IN THE EMPLOYMENT COURT
AUCKLAND

AC 73/06
ARC 1/05

IN THE MATTER OF	a point of law challenge to a determination of the Authority
BETWEEN	THE CHIEF EXECUTIVE OF THE BAY OF PLENTY DISTRICT HEALTH BOARD Plaintiff
AND	NEW ZEALAND PUBLIC SERVICE ASSOCIATION Defendant

Hearing: Submissions received on 9 August and 19 September 2005 for the plaintiff and 5 September 2005 for the defendant

Judgment: 13 December 2006

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff Health Board ("the Board") has challenged a determination of the Employment Relations Authority, dated 1 December 2004, which ordered the defendant union ("the PSA") to pay to the Board $500 as a contribution to its costs in relation to a dispute.

[2] The parties agreed that the matter could be determined on the papers by an exchange of submissions and on the basis of an agreed statement of facts.

Background facts

[3] The following is taken from the agreed statement of facts.

[4] On 16 April 2004, the PSA filed with the Authority a statement of matter dated 14 April 2004. The PSA was seeking a determination from the Authority that

the Board was incorrectly interpreting the Bay of Plenty District Health Board Mental Health Nurses and Mental Health Care Assistance Collective Agreement ("the Collective Agreement"), which was to expire on 30 June 2004.

[5] The Board had been making payments in accordance with schedules in the Collective Agreement which set out pay rates for employees covered by it. The Board wrote to the PSA on 8 January 2004, expressing its view that the PSA's contention was misconceived and that there was no foundation for the position that it was asserting.

[6] On 26 August 2004 the Board's solicitors wrote to the PSA, setting out the Board's position and providing an offer on a "*without prejudice except as to costs*" basis. The letter was written at the time when both parties to the proceedings were to file and serve briefs of evidence. In the course of preparing these, the Board's solicitors stated that they had thoroughly reviewed the circumstances leading to the current proceeding and considered there was no basis to support the PSA's claim. They dealt in some detail with why they had reached this conclusion. The letter went on to advise that the Board had instructed their solicitors to file applications not only seeking to have the matter struck out on the basis that the PSA's claim was unmeritorious but also, in the alternative, that the parol evidence rule be invoked in relation to the evidence the PSA was seeking to call before the Authority. Before doing so they were instructed to provide the PSA with an opportunity to reconsider its position in respect of the claim. The letter went on to state:

> …
>
> *Our client is prepared to bear its own costs incurred to date if the PSA discontinue the proceedings against our client. This offer is open for acceptance until 4pm Monday, 30 August 2004. In the event the offer is not accepted, we will proceed to file the applications referred to above.*
>
> *Further, in the event our client's offer is not accepted and our client proceeds to file the applications and is ultimately successful in either the applications and/or defending the PSA's claim, we reserve our client's right to produce this letter and rely on is* (sic) *contents in seeking solicitor/client costs against the PSA…*

[7] The letter was faxed to the defendant on the same day.

[8] On 30 August 2004, 10.37am the Board's solicitors received a copy of a letter the PSA had forwarded to the Authority, requesting an extension of time for

filing and serving briefs of evidence, to Wednesday, 1 September 2004. At this time the Board had received no response from the PSA to its letter of 26 August.

[9] By facsimile dated 30 August 2004, the Board's solicitors wrote to the Authority, advising the Authority of some of the contents of its letter of 26 August 2004 to the PSA, noting that the investigation meeting was set down for 10 September and seeking an urgent telephone conference to deal with the matters raised which would include the Board's application to vacate the investigation meeting in order to dispose of the strike out and parol evidence matters beforehand. It also opposed the extension of time sought by the PSA.

[10] On 30 August 2004, the Board's solicitors received a letter from the PSA stating that it did not consider it appropriate to withdraw the proceedings and that:

> …
>
> 2. *We advise that we do not accept that your letter is a genuine* Calderbank *offer as you have made no offer of compromise, rather you have threatened to engage in a series of potentially protracted interlocutory applications, and thereby further prolonging the litigation process, unless we withdraw our proceedings.*
>
> …

[11] The PSA advised that the applications to strike out the dispute and to strike out parol evidence would be opposed and went on to conclude:

> …
>
> 5. *This union has a policy of not seeking costs in respect of its successful legal proceedings as we believe that this runs contrary to the principle of building and maintaining productive employment relationships. However, in anticipation of your client's future conduct on the basis of your letter, we advise that we reserve the right to produce this letter in support of an application for costs.*
>
> 6. *Finally, and by way of conclusion, notwithstanding paragraph 5, we remain open to any genuine attempt to settle these proceedings and we indicate our willingness to enter into informal negotiations on the basis of any such a genuine attempt, perhaps with the assistance of the Department of Labour, to see if we can bring this matter to a mutually satisfactory conclusion.*

[12] The Authority granted an extension of time for filing the briefs and advised that the investigation meeting would proceed as scheduled on 10 September and convened a telephone conference call on 1 September.

[13] On 31 August the Board filed an application to have the dispute struck out and in the alternative to have any parol evidence struck out. On the same day the Board's solicitors wrote to the PSA stating that as the PSA had not accepted the offer in the letter of 26 August, it had filed the two applications.

[14] The telephone conference with the Authority took place on 1 September, and the PSA verbally opposed the Board's applications. The matter was adjourned to an investigation meeting on 10 September to enable evidence to be heard. Because of the preparation of the parties and the briefs of evidence they had filed, the Authority member was able to isolate the key issues quickly and efficiently and the 10 September meeting was concluded in under half a day.

[15] The Authority issued a determination dated 1 October 2004, in which it decided the Board had not breached the Collective Agreement. It invited the parties to attempt to resolve the question of costs. If they were unable to, the Board was to file a memorandum within 28 days of the date of the determination. The PSA was given a further 14 days from the date of receiving the Board's memorandum in which to file memorandum in response. The determination concluded:

> *The Health Board should file anything in reply within 3 days of receipt.*

[16] This deadline was extended at the request of the Board to allow for further negotiations and on 12 November the Board filed its memorandum of costs.

[17] The Board's memorandum referred to the course of the litigation and the continual denial by the Board that there was any breach of the Collective Agreement. It relied heavily on what it described as the *Calderbank* offer made on 26 August 2004. It referred to *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); and *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433. It stated the Board had incurred costs of $11,827.06, including disbursements of $176.06 but exclusive of GST, in defending the claim and because of the *Calderbank* offer sought an award covering the total amount.

[18] In the alternative it submitted that based on approximately a half a day investigation the total notional reasonable costs at an hourly rate of $250 equated to

$1,500. However because of the *Calderbank* offer the Board sought a higher award than the Authority would normally have made in the sum of $6,000.

[19] The PSA filed and served its memorandum as to costs on 26 November 2004 by facsimile followed up by paper copies in the mail. The Board claims that the facsimile received from the defendant was illegible but the PSA claims that it was correctly transmitted. The PSA provided a further copy of its submission to the plaintiff by facsimile on 29 November following a telephone request to do so from the Board's solicitors on the same day. The hard copy of the PSA's memorandum was received by the plaintiff on 30 November 2004.

[20] The PSA submitted that this was a situation where costs should lie where they fall because there was a legitimate dispute over the correct determination of the Collective Agreement and both parties benefited from the determination.

[21] The PSA's memorandum then submitted that costs awarded in favour of the Board should be no more than $420 and that costs should also be awarded in favour of the PSA and these could be set off against those ordered in favour of the Board. After dealing with the decisions cited by the Board, the PSA referred to the Board's refusal to consent to mediation in an endeavour to resolve the employment relationship problem, and the action of the Board in writing directly to the Mediation Service alleging that the PSA was acting in breach of its good faith obligations. In spite of a request asking the Board to withdraw this allegation from the Mediation Service, this was not done and yet PSA said the allegation of a lack of good faith was not raised at the investigation meeting.

[22] The PSA took issue with the way the application to strike out had been raised and claimed the first 20 minutes of the investigation meeting had been taken up with considering the Board's interlocutory applications. It claimed that the PSA had not unnecessarily prolonged the hearing in any way.

[23] It then dealt with the *Calderbank* offer, alleging that it was deficient in a number of respects. The first was that there was no legal basis for a *Calderbank* offer in respect of a dispute raised and pursued by a union on behalf of its members under s129 of the Employment Relations Act 2000. It submitted that the right to pursue a dispute was a statutory right under the Act and the union was entitled to

represent its members under s18(1). The second was that in any event it was not an offer capable of acceptance because neither the PSA nor its members could contract out of s131(2) of the Act. Consequently it submitted that the only offer capable of acceptance, in the absence of a determination by the Authority, was the PSA's interpretation of the applicable rates for additional hours under the Collective Agreement. Third it was submitted that a *Calderbank* was inconsistent with the good faith provisions and other objects of the Act including the proper recognition of the union. Fourth, the terms of the offer were said to have been improperly communicated to the Authority before the questions of costs fell to be decided. It sought to apply High Court Rule 48G by analogy. This forbids the communication to the Court of the fact the offer has been made until the question of costs is to be decided. Finally the PSA contended the offer had not been rejected but was invalidated by its own time limit.

[24] The PSA submitted that the costs sought by the Board had not been reasonably incurred and, allowing for the rate of $250 which the Board claimed was the applicable hourly rate, it appeared some 47 hours of work with four different solicitors working on the case had been involved. It also submitted that the unsuccessful interlocutory applications would have increased the cost.

[25] On the basis of *Harwood* the PSA submitted that this being an ongoing employment relationship, costs in the $1,000 to $1,500 range for a one day investigation would be appropriate and, in view of the fact that this was less than two hours in duration, costs should be no more than $500.

[26] The PSA also sought a contribution towards its own costs in successfully defending the two interlocutory applications.

[27] The Board sought an extension of time to 8 December in which to file a reply to the PSA's memorandum, by a facsimile received by the Authority at 4.34 pm on 1 December 2004, after the time by which the Board was to have filed its reply. No reply was received by the Board but the Authority's determination was handed down on 1 December and received by the Board on 2 December.

[28] The Authority's costs determination indicated that there was nothing to derogate from the principle that costs should follow the event and that the

unsuccessful applicant should make a contribution towards the respondent's reasonably incurred costs. It observed that the Board had not provided copies or invoices of documentation supporting its submissions regarding costs and what had been incurred was unusually high for a matter that took only two hours. It stated that it took into consideration the *Calderbank* offer and was satisfied under clause 15 of Schedule 2 of the Act that the discretion ought to be exercised in favour of the Board and ordered the PSA to pay the sum of $500 as a reasonable contribution towards the Board's costs.

[29] The Board wrote to the Authority on 2 December 2004 regarding its request for an extension in which to file a reply and observed that the PSA had not filed its costs memoranda until 26 November, which would have provided the Board until close of business on 1 December 2004 in which to file any reply but instead the Authority had determined costs earlier on that day. It sought to have the Authority withdraw its determination pending receipt of the reply. The Authority responded by way of a minute dated 6 December 2004 which referred to the timetable set out in the determination which provided for three days for the Board to respond to the PSA's submissions. The PSA's submissions had been filed on 26 November and the request for an extension was not made until 1 December. The request to withdraw the determination was declined.

The challenge

[30] Counsel for the Board filed extensive submissions in support of the challenge. Its grounds were that the Authority had failed to take into consideration the *Calderbank* offer, that the costs did not represent a reasonable contribution to reasonable costs and were wholly inadequate, and the Authority had erred procedurally in not allowing the Board any right of reply, prior to making its costs determination. The Board sought an award reflecting the *Calderbank* offer, or in the alternative an award of $6,000, or an award of not less than $1,500 if the *Calderbank* offer did not apply.

[31] In addition to the extensive chronology of events which I have used to prepare the background facts, the Board alleges that there were further matters to which the parties did not agree. Although it is not precisely clear, it appears that those matters relate to the date on which the PSA's memorandum as to costs was

received by the Board so as to trigger the three days the Board had to raise any matters in reply. In the absence of agreement or evidence, on a challenge on the papers it is not possible to resolve any factual disputes. However the areas of dispute do not appear to be material.

The submissions on the challenge

[32] The Board's submissions canvassed the history of the *Calderbank* offer from the English decision *Calderbank v Calderbank* [1975] 3 All ER 333. They refer to decisions in New Zealand such as *Ogilvey & Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 943 where, at 952, Goddard CJ said that a *Calderbank* offer are invariably in writing and expressed to be on a without prejudice basis save as to costs. It is an offer to compromise the action by some payment. If the offer is not accepted the letter is intended to be produced after the Court has dealt with the merits of the case but before it has dealt with costs. Reference was also placed on the decision of the Court of Appeal in *Health Waikato Ltd v Van der Sluis* [1997] 1 ERNZ 236 which observed that the *Calderbank* discretion is a broad one which can encompass total figures comprising both compensation and costs.

[33] The Board referred to Regulation 68 of the Employment Court Regulations 2000 which expressly provides that the Court, when exercising its discretion under the Act to make costs orders, may have regard to an offer despite that offer being expressed to be without prejudice except as to costs. The Board accepts there is no such equivalent provision in relation to the Employment Relations Authority. Both the Court and the Authority have a similar discretion to award costs and expenses as they think reasonable (s15, Schedule 2 and s19, Schedule 3 of the Employment Relations Act 2000).

[34] The Board submitted that while the Authority made reference to the *Calderbank* offer and says that it took it into account, there is no explanation in the determination as to its effect and an award of $500 does not appear to reflect an application of the *Calderbank* principles. The Board contended that the letter of 26 August which is summarised above was a genuine *Calderbank* offer even though, as the case of *Darroch* notes, it does not offer to compromise the action by some payment. Whilst that technically may not make it a *Calderbank* offer if it had been

made in the context of Court proceedings, Regulation 68 would have allowed the Court to have regard to such an offer.

[35] The Board's submissions dealt with the issue as to whether the offer remained open on its terms for acceptance for four days until 4pm on Monday, 30 August 2004 or whether, on the argument of the PSA, the Board had foreclosed on its offer earlier than that point in time. The Board submitted its offer remained properly open for acceptance.

[36] The Board submitted the Authority had failed to give necessary weight to the *Calderbank* offer and accordingly the costs determination should be overturned and a higher award made in favour of the Board, which should be not less than $6,000. The Board submitted that the determination does not represent a fair contribution to the costs reasonably incurred. Two witnesses were briefed, discovery was undertaken, preparation for the investigation took place and there was the attendance at the investigation itself. On the basis of those principles and the time involved it was submitted that a minimum costs award of $1,500 would be applicable but that this should be increased in view of the *Calderbank* offer to at least $6,000, if not full indemnity.

[37] The Board contended that the Authority did not provide any assessment as to what would have been reasonable costs for a hearing of this length although the Authority concluded that the costs were disproportionate to the length of the investigation hearing. The Board submitted the length of the hearing should not determine whether or not costs are reasonably incurred but the determination should take into account the nature of the case and the work that was required. The Board submitted that it should not be penalised by a low costs award simply on the basis that its comprehensive preparation enabled the hearing to proceed quickly and efficiently. I accept the Board's submission that, in broad terms, the entire investigation, including the Board's two applications took just under half a day. The Board says the minimum amount that should have been awarded in the circumstances was $1,500.

[38] The Board also submitted that the Authority erred procedurally in not allowing the Board the right of reply. This was to be filed within 3 days of receipt of

the PSA's memorandum on costs. The Board refers to the statement of reply it filed which allowed for documents to be served by either post or DX and makes no mention of facsimile transmission.

[39] As an alternative, the Board submitted that if the Court considered the PSA's memorandum was served by facsimile on 26 November, because that was a Friday the Board had until 12.14 pm on Wednesday, 1 December 2004, being three working days, in which to file its reply. It observed that the Act and the Regulations are silent as to the calculation of time but by analogy it applied High Court Rule 14(2) which requires that a Saturday and a Sunday be disregarded in calculating a period of time within which a particular act is to be done. It further submitted the application for extension was within time, and the Board also contends it never received a response to its letter to the Authority of 1 December 2004.

[40] The Board contended that the Authority erred procedurally and it suffered clear prejudice as a result of not being able to answer a number of unsubstantiated assertions made by the PSA.

[41] The PSA contended that this was a dispute where both parties benefited from the certainty of having the matter determined by the Authority. Therefore it was a very clear case where costs should have been allowed to lie where they had fallen. The PSA submitted that any costs order of the level sought by the plaintiff would be excessive, unreasonable and unjust and inconsistent with the Act and contrary to the public interest and industrial relations. The PSA contended that the plaintiff was engaging in a tactical costs appeal in an attempt to dissuade the PSA from seeking to represent and enforce the collective interest of its members employed by the Board. The PSA maintained its contention that the offer was unilaterally withdrawn prior to its expiry and its existence communicated to the Authority before the issue of costs fell to be decided. The PSA also points out that the offer was not actually placed before the Authority and therefore cannot be relied on.

[42] However in any event the PSA asserted that the Authority clearly did take into account the offer and made a small award of costs over the objection of the PSA.

[43] The PSA also submitted that there is no requirement in the Act or Regulations insofar as they relate to the Authority which requires the Authority to do anything other than consider or have regard to an offer which was precisely what the Authority had done in this case. The PSA repeated its earlier submissions made to the Authority that there was no basis for the making of a *Calderbank* offer in respect of a dispute raised pursuant to a statutory right by a union. It also contended it would be contrary to the objects of the Act and the role given to unions. The PSA relied on s131(2) of the Act which prevents payment at a lower rate than that contained in the collective agreement and as there was a dispute over the relevant rate until it was properly determined there was no offer made by the Board which was capable of acceptance. The PSA also contested the amount claimed by the Board as being unreasonable on what was a simple and very straight forward interpretation dispute and noted the lack of any itemised accounts or invoices and supporting documentation.

[44] Turning to the plaintiff's right of reply, the PSA first referred to the statutory bar contained in s179(5)(a) of the Act which prevents a challenge about the procedure the Authority has followed. As to the contention that the Board had only given authority to be served by either post or DX, the PSA observed this was not raised in the statement of claim and the Board was relying on other documentation served by facsimile transmission. The claim that the document sent to it on 26 November was illegible had not been proved by production of that document. The PSA maintained the position that the reply had not been filed within time.

[45] The further submissions of the Board took issue with each of the points made by the PSA and provided copies of additional relevant documentation.

Conclusions

[46] Many of the issues of principle argued by the parties in this case have been disposed of by the decision of the full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808. The decision was issued after the parties had filed their submissions in the present case. The full Court determined that the role of the Court on a challenge as to the Authority's costs is to stand in the shoes of the Authority and to assess the evidence relating to the costs award in that forum in order to judge what is an appropriate award in light of all considerations which are

relevant to the Authority. The full Court examined the role and functions of the Authority and concluded that it was not a court and was not subject to the application of court rules and processes but a practical and pragmatic institution not to be constrained by technicalities. Thus the Court of Appeal decisions governing costs decisions by the Court including *Binnie* (cited above), *Victoria University of Wellington v Alton-Lee* [2001] 1 ERNZ 305 and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, which refer to 66 percent of actual and reasonable costs being generally regarded as a starting point as a contribution towards a successful party's costs, had no application in the Authority. The full Court concluded that the unique nature of the Authority and its proceedings meant that the parties to investigation meetings should not have the same expectations about procedure and cost as they have of the Court's.

[47] The full Court also set out a series of cost principles which the Authority now applies and which it held to be appropriate to the Authority and consistent with its functions and powers. These included:

- *There is a discretion as to whether costs would be awarded and what amount.*
- *The discretion is to be exercised in accordance with principle and not arbitrarily.*
- *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*
- *Equity and good conscience is to be considered on a case by case basis.*
- *Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.*
- *It is open to the Authority [to] consider whether all or any of the parties costs were unnecessary or unreasonable.*
- *That costs generally follow the event.*
- *That without prejudice offers can be taken into account.*
- *That awards will be modest.*

[48] The full Court found nothing wrong in principle with the Authority's tariff based approach as long as it was not applied in a rigid manner. It also urged parties in accordance with the Court of Appeal in *Binnie* to be conscious of the costs that are accumulated as a matter proceeds.

[49] The PSA in its submissions is correct in saying that the offer made in this case is not a *Calderbank* offer strictly so called, for it does not offer a sum of money to settle the proceedings. That distinction is not important for the purposes of Regulation 68 but that does not apply to a costs application before the Authority. Although a *Calderbank* offer is normally made by the party sought to be held liable, it can also be made by the claimant offering to settle for a certain sum: *Watson v New Zealand Electrical Traders Ltd t/a Bray Switchgear* unreported, Colgan CJ, 24 November 2006, AC 64/06.

[50] I also accept the PSA's submission that an offer made to let costs fall where they lie, providing the other side abandons a dispute, may be in a different category. This is not because of the provisions in the Act relied on by the PSA dealing with the role of unions in collective bargaining and the enforcement of agreements. Those provisions, if anything, encourage the settlement disputes about the interpretation or application of collective agreements. It is because, as in the present case, where there is a genuine dispute and two views as to the meaning of provisions in a collective agreement, the party that does not accept the offer is not unnecessarily incurring costs because it is invoking the dispute procedure in order to resolve the matter and obtain certainty.

[51] As the Board properly accepted there is no provision requiring the Authority to consider offers in the nature of *Calderbank* offers, unlike the position set out in Regulation 68 of the Employment Court Regulations. However, the making of a *Calderbank* offer is a matter to which the Authority may have regard in exercising its very wide discretion as to costs. The non acceptance of a true *Calderbank* offer of a sum to dispose of the proceedings and a failure to recover more than the offer, may be treated by the Authority as conduct which unnecessarily increased or incurred costs. It may justify an order in favour of the party making the offer.

[52] I accept the Board's contention that the determination on costs does not show how the Board's offer was taken into account. I also accept the submission of the PSA that its submissions that costs should lie where they fall, or that the PSA itself should be entitled to a contribution towards its costs, do not appear to have been accepted, probably because of the existence of the offer. It is not an infrequent practice for costs to be allowed to lie where they fall where there is a genuine dispute

over the interpretation of a collective agreement and the parties to that agreement will benefit from the certainty of a determination.

[53] I also accept the submissions of the PSA that there was some difficulties with the way that the offer was presented. The offer was made on the basis that the parties would not be filing their briefs of evidence in the Authority by 30 August 2004 and the Board was in the process of preparing them. It was in this context that the Board took exception to the PSA letter provided to it at 10.37 am on 30 August stating that the PSA had sought an extension of time for filing and serving the briefs of evidence. The Board wrote directly to the Authority on 30 August in respect of the PSA's request for an extension of time and the PSA submit that that letter foreclosed on the offer. The Board's position is that it did not have that effect because the letter to the Authority made no reference to the offer and the PSA was not prevented from accepting it. It is a clear principle of *Calderbank* offers that their terms must be clear so that they are open for acceptance. The linkage of the offer to the time for filing the briefs of evidence had created a confusion which has led the PSA to consider that the offer was withdrawn. This may have prevented strict reliance on the terms of the offer but it is clear that in any event the PSA was not intending to accept it.

[54] As to the procedure adopted in the present case, this again is a matter for the Authority. On its face it did appear that the Board had failed to exercise its right of reply within three days of receiving the PSA's memorandum. The Authority was entitled to assume that the Board had received the PSA's submission on the same day the Authority had. The High Court Rules do not apply by analogy to the Authority and therefore the Saturday and Sunday could not be disregarded.

[55] As to the contention that the address for service did not provide for facsimile transmission I accept the PSA's submission that the parties had both dealt with each other and the Authority by the matter on the basis of exchanging facsimile transmissions of relevant documents. However, going to the merits, it is difficult to see what additional material might have been put before the Authority in that reply and I am not satisfied that the claim for prejudice has been made out. Very full memoranda were filed and I am satisfied that the relevant points were made to the Authority. Very little new material was provided to the Court on the challenge.

[56] Finally as to the quantum of the award, it is a modest hearing of less than half a day. Perhaps something more in the region of $1,000 might have been appropriate. However, taking into account the partial success of the PSA in opposing the Board's two applications and the general practice of frequently not providing any costs in the settlement of a dispute, the award for $500 was not so modest that it can be said that the Authority has failed to exercise its discretion on a proper basis. Therefore, I am not persuaded that a more substantial award ought to have been made in the circumstances.

Costs

[57] The challenge is therefore dismissed and costs are reserved. If they cannot be agreed they may be addressed by an exchange of memoranda, the first of which is to be filed and served by 4pm on Friday, 23 February 2007.

B S Travis
Judge

Judgment signed at 2.45pm on Wednesday, 13 December 2006