In the Supreme Court of New Zealand

I Te Kōti Mana Nui o Aotearoa

SC 18/2025

Between **Edmond Te Raupo Apanui**
Appellant

And **Commissioner of Police**
Respondent

Submissions for the Appellant

MĀTAI CHAMBERS

Counsel

Q Duff | M J McKillop | W N Rhodes
Barristers

Cathedral House Level 3, 48-52
Wyndham Street, AUCKLAND 1010
027 242 7734
q@mataichambers.com

Counsel certify that, to the best of their knowledge, this submission does not contain suppressed information and is suitable for publication.

May it please the Court:

1 Summary of the appellant's submissions on appeal

1.1 This appeal concerns quantification of a costs order under s 364 of the Criminal Procedure Act 2011 (**CPA**). Mr Apanui faced an arson charge and was remanded in custody. Material information about his flatmate Patrick Sylva's involvement in another house fire came to Police attention in February 2022. This information was not disclosed until November 2022, when the prosecutor determined that the prosecution test was not met and no evidence would be offered, and the charge was dismissed.

1.2 The disagreement is not whether a costs order ought to be made. This was a significant procedural failure occurring in the course of a prosecution, for which there was no reasonable excuse. The issue is the extent to which s 364 orders may be compensatory in nature.

1.3 No criticism can be made of the Court orders authorising Mr Apanui's detention. He was lawfully remanded in custody under the Bail Act between February and November 2022. A false imprisonment claim in tort cannot succeed. But Mr Apanui sought costs under s 364 CPA to compensate his arbitrary detention in breach of s 22 of the New Zealand Bill of Rights Act 1990 (**NZBORA**), occasioned by the failure of disclosure. He ought not have been facing a charge at all from February 2022 onwards. The Police failure rendered his remand in custody arbitrary in nature.

1.4 Arbitrary detention requires an effective remedy. An arbitrary detention may be compensated within the criminal process via s 364 CPA order just as an evidence exclusion order may effectively ameliorate an unlawful search, or a sentence reduction or stay may be granted following undue delay. Unless precluded by statutory wording, remedies connected with the criminal

process ought not be read down in a way that prevents a criminal court from granting an effective remedy for a breach of rights. Doing so would kneecap the effective enforcement of human rights where a breach has occurred in the criminal process.

1.5 There is no "floodgates" issue in recognising that s 364 CPA is responsive to NZBORA breach by a prosecutor. Section 364 does not have a general compensatory intention equivalent to a tort claim. If s 364 were intended to create a statutory tort where all foreseeable consequences of a significant procedural failure could be compensated for, it would have said so. It does not.

1.6 But when person covered by s 3 NZBORA engages in a significant criminal procedural failure without reasonable excuse that results in a breach of a right, public law compensation for breach of that right ought to be available as part of the broad discretionary power conferred by s 364. There is significant overlap between the purposes of s 364 costs and public law compensation.

1.7 The appeal ought to be allowed. The award of $28,600 ought to be restored.

2 Background

Arson charge against Mr Apanui

2.1 The Court of Appeal judgment records the background to the arson charge, Mr Apanui's remand in custody, the significant procedural failure at issue, and the decision to offer no evidence leading to dismissal of the charge.[1] The appellant adopts that summary of the relevant facts.[2]

2.2 The arson charge against Mr Apanui was evidently not withdrawn for discretionary reasons. It was a direct response to Crown counsel receiving the relevant disclosure from Police. The non-disclosed evidence of Mr Sylva's involvement in another house fire did not alter the public interest in Mr Apanui's prosecution. Rather it affected the evidential sufficiency test, in that it weakened an already circumstantial case against Mr Apanui and tended to suggest that Police had charged the wrong man. The Sylva evidence meant dismissal of the charge against Mr Apanui became inevitable.[3]

---

1 *Commissioner of Police v Apanui* [2024] NZCA 307 (CA judgment) at [3]-[14].

2 The DC judgment (*Apanui v Commissioner of Police* [2023] NZDC 24918) also recites these facts in detail (at [1]-[15]) which the appellant also takes no issue with.

3 Mr Apanui's case can be contrasted with *King v Attorney-General* [2022] NZHC 695, which concerned a failure on the part of the Crown solicitor to revisit the question of evidential sufficiency despite repeated defence discharge applications under the former s 347 Crimes Act. When the Crown solicitor did finally reconsider evidential sufficiency, he concluded that witnesses supporting one strand of the Crown case were unreliable and invited a third s 347 application on the eve of trial. Mr King claimed he had been arbitrarily detained since the Crown had wrongly laid the indictment on the basis of that evidence. Ellis J concluded that the high bar for review of prosecutorial discretion had not been met (e.g., there was no abuse of process: [225]-[230]). Mr Apanui's case is different: the evidence available to the Crown solicitor actually changed, and as soon as the evidence was made available a decision was made to offer no evidence against him. There is no need to review an exercise of prosecutorial discretion here – rather, the prosecutor was hampered in exercising that discretion in good time by the Police disclosure failure.

Costs application

2.3 After his discharge, Mr Apanui sought costs under s 364 CPA. Mr Apanui sought to quantify the appropriate costs order on a compensatory basis, reflecting the period of arbitrary detention that resulted from the disclosure breach. $75,000 was sought in respect of the 286-day overrun of detention. This is not an exact mathematical calculation, but rather an impressionistic sum as to what would be "just and reasonable" in terms of the s 364(3) test.[4]

2.4 Counsel had reference to the guidelines guiding *ex gratia* compensation decisions following wrongful conviction and detention, and in particular the yearly tariff of $150,000 for imprisonment.[5] The sum of $75,000 also reflects the typical value of an "overrun" of originally awful imprisonment for the period at issue.[6]

2.5 Judge Winter granted the s 364 application. His Honour had reference to the *Bublitz* and *Lyttle* Court of Appeal tests,[7] and spent considerable time considering the Police conduct against the *Lyttle* factors when determining the appropriate sanction.[8] His Honour concluded that it was nonetheless appropriate to calculate the costs order on the basis of time spent arbitrarily detained, in the "very unique circumstances" of Mr Apanui's case.[9]

---

4 Applicant's DC submissions at para 10.9 (CA Casebook at 35).

5 Applicant's DC submissions at paras 10.7 (CA Casebook at 34).

6 The correct range for a one-month overrun of imprisonment was held to be $8,000-$12,000 in *Chief Executive of the Department of Corrections v Gardiner* [2017] NZCA 608, [2018] 2 NZLR 712. Mr Apanui had been arbitrarily detained for around nine months, which on the *Gardiner* approach suggests loss of liberty valued at least at $72,000.

7 Further explained below.

8 DC judgment at [37].

9 DC judgment at [39].

2.6 His Honour noted the limited usefulness of the compensation guidelines, not accepting that Mr Apanui was in a similar position to a wrongfully convicted person.[10] His Honour also noted that Mr Apanui had been remanded in custody due to breaching the conditions of his bail.[11] These appear to have been factors in the Court adopting a lower "daily tariff" of $100 in respect of the period of arbitrary detention.

2.7 Judge Winter also awarded $5,000 in counsel costs in relation to the s 364 application itself.

Crown appeal

2.8 The Crown appealed Judge Winter's s 364 order on the basis his Honour had wrongly calculated the costs order on a compensatory rather than punitive basis, and that there was no power to award costs for the bringing of the s 364 application.

2.9 The Court of Appeal allowed the appeal on both grounds. The Court noted that Judge Winter had erred in that he had:[12]

> ...set the award by reference to the effect of the police procedural failure on Mr Apanui rather than assessing the amount appropriate to penalise that failure. In doing so, he set the award principally, if not wholly, by reference to its compensatory effect and not by reference to its penal purpose.

2.10 The Court noted that its prior decisions in *Bublitz* and *Lyttle* were binding "absent further consideration by the Supreme Court".[13] It was therefore not accepted that Mr Apanui's circumstances took his case outside of the framework set by those prior authorities.

2.11 The appropriate award was held to be $15,000 given "the seriousness of the police failures",[14] and was all payable to Mr

---

10 DC judgment at [27]-[28].

11 DC judgment at [27].

12 CA judgment at [45].

13 CA judgment at [46].

14 CA judgment at [50].

Apanui in light of "the impact of those failures on Mr Apanui",[15] being "his continued detention in custody for almost nine months".[16]

2.12 The costs component of the order was quashed, there being no power within s 364 CPA to award costs for the application itself, with only the Costs in Criminal Cases Act being potentially applicable.[17]

The issues on appeal

2.13 The parties have agreed, and both courts below accepted, that the prerequisites for a costs order under s 364 CPA are met. The delayed disclosure of Mr Sylva's involvement in the Henderson fire was a significant procedural failure of a prosecutor without reasonable excuse, meeting the test in s 364(2) that permits a Court to make a costs order. The appellant sought a costs order accordingly, and the respondent accepted that an order was an appropriate response to the significant procedural failure.[18]

2.14 The contest is the quantum and basis for calculation of that costs award. Mr Apanui sought, and still seeks, an award that is essentially compensatory in nature, grounded primarily in the long period of arbitrary detention he experienced because of Police's significant failure. Police say the costs award should instead focus on sanctioning their poor conduct.

2.15 Mr Apanui accepts there was no jurisdiction for Judge Winter to make a costs order in relation to the s 364 application and does not seek to overturn that aspect of the Court of Appeal's judgment.

---

15 CA judgment at [53].
16 CA judgment at [47].
17 CA judgment at [51].
18 CA judgment at [34].

3 Relevant law

Section 364 of the Criminal Procedure Act

3.1 Section 364 was newly created as part of the wholesale reform of criminal procedure in 2011. Its genesis was the Law Commission's 2005 report *Criminal Pre-trial Processes: Justice Through Efficiency* which recommended a new legislative provision permitting costs orders for failures without reasonable excuse to comply with procedural obligations.[19] Such orders would be tailored to the circumstances of each case.[20] Prosecutors were an explicit target of the Law Commission proposal, with the intention of promoting public accountability and better future conduct.[21] This was an aspect of the proposed response to the problem of inadequate or untimely disclosure identified by the Law Commission,[22] and reflected what the Commission described as a "culture of non-compliance".[23]

3.2 Section 364 was introduced as cl 361 of the Criminal Procedure (Reform and Modernisation) Bill 2010 in substantively similar terms. The explanatory note to that Bill listed the first purpose of the reforms as ensuring "the fair conduct of criminal prosecutions in the New Zealand courts (as reflected in section 25 of the New Zealand Bill of Rights Act 1990)",[24] and that the reforms were intended to "improve public confidence in the criminal justice system".[25]

---

19 Law Commission "Criminal Pre-trial Processes: Justice Through Efficiency" (NZLC R89, 2005) at para 398.

20 Ibid.

21 Ibid at [400].

22 Ibid at [111]-[119].

23 Ibid at chapter 11.

24 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1), Explanatory Note (p 1).

25 At pp 1-2.

3.3 The section provides:

> **364 Costs orders**
>
> (1) In this section, –
>
> **costs order** means an order under subsection (2)
>
> **procedural failure** means a failure, or refusal, to comply with a requirement imposed by or under this Act or any rules of court or regulations made under it, or the Criminal Disclosure Act 2008 or any regulations made under that Act
>
> **prosecution –**
>
> (a) means any proceedings commenced by the filing of a charging document; but
>
> (b) does not include an appeal.
>
> (2) A court may order the defendant, the defendant's lawyer, or the prosecutor to pay a sum in respect of any procedural failure by that person in the course of a prosecution if the court is satisfied that the failure is significant and there is no reasonable excuse for that failure.
>
> (3) The sum must be no more than is just and reasonable in the light of the costs incurred by the court, victims, witnesses, and any other person.
>
> (4) A costs order may be made on the court's own motion, or on application by the defendant, the defendant's lawyer, or the prosecutor.
>
> (5) Before making a costs order, the court must give the person against whom it is to be made a reasonable opportunity to be heard.
>
> (6) A costs order may be made even if the defendant has not yet been convicted, or is eventually discharged, or the charge is dismissed.
>
> (7) The court may make more than 1 costs order against the same person in the course of the same prosecution.
>
> (8) The court may order that some or all of the amount ordered to be paid under a costs order be paid to any person connected with the prosecution.
>
> (9) Subsections (2) to (8) do not limit or affect the Costs in Criminal Cases Act 1967.

Appellate cases considering s 364 CPA

Bublitz[26]

3.4 Mr Bublitz and his co-defendants were charged with multiple counts arising from the collapse of two finance companies under his control. The trial was scheduled for three months and commenced in August 2016, but significantly exceeded that timeframe. The trial was aborted nine months later in May 2017, after the Crown revealed it had not disclosed a large number of documents in breach of the Criminal Disclosure Act. Mr Bublitz was later retried and convicted.

3.5 Following the aborted trial (but before his retrial), Mr Bublitz sought costs of about $200,000 under the Costs in Criminal Cases Act (**CCCA**) and about $1 million under s 364 CPA, reflecting the costs of his defence. His CCCA application was adjourned in light of his impending retrial. His CPA application was partially successful, but he did not recover anything like his actual costs. Instead the High Court concluded that s 364 CPA had a primarily penal purpose focused on the nature of the procedural failure, and ordered that $50,000 be paid and split five ways (in other words, Mr Bublitz received $10,000 only).

3.6 Mr Morrison was one of the co-defendants. Unlike Mr Bublitz, he was not retried and following the aborted trial the remaining charges against him were dismissed when the Crown indicated it would not offer any evidence. He sought approximately $210,000 in costs under s 364 CPA and the CCCA. Mr Morrison received costs of $75,000 under CCCA, as well as $10,000 under s 364 CPA as part of the same award Mr Bublitz benefitted from.

---

26 *R v Bublitz* [2018] NZHC 373; *Bublitz v R* [2019] NZCA 379 (*Bublitz (CA)*); *Bublitz v R* [2019] NZSC 139 (*Bublitz (SC)*).

3.7 The Court of Appeal found the judge had correctly approached s 364 CPA and that, as a discretionary decision, there was no basis on which to disturb the award made in the High Court. The Court concluded that the focus of s 364 was not compensatory but penal, and was a method of encouraging compliance with the CPA and Criminal Disclosure Act. The Court acknowledged that awards could have some potential compensatory effect, particularly in light of the consideration of the parties' wasted costs under s 364(3). There was no basis on which the High Court's s 364 order could be disturbed, and the appeal was dismissed, although the Court acknowledged that the s 364 CPA order could have been higher.[27] The Court also dismissed Mr Morrison's appeal against his $75,000 CCCA order.

3.8 The Supreme Court declined Mr Bublitz and Mr Morrison's applications for leave to appeal, noting that while it may wish to address whether s 364 has a compensatory as well as penal purpose in a future case, the issues raised by the proposed appeals were highly case-specific.[28]

Lyttle[29]

3.9 *Lyttle* exhaustively summarises the Court of Appeal's approach to s 364 and its statement of principle can now be regarded as the leading authority. Lyttle, S and Singh were three criminal defendants who were either acquitted or had their charges dismissed. They each sought costs under either or both of s 364 CPA and the CCCA. Notably, every s 364 CPA claim was grounded in whole or in part on a serious failure of disclosure under the Criminal Disclosure Act.

---

27 *Bublitz (CA)* at [49].

28 *Bublitz (SC)* at [16].

29 *R v Lyttle* [2022] NZCA 52.

3.10 The Court of Appeal reaffirmed *Bublitz* and summarised the approach to s 364 CPA as follows:[30]

(a) The policy that underpins awards made under s 364(2) of the CPA is the desire by the legislature to discourage inefficiency and unnecessary delays in the criminal justice system.

(b) The principal purpose of a costs order under s 364(2) of the CPA is to denounce failure to comply with procedural obligations, hold the defaulting person accountable and to deter similar breaches in the future.

(c) There may also be an element of compensation associated with an order made under s 364(2).

(d) Once the statutory criteria for making an order under s 364(2) are satisfied, considerable leeway is bestowed on the courts when determining the quantum of an order, provided the sum awarded is no more than is just and reasonable in light of the costs incurred by the court, victims, witnesses and any other person.

(e) Other factors that may influence the amount of an award made under s 364(2) of the CPA include:

(i) the nature and frequency of the procedural failure;

(ii) if there was a failure to disclose evidence, the nature of the evidence that was not disclosed;

(iii) the nature of the charges faced by the defendant;

(iv) the seniority of those responsible for the procedural failures; and

(v) the extent to which it is necessary for the court to denounce the failures, hold the defaulting parties accountable and to deter similar breaches in the future.

Morrison[31]

3.11 Mr Morrison was one of the *Bublitz* co-defendants. Following the dismissal of his application to appeal his costs awards to this court, Mr Morrison and another co-defendant (Mr Blackwood) commenced civil proceedings against the Financial Markets Authority and the Attorney-General in respect of the aborted

30 At [14].

31 *Morrison v Financial Markets Authority* [2022] NZHC 1654 (*Morrison (HC)*); *Attorney-General v Morrison* [2025] NZCA 240 (*Morrison (CA)*).

Bublitz trial. The major claims[32] advanced in the High Court were that:

(a) the Criminal Disclosure Act breach that caused the trial to be abandoned amounted to the tort of breach of statutory duty, under which the plaintiffs' resultant losses could be compensated; and

(b) the aborted trial was a breach of their fair trial rights and the process amounted to undue delay, for which *Baigent* damages ought to be granted.

3.12 The tort claim failed. McQueen J concluded that the Criminal Disclosure Act was not intended by Parliament to give rise to a private law cause of action.[33]

3.13 The *Baigent* claim succeeded. Mr Morrison and Mr Blackwood's fair trial rights were found to have been breached by the Crown conduct in relation to the abandoned trial, and the case was an exceptional one requiring an award of damages, which were quantified at $10,000 each. Mr Blackwood was retried and convicted, but ultimately acquitted following a successful appeal. He was found to have also suffered undue delay in terms of s 25(b) NZBORA and was awarded an additional $5,000.[34] McQueen suggested that courts ought to approach *Baigent* claims relating to criminal non-disclosure by requiring claimants to prove that:[35]

(a) the prosecutor withheld information (this requires that a plaintiff prove a prosecutor was in possession of the information and failed to disclose it, whether or not this was intentional or inadvertent);

---

32 Another (difficult to understand) claim, effectively seeking to vicariously blame the Attorney-General for the Financial Markets Authority's failure, was not vigorously pursued and was dismissed with brief reasons: *Morrison (HC)* at [119]-[134].

33 *Morrison (HC)* at [115]-[116].

34 *Morrison (HC)* at [208].

35 *Morrison (HC)* at [179].

(b) the prosecutor knew or ought reasonably to have known that the information was material to the defence ("directed to some matter in the case") and that the failure to disclose would likely impinge on their ability to bring a defence;

(c) withholding the information breached their rights under the NZBORA; and

(d) they suffered harm as a result (on the basis of a 'but for' test).

3.14 There was no appeal in respect of the tort action, but the Attorney-General appealed the *Baigent* damages awards. The Court of Appeal dismissed this appeal, reconfirming that *Baigent* damages were available for breaches of fair trial rights in New Zealand and that McQueen J had applied the correct test in determining their availability in this case.

3.15 The Court of Appeal noted that s 364 CPA, the CCCA, and *Baigent* damages all had different purposes (and thus there had not been "double recovery" in this case):[36]

> [T]he awards under the CPA were to sanction or punish the FMA for its failure to comply with the CDA. On the other hand, the awards under the CCCA were primarily designed to compensate the respondents for the costs they incurred in successfully defending the charges. The primary role of public law damages is however to vindicate the breaches of the respondents' rights, and in this case, their right to a fair trial.

4 Substantive submissions

Section 364 has dual purposes – penal and compensatory

4.1 This appeal concerns the degree to which compensation is permitted under s 364 CPA. Public law damages do not achieve the same extensive compensation as tortious damages, but they do have a compensatory effect.

---

36 *Morrison (CA)* at [92].

4.2 As Mr Apanui was legally aided, reimbursement of the costs of his defence does not directly arise in this case as a relevant consideration. However, the Court may consider it difficult to consider the correct overall approach to s 364 without taking compensation for a defendant's legal costs into account. These submissions therefore address the entire scope of a "compensation" purpose for s 364 CPA.

4.3 Previous cases have overemphasised a "sanction" purpose and wrongly confined the "compensation" purpose of s 364 as merely subsidiary. Correctly interpreted, s 364 confers a broad discretionary power permitting costs orders appropriate to the circumstances of each case. It is unprincipled to interpret the section as conferring a discretion to sanction which may incidentally compensate. Neither a "sanction" nor "compensation" purpose predominates – s 364 is a permissive power that can be used to achieve both ends.

4.4 The essential idea underlying s 364 is contained in the words "just and reasonable" in s 364(3) – in other words, a costs award can be made for sanction, compensation, or both, as required by the interests of justice, given the impact of the breach on the people involved in the criminal proceeding.

4.5 Prior judgments have had too much regard to extraneous materials, resulting in a constrained interpretation of s 364 that partly nullifies the wording Parliament has chosen ("just and reasonable") in conferring the power to make a costs order. The only prescriptive element of s 364 is the test to establish the jurisdiction to make an order under subs (2). It is wrong in principle to so narrowly confine the broad discretionary power Parliament has conferred.

4.6 The requirement in s 364(3) to have express reference to the costs incurred by the participants when setting the costs award

sum signals that compensation related to the criminal process sits at the heart of s 364, and does not marry neatly with an exclusive purpose of sanctioning misconduct.

4.7 In *Bublitz* the Court of Appeal suggested that the "default position" was that costs were to be paid to the Court, unless an order was made for payment to a person involved in the prosecution under s 364(8).[37] But it is not correct to describe either payment to the court or to a person involved in the prosecution as the "default". There is no requirement to take a "two stage" approach to costs orders, whereby the sum must first be determined before deciding if there will be an apportionment, and if so how much and to whom. Section 364 must be read as a coherent whole. It confers a power to sanction and/or compensate in accordance with the interests of justice.

4.8 As Mr Bublitz's case highlights, a failure to recognise a compensation purpose in s 364 raises double or disproportionate punishment concerns. A criminal process ought to result in one penalty only – the sentence imposed under the Sentencing Act if the defendant is found guilty. The costs of defending a criminal prosecution cannot normally be regarded as a penalty in any sense. But an expectation that a guilty offender must also bear the extreme costs of a prosecutor's breach of duty can have a penalising impact. Similar conduct may have a vastly different impact on the course of a criminal proceeding. An instance of procedural breach that is prejudicial but rectified well in advance of any trial will not lead to wasted costs comparable (for example) to an aborted nine-month trial. In such cases a predominant focus on sanction rather than compensation will not meet the "just and reasonable" standard in s 364(3).[38] By the same measure, Courts

---

37 *Bublitz (CA)* at [42].

38 After the *Bublitz* retrial was complete, the sentencing judge gave a 30% discount to reflect the "significant punitive element in the way the prosecution had been undertaken", and particularly noted the "devastating effect" and

will be very cautious before making costs orders under s 364 *against* criminal defendants, in order to avoid double punishment.

4.9 This last point goes some way to responding to the point made by the Court of Appeal in *Bublitz* in support of a "sanction" focus, that (unlike the CCCA) the ultimate merits or outcome are not listed in s 364 as a relevant consideration.[39] The underlying point the Court was making is that Parliament has determined that compensatory costs are only due to wrongly prosecuted (or indeed factually innocent) defendants. This will of course be a factor in calculating an appropriate costs award in light of the highly discretionary nature of s 364. But the fact there is a separate criminal costs regime not grounded in substantial procedural failure does not alter the correct interpretation of s 364. Indeed, s 364(9) states that the CCCA is not affected at all.

Mr Apanui was arbitrarily detained

4.10 Mr Apanui seeks compensatory damages in respect of a detention that became arbitrary in February 2022 due to the failure of Police to meet their disclosure obligations.

4.11 The District Court's orders remanding Mr Apanui in custody between February and November 2022 cannot be treated as wrong. This means that there was formal legal authority for his detention, and no judicial error. The existence of a court order justifying detention means the tort of false imprisonment cannot succeed against the Crown.

"serious financial harm" of the abandoned trial: *R v Bublitz* [2019] NZHC 592, at [90]-[92]. In *Morrison (HC)* McQueen J noted that while she would not entertain anything that amounted to a collateral challenge to the *Bublitz* s 364 order, her Honour had sympathy for the view of the authors of *The Law of Costs in New Zealand* that the order was "extremely generous" to the Financial Markets Authority (at [97]-[98]).

39 *Bublitz (CA)* at [39].

4.12 But arbitrary detention is not to be equated with being "against the law" in a formal sense. Rather, as explained by this Court in *Chisnall*:[40]

> The relevant discussion in the White Paper for the Bill of Rights emphasised that the word "arbitrarily" covered not just an absence of legislative authority but was intended to measure the validity of any law allowing for arrest and detention. A more generous approach to interpretation of s 22 is consistent with the fact that the Bill of Rights is intended to affirm New Zealand's commitment to the ICCPR. The concept of arbitrariness under art 9 of the ICCPR is explained in the United Nations Human Rights Committee's General Comment 35 in the following terms:
>
> > The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.

4.13 This approach to arbitrary detention was recently affirmed in *J v Attorney-General*, where the lead judgment of the majority went on to note that "it is not disputed…that a detention which is initially lawful may subsequently become arbitrary and so inconsistent with s 22 if the detention has become disproportionate to its legitimate aim."[41]

4.14 Mr Apanui's s 364 CPA application was premised on his arbitrary detention. The District Court made a costs award on that basis, and the Court of Appeal (while overturning the award) accepted that the "consequences of the failures were…his continued detention in custody for almost nine months".[42]

---

40 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [161] per Winkelmann CJ, O'Regan, Williams and Kós JJ (references omitted); quoting Human Rights Committee *General comment No 35: Article 9 (Liberty and security of person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [12].

41 *J v Attorney-General* [2025] NZSC 103, at [90]-[92] per Ellen France and Miller JJ.

42 CA decision at [47].

NZBORA–consistent interpretation will ensure effective remedies

4.15 Article 2.3 of the ICCPR provides that state parties undertake to ensure an effective remedy when a person's rights have been breached, notwithstanding that the violation has been committed by persons acting in an official capacity.

4.16 An effective remedy is one that vindicates the right breached (by compensating the claimant) and ensures future compliance (by dissuading similar behaviour in future).[43] Judicial recognition of *Baigent* compensation was grounded in the need for an effective remedy in relation to Police misconduct where no criminal process had resulted.[44]

4.17 But an element of a remedial "effectiveness" is that the remedy is timely, accessible, and relevant to the nature of the breach. These factors have driven the development of remedies for NZBORA breach *within* the criminal process. Such remedies include evidence exclusion[45] and sentence reduction or stay.[46] None of these remedies were expressly envisaged by relevant criminal process law as a consequence of NZBORA breach (albeit the evidence exclusion test is now codified). Rather these remedies were recognised as necessary to give effect to the promise of the NZBORA and ICCPR.

---

43 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [109] and [112] per Elias CJ, [253] per Blanchard J, [317] per Tipping J, and [366] per McGrath J.

44 *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 (CA). The Supreme Court has since affirmed that the need for an "effective" remedy sits at the core of the justification for public law damages: *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [106] per Elias CJ, [232] per Blanchard J, [300] per Tipping J, and [364]-[365] per McGrath J.

45 As permitted by the Evidence Act 2006, s 30; this reflected the common law position for evidence obtained in breach of NZBORA as judicially developed prior to codification (the leading case being *R v Shaheed* [2002] 2 NZLR 377 (CA)).

46 *R v Williams* [2009] NZSC 71, [2009] 2 NZLR 750; *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505.

4.18 All s 364 cases of note involve disclosure breaches. Where a criminal disclosure breach is claimed to give rise to a breach of NZBORA, the four-part analysis adopted by McQueen J in *Morrison* is applicable.[47] If that test is met, it is just and reasonable that appropriate remedies be granted within the criminal justice process, including by way of a s 364 CPA order.

4.19 The alternative is that, rather than the consequences of the breach being dealt with by a judge in the course of the criminal process, a claimant will be forced to commence a new *Baigent* claim against the Crown. Such a requirement cannot be regarded as an "effective" remedy:

(a) Criminal defendants will be required to engage counsel willing and able to bring civil proceedings on their behalf which, in light of the modest levels of compensation typically available in *Baigent* claims, may prove uneconomical;[48]

(b) A multiplication of proceedings addressing the same issues tends to lead to delay and pointless strain on the judicial system; and

(c) Judges within the criminal process are better placed to consider the effect of the breach on the defendant, as opposed to a judge exercising a later civil jurisdiction.[49]

4.20 Section 364 provides a statutory process for remediating the rights-breaching impacts of criminal process breaches. That statute, properly interpreted, includes public law compensation as

---

47 See paragraph 3.13 above.

48 Awards of only $10,000 and $15,000 were obtained following a lengthy post-criminal *Baigent* claim in *Morrison*.

49 This much is clear from *Morrison (HC)*, where McQueen J was required to consider various findings made by Woolford and Lang JJ in the course of the *Bublitz* criminal process (see for example [183]-[184] where McQueen J considered whether Woolford J's reasons for aborting the first trial suggested a breach of ss 24-25 NZBORA).

a purpose. It would be an unusual starting point to assume that a remedial civil jurisdiction *implied* from the text of NZBORA (*Baigent* compensation) is a more appropriate method by which to seek an effective remedy than through the statutory power conferred on the criminal court.

Tortious damages not envisaged by s 364

4.21 The Crown will doubtless oppose any suggestion that s 364 can be used to provide any form of compensation. A "floodgates" argument may be mounted.

4.22 To respond, it is necessary to distinguish legal costs and public law compensation from private law remedies.

4.23 Section 364 cannot be interpreted as providing a backdoor to tortious damages. Where a particular procedure is required by statute, the proper way to assess whether breach of that duty has resulted in a tort is through the well-established tort of breach of statutory duty. It would be incoherent and inconsistent with that tort to smuggle general tortious remedies into s 364.

4.24 Conceivably Parliament could choose to codify or create a statutory tort, displacing breach of statutory duty with regards to the criminal procedural powers at issue. But it is clear that was not the intention behind s 364. A typical statutory tort, whether a codification of common law or a new cause of action, is a civil proceeding that defines with precision the actionable harm and the remedies a court or tribunal may grant.[50] Section 364 is different in that:

(a) It is an adjunct to a criminal proceeding, rather than a fresh civil proceeding;

---

50 See for example the codified reputational torts contained in the Defamation Act 1992, or the statutory torts contained in Part 2 of the Human Rights Act 1993.

(b) It is actionable *per se* rather than upon proof of harm; and

(c) Relief is highly discretionary rather than a presumed consequence of breach.

4.25 Breach of statutory duty is nowhere named or referred to in the CPA or in any preparatory materials. The elements of that tort do not coincide with the s 364 test. Finally, it would be inherently unlikely that Parliament could be taken to have codified breach of statutory duty in relation to the Crown's Criminal Disclosure Act obligations by a sidewind.

4.26 Further, in *Morrison* the High Court ruled against tortious liability for disclosure breaches. Criminal disclosure obligations are statutory duties, but not of the kind that are intended to give rise to a tortious cause of action for breach of statutory duty. There is therefore no route to tortious liability for Criminal Disclosure Act breach, and the appellant does not argue for one.

4.27 By contrast, public law damages are compatible with s 364 CPA. The deterrence purpose of public law damages and the sanction purpose of s 364 overlap considerably. Public law damages, like s 364 awards, are discretionary. When vindication of a right requires compensation, that can be achieved within the discretion conferred by s 364.

4.28 When criminal disclosure breaches occur, there is no "floodgates" issue. Nor can there be any "chilling effect". Rather, as the Court of Appeal held in *Morrison*, "where public law damages deter the infringement of rights, they promote good governance, not undermine it."[51]

---

51 *Morrison (CA)* at [83](a).

Proper way to assess s 364 award in this case

4.29 Section 364 can and should be interpreted to meet both the purposes outlined by the Court of Appeal in this case, *Bublitz* and *Lyttle*, as well as the purposes of public law compensation when a procedural breach also leads to a breach of a human right.

4.30 The notice of appeal seeks orders restoring the $28,600 costs award in favour of Mr Apanui, and making an additional punitive order of $15,000 against Police.

4.31 The appellant has revised this position in preparing these submissions. He submits the correct approach to meeting the compensatory and punitive purposes of s 364 CPA is to consider what total costs order is just and reasonable to meet both purposes.

4.32 In this case, the Court of Appeal has concluded that the punitive purpose will be met by an order for $15,000. The District Court had previously assessed the appropriate compensatory award to Mr Apanui as $28,600. The discretionary nature of s 364 means that, if the appeal is allowed on the basis advanced by Mr Apanui, there is no basis on which it could be said that Judge Winter made that assessment without proper regard to correct principle.

4.33 As an award of $28,600 is sufficient to achieve both the compensatory and punitive purposes of s 364 CPA, that award ought to be restored.

4.34 The additional counsel costs award made by Judge Winter was quashed by the Court of Appeal for want of jurisdiction and no issue is taken with that result.

5 Conclusion

5.1 The appeal ought to be allowed. The award of $28,600 made in the District Court ought to be restored.

Chronology

5.2 A chronology of the key events, prepared by the Crown, is contained in the CA Casebook at pp 58-59.

List of authorities

5.3 A list of authorities is **annexed**.

Date: 23rd September 2025

.....
Q Duff | M J McKillop | W N Rhodes
Counsel for the appellant

To: Registrar of the Supreme Court.

And to: Crown Law Office.

List of Authorities

Legislation
Criminal Procedure Act 2011, s 364
Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1)
Costs in Criminal Cases Act 1967
Evidence Act 2006, s 30
New Zealand Bill of Rights Act 1990, ss 3, 22

Cases
Apanui v Commissioner of Police [2023] NZDC 24918
Attorney-General v Chisnall [2024] NZSC 178, [2024] 1 NZLR 768
Attorney-General v Morrison [2025] NZCA 240
Beckham v R [2015] NZSC 98, [2016] 1 NZLR 505
Bublitz v R [2019] NZCA 379
Bublitz v R [2019] NZSC 139
Chief Executive of the Department of Corrections v Gardiner [2017] NZCA 608, [2018] 2 NZLR 712
Commissioner of Police v Apanui [2024] NZCA 307
J v Attorney-General [2025] NZSC 103
King v Attorney-General [2022] NZHC 695
Morrison v Financial Markets Authority [2022] NZHC 1654
R v Bublitz [2018] NZHC 373
R v Lyttle [2022] NZCA 52
R v Shaheed [2002] 2 NZLR 377 (CA)
R v Williams [2009] NZSC 71, [2009] 2 NZLR 750
Simpson v Attorney-General [Baigent's case] [1994] 3 NZLR 667 (CA)
Taunoa v Attorney-General [2007] NZSC 70, [2008] 1 NZLR 429

Texts and other materials
Human Rights Committee *General comment No 35: Article 9 (Liberty and security of person)* UN Doc CCPR/C/GC/35 (16 December 2014)
Law Commission "Criminal Pre-trial Processes: Justice Through Efficiency" (NZLC R89, 2005)