IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 18/2025
[2025] NZSC Trans 20

EDMOND TE RAUPO APANUI
Appellant

v

COMMISSIONER OF POLICE
Respondent

Hearing:	11 November 2025
Court:	Glazebrook J Ellen France J Williams J Kós J Miller J
Counsel:	Q Duff, M J McKillop and W N Rhodes for the Appellant M F Laracy, Z R Johnston and O A Jessop Boivin for the Respondent

CRIMINAL APPEAL

MR DUFF:

Mōrena koutou ngā Kaiwhakawā. Ko Duff, McKillop, rātou ko Rhodes, hei whakakanohi mō Apanui. May it please the Court, Duff, McKillop and Rhodes for Mr Apanui.

GLAZEBROOK J:

Tēnā koutou.

MS LARACY:

Tēnā koutou e Ngā Kaiwhakawā. Kei – ko Ms Laracy ahau, kei konei mātou ko Ms Johnston, ko Ms Jessop Boivin, mō te Karauna.

GLAZEBROOK J:

Tēnā koutou. Mr Duff. Oh, perhaps before we start, we do think the points in the appeal are relatively simple so we would have thought that half a day was more than sufficient, but do counsel have a different view?

MR DUFF:

No, I think it came from the fact that we had an initial communication that had suggested that there was going to be a day. There was a follow-up email that confirmed that it was likely to be half a day and we agree. In fact, I mean, although last time I was here somebody had the temerity to suggest that they weren't going to be talking too much and Justice Kós had said: "Well you're in for a surprise," but I don't even know if I'm going to get to the morning adjournment, to be fair, Justice Glazebrook.

GLAZEBROOK J:

All right. Obviously you're in our hands to a certain extent in terms of interventions so we understand. So Mr Duff.

MR DUFF:

Indeed we are. Thank you, your Honours. May it please the Court. Obviously the Court will have read our submissions, so I propose only to really just address you on my speaking notes, and I'm going to do that by just touching on five subjects and hopefully as I go through them wherever your Honours' questions, they will fit rather comfortably under those, but of course as with anything I'm in your hands.

KÓS J:

Are those speaking notes that you've provided in advance, or are they just your notes?

MR DUFF:

These are just my speaking notes your Honour. So no, not speaking notes that I've provided in advance. I'm going to speak briefly on why this case is important. The second, in terms of arbitrary detention and compensation, has always been the basis of the costs claim. Our take on the respondent's concession and what we suggested it must mean. A brief recitation of how the Courts below had dealt with this case, and a reply to the respondent's procedural concerns.

So let me start with why this case is important. Mr Apanui was wrongfully imprisoned for nine months –

WILLIAMS J:

Sorry, can you just run through those five. I couldn't hear, sorry. Why this case was important?

MR DUFF:

Yes. Arbitrary detention and compensation has always been the basis.

WILLIAMS J:

That's number 2?

MR DUFF:

That's number 2, Sir. Number 3, our take on the respondent's concessions and what we say it means. Number 4, the brief recitation of how the Courts below have dealt with this case. Number 5, a response, a reply to the respondent's procedural concerns.

So starting with number 1, why this case is important. Mr Apanui was wrongfully imprisoned for nine months. But for the disclosure error on the part of the police, the arson charge would have been dropped and his remand in custody avoided. We say for every right there must be a remedy. The wrongful deprivation of liberty by the Crown is one of the most severe breaches of rights known to law. The s 364 power to make costs orders is the obvious first line remedy to address the consequences of breaches of disclosure obligations. The interpretation of s 364 adopted in the Court of Appeal allows compensation –

KÓS J:

Why do you say "first line" Mr Duff?

MR DUFF:

Sorry Sir?

KÓS J:

Why do you say "first line"? It seems to me the problem is you're never going to get to what you want fully under the s 364 application, so why not start with something else?

MR DUFF:

Well, because it is quite clearly the Act that is concerned with ensuring that disclosure was provided in a timely form, and I had a line for my sort of big finale, but it really isn't just, the Criminal Disclosure Act 2008 –

WILLIAMS J:

Don't play it now.

MR DUFF:

I'm going to have to then I'll just sit down, Sir, which is probably what your Honour wants, but the Criminal Disclosure Act is not concerned about, merely concerned about bureaucratic efficiency. It ultimately has to be about making sure that disclosure is provided in a timely way to ensure either that this nightmare scenario doesn't occur, or everything below that. So it does become the "first line", even though we're obviously saying that this extreme circumstance, this extreme consequence is something that we're arguing needs to be read in by this Court. So it is the first line in the sense of saying that any sanctions, as far as disclosure is concerned, do fall under the s 364. Making sure that things are provided in a timely way.

KÓS J:

So what work is left for the Costs in Criminal Cases Act 1967 and *Baigent* damages and the law of torts?

MR DUFF:

Well, as we've pointed to in our submissions, the reality is that each of those cover different circumstances. So Costs in Criminal Cases was not something that could have been applied here because, of course, we didn't have a conviction. We didn't have somebody that had, you know, gone through an entire process.

KÓS J:

Well, you didn't have legal costs is your basic problem.

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MR DUFF:

Well –

KÓS J:

You don't need a conviction under the CCCA.

MR DUFF:

Well, we didn't have any costs in the sense of money being expended, but it would be wrong in my respectful submissions, Sir, to say that there were no costs. I mean the reality is, is that there is a cost when somebody is imprisoned, arbitrarily imprisoned.

KÓS J:

Well, that's not what the CCCA is concerned with.

MR DUFF:

No, well that's right and so to that extent that still has a place, but it isn't a place that covered what has occurred here. So this doesn't, in my respectful submission, it certainly doesn't have any impact at all upon the CCCA.

KÓS J:

So we'll strike the CCCA. Now, what about the other two?

MR DUFF:

The other two in terms of tortious remedies and *Baigent*?

KÓS J:

Baigent and tort, yes.

MR DUFF:

Well, again, as I have addressed in the submissions, *Baigent's* remedy really is a longwinded process. Effectively it's a civil remedy. It requires a criminal lawyer who is prepared to take that on and it's not efficient. It's a process that you've got to go through separate to the criminal disclosure and the criminal justice process in terms of a trial and that surely can't be what's envisaged by Parliament for things to simply stop and we make a decision about what kind of remedy when there has been somebody who, in this case, was arbitrarily detained.

So *Baigent's* remedy may be something that, failing this, or can be run as an adjunct to this, as a top-up some way, but that is not, that I saw when we took the first application. I didn't see that as being what was envisaged even by *Baigent*. I saw that as being something quite different to what we have here, which is why my view that the Criminal Disclosure Act is the first line of defence and the Court as being really the last line of hope because without the courts, without judges actually giving meaningful sanctions for disclosure delays, well, it's all toothless. I mean it doesn't overstate the case to simply say that if judges aren't going to sit there and say that this is the nightmare scenario, the idea that there is somebody who but for the lack of disclosure would not have been sitting in custody, whether it's for one hour or nine months.

WILLIAMS J:

The question here is "what's meaningful"? I mean, no one is going to disagree with that rhetoric, Mr Duff, but just the argument in this appeal is what does "meaningful" mean under s 364.

MR DUFF:

Well, "meaningful" has to mean looking at rights remedy, Sir. "Meaningful" has to look at the notion of costs as being broader than simply nickels and dimes. It may have been fine in *Bublitz v R* [2019] NZSC 139 241, it may have been fine in *R v Johnson* [2023] NZHC 2948, (2023) 31 CRNZ 156 and those kind of cases where you were talking about the collapses of financial companies and people that had a lot more money than Mr Apanui has. "Meaningful" in a situation where you've got a man with mental health issues sitting inside a prison cell, Sir, for nine months.

WILLIAMS J:

Yes, we get all that. You don't need to do the jury address.

MR DUFF:

No, no, well, but I do, Sir.

WILLIAMS J:

No, you don't.

MR DUFF:

Okay, then I won't.

WILLIAMS J:

Just help us.

MR DUFF:

I accept that.

WILLIAMS J:

Help us with the law.

MR DUFF:

But "meaningful" is looking, as this Court does, in terms of the broadest discretion that is available to it. The reason that I had attempted to persuade his Honour Judge Winter in terms of looking at the CCCA as a mechanism was to come up with a principled approach for – how do we calculate costs on a per diem when there isn't a nickels and dimes invoice that I could point to? That was the purpose of referring to the CCCA in terms of a mechanism for working out what "meaningful" means.

So whether or not this Court, I mean we have certainly accepted the notion that his Honour Judge Winter came up with in terms of a $100 a day per diem and I understand my friends are opposed to that interpretation, but that is how we grappled with "meaningful".

KÓS J:

Do any of the cases that have been referred to us deal with loss of liberty as an aggravating factor in terms of sanction?

MR DUFF:

No.

KÓS J:

Was this the first and only case?

MR DUFF:

No, I believe this is the first and only case. Each of those were concerned with, as I say, with finance company collapses and people that have been out on bail, fundamentally.

KÓS J:

Yes, most of them seem to be on bail. *Johnson* obviously wasn't bailed, but there didn't seem to be a delay in the trial.

MR DUFF:

And even if you look at, I mean, the *R v Lyttle* [2022] NZCA 52 573 case, you know, that again was just the extraordinary delays, nobody argued that in the end that the, I mean, that he wasn't lawfully or not arbitrarily detained, should I say. So this is the first time that this particular issue, as far as somebody's liberty is concerned.

MILLER J:

Can I ask you about the sufficiency point you raised earlier, the Court seized of it, let's deal with it. It seems to run into a difficulty that there is not any kind of process around this for discovery, this sort of exchange of witness statements and so on that you'd expect in a civil proceeding, which leads me to think that what the legislation has in mind is that the Court will be able to make a decision about what is fair and reasonable on the information it has gathered as part of the criminal process. So it will know that there has been a failure of disclosure, it will know that Mr Apanui has been held in custody and that is possibly about all it will know and isn't there, the Crown makes this point in its submissions, is there not something in it?

MR DUFF:

Justice Miller, I think that goes to how I answered the first question in relation to Justice Kós' question. When we are talking about what should go on, as your Honour will be well aware of in terms of thinking about how a criminal trial normally proceeds, there really isn't the luxury for running those kind of "cases within a case" like that and that's why what we have submitted that the Criminal Disclosure Act envisages something, in my submission, far more dynamic in terms of an approach because – but you're right, I mean, there isn't a methodology, there isn't, I mean, the calculation of quantum really is and how we calculate that quantum really is what I believe that this case is about, Sir, because there aren't the procedures. But here, what we can say is this and it may be that it's, I mean, the utility of it in terms of the facts of this case, but what we are able to say is that from the point that the police were aware in February 2022 in the disclosure and failed to provide that and we know that as soon as it was provided within three days, and even that three days was only because that was the earliest date the Auckland District Court could accommodate, on the Crown's own application the matter was s 147'd and no evidence was offered. So we know that this isn't a situation where there was a need to look at anything because the Crown had analysed it for themselves as they should do under the guidelines.

MILLER J:

But I was thinking of the kind of compensation that you might claim. There are a number of cases in which the courts have looked at this thing and there may be emotional harm losses, for instance, there might be, well, presumably not in Mr Apanui's case, but there might be loss of income, it's not necessarily just the per diem thing. So if you're right, we can contemplate a case which someone comes to the Court and says, "look, I was out of work and here's my lost salary."

MR DUFF:

Yes.

MILLER J:

"I suffered, my family split up, I suffered emotional harm", so there's a whole lot of heads of loss that would flow from your proposition that essentially damages are recoverable. It may be that Mr Apanui only wants per diem because he doesn't claim any other kind of loss, but we have to look at this wider and so that's why I'm testing you on it.

MR DUFF:

And the reason that I'm hesitant to comment on that is because that isn't – yes, this Court does obviously have to think wider – I would be concerned that by entering into with you on the basis that it doesn't apply to Mr Apanui that somehow I would be entering into something that my friends could say "well, there's the floodgates that we were concerned about opening". I'm not sure if –

MILLER J:

Well, I don't want to suggest that "floodgates" is a consideration, as I see it. It's the practicalities of a trial court and is a criminal trial court making this decision.

MR DUFF:

Yes, well, again, I –

MILLER J:

On what would seem to be a sort of a summary basis.

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MR DUFF:

No, no, and, as I say, I am hesitant to get into that. I hadn't turned my mind in terms of the idea that people could claim those kind of things and say that was a direct consequence. I mean, we take the idea that a relationship had broken down. I wouldn't really see those as being compensable losses, if I use perhaps what my friends are sort of trying to allude in relation to this case.

Wages, I mean that again goes back to why it was that I had initially argued on the basis of that sort of $300 per diem because that did seem to be where

Parliament had landed in terms of trying to calculate what does it mean to have somebody in custody and envisage something of the losses, you know, to the ability to earn. It may be different in other cases. It certainly wouldn't have been that high as far as Mr Apanui was concerned.

But I mean, look, yes, I mean the answer must be that that's quite right. I mean, there may be additional losses outside of. I mean, here we're obviously talking about an arbitrary detention and just what does that mean.

GLAZEBROOK J:

I think we are probably getting tied up with arbitrary detention which is related probably more to the New Zealand Bill of Rights Act 1990 damages. Isn't the simple proposition that if this disclosure had been made earlier, then he wouldn't have been in custody for the amount of time that he was. It doesn't matter whether it's arbitrary or anything, it's a direct consequence of the failure of disclosure and that seems to be accepted.

MR DUFF:

Well, I mean, yes, that's exactly right, your Honour.

GLAZEBROOK J:

And then the question is whether and what is fair and reasonable. Well, one, whether the amounts payable can include a compensatory element and the Court of Appeal decisions say, "yes, but it can't be dominant", although I don't quite understand how that distinction comes and how it comes out of the statutory language. But leaving that aside and then the question is, "well, how much is fair and reasonable and can it be on a per diem basis, and is the sort of per diem basis that was set in the District Court reasonable"?

MR DUFF:

I mean, that is how we have approached it, your Honour. I mean, that is quite right.

GLAZEBROOK J:

And if some other person comes along later with some other heads of compensatory damage, then that's presumably for the later Court to decide what happens under the principles, whatever they are.

MR DUFF:

Yes.

GLAZEBROOK J:

So either it can include compensation or it can't. If it does include compensation, on what principle do you assess what should be the award?

MR DUFF:

That's right.

GLAZEBROOK J:

So perhaps you can let us know. Obviously you say it can include compensation. You obviously also say that saying it can't include compensation as a primary aspect is wrong.

MR DUFF:

I mean, I do say that.

GLAZEBROOK J:

Perhaps you can let us know why that is? Because that seems to be the nub and then what you say is fair and reasonable in these particular circumstances.

MR DUFF:

I say it's wrong, because it's my submission in terms of s 364 is that Parliament has conferred a broad discretion in terms of the language that it has used and it's been unduly narrowed to the point where, you know, where really this first line remedy for a breach is ineffective.

KÓS J:

Well, has it been unduly narrowed? I mean the point is, I mean I sat in *Bublitz v R* [2019] NZCA 379 221 and I sat in *Lyttle*. I mean, we were not dealing with loss of liberty cases, so that adds something different.

MR DUFF:

Yes.

KÓS J:

Plainly, loss of liberty requires a sanction response. So if you have all the other things that happened in those cases plus loss of liberty, then the amount that is going to be awarded by way of a sanction is going to be greater.

MR DUFF:

Yes.

KÓS J:

I'm not sure that the other cases have narrowed that. They just haven't dealt with this point, that's why I asked the question before.

MR DUFF:

I would be happy if your Honour adopts that kind of interpretation to the extent that I had really the same consternation as I am interpreting Justice Glazebrook is having in relation to the Court of Appeal's decision. I didn't see, I couldn't understand, the hesitancy for them to actually look and realise that compensation or punitive, you know, costs, are both valid and that there doesn't need to be this kind of perhaps artificial hierarchy, "is it wrong because it hasn't been considered yet". I guess I have to agree with your Honour's interpretation in relation to that. I do –

KÓS J:

Well, you seem to have, because you flinched at trying to support Judge Winter's judgment on its own terms. You're now saying we have to deal with it a different way, so right at paragraph 4.32 of your submissions. So why

not finish the finale – why not start with the finale again. You there swiftly move from the idea that you can do $100 a day to something else. You look at a global sum.

MR DUFF:

The reason that I flinched is because the mechanism that his Honour Judge Winter used, the part that I applaud, was that he at least tried to grapple with the idea of "how does it, how do I work out what is a compensable loss", and that it seemed to be principled to adopt the idea that without arbitrary detention we had these kind of wrongful conviction cases, and there was a $300 a day per diem, and why that should be so vastly different, why that should be such a different consideration, even though the legal ways, you know, the mechanisms for getting to that point are different, but the result is still the same. The result in the sense that there was somebody being held in custody, that was still the same, so it did seem to me that it was a principled approach to submit to the District Court that $300 per day per diem. I flinched, and you've recognised that accurately, because I lost my courage, really, concerned that if I had asked you to go for the $300 a day, we wouldn't have even got anywhere near this Court. I flinched because I chose instead to support Judge Winter's decision recognising that this Court, and going back to what his Honour Justice Williams has said in terms of trying to establish how we, you know, quantify these kind of losses, that is a matter for you. So I did flinch.

KÓS J:

Well, that's fine. We're just trying to understand what's the principle underlying 4.32.

MR DUFF:

Yes, so yes, I did flinch but for that reason, because I would certainly quite happily stand here and say, as I did in terms of the Court of Appeal, that if my learned friends were saying that the punitive costs element should be $15,000 for the disclosure failure, that should not preclude the Court of Appeal from also awarding compensation for the arbitrary detention element, which was the direct consequence. So there are two aspects. Not only they failed to live up

to their disclosure obligations as envisaged by the Disclosure Act, but there was a direct consequence, which was the time spent in custody.

MILLER J:

It seems to me it's just not necessary for you to run this as effectively *Baigent* damages because the Act itself contemplates only a loose causal connection between the wrong and the consequences for the party who suffered the loss, and you can say therefore that a rule of thumb, which is already established and used in another context, will do. The Court doesn't need to be satisfied on the balance of probabilities that there is that causal connection, although if it needed to be it could be here. So I'm not sure why you need to shrink from the idea that there's a rule of thumb readily available to Judge Winter here. Why not just grab it? Then the difficult question becomes how much you discount that, on account of other causes, or a sense that the amount that the police are being asked to pay is out of scale with their fault, if that's the view you take, and those are simple matters of judgement.

MR DUFF:

I think that, Justice Miller, my concern fundamentally was that at that point I'm getting into those kind of, the tortious damages. Not something that I felt overly equipped to make enough comment on for the purposes of this Court, whereas compensation for breaches, a breach of rights, and again notwithstanding her Honour Justice Glazebrook's comments, compensation for a breach of rights is far more discretionary and so the approach that this Court can take is far more discretionary than perhaps some of those tortious options.

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GLAZEBROOK J:

We've probably taken this as far as we can take it and you've probably half-covered some of the other points you were going to.

MR DUFF:

I really do think that I have and it may be –

GLAZEBROOK J:

I think you perhaps take on the respondent's concessions and the response for procedural concerns are things that I have noted that you may not have dealt with. I think we understand how the courts below dealt with it but if you have got some particular comments on that? You have already commented on the Court of Appeal approach.

MR DUFF:

Yes. Well, I wonder then if, I mean, I'm quite happy then perhaps to do that by way of response to hearing from my friends rather than unnecessarily taking up the Court's time. I am fine to go through my sort of speaking notes but I mean –

GLAZEBROOK J:

Well, perhaps do the take on the concessions now and the response to the procedural concerns on –

KÓS J:

Yes, I think we need those two points covered.

GLAZEBROOK J:

Yes.

MR DUFF:

In terms of what, how we have attempted to grapple with the respondent's concessions. Since receiving the 14 October memorandum, we did attempt to engage and understand the position in relation to payment of the costs ordered to Mr Apanui.

Counsel understands that the respondent's position to be that s 364(8) confers a discretion to order costs to be paid to a person involved in a criminal proceedings if it is just and reasonable to do so regardless of whether there is compensable loss. The respondent doesn't therefore resile from their concession at first instance that Mr Apanui ought to be paid any costs award and yet also doesn't concede that Mr Apanui has suffered any compensable

loss and though this is pragmatic, in our respectful submission, it's an unprincipled position.

Compensable loss is an essential precondition for exercising the power under s 364(8). Any other reading would confer discretion to avoid "windfalls" and it is clear a costs order can be made to meet the sanction purpose of s 364, regardless of whether the compensable loss has been incurred. In such cases, costs are payable to the Crown but it would be unusual to suggest that the Courts might on a discretionary basis award a windfall to a party or any persons connected with the prosecution when a sanctioning costs order is imposed.

Section 364 must be read as a coherent whole. The just and reasonable calculation test in s 364(3) requires consideration of the costs incurred. The calculation tests and power to order payment to a person connected with the prosecution are not independent decisions. Instead, ordering payment under s 364(8) will logically follow from the assessment of losses incurred when properly applying the s 364(3) test.

To the appellant's knowledge, no court has treated s 364(8) in the manner the respondent contends. Rather, payment of costs orders to parties have invariably reflected actual losses incurred. The respondent's concession may have been made under the wrongful impression or the wrong impression that s 364(8) confers a highly discretionary power to disburse a costs order as a court sees fit, but it had the effect of avoiding any need for argument as to the basis for Mr Apanui to be compensated.

This may explain why the respondent was seemingly surprised by the description of this loss as compensation for arbitrary detention in the appellant's submissions. But this wasn't envisaged as a new argument, it's merely a succinct summary of what had come before and how the claim had been framed and what the courts below had decided and what the respondent had seemingly already conceded was due.

A New Zealand Bill of Rights Act consistent interpretation is always a live issue in criminal proceedings.

GLAZEBROOK J:

So if I understand right, is your argument the power to award to the person involved in criminal proceedings in itself says that it is a compensation section?

MR DUFF:

I'm sorry, Justice Glazebrook, could I have that question again please?

GLAZEBROOK J:

Well, are you saying that if you have power to, well, I think you definitely said that all of the cases where payments have been made to the person have been effectively compensatory?

MR DUFF:

Payments, yes, compensatory in terms of actual costs.

GLAZEBROOK J:

Legal costs or actual costs?

MR DUFF:

Legal costs, yes, that's right.

GLAZEBROOK J:

So what you say is that the existence, well, as I understood you, the existence of that very power means that that was what was intended by Parliament, that these costs could be compensation and in fact to pay them to the person should be compensatory and not merely punitive?

MR DUFF:

Yes.

KÓS J:

Well, your point is that costs are not about windfalls.

MR DUFF:

What, sorry, Sir?

KÓS J:

Your point in a nutshell is costs are not about windfalls.

MR DUFF:

That's right.

KÓS J:

You don't get them unless you've suffered a loss of some sort.

MR DUFF:

That's right.

ELLEN FRANCE J:

So, in terms of cases, you are talking about where the payment made to the person under (8) have been effectively compensatory, what's your best example of that?

MR DUFF:

It's probably it would be a combination of *Bublitz* in terms of there being the $50,000 that was then spread across five and then *Morrison v Financial Markets Authority* [2022] NZHC 1654 where after Mr Morrison was acquitted, there were additional costs that were awarded, but nowhere near what it was that he had sought. I think if I am right it was $70,000. Have I got that right? But in terms of his legal costs, because ultimately he was acquitted, so those are situations where this has been applied where we were able, you know, the Court had been able to look at invoices and then consider quantum based upon that.

GLAZEBROOK J:

Now the procedural issues, or have we got there or is there another point on –

MR DUFF:

Well, it really is just, I mean, it is something that was addressed I think in our reply memorandum, but look, I will go over it, your Honour, just for the sake of completeness. It's really just to reiterate the notion that the Crown has really suggested that there has been a reshaping of the argument, you know, and that apparently –

GLAZEBROOK J:

Procedural concerns in relation to this appeal.

MR DUFF:

That's right.

GLAZEBROOK J:

Okay.

MR DUFF:

In terms of what I have articulated perhaps in the memorandum as being the magic words of arbitrary detention and the New Zealand Bill of Rights Act. So I mean to the extent that, I mean, I think the point has already been made. I was only covering it off in terms of my oral submissions for the sake of completeness but not something that requires me to remain on my feet any longer if you don't have any further questions in relation to our other points.

GLAZEBROOK J:

Thank you very much.

MS LARACY:

I will just take a little time to set up. I've got lots of paper.

GLAZEBROOK J:

Sure.

MS LARACY:

May it please the Court. I propose to deal with the bulk of the arguments that the Crown will make today and Ms Johnston will deal with issues of quantum and how, on the facts, this case may compare with others if the Court is interested in that sort of comparison in order to consider the appropriateness of quantum. So there may be parts where I suggest that it's best left for her.

What I would like to do is start with the Crown's proposition and proposal that what I focus on is the purpose of s 364 and it is worth noting, as this Court is obviously well aware, that the Court of Appeal has recognised in earlier decisions that the Supreme Court may wish at some point to consider the extent to which s 364 has a compensatory role or effect or purpose in addition to the primarily punitive and deterrent purpose.

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And I would adopt essentially Justice Glazebrook's summary statement 15 minutes or so ago of the issues that I suggest it is important that the Court grapples with here. What is the purpose of s 364? If it's compensatory, what does it compensate? How far down the track can losses and claims be compensated? What's the process for settling on an award? Those sorts of issues are, in my submission, the key question for this Court today.

In terms of the Crown's view in summary of the purpose of s 364, the better view, I submit, is consistent with the approach taken by the Court of Appeal in a number of decisions to date, including the one under appeal, and that is that there can be a compensatory element to an award under s 364. I would go so far as to say that is not a purpose of s 364, but s 364 within its primarily punitive, deterrent, disincentivising purpose can, to a degree, reflect loss as part of assessing how serious the procedure or failure was in the particular circumstances.

What we know in this case, and it's important to bear this in mind, is that compensation for loss said to be caused by the procedural breach was the sole basis on which the award of costs under s 364 was made. The $26,000 that

was awarded by Judge Winter initially was on the basis of 269 days in prison to be compensation at a daily rate of $100. There was no other statement or consideration by the Judge in the paragraph where he reasoned that that was the appropriate outcome that reflected the punitive purpose of s 364 and the need to take account of the procedural disadvantages that non-disclosure puts the Court at delays, rescheduling, all that sort of thing that is normally the basis of a s 364 order. Instead, in terms of grappling with the question the Court of Appeal has previously recognised this Court may well be interested in, to an extent this is an ideal vehicle because it's solely based on a compensation purpose, and a compensation award. Now that would mean that compensation –

KÓS J:

Do you think that's what he was trying to do?

MS LARACY:

I do Sir.

KÓS J:

After all, at 37 on he goes through the *Lyttle* criteria, quite carefully.

MS LARACY:

I do Sir, in the sense that the critical paragraph, I'm just looking for it in my notes, is paragraph 39, I suggest, where the Judge says: "I see no reasonable excuse for that procedural failure and therefore the Commissioner of Police should be liable for a costs order under s 364 … for the custodial detention suffered by Mr Apanui over that period." Of 286 or 296 days. So in substance I do say that was the purpose on which compensation was ordered.

KÓS J:

But you can't just treat that in isolation, we've got to look at the preceding paragraphs, where he has gone through the case law and the approach in *Bublitz*, and the reality here is that if we're talking about costs, and if Mr Duff is right that costs are about actually either economic or temporal disadvantages

that have been incurred by someone, the Court system or the defendant, then in this case it was dominated by what had happened to the defendant. The Court wasn't particularly put out by this. There was some measure of it but, you know, I mean this is the liberty case. The unusual one.

MS LARACY:

There is plenty that the Crown does need to address the Court on in terms of whether this is the liberty case, whether the procedural failure can in fact and in law be said to have caused the remand in custody from February to November, and our submission is that is not correct and that has never been accepted by the Crown.

But the short answer to your question, well, to your proposition, in my submission, is that if the correct approach was taken which is a primarily sanctioning purpose which seeks to identify how serious, looked at in itself, was this procedural failure, which requires a real focus on what the police did and knew and the information at heart, so it requires a stepping back in time to 16 February, essentially.

If the focus is on that and sanctioning the police omissions at that time, then I accept, as the Crown always has done, that part of understanding the seriousness of that is recognising that to some degree, unquantifiable and unquantified, there was an impact for a time on Mr Apanui in that he probably stayed in custody longer than he needed to. We don't accept it was nine months and that is part of the seriousness of the procedural failure.

KÓS J:

What were the other impacts in this case of the ineptitude of the police officers?

MS LARACY:

As my learned friends made the point in submissions in the lower court, it meant that depending on when and whether a s 147 was brought, he may not have needed to go so far down the Criminal Procedure (Mentally Impaired Persons) Act 2003 process.

KÓS J:

Well, that's still Mr Apanui. Who else was disadvantaged by the police ineptitude?

MS LARACY:

Well, that's, in my submission, that's why this case is, as the relative to other cases, a less serious procedural failure. It's not a situation where a trial had to be put off, where a hearing that had been scheduled couldn't go ahead, when witnesses and –

GLAZEBROOK J:

It's rather difficult to say somebody who, I mean, I have difficulty seeing why the same thing wouldn't have happened at the earlier stages, if it had been dealt with properly, as it was at the later stages when it seems a casual conversation caused the prosecutor to say, "well, this has to be disclosed".

MS LARACY:

It certainly had to be disclosed.

GLAZEBROOK J:

So it's very difficult to me to say, to see there's a difference, and to say that a delay in the Court process is more serious than somebody spending time in prison when they shouldn't have been in prison. It's quite an extraordinary submission on the Crown's part.

MS LARACY:

It does, it is a concession that has never been made by the Crown. It was never accepted, but I accept –

GLAZEBROOK J:

Well, it may not have been, but I can't quite see why it hasn't been made by the Crown.

MS LARACY:

I accept that and it's because of issues of causation and –

GLAZEBROOK J:

Well, we can deal with those.

MS LARACY:

And I can take the Court through that and it is, there is quite a lot of legal and factual and process detail to take the Court through and I will, I certainly intend to do that.

GLAZEBROOK J:

And were these brought up in the lower courts? You did have a chance to make further submissions when we put out that minute and chose not to.

MS LARACY:

Yes, the Court invited the Crown, if it wished to, to make further submission on the Bill of Rights aspects. We are satisfied that our existing submissions adequately cover the Bill of Rights. The position I rely on for explaining to the Court why the Crown has always said that we don't accept there was nine months of pre-trial remand caused by this particular non-disclosure is summarised in the submissions that were filed by the Crown in the District Court. This is not a new position and, as I say, I will take the Court to that.

If I can just, because I think –

GLAZEBROOK J:

So we are supposed to have gone to the submission in the District Court to understand the argument that you are now making in front of us which – is it in your submission in this Court?

MS LARACY:

Which is reflected in our submission in this Court, yes.

GLAZEBROOK J:

Right, well, perhaps we'll stick with those.

KÓS J:

Before you stick to anything, could you stick to my question and answer for me, who has been adversely affected in this case other than Mr Apanui?

1050

MS LARACY:

We say Mr Apanui was adversely affected in that he lost the opportunity to make a bail application. My submission is that it's highly speculative that the information that was not disclosed would have made a difference to that and I can go into some detail. But he has a right to make a bail application

KÓS J:

I feel we are misunderstanding each other. I'm interested to know who has been adversely affected by the actions of the police officers. Who, in other words, whose interests here might be met by some form of cost order?

MS LARACY:

Mr Apanui, because he is entitled to have relevant material disclosed.

KÓS J:

Absolutely. Anyone else?

MS LARACY:

The Court, because the Court is entitled to know that the prosecution has met its obligations under the Criminal Disclosure Act.

KÓS J:

So we would have to probably work out some sort of balance between how adversely affected the Court was by this and how adversely affected Mr Apanui was?

MS LARACY:

That's right and what is difficult and alluded to in the Crown's submissions in the District Court here is that usually, as in the *Lyttle* case and the *Bublitz* case, it's quite easy not to quantify the harm and the cost to the Court, but to say there was a hearing on this date, or there was a thing that needed to happen according to the Court's schedule by a certain date and that couldn't happen, and everyone was disadvantaged, and other matters that could have been heard or dealt with weren't able to be, because this matter took up the time and then it couldn't go ahead. Those dates and events can be accounted for.

We don't have that here. Instead, what I submit we have is a number of lost opportunities for Mr Apanui to have gone back to the Court. The reason we don't have those lost court hearings is because the case was already going down a separate route. It wasn't going down a route to trial. It was going down a slower route because having been found unfit, the situation with respect of insanity in respect of the Crown charge changed. It went from an initial report that was directed, well, that concluded that he probably was insane at the time to that being reviewed. There were two further reports. So that meant that before any trial could be set down, or any disposition on the merits of the criminal case, those other issues were being explored and that was the basis upon which both parties were addressing the case and there were no delays to those processes that have been identified as a result of the non-disclosure.

KÓS J:

Right.

MS LARACY:

So it's an unusual case in that respect.

KÓS J:

So it's mostly Mr Apanui, really?

MS LARACY:

Yes.

WILLIAMS J:

There is the system interest which is part of the reason for this legislation.

MS LARACY:

Of course.

WILLIAMS J:

In making sure that police competently pursue their investigations so that citizens are not constrained in their liberties for no good reason. So this is a signal to the police, "can you stop doing this and don't have these, you know, informal side conversations, that didn't seem to catch in the mind of Detective Dhillon", right. That's an important signal in itself, isn't it?

MS LARACY:

It's an important signal because criminal disclosure affects the timely and efficient progress of courts and in so doing, it supports fundamental rights. Section 364, in my submission, is not designed as a guarantee of fundamental rights, but it inevitably is a prop in the system which will support those fundamental rights. So if there is timely disclosure and adequate disclosure, that will support the right to fair trial. That will support the right to trial without undue delay. It will support the right to natural justice. So there is definitely connection and there is no issue with that. But its primary purpose is to sanction procedural failures that in themselves are undesirable in terms of efficient criminal process and they apply equally to defence counsel as they do the prosecution.

WILLIAMS J:

On the basis, then let's assume that the "inexcusable failure", I think how it's described, however it's described, did cause unnecessary deprivation of liberty, how would you calculate its effect on the resulting number? Neither party seems to have helped us with that.

KÓS J:

Ms Johnston has the answer for that, I think.

MS LARACY:

In part Ms Johnston may be able to assist the Court. The answer to that Sir, in my submission, is as the Court of Appeal has recognised in this case and others, the discretion to make a costs award under s 364 is a genuine discretion. It's broad and it requires the Court to stand back and look at what is right, a fetter on that discretion, in my submission, because in the end no open discretions are truly unfettered. I don't think the Court needs a case for me to support that principle. Discretions are shaped by the parameters of the statutory provision, the purpose of that provision.

So the Court's discretion here to come up with an award is shaped by the purpose, and the purpose is to sanction the police's failure to recognise the significance of this information at the time. To record it, to follow up on it, because essentially it was a line of enquiry rather than hugely valuable information in itself, it was a line of enquiry about Mr S, and to disclose it. So that's the purpose. Getting to your question, how then do you factor in the fact that…

WILLIAMS J:

Well, the relationship between effect and sanction.

MS LARACY:

The relationship of the ongoing consequences for Mr Apanui being in custody to this disclosure. The way the Crown did that, and in my submission the way the Court of Appeal rightly acknowledged it can be done, is to say that the primary purpose is to sanction but within that context the Court, as a matter of its broad discretion to do what is just and reasonable, can take account of the impact on the participant.

WILLIAMS J:

Yes, that's how. Otherwise, they're just making it up and, of course, the "wait for 20 cases so you can see a swarm of dots on the profile" and then that becomes law somehow, without actually addressing the underpinning problem

is if it is accepted that loss of liberty is relevant, then how do you do that without mere magic?

MS LARACY:

If I can put it this way. My submission on how the Court does that properly is if the Court considers that, and I just use this language because it comes to mind, it may not be correct, but downstream compensatable consequences. So the downstream of the procedural failure, which in itself is the primary focus, but downstream compensatable losses or harms should be compensated. Then the Court, as a matter of its broad discretion to do what is just and reasonable, can say this aggravates the sum that should be paid as a result of responding directly to the procedural failure. But what it can't do, in my submission, is say the primary purpose of this costs award is to compensate for those downstream compensatable failures.

GLAZEBROOK J:

Can I just check, just taking it in stages. So there's a failure, and there's a sum to compensate for that failure. How is that picked, without looking at the consequences of that failure? So there's a failure perhaps of disclosure on day 1. At the initial hearing, the Crown realises, it hands over disclosure. There may be a delay because they have to then come back next week to decide whether they're going to plead or not.

MS LARACY:

Yes.

GLAZEBROOK J:

But what are you, it's really just asking what you do there. Do you just pluck a figure out of the air and say, "this is enough to compensate"? I suppose, looking up, you might look at the factors that were looked at in the District Court.

1100

MS LARACY:

Probably the most useful paragraphs in my submissions on those are around 40 and 41, talking about the analysis in the *Lyttle* case, which is useful because –

GLAZEBROOK J:

Sorry, paragraph 40 of your submissions?

MS LARACY:

My written submissions, your Honour. What we call the *Lyttle* decision was a composite decision involving three cases that dealt with, to different degrees, claims under the Costs in Criminal Cases Act and the Criminal Procedure Act 2011 s 364. So there's three different scenarios there, three different ways on the facts of the case that the Court analysed the way the costs awards should be reached. The Court there referred to the primary purpose of s 364 being to denounce failures, to comply with procedural obligations, and to deter similar breaches in future, and that purpose of deterrence, which is part of the sanction element, is an important factor, in my submission, when ultimately the Court comes to decide how significant was this in terms of what awards should be given. To what extent is a sanction going to disincentivise the particular procedural error that occurred here, in the mind of Constable Dhillon, in February.

But leaving that aside, the criteria is at paragraph 41. As your Honour has correctly pointed out, Justice Kós, Judge Winter did recognise these factors, noted the guidance in *Lyttle,* and the Court of Appeal itself in its judgment says there's much in terms of Judge Winter's reasoning and approach that it takes no issue with at all. It was instead the fact that in the expressed terms of the way the compensation was, that the award was reached, it was based on compensation for loss of liberty on a day-by-day basis.

GLAZEBROOK J:

I suppose what I'm really asking is, yes, I understand these factors, but how do you pluck a figure out of the air that deals with them, if you say that's the primary purpose?

MS LARACY:

We look –

GLAZEBROOK J:

And I say that they pluck a figure out of the air because effectively it does seem to me that without some guideline, you're plucking a figure out of the air. So for instance you say this was very, very serious, and it needs to be deterred, $50,000. Do you understand the…

MS LARACY

It is the value of case law, and we don't have a huge amount at the Court of Appeal level. There is growing case law though, so that's helpful.

WINKELMANN CJ:

There is growing case law did you say?

MS LARACY:

There is growing case law on CPA costs. *Lyttle*, because it involves the three judgments, and was specifically focused on really the framework for how does the Court reach an award in these cases, is definitely the most useful guidance to date.

The way Ms Johnston will approach this is to explain the significant differences, particularly having regard to those factors in (i) to (iv) in paragraph 41 between this case and the other ones where an award has been made, and our submission is, just to cut to that end point, is that $15,000, which is what the Crown suggested here, was appropriate, can be justified, as the Court of Appeal found.

But if the Court finds it helpful, we suggest that the case of *Singh*, which she will talk about, is the most useful there partly because one of the factors that the Court in *Singh* said could be part of the award, because if reflected a serious impact on the defendant, was the length of time which he had and the stress in the particular case of having these proceedings hanging over him. He wasn't being compensated for time in custody there, but a result of a number of procedural failings there had led to proceedings being elongated and considerable stress in the particular circumstances of that case. So it said that could be reflected and the award there was $5,000. We've acknowledged that this is a more serious case overall.

WILLIAMS J:

So and because this is a stand-alone loss of liberty case, it would have been, well, one more transparent way of addressing it might have been to identify a per diem, whatever that might be, for loss of liberty assuming that causation is made out, and I know you argue that but let's just assume for this, and then to step back and discount or aggravate that number by reference either to the seriousness of the failure, if it wasn't very serious you might discount it, if it was very serious you might add to it, or the potential "chilling effect" on prosecutorial discretion of an overly large number and come to your final number. The point here is that that at least has the advantage of the transparency of reasoning. Because these cases do look like they're just making a number up.

MS LARACY:

If the Court were to find that –

WILLIAMS J:

In the case of loss of liberty where you have, well, to be fair, in those other cases you had, you know, objectively –

GLAZEBROOK J:

Can I perhaps take it in stages. Because there seems to be an acceptance that stress can add to something. There seems to be an idea in the cases that extra legal costs, at least that were specifically related to, and I think that's conceded

by the Court, isn't it, that specific legal costs that are specifically related to the failure can be taken into account. I think for some reasons the costs involved in the making of the application under s 364 are thought not to be included and perhaps you can explain a bit further to us why you say that is the case. And then there's the loss of liberty and so on that spectrum what's the additional that one can add in respect of that, again, as Justice Williams said, assuming that we do have causation here?

MS LARACY:

The reasoning steps that would be required are that, first, the Court would need to find, in my submission, that a secondary, or a parallel, or an equal, or one way or another a legitimate purpose in itself, of s 364, is to directly compensate for those consequential losses. Having done so and if they have been proven, we don't need to get into what "proof" means, it might be production of invoices, it might be something on the record, that's just "this happened", it's apparent to the Court –

GLAZEBROOK J:

Well, I don't accept that for a start, because I thought we had got past that. What had been said was, as I understood you, is that the cases say you can add something for the what would be effectively compensation.

MS LARACY:

A compensatory impact.

GLAZEBROOK J:

So why would you have to first decide that you have a parallel or legitimate purpose, if you can add something to it?

MS LARACY:

Because if you're –

GLAZEBROOK J:

I mean, either you can't compensate because it's only punitive, which is not what the Crown argues, or you can add some compensation, but when can you do that?

MS LARACY:

You can add but my – and what that does is, I might use the language of it, it would aggravate the otherwise appropriate award. It would increase it and the way the Court would do that would by taking a global approach to the harms and the impact in assessing the seriousness of the procedural breach and things like ongoing and extreme stress are the sort of matters that are apparent to a judge and can, on that approach, be taken into account as happened in *Singh.* We don't object to that but it does raise other questions. So, for instance, and I don't –

GLAZEBROOK J:

Well, it's – there's nothing more apparent to a judge, or can I suggest the person involved, of detention when you're not, shouldn't be detained, so I'm not entirely sure why stresses can aggravate but not actual detention or is that not the argument?

1110

MS LARACY:

I would respectfully need to take the time to explain why, in my submission, your Honour's premise is incorrect there and that takes us back to the point that the Crown does not accept and never has that nine months in custody was caused by this particular non-disclosure.

GLAZEBROOK J:

No, no, no, we're assuming for this purposes that it was caused.

MS LARACY:

Okay.

GLAZEBROOK J:

So leave aside causation, but can you explain what you do, and that was always the premise of Justice Williams' question.

MS LARACY:

Okay. Let's imagine then a situation where the police have clear evidence that is wholly exculpatory and whether deliberately or through inadvertence, it really doesn't matter, but it is wholly exculpatory, it goes to the heart of the charge, the heart of the Crown case, and they don't disclose it. From the point that material comes to the attention of police where they should have recognised it could be disclosed, time in custody from then could, in the round, in my submission, be compensated. If it were clear that there was nine months in custody from that point, the Court could well say this is a direct consequence, it's hugely serious, it's the only thing that led to this person being in custody and it warrants a significant award for sanction even though this was a one-off disclosure failure of one piece of information or one document on a police file that only one officer was responsible for.

MILLER J:

Can I just ask how you get to that conclusion, if we look at s 364(3)? So that says: "The sum must be no more than is just and reasonable in the light of the costs incurred by the Court, victims," et cetera. Are you prepared to accept that the detention is itself a cost or has an impact that is measurable as a cost?

MS LARACY:

It certainly has an impact that's measurable. Not on a daily cost basis.

MILLER J:

Right, so it is a cost for this purpose and then you're obviously very much wanting to debate whether it's just and reasonable to order that the Crown pay that?

MS LARACY:

That's right and if the Court, on those extreme facts, concluded that that impact was so directly attributable to a single one-off disclosure failure, that it was the cause of the detention, it was a direct consequence, I accept.

MILLER J:

So then can we look at how one proves that cost in this setting, because obviously it must be the case that a potential, one consequence of a procedural failure here is that someone spends time in custody when they ought not have. You're accepting that?

MS LARACY:

Some degree of time would likely have been addressed earlier.

MILLER J:

Putting aside how much of the cost ought to be paid to sanction the police for this failure, how is the Judge to measure the cost if not by using some rule of thumb such as the compensation guidelines?

MS LARACY:

My submission would be that, again, what is just and reasonable to punish, deter, disincentivise the circumstances in which that non-disclosure arose, would be the guiding principle that drives the cost award. So again, as in the case here, it doesn't support a per diem compensation analysis, but it does –

MILLER J:

But is not the logic of this subsection that, first, you establish what were the costs incurred and maybe in a rough and ready way, and then you decide how much of that is attributable to the police and how much the police, a separate question, the police ought to pay having regard to the culpability of the failure, is that not the logic?

MS LARACY:

In terms of stepping through it, if –

MILLER J:

Because I'm wondering if (3) sets a cap, it must be “just and reasonable” by reference to the “costs incurred” by all of these parties collectively. So don’t you first, well, at least in a case where the failure may get close to the costs that have been incurred and Mr Duff is asking for that here.

MS LARACY:

The focus of the section is on the efficiency and impacts for the Court and for the system, and that focus are an intent behind s 364 drives the analysis as to what’s compensatable and the extent to which an award under s 364 can compensate for downstream losses per se. So, in my submission, even on those extreme facts the Court needs to ask, “what is the just and reasonable sum in light of the costs incurred by the Court and the other persons", but having regard to the focus of this section which is to ensure procedural efficiency in criminal court processes.

KÓS J:

There are three words you keep using which are really intriguing me. One of them is the word “costs” and that is true that word appears in the section, “efficiency” and “aggravated” are the other two words that you keep using. Is this simply not a cost provision in the ordinary way? In other words, you are looking at what costs have been incurred by actors in the court process who have been disadvantaged by the actions of the State? And aggravation doesn’t seem to come into this and efficiency might be there but the starting point is, as Justice Miller has put his finger on, in (3) it's a costs provision: “... no more than is just and reasonable in light of the costs incurred ...”. So why do we have to look at things like loss of liberty as an aggravating factor, as opposed simply to a cost in their own right?

MS LARACY:

It's a cost provision, in my submission, that needs to be understood in its statutory and historical context and that's where the heart of our submissions, which I don’t think I need to go over today, are really focused and it's from that analysis that I make the submission that the purpose of s 364 having regard to

its text, the legislative materials, the Law Commission work, this broader statutory framework, the purpose of it is reasonably limited. It is to sanction for the procedural failure in the context of endeavouring to ensure that criminal proceedings move efficiently and according to law and that procedural failures are disincentivised.

GLAZEBROOK J:

Well, if there is a procedural failure but there's no cost incurred, can you just pluck a sum out of the air to punish? Because I would have thought not, in terms of the way the section is organised and especially (3).

MS LARACY:

There have been, a case, I mean, we don't see the District Court approach to s 364, it tends not to go any further than that, but I'm not sure if we have got anything in the material Ms Johnston is going to cover, but there are certainly examples of judges being satisfied in the context of a particular case that one or other party hasn't done what they were meant to do by a particular time, file a case management memorandum or make an admissibility application by a particular time, and the judge says, "have you got anything to say about that", that's giving effect to the right to natural justice in the provision. The answer is, "no". "Right, $200 fine for you as counsel". So, figures are plucked –

MILLER J:

And you would say that is fine, one doesn't need to go through the analysis of figuring out costs, because this and you say this, in fact, is such a case. It's almost irrelevant, it's just a small failing which merits some sanction in itself and the Court can use a sort of arbitrary approach.

MS LARACY:

And in those cases where a spot fine, essentially, of $200, they are that. The Court just needs to quickly decide what's a reasonable sanction in the context of this procedural failure. The Court doesn't say, "well, somehow I need to work out the cost of having the registry staff sitting there for an extra two hours while we adjourn so we can come back and…"

1120

MILLER J:

But here we do have a case in which a man says he spent nine months in prison when he ought not, and you say, "well that's not actually all of our fault", but then surely, we are in a situation where you have to assess what are his costs, and not just look at how culpable was Constable Dhillon.

MS LARACY:

So I understand that the main issue the Court is struggling with is the one I can't help you much with, which is, "how, if downstream costs are compensatable in a particular case, and under the Court's understanding of the purpose of s 364, how do you do that, is it not always going to be a bit arbitrary"? The only answer I can give on that is that we have other cases to guide us. The case law develops incrementally. There are appeal rights that ensure that awards that are too much or too little get adjusted, and the body of guidance grows out of that, and we do have these three –

GLAZEBROOK J:

Well, the trouble is you'd have to have some principled basis that you're saying it's too much or too little. Now can I understand with a spot fine that says $200, that there's obviously been some costs and you have, you might even get some sort of tariff for that, that doesn't have a particular effect on anybody, but had an effect on the Court process. But $200 is possibly because people had to turn up, counsel had to turn up, spend time getting there, witnesses might have had to turn up, the Court had to be there, there might have been another case that could have come in instead. One can understand those sort of things.

MS LARACY:

Yes, and some downstream compensatable costs are going to be a lot easier to quantify. So for instance, and this is a hypothetical but I can do it briefly, imagine a trial with certain expert evidence that's been agreed, and gone through admissibility processes, and it's about to start, and a witness for one side or another, an expert witness who's flown in from a foreign country and

incurred cost for whoever pays for them, it varies, and then one side or the other on the morning of trial puts up late an expert brief that changes the shape of the case. It doesn't have to be a case about experts, but the evidence changes, and there needs to be an adjournment of the trial. Now, one cost that's directly referrable to that procedural failure by whichever party it was to not get their expert evidence sorted in time, is that another expert has had to travel and there'd be airfares, and accommodation, and food costs, and they'll have to go back to wherever they came from and come back for the time of trial, but they're quantifiable costs. They are capable and we would expect them to be submitted under a s 364 costs application, and the Court may or may not decide to award full compensation. Generally both under the Costs in Criminal Cases Act, and under the CPA, because compensation is not the primary purpose, full compensation is not awarded. But what you do see is a sum of money being identified as the appropriate figure to compensate that loss to someone who's contributing to the system.

Now the Court there would presumably direct that that money be paid by whichever party, not to the expert obviously, but probably to the Court, which is the default position. Another example is that –

GLAZEBROOK J:

I would have thought not at all. If it's direct costs of an expert, that otherwise the party would have to pay, wouldn't that be an obvious case to pay it to the party?

MS LARACY:

Well, it might if, let's say, the party who was in default was a private, was a defendant with privately instructed counsel. But experts for the defence are usually engaged through legal aid, and experts for the Crown are paid for by a special provision under the Expert Witnesses Act *[sic]* by the Ministry of Justice, so normally what would happen in that case, in my submission –

GLAZEBROOK J:

All right, you're assuming legal aid.

MS LARACY:

The Court, yes, but I agree, let's imagine that it was a private, the victim of this procedural delay was a defendant with private counsel, and they had paid for and instructed their overseas expert, then the Court may well say, "look, this has not only delayed our procedure, put the trial off, stopped other trials being able to go ahead, wasted all these peoples' time, we're going to have to come back in a year, but also the defendant spent a lot of money on this expert coming, they're going to have to come back, I've got their invoices here, that at least should be paid to the defendant". The Court may well decide that those other intangible and unquantifiable costs to the system all be bound up in one sanction and all of it be paid to the defendant who is out of pocket, or it might say, "some of it to the Court, which is all those system costs, and the identifiable costs to counsel".

Just one more scenario that's just worth thinking about in terms of compensation. Imagine a situation where there's non-disclosure which leads to a proceeding being in train for much longer than it should have been. It doesn't need to involve a remand in custody element, but as a direct result of the non-disclosure the proceeding continues on longer than it should and in that time, as a result of the proceeding not being resolved, the person can't apply for employment or loses their employment, or loses other opportunities, or has other financial costs. In my submission, those are the sorts of scenarios that any overarching parallel compensation purpose would need to grapple with and it would need to identify how far down that sort of train of causation and loss can we compensate within the confines of s 364.

WILLIAMS J:

The logic of that, and you can see the same process in *Bublitz*, for example, where you have actual numbers of expenditure and then the Court says, "well, you're not getting that, but here's a fair sum", it's transparent to that extent. You can see the discount.

MS LARACY:

Yes.

WILLIAMS J:
Relatively substantial in that case.

MS LARACY:
Yes.

WILLIAMS J:
In this case then, if loss of liberty is relevant in a compensatory sense to the equation, then if Judge Winter had taken paragraph 39 and put it at the front of his judgment to say, "here is the loss for this person, now I'm going to go through the *Lyttle* factors", and had come to the conclusion that the number he started with is the correct number, you wouldn't have a problem with that?

MS LARACY:
I'm not trying to fudge. If I can answer that by saying if Judge Winter had framed what he was compensating in the context of, "this is a case where as a result of the non-disclosure I am satisfied that", and I think he essentially does this. As Justice Kós said, there were some unidentified court proceedings that went ahead that shouldn't have gone ahead, there has been delay, there has been expert reports that the system has had to fund that maybe it wouldn't have needed to fund, and there's been a significant impact and a loss which I can't quantify on Mr Apanui for a period of time in custody.

WILLIAMS J:
Why can't he quantify it?

MS LARACY:
Well, that brings us back to how do you quantify time in prison, even if it's clear?

WILLIAMS J:
Well, once you accepted it's a factor you then have to quantify it and put it in the mix. Your argument is really that Judge Winter didn't do that. He just took the per diem and concluded with it.

MS LARACY:

No, my argument, with respect, Sir, is not that you need to quantify it, but rather, it can, in a way that may be intellectually frustrating, be taken into account in the round just as stress and extreme stress from having proceedings hanging over your head at a point where the Court has decided they should never have been, just as that can be taken into account. It's not just the cost of going to see a psychologist or a counsellor to deal with the stress. It's also, it would seem from *Singh*, this unquantifiable thing that's a human loss, a human harm. 1130

The only way the Court can do that in the context of s 364, in my submission, is to stand back and say, "this is an impact, it's relevant, I'm going to factor it in, in a way" – whether and I'm happy to move away from the language of "aggravating" but it's an exacerbating factor here because it goes to the seriousness of the breach – "because I'm satisfied that the seriousness of this breach had, to some degree, a significant human harm. I can't quantify it, but it means that this case is worth more as a sanction than a case where on exactly the same facts the person was never in custody".

KÓS J:

I think it's important here to accept, though, that the $100 a day that Judge Winter landed on is itself a discounted sum. I mean, it's nowhere near what was sought and it's nowhere near what the Cabinet guidelines would suggest. It's a not entirely random sum but it is certainly not a compensation for time spent, 24 hours in prison, it's about $20 an hour. You know, it's not a very large amount of money.

MS LARACY:

Well, there's no law that –

KÓS J:

It's not even that, actually, $2, $4 an hour? $5 an hour, thank you.

MS LARACY:

There's no law that says in these situations that time in prison should be compensated unless there's a relevant framework to govern it and I have got those points of policy and other regimes in my submissions.

KÓS J:

No, we'll come to those, but I just – I don't want to start the premise that the $100 is a kind of per diem thing that then should have been subject to discount. It was a discounted sum, I think, as I see it.

MS LARACY:

Well, that's assuming that the guidelines have any role at all.

GLAZEBROOK J:

Well, let's just, shall we just, because we are at the morning adjournment, so perhaps stop there. I was going to suggest also that not only deal with that after the adjournment but also the counsel's legal costs in preparing the costs application.

MS LARACY:

I can certainly give you that.

GLAZEBROOK J:

I think we just need to understand why that is not included but and then I presume we will be going fairly quickly to Ms Johnston?

MS LARACY:

Well, what I would like –

WILLIAMS J:

If you'll be allowed to.

MS LARACY:

What I would like, no, no, what I would like to do is take the Court through why we don't accept that this can be seen to be the result of the non-disclosure, so the causative point.

GLAZEBROOK J:

So Ms Johnston is not doing causation?

MS LARACY:

No, so that's me, after the morning adjournment.

GLAZEBROOK J:

All right, thank you.

MS LARACY:

And that might take a bit of time.

GLAZEBROOK J:

Well, do you want to tell us how long?

MS LARACY:

I think the Court is going to be interested in it and it requires a mix of facts and criminal procedure and it's a bit technical, it might take half an hour.

GLAZEBROOK J:

I'm just slightly worried that if you are going outside of your submissions, that Mr Duff hasn't had an opportunity to take that into account and neither have we had any opportunity to read it beforehand, and especially in light of the fact that we did say the Crown could make further submissions. But anyway, let's take the adjournment.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.51 AM

GLAZEBROOK J:
Ms Laracy.

MS LARACY:
Thank you, Ma'am. Ms Johnston is going to deal with that specific and small question about costs on the appeal.

GLAZEBROOK J:
Oh, sure.

MS LARACY:
She's happy to do that at the end if that's convenient.

GLAZEBROOK J:
No, that's fine.

MS LARACY:
Thank you. Right, I promise I am going to go as quickly as I can through this next bit. So if I can just start with the Crown's proposition is, as it always has been, that causation, nine months in pre-trial custody which has been asserted, is not accepted, and that has always been the case.

In terms of my submissions, I freely apologise if I didn't develop this enough, our focus is on the interpretation purpose rather than these facts relating to causation which really only arise if compensation is at the fore, but my submissions do address this to some degree. If I can just give the Court the references.

Paragraph 19 which refer to, among other things, to the Crown's submissions which are in the case material the Court has at paragraphs 2.10 and 2.11. That's the District Court submissions which were very thorough and which at paragraphs 2.10 and 2.11 touch, to some degree, on this topic and I will come

back to what's in the Crown's submissions. They certainly, as did both parties' submissions in the District Court, they warrant a read and are useful for context.

Paragraph 32.2, just on this point, the only words I wish to just draw the Court's attention to is that what we do accept is that where, as here, the procedural failure contributed to a person spending longer in custody than they should and I will come on to what that might mean.

Paragraph 45, in this case, Mr Apanui's remand status turned on a number of factors. When I say "unknown to the Courts below", I think what I really mean there is not addressed by the Courts below because they have not been the subject of specific pleadings to prove causation, either in the context of s 364 can compensate for causation that these facts haven't been proved, but also that they're not proved in the context of a s 22 claim. But some of those other contributing factors are the presence of the Bail Act 2000 and I will address that in my subsequent submissions, the ability to make a bail application, and most importantly here, the fact that this case was going down an extended CP(MIP) track and there was a basis for Mr Apanui, given the seriousness of this offending and his ill health, to stay in custody given he had no address to go to pursuant to those processes being completed.

So the important thing, in my submission, to understand –

KÓS J:

If there had been completely exculpatory information and this may or not have been that, however, those CP(MIP) proceedings would have to have come to an end, wouldn't they?

MS LARACY:

Absolutely.

KÓS J:

Yes.

MS LARACY:

And that's really the heart of the submission I'm about to make and the detail I am going to endeavour to take the Court through as quickly as possible. This was not exculpatory information. We don't say it was unimportant information, but what this information was, was material that may impact the credibility of the key witness. Whether it was in fact going to and how it would is a question of, to a degree, speculation and submission, but it doesn't undermine the Crown case and that is what is reflected in that brief submission at paragraph 2.11 of the Crown submissions when they say it would have still withstood a s 147 application, so that is an application by the defence throughout that nine-month period to dismiss the case on the basis that there was insufficient evidence. The Crown's position to, Judge Winter is applying s 147 properly, and I can briefly take the Court to that, this case would have withstood it.

GLAZEBROOK J:

So why didn't it withstand it later?

MS LARACY:

That's – so there are two opportunities that could have been, legal opportunities, that could have taken earlier had the material been drawn to the attention of both counsel: one, defence counsel could have made a s 147, as I have said; the other is that the Crown would have reviewed the sufficiency of the evidence earlier. And the important point to understand there is that the way a s 147 application by the defence works and what the Crown does when it decides to withdraw the case for on the basis that it's satisfied the evidential sufficiency test isn't met involve essentially different tests.

So s 147 involves in law looking at all of the Crown's evidence and taking it at its highest, because it hasn't been gone into by a jury and I don't –

GLAZEBROOK J:

Well, we're not, I mean, my question is, why wouldn't the Crown have done exactly the same thing earlier that it did later?

MS LARACY:

It might have done it to some –

GLAZEBROOK J:

Well, "it might". Are you saying why it wouldn't have done the same thing later? Is there anything to suggest it wouldn't have?

MS LARACY:

Yes, in my submission, there is.

GLAZEBROOK J:

All right, well, why don't we go to that.

MS LARACY:

Now, what the Crown has to do when it is reviewing a case for evidential sufficiency, once it has commenced, is it needs to apply the test that was in the prosecution guidelines at the time and that is different from the s 147 in that instead of taking the Crown case at its highest, under the guidelines at the time there's quite an extended and quite complex process for assessing evidential sufficiency. But the guidelines at the time, among other things, required the prosecutor to endeavour to anticipate and evaluate likely defences. Now, the Court may well say, "well, to the extent that the Crown prosecutor in November thought that this may well undermine Mr S's credibility to a material degree, the Crown prosecutor may well have thought that earlier on. I accept that they may well have. But there is something in the fact that, and this is in paragraph 2 –

KÓS J:

Well, hang on, this case was about Mr S's credibility. It might have been in part but it was an inferential case. Mr S wasn't saying that he saw Mr Apanui light the fire, Mr S was enjoying himself in the bath.

MS LARACY:

That's right. So the evidence of motive, Mr Apanui's presence, timing, opportunity, the other circumstances, are unaffected by this. What this does affect is –

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GLAZEBROOK J:

Well, I think "motive", not necessarily, because didn't that depend a lot on Mr S's evidence in terms of the fight they were supposedly had?

MS LARACY:

That's right. There was always a defence argument that they each had a motive, but –

GLAZEBROOK J:

Well, not "each had a motive". I thought – well, I might be wrong in that.

MS LARACY:

Each of them said the other had been aggressive.

GLAZEBROOK J:

Yes.

MS LARACY:

So they each had a motive. So it doesn't bear on that. But what's relevant for a defence s 147 obviously is that if you take the Crown case at its highest, you've got a statement from Mr S that he was the victim, Mr Apanui was the aggressor. He got in the bath to walk away from him. It doesn't change that. What it does change, though, is it allows the defence to cross-examine Mr Apanui – sorry, Mr S and say 15 months later you were at, your bedroom was the site of a suspicious fire. It was never declared, found to be an arson. The cause of that wasn't ever explained, and Mr S wasn't there at the time the fire started, he'd left sometime earlier, and it was his bedroom where he said to the police in the job sheet that he smoked. So it wasn't, it could have at best

been alleged by defence counsel to be, under s 40, perhaps propensity evidence, but really that wouldn't be fair. It's not, it doesn't establish a propensity to light fires. Instead it establishes at most a coincidence that Mr S was in a boarding-house 15 months later where his bedroom was found to be on fire in circumstances that couldn't be resolved.

So it's a line of challenge, and it is perfectly responsible for the Crown prosecutor, after nine months when this material should have been disclosed so much earlier, to look at that and say, "well, it's going to have an impact on the one key witness we've got". It's not the only evidence. It's going to definitely have an impact, depending on how effective defence counsel is in making something of this. The other thing it's going to do is it's going to undermine jury or judge confidence in the integrity of police in this case. Constable Dhillon, who'd be giving evidence, undoubtedly it would do that. Now, those are factors that go to the assessment under the guidelines of anticipating the lines of defence, and the impact they would have on the case.

Had this been drawn to, and I'm speculating here, but had this been drawn to the Crown's attention in March, April, May, June, where there was still no trial date, Crown counsel in their submissions allude to the fact, and I can take the Court to that paragraph, that further enquiries could have been conducted by police about Mr Apanui – sorry, Mr S. So he was interviewed by police only in the context of a brief interview in a job sheet. But potentially further material that might have been helpful to the Crown could have been obtained by sitting down with him and having a proper interview about what his movements were, so further exploring him. So he was a suspect in that he was the only person who was spoken to by police as possibly as having lit a fire for a short period of time while this file was open, which was about three months. It was then closed.

KÓS J:

Which fire, is this the second fire?

MS LARACY:

This is the alleged Mr S fire.

KÓS J:

The second fire?

MS LARACY:

Yes, yes, so it was open for a short period of time.

KÓS J:

Was he a suspect in the first fire?

MS LARACY:

No.

KÓS J:

No. So the swab that was taken was to eliminate him?

MS LARACY:

Well, actually, I don't, I suppose I don't want to speculate on that. There were two people there. They were both spoken to. They were both interviewed. Swabs were taken from both parties. The police charged Mr Apanui the next day and –

KÓS J:

So pretty quickly they decided it was Mr Apanui, not Mr S?

MS LARACY:

Yes and the evidence of that, and I've sort of broken it down for convenience sake, into three headings. If I can briefly take the Court to that. There's, like almost all cases, this is a circumstantial case where there were strands of evidence, and it may or may not on the day satisfy reasonable grounds of belief to a fact-finder, but there was motive.

GLAZEBROOK J:

But the motive depended on Mr S?

MS LARACY:

Yes, and there was circumstantial evidence that supported Mr S's account, but obviously didn't prove it. So there's the motive, and in particular what we know about the first fire, which is the Massey fire, is that it was arson almost certainly. There was a pile of soaked clothes and bedding in the middle of the lounge that had been put there. There was no other reason the fire investigator could find to have caused an accidental fire.

KÓS J:

I thought there was traces of accelerant, which is usually a bit of a giveaway.

MS LARACY:

Exactly. Exactly. So there is no question it was an arson and it was charged as an arson endangering life. Both of them had had an argument immediately before. So on the Crown's case that obviously goes to Mr Apanui's motive.

GLAZEBROOK J:

Was there independent evidence of the argument, or was it just each said, "we argued before"?

MS LARACY:

Each said, "we argued", yes. More importantly, there was a credible witness account and this material is all in what you have. Mr S said after their argument he went to have a bath. About 10 minutes later he smelt smoke. As he went out of the bathroom to investigate he found the lounge on fire. He then grabbed his phone and ran outside. So he ran outside just with his towel on. So that's one of the circumstances that has a tendency to support the motive point.

Second, Mr S's account is supported by Mr Wanakore who was a neighbour who lived down the same shared driveway and that's at the respondent's authorities tab 11 has his statement.

Now, he gives an account of being outside and Mr Apanui walking out of the house and along the driveway and stopping for a second and then for a short

time and moving on and some time later, a very short time later, Mr S rushing out of the house. Now, he describes Mr Apanui as being in a rush as he came out of house and being uncharacteristically rude and abrupt when he asked the neighbour for a cigarette before leaving. Seconds after Mr Apanui walks off fully clothed, a factor which, like reasonably well-dressed, another witness identifies, a factor which goes to the arsonist may have been the person who had time to get dressed, but it doesn't take you too far. Seconds after Mr Apanui left, Mr S then ran out of the house wearing only a towel. The neighbour said Mr S appeared to be in shock and was yelling for someone to call the police urgently, which he did. So that's Mr Wanakore's statement and then there are other points which I probably don't need to go into to tie him in opportunity. Mr Wanakore says Mr Apanui was with him for about one minute, so reasonably calm and then –

KÓS J:

The police or the fire brigade, police or fire brigade?

MS LARACY:

Who came first?

KÓS J:

No, no, who did he ask?

MS LARACY:

Police, someone to call the police.

KÓS J:

Interesting choice.

MILLER J:

"He was saying something like call the cops," is what this statement says.

MS LARACY:

"Call the cops," yes. The timings of Mr S going into the bathroom, smelling smoke, Mr Apanui coming out, staying potentially for a minute with Mr Wanakore and seconds later Mr S rushing out in his towel. The Crown submission would be that there was time and opportunity for Mr Apanui to get dressed, gather material to light the fire, light the fire, get a cigarette from the neighbour and leave the scene. So that's the essence of the evidence against Mr Apanui.

Not at the time of charging, but just for the Court's awareness, later on while the CP(MIP) processes were being undertaken, Dr Kettner, who did the first report saying, "I think he's probably insane", and then a second report which said that: "Having viewed his, Mr Apanui's video interview with police, I've revisited it based on the detail, on the way he presents in that and I consider that he is sane," and that view was reflected by a second expert. There are some comments in Dr Kettner's report which are not evidence the Crown would have led, but what they say is that in his view and it might be we can – oh, we don't have it. Sorry, we can hand this up to you.

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He says that there was a curious factor whereas Mr Apanui could describe in reasonable detail a lot of what happened that day but had an odd lack of memory of anything to do with the moments around the fire. And the relevance of that is that certainly when looked at through a, you know, "was there nothing that allowed this case to be maintained over that nine-month period", it wasn't arbitrary. There was the Crown evidence which was affected but not undermined by Mr S.

GLAZEBROOK J:

But what can, okay, this is July.

MS LARACY:

That's right and the passages are...

GLAZEBROOK J:

Well, what are we supposed to do with this? This wasn't –

MS LARACY:

Well, the point of –

GLAZEBROOK J:

Because that wasn't in front of the District Court, was it?

MS LARACY:

Yes, it was. All of this material was part of the Court –

GLAZEBROOK J:

Well, I understand that, but in terms of the argument in front of the District Court?

MS LARACY:

No, no, this wasn't. This goes to the question is was there any basis to maintain Mr S in custody for this nine-month period and –

WILLIAMS J:

Mr Apanui.

MS LARACY:

Sorry, Mr Apanui. And all I am doing is noting is there was the evidence available throughout, which my learned friends have accepted, that as of 16 February 2022 was sufficient to found the charge. My submission to the Court consistent with what the Crown said in the District Court is that the further material that came to light with the police had an impact on the Crown case but it didn't eviscerate it, it wasn't exculpatory, and then there is the further note which wouldn't have been evidence because it is opinion, but Dr Kettner notes that in his view there was an odd failure on Mr Apanui's part to be able to recall these events at the time.

KÓS J:

This goes to the seriousness of the failure, doesn't it, rather than any question of causation, because it remains the case that the prosecutor looked at it, thought, "we're not quite there", and folded her tent?

MS LARACY:

So my submission on that, yes, that's right. Had this been drawn to the Crown's attention earlier on, where it wasn't a nine-month delay and the bad fact that goes with that and a sentence indication around the corner, the Crown would have said, "this is a non-disclosure". The ordinary response to non-disclosure is to disclose immediately. Mr Apanui's counsel can bring a s 147 if he considers it will make a difference. The Crown submits it can be withstood and it wouldn't have led to the Crown withdrawing the charge and I refer the Court to those paragraphs 2.10 and 11 in the Crown's submissions. So that's what the Crown's position was in the District Court and it –

WILLIAMS J:

It does look like Detective Constable Dhillon thought, without reference to the nine months, this case was a goner.

MS LARACY:

He did.

WILLIAMS J:

And it wasn't about weighing up the odds here, it was, "this is never going to work, because this is a circumstantial case and my key witness lacks credibility now".

MS LARACY:

Yes.

WILLIAMS J:

And his senior colleague says, "withdrawal".

MS LARACY:

Yes.

KÓS J:

Plus the accelerant swabs failure.

MS LARACY:

And for the purposes of this hearing the Crown didn't go into any of this in great detail, because its proposition was the Court doesn't need to go into it because we accept that there was some period of time that was caused by this non-disclosure in which he was in custody and on the proper approach to s 364 that can be taken into account, not on a compensatory basis, but it can be taken into account in the round and if I can just – I will just give the Court a key –

GLAZEBROOK J:

Well, one of the difficulties with that is either it was causative or it wasn't, or there's some period or there wasn't, and now we need to know what the "some period" might have been. I mean, I can understand that it might, they might have done some further investigation if it had come to light in February, or they might have taken a bit longer to decide that it had destroyed their case, or not as the case may be.

MS LARACY:

And he might have brought a s 147 and it might or might not have succeeded.

GLAZEBROOK J:

But what are supposed to do with that? And this is my problem that I've always had with the submission. I can understand a submission that says, "this is not, you can't take it into account at all, because it's not a cost and you can't take it into account", I can understand a submission to that effect and that you can't actually take costs into account, well, I can't really understand that given the terms in which s 364(3) refers to costs, but I can't understand, I am having difficulty understanding the submission is that you sort of just pluck a figure out of the air?

MS LARACY:

That, I sympathise with, I mean, that's wholly sort of, it's intellectually unsatisfactory, but the only answer to that is that it works so long as s 364 is not aimed at an extended fact-finding process to work out what downstream consequences are compensatable and putting costs on those things. Rather, this section does work and can fairly and equitably and efficiently take account of relevant downstream impacts on participants and a range of harms and losses that are inherently unquantifiable if the Court of Appeal's approach to date to s 364 is taken, which is we look fundamentally and set the award based on what went wrong at the time.

MILLER J:

Well, it's consistent with that to say, to observe, that the Court is the primary, the default recipient of the money. Because what that says to you is that this a fine. The Court is not receiving the money because it has any measurable or compensable loss.

MS LARACY:

Yes.

MILLER J:

It's receiving it because it's a sanction which is effectively being paid to the State to encourage correct behaviour.

MS LARACY:

That's correct.

MILLER J:

Yes and then downstream you may share that money with someone else, but...

MS LARACY:

And one of the advantages of this process and I suggest that reading the Crown's submissions it's seen there is that the Court isn't asked to determine all these factual disputes. It's not being asked to consider the factors that we

are needing to look at here because the Crown said, “it had an impact, we accept, it can be built into the punishment, that's the quick process”. Nobody was cross-examined here at this costs hearing. No evidence, oral evidence, was led. There weren't – there was submissions on the law and on some of the key facts by both parties but the matter was able to be dealt with reasonably efficiently.

KÓS J:

I think the other thing that goes with Justice Miller’s observation is that not only is it a sanction or a fine, but it's also one to which there is a general discretion, so it doesn’t involve the same sort of evaluative exercise of comparison that you have with most sentencing questions where –

MS LARACY:

Exactly.

KÓS J:

Yes.

MS LARACY:

Can I just, I’ve got one more thing to say but before, and then I will sit down, but I can I just give the Court the key paragraphs in the Crown submissions again, so at paragraph –

WILLIAMS J:

These are the District Court submissions?

MS LARACY:

District Court. Paragraph 11, paragraph 4.13 where the Crown says –

GLAZEBROOK J:

Can you just – para 11? Para?

MS LARACY:

4.13 where the Crown says it was one of the causes of delay. My notes say 5.5(b).

GLAZEBROOK J:

Can we get them up, perhaps?

MS LARACY:

Certainly. Sorry, 2. – so, it shouldn't have been paragraph 11 – 2.11. You can see the two points I've tried to cover made there in a truncated version. I have expanded upon them in my oral submissions, that is 2.11.

4.13, the Crown concession that was one of the causes of the delay, you'll see that in the final sentence. But one of the causes isn't gone into in any great detail in these submissions but the context for that, which is referred to later on, is that this case was going down the CP(MIP) track so there were dates associated with that and unless there was no case at all, he needed to be in prison because it was going down that track: there was no address, it was a serious, it was a really serious charge, it was offending on bail, it was an arson that endangered life, that was the charge, so 4.13.

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5.6, this is as to the Crown's approach to compensation dealing with the question, "is compensation a purpose"? And the Crown says it's the effect on the participants in light of the purpose of incentivising compliance.

5.37 the respondent acknowledges the impact on the applicant has some relevance and –

GLAZEBROOK J:

Sorry five point…

MS LARACY:

Sorry 5.37 and 5.5(b) I've got.

GLAZEBROOK J:

5.5(b)?

MS LARACY:

5.5(b).

WILLIAMS J:

It talks about compensatory effect.

GLAZEBROOK J:

No, we're just at 5.3, so it's 5.5(b).

MS LARACY:

Yes.

GLAZEBROOK J:

Or it is not 5.5(b)?

MS LARACY:

It's 5.5(b). So talking about the, again, the approach the compensatory effect, not focused on time in custody. So that was the Crown's approach and it allowed this award to be made and the Crown to concede it should be made, and that for the purposes of s 364 there was a significant procedural failure, but also to say that it didn't need, didn't allow an approach that quantified time in custody.

The only other thing I wanted to cover off, because it's important just to set the scene for how serious this police procedural failure was in the context of non-disclosures. So if I can just leave aside the whole time in custody causation thing, I've taken that as far as I could.

First of all, my submission is, as I've said, that seriousness of non-disclosure in terms of a punishment needs to be considered in light of its purpose. So, how bad was this non-disclosure in the context of the particular case, and the *Lyttle*

factors are useful here, and we've covered it at paragraphs 68 and 70 in our submissions.

But what we say is relevant to assessing this failure in its own terms, in that it's an unusual case in that it was a failure to join the dots. To complete the significance of evidence in an unrelated investigation that wasn't an arson, but was a suspicious fire, failure to think that short-term suspect there, remember this is the very day of the Henderson fire, and Detective Elima says to Constable Dhillon, "I've got a suspect in my Henderson fire who I can –

GLAZEBROOK J:
Well, at the scene they were told by the landlord, according to the, they were told by the landlord that Mr S had been involved in another fire at his property nine months before. They were told that there was an investigation into that, and they were told that somebody else had been charged, and that this man was a witness.

MS LARACY:
So I accept all that.

GLAZEBROOK J:
So that's what they knew, and that's what they'd been told, and they knew that Constable Dhillon, as I think he was at the time, anyway, whatever he was, was actually investigating that, and that's the context of that conversation.

MS LARACY:
Yes, I accept all that. But it's still an unusual scenario to have the disclosable material relating to –

GLAZEBROOK J:
It's not very unusual, is it? You find some further information about a witness? I mean if a witness in a case has been convicted of perjury in something that's got nothing whatsoever to do with it, that would be something that you'd think, "well, maybe we shouldn't be relying on this witness".

MS LARACY:

Exactly. I mean there are obviously degrees, and that would significantly affect the credibility. Constable Dhillon, importantly he says, and he wasn't cross-examined on this, in his affidavit said he didn't recall the conversation. So this was an inadvertent failure to compute and join the dots.

GLAZEBROOK J:

But shouldn't, is it Sergeant Elima, have made the connection himself and written that down? Shouldn't it have been a formal process? With the information that he had from the scene.

MS LARACY:

Putting a note in the other –

GLAZEBROOK J:

Well, putting something –

MS LARACY:

I can accept –

GLAZEBROOK J:

So he could have joined the dots.

MILLER J:

So, your point simply is that it's a sin of omission and you would, you say, it's not especially egregious.

MS LARACY:

It's a sin of – and there's disclosure omission, which is omission which is the officer has seen the material, knows it's there, knows it needs to be disclosed and forgets, that's different from this where the difficulty here, from Constable Dhillon's perspective, is he didn't register the conversation. If he heard at the time, he didn't compute, "this is significant for this purpose, it's relevant, goes to the credibility of the key witness in my case", as a result he

didn't follow it up as a line of enquiry, he didn't record it and, because he didn't do those things, he didn't disclose it.

He also, relevant under the *Lyttle* factors is how senior are the people involved. I absolutely accept your Honour's point that there would be other senior police officers, including Detective Elima, who are not junior detectives in training in their first couple of years which is the position with Constable Dhillon, but he was the one who was in the firing line here and that was his situation. He was young, he was in the office, his statement, or Detective Elima, says because he was busy, he was under pressure, it's relevant that once he did realise the significance of it he actioned it immediately.

GLAZEBROOK J:
Well, I'm not sure really, because wasn't there just another casual conversation later and he mentioned it to the prosecutor?

MS LARACY:
That was October, that was the same month, two weeks later, I think. He actioned it reasonably promptly.

GLAZEBROOK J:
I'm not suggesting he didn't, I'm just saying it was another casual conversation, he mentioned it to the prosecutor, who said, "it must be disclosed" and...

MS LARACY:
It was, that's right.

GLAZEBROOK J:
Understandably.

MS LARACY:
That's right, he computed it, in that he registered it was something significant here in September and disclosed it to the prosecutor when he saw her in November, fortuitously. Steps were then immediately taken to disclose it and

the whole case was brought to an end. Now, in my submission, that is relevant to the Court looking at the sufficiency of the any remedy.

The Court always needs to look at the totality of remedies in any situation and what we have here is a viable Crown case, notwithstanding the Crown prosecutor's discretionary decision to withdraw it, part of the Crown evidence hadn't been undermined and a serious charge and a man who not only had the information disclosed but had the proceeding brought to an end.

Unless there is anything that the Court has time for and thinks I really ought to cover, perhaps if I could hand over to Ms Johnston.

GLAZEBROOK J:
Thank you.

MS LARACY:
As the Court pleases.

MS JOHNSTON:
May it please the Court. I will do my best to finish by hopefully 12.45 in order to leave some time for my learned friend's reply but obviously guided by the Court as to how much detail you want.

There are two topics that I am proposing to cover: first, the question that Justice Glazebrook's asked about the question of the costs on the costs application; and the second issue is what guidance I can offer in terms of quantum based on previous cases.

In terms of the legal costs for the appellant bringing the costs application, the District Court Judge made an order of just over $5,600 to be paid to the then defendant for the costs in bringing the application for costs under the Criminal Procedure Act 2011. That was part of the Crown's appeal to the Court of Appeal. The Crown submitted there wasn't a principled basis for that and I can address the Court on the reasons why that was the Crown's submission.

The Court of Appeal at paragraph 51 of their judgment accepted that submission. Essentially, finding that costs on the costs application is not a sum in respect of a procedural failure and the appellants have expressly not sought –

GLAZEBROOK J:

Well, I understand that. We just can't understand that, so –

1230

MS JOHNSTON:

Certainly, your Honour. So in terms of the reasons why that was the Crown's submissions that are not reflected in the actual Court of Appeal decision, the common law position is obviously, in a criminal proceeding, costs are not ordered. So, it's not like obviously a civil proceeding where costs follow the event, so costs ordered in the criminal proceeding require specific authorisation because the common law position is that costs aren't ordered and, in our submission, the wording of s 364, a sum in respect of a procedural failure doesn't extend to "and costs".

In relation to that, there are some other concerns the Crown would have with costs being ordered on a cost application. Firstly, it speaks like a civil law, costs following the event.

WILLIAMS J:

Isn't this conceded by Mr Duff?

MS JOHNSTON:

Yes and –

GLAZEBROOK J:

It might be it's just, I think, we couldn't understand why it had been conceded and why there had been a finding in that respect, so because we couldn't, well, speaking for myself, I couldn't find anything whatsoever in s 364 that said it

couldn't be related to the procedural failure, because you wouldn't have had to incur those costs had it not been for the procedural failure.

MS JOHNSTON:

Yes and perhaps if we can scroll down a little to reflect the footnote 30, of course costs need to be costs incurred and whilst there was an invoice presented to the Court of Appeal for the costs of bringing that cost application, it was confirmed by counsel for the appellant in the Court of Appeal that those were not, in fact, costs incurred because the matter was proceeded on a pro bono basis.

KÓS J:

That's tricky though. Out of the goodness of his heart and best traditions of the bar, all those sorts of things, Mr Duff has done this. It's brought to the Court's attention the consequence of the procedural failure. It's therefore pro-systemic in bringing the system to account, or failure into account. Mr Duff is a person affected because he stepped in to fix the problem, doesn't that suggest that there should be some allowance within the scope of the provision?

MS JOHNSTON:

The only points I can make in response to that is, first, we have no information as to why, given there was legal aid for the main criminal prosecution, why legal aid hasn't paid for this or whether any legal aid application was advanced.

GLAZEBROOK J:

I think you would be lucky to get legal aid for something like this, but who knows.

MS JOHNSTON:

Well, we just simply don't have that information. The only other points that the Crown can make are that it seems unusual in the scheme of criminal costs for full indemnity costs to be ordered when it's unusual, of course, under a CCCA application, for full indemnity costs to be ordered and particularly here, in light of the fact that the Crown conceded there was a significant procedural failure

and that an order should be made. The only dispute in the hearing was as to quantum. It's difficult to see how.

KÓS J:

Who was going to apply, Ms Johnston?

MS JOHNSTON:

Sorry?

KÓS J:

Who was going to apply if Mr Duff wasn't there? I mean you can see there should be a payment, but who was going to make the application to start the wheels turning?

MS JOHNSTON:

Well, my broad point is that there needs to be specific authorisation for a costs order to be made and the point I'm now making is that full indemnity costs would never be appropriate in a criminal circumstance, under these facts, and that was what was ordered here without –

GLAZEBROOK J:

Well, that's a different point and I can understand those points, but you say nothing could be given.

MILLER J:

Just picking up on that point, just looking at s 364, so (4) tells us an order may be made on application by the defendant and the Court then awards a sum no more than just and reasonable in light of the costs incurred. At that point, at the point where the Court is making the order, those costs of the application have been incurred. So you're reading into it some additional idea that it has to be a direct consequence of the procedural failing. That is a gloss, isn't it, because that's nowhere there in the language?

MS JOHNSTON:

I think all I can say in response to that is to repeat the point that when the common law position is that costs are not paid –

MILLER J:

You need authorisation for this.

MS JOHNSTON:

You need specific authorisation, and my submission is that s 364 isn't specific enough.

MILLER J:

Right.

MS JOHNSTON:

I don’t think I can take it any further than that, but other than to also note that there is an implication, if there is a finding that costs, the costs of bringing a cost application, are to be paid then that would cut both ways. So if a defendant is unsuccessful in a costs application, that implies that the Crown may be entitled to an order for their costs, and that –

GLAZEBROOK J:

I can't see that follows, because the only costs that can be awarded are costs that are relevant to the procedural failure but, anyway, I don’t see how that means that you could award costs to the Crown for defending an application.

MS JOHNSTON:

I take the point.

GLAZEBROOK J:

Because there wouldn’t have been a procedural failure, presumably, in that case.

MS JOHNSTON:

Yes, I guess –

GLAZEBROOK J:

I mean, and if there isn't a procedural failure, then s 364 doesn't have any application, and it's just a cost that the Crown incurs in saying, "well no, we didn't fail", which is a, definitely, a possible defence.

MS JOHNSTON:

Yes.

GLAZEBROOK J:

But anyway, it's not in front of us, although for myself I just wanted to know why they said that. I can understand the other points in terms of not having enough evidence on what that was, but that's a different point.

MS JOHNSTON:

Yes.

GLAZEBROOK J:

That's related to quantum not ability to add.

MS JOHNSTON:

So I think in light of the appellant having not pursued this in this Court, all I can do is what I've done now is explain to the Court the Crown's position in the Court of Appeal.

GLAZEBROOK J:

Yes.

MS JOHNSTON:

So perhaps then I can move to my submissions on how quantum is to be reached. Now, obviously Ms Laracy has addressed the Court on the principles that are applicable, and the factors to be taken into account in setting a figure, and the reasons why the Crown says that the figure reached in the District Court of $28,600 on that daily rate is excessive in light of what the Crown says is a punitive purpose, because the section is designed to be more in the nature of

a fine, and essentially Ms Laracy's addressed the Court on the principled reasons why the Crown says that the figure substituted by the Court of Appeal of $15,000 is more appropriate, and my job is to address the Court on why the $15,000 is the figure that's chosen, and why it's consistent with previous cases.

Now, obviously much like a sentencing exercise, or an exercise where the Court sets a fine, each case would depend on its own facts. It's a discretion that requires a balancing of a range of different factors and, of course, I can't offer a mathematical formula. I can explain how the $15,000 figure was reached in the District Court, which was the original figure that the Crown offered up in the District Court, and that's based on a broad analogy to the decision of *Singh*.

That's one of the cases in *Lyttle*, and that's summarised in the Crown submissions from paragraph 70 and following, and there's an appendix C to the Crown submissions that addresses it in more detail.

In the interests of time, I won't go into that in a great deal of detail, but that was another case where there was a failure to disclose. There, there was two separate messages from a complainant saying: "I don't wish to pursue this anymore," and also a message from her to police where she's changed the date on the particular offence she says happened. These factors were all eventually disclosed some months later and the charges were dismissed. So, there's a broad analogy to the present case here.

Obviously the present case is different because Mr Apanui was remanded in custody, but Mr Singh was not. They were both cases where stress was obviously caused to the participants, and both cases we know bad faith was found.

KÓS J:

So, although there's no mathematical formula, what I think you've done is convert something between, I don't know, six and nine months' detention into $5,000. Is that the essence of it?

MS JOHNSTON:

I would describe it more as we've taken a, and I don't want to call it a "starting point" like it's a sentencing exercise, but we've looked at a decision where there was a broadly similar disclosure error where $5,000 was ordered, and then reasoned, "well, this is a case where there's a particularly special need for sanction to the police because of the consequences to Mr Apanui including his remand".

1240

KÓS J:

So *Singh* was $10,000, wasn't it, on the table?

MS JOHNSTON:

Five.

KÓS J:

I'm sorry, yes, the other. The other, sorry, the $10,000 was CCA. It's at five, thank you, got you, so $10,000.

MS JOHNSTON:

Yes, so it's a tripling of the figure to reflect the more serious consequences to Mr Apanui, so the greater need to send a message to the police that this –

WILLIAMS J:

You have to interrogate the number though, don't you, otherwise you get incrustation of an ad hoc call, or an incrustation of ad hoc call at some point, and this is the common law method. An appellate court, usually a second appeal court, will look at that collection of experience and attempt to apply principle to it. That's the point we're at now.

MS JOHNSTON:

We have dots on a graph and –

WILLIAMS J:

That's right. We're at the point where we have to make sense of the dots on the graph and whether they are consistent with the Act, particularly in this signal loss of liberty case where there are clear measures that are used routinely to work out what the cost, what the human cost is of incarceration that should not have happened, assuming that it should not have happened, so why would you blind yourself to that?

MS JOHNSTON:

It's not so much a matter of the Crown or the Crown inviting the Court to "blind itself" to those measures, but the Crown's position is that the section is primarily punitive and –

WILLIAMS J:

I understand that and no one is fighting with you on that, but you still have to, as a subset of that exercise, work out what compensatory element there might be. Once you commit to that task, you can't just make it up and you certainly can't just make it up by reference to cases that are materially different, particularly when you have got a body of knowledge about the sort of tariff you have for this. Don't you have to work back from that, and you might work back a long way in a principled analysis, but you can't ignore that?

MS JOHNSTON:

If the position is that one of the primary purposes of this section is to provide compensation, then yes that's a situation where the Court then needs to look at the wrongful imprisonment figures that are used. I mean, the Cabinet guidelines and the tort of –

GLAZEBROOK J:

Well, why does it have to be a "primary purpose", why can't it just be "a purpose"?

MS JOHNSTON:

Well, the Crown's submission is that there is a compensatory effect to the provision, so if one of the main factors that is driving the Court's assessment is compensation then, yes, you need to make sure that you are getting the right figure to fully compensate this person.

WILLIAMS J:

Yes, but we agree that that's not the point. We agree that compensation is relevant, the only question is how you work it out. Ms Laracy suggests it's, you know, the alchemy of the common law and my point is it is hard to accept that when there is this body of knowledge on precisely this question and if you impose that on the underlying question, which is punishment, sanction, efficiency, you might come to a decision that is transparent.

MS JOHNSTON:

Maybe I am going to get myself in trouble for stepping on my boss' toes, but I don't think –

WILLIAMS J:

Don't do that.

MS JOHNSTON:

The "body of knowledge" that your Honour refers to is based on a different premise. The Cabinet guidelines is perhaps one of –

WILLIAMS J:

Yes, yes, but that's, you take that body of knowledge, then you apply it to this premise and it might have deductive effect but it's transparent and accountable. Otherwise, it's just alchemy and with, you know, with respect to pain and suffering and stress and so on, $5,000 is plausible. With respect to nine months in jail it's much less so, I would have thought, as a fair and transparent way of properly incorporating that into the recipe that produces the result.

MS JOHNSTON:

I think that's premised on the notion that the Court is seeking to fully compensate this person for what is –

WILLIAMS J:

No, no, no, it's not.

KÓS J:

No, no.

GLAZEBROOK J:

No, no, a fair and reasonable compensation, if you like, compensatory element to whatever the award is made.

KÓS J:

It's just the body of knowledge is an economic computation of human cost. And then the question here is: "what is just and reasonable contribution to that"? Which is what costs do, it's usually about a contribution, so we could start with the, whatever, $1,000 a month it is, and then say, "well, what's a fair contribution to that"? Which will be deductive, it is certainly not expandive.

MILLER J:

Yes, there are two things at large, aren't there. We can say that the loss of liberty has real value, we can all agree on that. What is different about this situation is you must then focus on the strength of the causal connection and critically the significance and the significance of the error in the absence of reasonable excuse for it. So those are things that make this context different and you can argue about that all you like. Ms Laracy is telling us that essentially the Crown was not really much at fault here, that's fine, I don't see any difficulty with that. I'm not quite sure why you're resisting the idea that if loss of liberty is a factor it has a real value.

WILLIAMS J:

Except as a means to mitigate quantum, which is...

MS JOHNSTON:

The Crown accepts there is real value obviously in the loss of liberty but what the Crown is not accepting, that through the mechanism of s 364, the summary mechanism without detailed fact-finding processes that would underly the usual body of case law there these things are calculated that actually the, perhaps rather than using the terminology of "alchemy", if we just call a judicial assessment just like judges do in setting sentencing starting points, setting fines –

WILLIAMS J:

Yes so there are thousands and thousands of cases to support that exercise.

MILLER J:

So the point you are coming to is a slightly different one, it's that where there are complex questions of causation they really ought to be sent off to be done in civil proceedings rather than here. At some point the Court will say, "we draw a line under this because this is essentially a summary process". It's a bit hard to decide where that line is drawn though, isn't it?

MS JOHNSTON:

Yes. I certainly accept it is difficult to know where that line is drawn and, of course, there is the broader context and that's addressed in the written submissions of the other mechanisms that can be used. So it's not a situation where Mr Apanui is left without an ability to seek a day-by-day compensation should he wish to do so. So that's another reason why, in my submission, the court shouldn't be striving to have a calculated figure by reference to loss of income or a daily rate or time spent in custody when the aim, in my submission, of section 364 is to have a judicial assessment about the seriousness of the error and the impact on the system, reflecting the fact that somebody has been held in custody, without seeking to go down a day-by-day quantum route, accepting that that is available potentially elsewhere.

I'm certainly happy to address the Court on any of the other cases that the Crown has referred to. They are in that appendix, obviously as the

Supreme Court the previous authorities are not as important as they would be in the lower courts, but I'm also happy to –

GLAZEBROOK J:

I don't want to cut you off, I mean, don't think that just because it's set down for a half day we need to cut you off. So if there is anything that you think it would be useful to refer us to, you've referred us to *Singh* saying that's the most analogous, are there any others that you would have referred us to? I mean, rather than just letting us loose.

MS JOHNSTON:

The *M v R* [2022] NZHC 529 decision.

GLAZEBROOK J:

Yes, you say that in the submissions.

MS JOHNSTON:

The High Court decision where it was, $6,000 was ordered under the CPA. Broadly similar in terms of a non-disclosure of a telephone call that was relevant and resulted in a one and a half day delay to the middle of the trial, similarly it was relevant to the credibility of a witness there.

And then the only other comparison I think I can draw is really to look at the cases like *Bublitz* and *Lyttle* where much higher costs orders were made with much more serious ongoing disclosure values that –

GLAZEBROOK J:

I'm not so sure about the "much more serious", so perhaps, you know, you might want to go into that. I mean, there was certainly a lot of non-disclosure. Was it more serious just because there was a lot of it rather than something that seems to me to go to the heart of the case, even if not as much to the heart as I would see it, so even accepting – because it does go to the heart of a credibility of an eye-witness in the case. In this case, I mean.

MS JOHNSTON:

In terms of *Bublitz*, I mean, there was a nine-month –

GLAZEBROOK J:

It's just that there is a whole pile of documents but it is the seriousness of the consequence, isn't it, rather than the seriousness in the non-disclosure and obviously in both *M* and *Singh* the non-disclosure was quite significant in terms of the consequences.

1250

MS JOHNSTON:

Yes. I mean, it will be well known to the Court that the large volume of disclosure in *Bublitz* resulted in a nine-month trial being aborted and so that's really the foundation for my submission of it being a much more serious, a much, you know, later.

GLAZEBROOK J:

In terms of the effect on the Court, is that the submission?

MS JOHNSTON:

Yes.

GLAZEBROOK J:

Okay.

MS JOHNSTON:

I don't know that it's addressed in detail in the judgment, but there will have been obviously a significant amount of time that Mr Bublitz and co-defendants had spent on bail awaiting trial and all the stress consequent on that.

KÓS J:

Ms Johnston, it does seem from your table that this is the only liberty case.

MS JOHNSTON:

It's the only case where liberty is argued. Obviously, Mr Lyttle had spent some time in custody. It's not referred to in the judgment because it wasn't argued in this way. Mr Johnson, the Palmerston North case, he faced a murder charge, but again, it's not apparent from the judgment –

KÓS J:

There didn't seem to be a delay, particularly a delay. It's just egregious non-disclosure.

MS JOHNSTON:

He would of faced charges for an amount of time and it's not apparent from the judgment whether he was on bail or in custody.

KÓS J:

Probably, yes.

MS JOHNSTON:

This is certainly the only case where liberty had been argued to be a particular cost that needs to be reflected in an order.

ELLEN FRANCE J:

I mean in *Lyttle* you do have a trial being declared a mistrial, they had to start again and the disclosure does relate, at least in part, directly to his defence, doesn't it?

MS JOHNSTON:

Yes. Yes and both in *Lyttle* and the *S* decision there was the important factor of police and Crown giving assurances that disclosure had been made and that it had been checked and then new disclosure arose after that.

Just in terms of the liberty point, there is a number of references, including in the *S* case to the concern, and it's primarily described in the context of stress to the defendant, but the concern that if convicted this person would have faced

a term of imprisonment and that's referred to in *S* and I think *Lyttle* in terms of liberty, in that sense, which is obviously a slightly different sense to the present case.

Unless there is anything further I can assist on, I would happily sit down.

GLAZEBROOK J:
Thank you very much. Ms Laracy, that's the end of the submissions?

MS LARACY:
Thank you, Ma'am.

GLAZEBROOK J:
Thank you. Mr Duff, are you ready to reply?

MR DUFF:
Yes, I am, your Honour and so then we can hopefully finish by lunchtime. I just thought it would be helpful just to give a very quick timeline so that we are all on the same page here.

On 21 October 2021, there was a trial allocated for 7 June 2022 and what had occurred was that there had been some police charges that were related to a date on 12 September 2020, and he was acquitted effectively because of insanity. So given the proximity to that 12 September and the 23 November date, we thought out of an abundance of caution that we should see whether or not the insanity that had been attributed to the 12 September 2020 should be canvassed in relation to the arson charge. That is why it went down what seems to be the CP(MIP) process.

On 16 February, there was the second arson charge giving rise to this appeal of 2022.

On 19 May 2022, we filed a memorandum explaining the defence expert reports opining that the Court is likely to find Mr Apanui insane and requesting a vacation of the trial date and a CP(MIP) referral.

On 1 June 2022, the trial date was vacated administratively by the Court.

June 2022, an addendum report from the defence expert altering opinion on insanity, after reviewing the additional material, which is mainly the police DVD interview.

June 2022, the CP(MIP) review and Judge Winter orders a section 31(b) report to be prepared by the Mason Clinic canvassing insanity.

On 5 September 2022, Dr Jacques' – from the Mason Clinic – report opines sane at the time of allegations and so on 21 September 2022 we abandoned the insanity defence, after reviewing all reports, and referred back to the Court for the normal procedure.

6 December 2022, to set a new trial date and a sentence indication on 16 December.

So, from there, respectively, my friends' submissions in relation to the options that were open, this was an inference case and a circumstantial case that was immune from a s 147 application.

From the time of the disclosure failure in February 2022, this went down a process but nothing fundamentally had changed, as far as the Crown's case is concerned. So within three days of the defence receiving that information and I don't think this point has been lost on the Court, within three days, the only communication was that where the defence wrote to the Crown and said: "Can we expect a s 147 application," and that was done.

So my friends, respectfully, my friends' submissions in relation to that really become moot. This was a situation where whatever discretion the prosecutor

had, the reality is that once they got the disclosure in full and it was disclosed to the defence in full, they made the decision to s 147 it, which is why the clock, in my respectful submissions, started clicking in February 2022.

WILLIAMS J:

The Crown says that if it had been closer to the time the Crown might have had more fight in it.

MR DUFF:

Well, there wasn't anything in relation to that nine months. That's what I mean about there being no change of pulse.

GLAZEBROOK J:

I think one of the things Ms Laracy said was one thing that had changed is that it had been nine months since the disclosure, so that in itself would've been a factor taken into account.

MR DUFF:

Well, that will be the point then. I will simply stop with the submissions because that would be me speculating. As far as the Crown was concerned, the only correspondence that we had was that once I got the disclosure I emailed them immediately and said: "Can I expect the 147," and we got a date and that's exactly what happened. So the decision –

GLAZEBROOK J:

All right, so you say it would be speculative to say, "well, maybe they wouldn't have done it or would have done it earlier", because in fact they did it so quickly after that period.

MR DUFF:

That's right. I mean, my friends might try to entice this Court into the proposition that that nine-month intervening period was part of the decision-making process.

GLAZEBROOK J:

But there's nothing. You say it would be speculative.

MR DUFF:

Yes.

GLAZEBROOK J:

Because there's nothing in the record to suggest that.

MR DUFF:

That's right, that's right. Now, let me just briefly speak to the costs question. I think, Justice Glazebrook, you're right. Two things. First of all, as a criminal lawyer of some years these questions of costs don't often arise in the general day-to-day of our work. So, quite frankly, when it gets brought up it's embarrassing to sit there saying, "well, no, you should give me money because we spent the work on it".

It was abandoned by me not because it – because, fundamentally, all we tried to do was say, "look, if this had been something that could have been done on legal aid", we had calculated what the amount was, if this had been, the work put into this, was done on legal aid and put it in there, others may want to come and argue that I have abandoned it because, again, I don't want to be standing in this Court quibbling over whether or not I should have been paid $5,000, but – and then it is self-serving for me to highlight all my virtues, as Justice Kós has done, so I will leave it there.

GLAZEBROOK J:

Well, there have been costs awarded when something has been paid pro bono and are done pro bono and it is done quite relatively frequently on a basis of, "this is what I would've charged if it had been that".

MR DUFF:

Yes.

MILLER J:

I regularly did it with some of Doug Ewen's cases. He would say he was appearing pro bono, but if the Court was prepared to award costs, then there would be a fee charged.

MR DUFF:

Regrettably, I kind of treat pro bono as being exactly that. Mr Ewen may have different. But, I mean I –

WILLIAMS J:

He was a bit busier in that niche.

1300

MR DUFF:

And therefore that perhaps this pro bono thing really meant contingency, I don't – but I mean, the reality is, your Honour, as I say, there was a part of it –

GLAZEBROOK J:

You're not seeking them and we know that because you have said so. I was personally, and I think a couple of the other members of the Court were interested in, whether it was a matter of principle that it couldn't be there, or whether it was just your choice not to accept?

MR DUFF:

I would say it was my choice. It was my choice not to.

GLAZEBROOK J:

So you say it was pro bono, you're not seeking it.

MR DUFF:

It was my choice not to, because I'd undertaken this on the basis of it being pro bono. The reality is I don't think it should preclude somebody else because I think, I mean, there is a cost.

GLAZEBROOK J:

Yes.

MR DUFF:

There is a cost even coming to visit you good folks. But there is a cost and as you know, I mean, this is the tip of the iceberg of cases that actually make it, the very tip of the tip of the iceberg of cases, because as I am about to go down to, disclosure failures are really for the defence, were really for the participants in the criminal justice process, disclosure failure are internationally an issue that needs looking at, needs a meaningful sanction.

I really sound like I'm probably only echoing Justice Glazebrook, your comments, "this wasn't an unusual failure". Unfortunately, it was an all too common failure. What distinguishes this case is, in terms of what has been argued thus far in our courts, is when the disclosure failure directly results in somebody, we say, being arbitrarily detained for a period of nine months and so therefore it is with that in mind that I move to looking at a quantum.

So, Justice Williams, can I just say that I am sorry that you didn't see that we were – we didn't try to assist, because I think that we have squarely put it into the realm of a per diem calculation based upon the guidelines as being the principled approach to take with wrongful or arbitrary detention cases.

WILLIAMS J:

So, how then do you take into account the point that the Crown focuses on, which is this is a "fine" – as Justice Miller said – situation and the nature of the failure here, while inexcusable, was not as significant as in other cases? How do you factor that in?

MR DUFF:

Because that would be to render the regime of the criminal justice, of the Criminal Disclosure Act, to ignore the participants and what it is that we are trying to achieve with this regime overall, Sir.

WILLIAMS J:
I'm not suggesting that you put that to one side and forget it.

MR DUFF:
No.

WILLIAMS J:
I'm asking what you say is the impact on the per diem of those factors?

MR DUFF:
The per diem constitutes what I submit to be a meaningful, just and reasonable way of approaching this, because as one – what you, I think, what the bench has correctly identified is that there are actually thousands of this kind of cases, in the sense of looking at what is the effect or how it is that we should be approach arbitrary detention and time in custody, because ultimately that's what this Criminal Disclosure Act is intended to do. It is intended to make sure that there is a sufficiency of the evidence, that it is provided in a timely way, so that people are not wrongfully convicted but also not wrongfully detained in custody, which is what happened here.

And so it, from the get-go, it seemed to us that the principled approach was to look at that guidelines, look at the per diem, and I think in my submissions in 2.4 I have talked about the *Chief Executive of the Department of Corrections v Gardiner* [2017] NZCA 608, [2018] 2 NZLR 712 case and that there is again where there was an award of $10,000 for the month, effectively, allocated which again went back to $333 a day.

But all it is to say that we, it would certainly be I would echo your comments Justice Williams, in terms of where a figure seems to be magically plucked out of the air and that occurred in the Court of Appeal, whereas his Honour Judge Winter went through a process of trying to work out something, as far as where arbitrary detention was concerned and, as Justice Kós identified, that $100 per diem was already the discounted amount and so obviously I haven't

been brave enough to come to this Court and say, “give him the $15,000 for the police breach, make it punitive”.

I mean, I do think that we are creating this arbitrary dichotomy to admit and to award costs for the purposes of ensuring that there isn't an arbitrary detention, so that there are future protections, there is a future sanction, so that the police understand that their actions have an impact and sometimes that impact is the very worst thing that our criminal justice system attempts to prevent, that is somebody being held in custody for longer than they should be and I hope that doesn’t smack too much of me getting on a jury high horse, Sir, but fundamentally –

WILLIAMS J:
You can't help it, Mr Duff.

GLAZEBROOK J:
Well, do I understand the submission, then, that you say the sort of award that was made by Judge Winter, which at this stage, because you weren't brave enough to go back to your original submissions at this stage, you’re defending is to say, “well, in fact that in itself has a punitive effect because the consequences were serious in this case”.

MR DUFF:
Yes.

GLAZEBROOK J:
“That makes the breach very serious in this case, in fact the most serious it could be”.

MR DUFF:
That’s right. Because I mean, again I can understand –

GLAZEBROOK J:
That’s the submission, not –

MR DUFF:

That's right and I can understand why my learned friends are attempting to characterise this as simply being one failure of disclosure which had one effect. That's not right. This was a failure which resulted in the clock ticking on an arbitrary detention. That's as high, that's what I would say, and therefore we gave his Honour Judge Winter a principled mechanism by which to calculate a costs award that would sanction this disclosure failure in a principled way that still sent a signal to say, it's not about that you can't have those side room discussions, it's about saying, "disclosure is important, disclosure is appropriate". And doing that in a timely way will not – their failures will not stop unless this Court says, "we are going to do something that is meaningful here", and as I say, I mean, as far as an arbitrary detention is concerned, it did seem principled to at least be looking at the guidelines and making that as a starting point and then where the s 364(3) discretion kicks in is up to each judge to sit there and say, "well, as I look at this", which is what it seems to me that ultimately Judge Winter did do as far as the discounts that he applied.

I don't think that, obviously this Court is not bound by that because except to the discretion point, but certainly not bound to it and so therefore I would invite your discretion, where adjustment, adjustment up.

Those are the extent of my submissions, unless there is anything that I could address further.

GLAZEBROOK J:

Thank you very much and thank you counsel for finishing on time as well and we will reserve our decision.

ELLEN FRANCE J:

Could I just ask you pause before we retire. It seems appropriate to acknowledge that at least on our current programme this will have been Justice Glazebrook's last appeal hearing. It is not her very last appearance in court because there will be judgment deliveries and so on, and while there

obviously will be opportunities to acknowledge and celebrate her contributions, we shouldn't let the occasion pass without mentioning and acknowledging.

MR DUFF:

Yes, absolutely.

GLAZEBROOK J:

Thank you. And we will now retire.

COURT ADJOURNS: 1.08 PM