined to arrest the plaintiff, therefore unlawful detention.	Section 22.	$11,000 (awarded at DC in respect of "trespass, false imprisonment and wrongful arrest". Upheld before HC on the basis the claims for common law and BORA compensation were pleaded and bundled together and therefore treated equivalently).	Non-pecuniary: humiliation, indignity, inappropriate treatment, arbitrary and unlawful detention.	No order for costs.
Wilson v New Zealand Customs Services (1999) 5 HRNZ 134 (HC) (Williams J).	Customs seized the plaintiff's car (reasonably) and detained it (unreasonably) for two years. Unreasonable search and seizure due to the extended nature of the detention.	Section 21	$250 a month for the number of months between detention of her vehicle and the judgment (roughly $6000 in total) plus interest.	Pecuniary loss: assessed with reference to $100 being the cost she paid for alternative transport per month and $150 for lost income and additional costs.	Costs reserved.

Case	Conduct	Section breached	Award	Type of effect	Costs
Small v Attorney-General (2000) 6 HRNZ 218 (HC) Christchurch (Young J)	Search of plaintiff's property, pursuant to warrant obtained with information procured without factual basis. Unlawful search. Issue with "slapdash" obtaining of the warrant, intrusive handling of search, but no physical force and subsequent apology from Attorney-General. Emphasis on plaintiff being "targeted" as an activist by the police as the worst aspect of case.	Section 21	$20,000 (AG had accepted plaintiff entitled to compensation prior to HC – only issue of quantum).	Non-pecuniary: invasion of privacy, inappropriate treatment, indignity.	Costs reserved.
Binstead v Northern Region Domestic Violence Approval Panel HC Auckland, M1629-PL01, 5 June 2002 (Williams J).	Plaintiff ran a Protection Order service provider. Declined renewal. Breach of natural justice, failed to give the plaintiff adequate information as to lack of satisfaction of criteria.	Section 27(1).	Subject to proof of causation and quantum, accepted that a modest part of plaintiff's lost income may be claimable for brief period between decision not to register his service and consent order.	Both pecuniary and non-pecuniary: most important interest, right natural justice, vindicated by quashing the decision. Accepted minimal element of pecuniary loss in principle (disallowed broader claims analogous to general damages: loss of reputation, market share, time and expenses).	Indemnity costs – at least all costs associated with the hearing (plaintiff had previously agreed to 2B scale costs).

Case	Conduct	Section breached	Award	Type of effect	Costs
Archbold v Attorney-General [2003] NZAR 563 (HC).	Plaintiff arrested and beaten significantly by police. Exemplary damages awarded against Attorney-General vicariously.	Section 23(5)	Awarded exemplary damages, would have awarded $15,000 of BORA if no exemplary damages.	Non-pecuniary: inappropriate treatment, dignity.	Costs reserved, indication favourable for indemnity costs.
P F Sugrue Ltd v Attorney-General [2004] 1 NZLR 207 (HC) Chisholm J	Plaintiff's helicopter seized by Department of Conservation investigating illegal hunting. Damaged upon recovery. Seizure unreasonable as warrant not based on credible evidence or factual evidence to support contrary narrative of events. Held technically lawful, but unreasonable.	Section 21.	$361,792.28 (comprising loss of income for years 1991-1994 of $278,206 and special damages comprising $83,586.28).	Pecuniary: loss of income expressly identified as the metric for damages. Did not elaborate at first instance on the metric for special damages.	Costs reserved.
Attorney-General v P F Sugrue Ltd [2004] 1 NZLR 220 (delivered by Blanchard J).	Case above on appeal. Overturned – warrant lawful and reasonably issued.	Overturned s 21 breach.	Noted that even if there had been a breach of s 21, Court of Appeal would have only been willing to grant a declaration.	Non-pecuniary: held a declaration would have been an effective vindication of plaintiff's harm to dignity, privacy and humiliation.	Attorney-General entitled to costs and disbursements.

Case	Conduct	Section breached	Award	Type of effect	Costs
Attorney-General v Udompun [2005] 3 NZLR 204 (CA).	Detained at Auckland airport off plane for 5.5 hours before officer and interpreter to become available; detained waiting for next flight, not provided access to shower, food or sanitary materials. After flight, waited six hours and then another four hours in detention at airport, then two nights stay at police station – not offered a change of underwear or shower. No food offered during airport detention and no means through which she could communicate her sanitary needs.	High Court found breach of s 27(1), 23(1) and 23(5). Court of Appeal overturned breach of s 27(1) finding (natural justice) and 23(1). Upheld breach of s 23(5).	High Court ordered global award of $50,000. Attributed half to each Immigration New Zealand and the police. CA reduced to $4000.	Non-pecuniary: indignity, inappropriate treatment, humiliation.	Awarded interest and indemnity costs in the High Court. Remitted to the High Court by the Court of Appeal. No order for costs in the Court of Appeal, as Ms Udompun was legally aided.
Oosterman v Attorney-General DC Rotorua, CIV-2006-063-384, 1 July 2008.	During a protest police grabbed and pepper-sprayed the plaintiff within 15–20 cm.	Section 23(5).	$5000 – declaration insufficient but plaintiff's behaviour relevant in assessing quantum.	Non-pecuniary: indignity, inappropriate treatment, arbitrary detention.	Held plaintiff entitled to costs: in separate judgment awarded daily rate at scale, travel costs and disbursements.

Case	Conduct	Section breached	Award	Type of effect	Costs
Slater v Attorney-General (No 2) [2007] NZAR 47 (HC).	S and another asleep in damaged rental car, police sought to recover the car, took the keys, attempted to awaken the two by shaking them, then used pepper spray. S reacted violently and had to be restrained, then detained for 7.5 hours before being released without charge. Found unlawful arrest, false imprisonment, battery, breach of s 22 BORA. Considered damages separately.	Section 22.	$5000 – emphasised that although police acted in good faith, detained for 7.5 hours. S contributed to his arrest by overreacting and behaving aggressively. Expressly states not awarded BORA compensation for breach of s 22 – appears to be only for unlawful arrest, false imprisonment and battery.	Non-pecuniary: unlawful arrest, false imprisonment, battery. Expressed to be purely compensatory on the basis of tort.	S legally aided – entitled to scale costs in both HC and DC and disbursements.

Post*-Taunoa *cases

Case	Conduct	Section breached	Award	Type of effect	Costs
Taunoa v Attorney-General [2007] NZSC 70, [2008] 1 NZLR 429.	Prisoners subject to unlawful scheme – Behavioural Management Scheme. Included solitary confinement and humiliating strip searches. SC upheld CA findings that BMR did not constitute s 9 breach.	CA found s 9 violation in respect of one plaintiff (didn't appeal to the SC) – awarded $25,000. Others breach of s 23(5).	Gunbie – subjected to six and a half weeks of BMR - $2000 (nominal, marks the breach). Mr Kidman – three months – award reduced from $8000 to $4000. Mr Robinson – almost a year of BMR, reduced from $40,000 to $20,000. Mr Taunoa - over two years in BMR – reduced from $65,000 to $35,000	Non-pecuniary: humiliation, dignity, inappropriate treatment.	Costs reserved.
Rochford v Attorney-General [2008] NZAR 404 (HC).	R's house searched by police pursuant to a search warrant. In DC proceedings, held that the search was unlawful and unreasonable. Not obtained in bad faith, but was defective in form rather than substance. Appeal to HC on refusal to award BORA compensation.	Section 21	Declaration – refused to award compensation at DC. HC – dismissed appeal. No bad faith or improper purpose, and the search warrant would have been obtained if the omitted information had been disclosed. Not convinced DC exercised discretion wrongly.	Non-pecuniary: privacy, dignity. Declaration sufficiently vindicated rights.	Indemnity costs in DC.

Case	Conduct	Section breached	Award	Type of effect	Costs
Murray v Gebbie [2009] NZAR 630 (HC).	G arrested on charges of breaching a protection order and criminal harassment, taken to Lower Hutt police station for processing. G knew police officer M, ended up in a brawl and M punched G in the head.	Section 23(5).	$12,000 exemplary damages awarded directly against the police officer for assault and battery, with AG liable vicariously – indicated Judge would have awarded $5000 for BORA compensation, but that was inadequate.	Non-pecuniary: quantum dictated primarily by tortious liability, did not see BORA ground as reason to limit that basis.	Costs reserved, 2B scale indicated.
Falwasser v Attorney-General [2010] NZAR 445 (HC).	F assaulted by the police in his cell with batons and pepper spray over a period of twenty minutes.	Section 23(5).	$30,000.	Non-pecuniary: indignity, inhumane treatment. Conduct required denunciation.	Costs reserved – indication indemnity would be appropriate.