IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP254/94

BETWEEN	JOHN GEORGE RUSSELL Intended Plaintiff
A N D	THE ATTORNEY-GENERAL First Intended Defendant
A N D	KEITH LEIGH PETERSON Second Intended Defendant
A N D	WELLINGTON NEWSPAPERS LIMITED Third Intended Defendant
A N D	AUCKLAND STAR LIMITED Fourth Intended Defendant
A N D	THE SUN PUBLISHING COMPANY LIMITED Fifth Intended Defendant
A N D	WAIKATO AND KING COUNTRY PRESS LIMITED Sixth Intended Defendant
A N D	WILSON & HORTON LIMITED Seventh Intended Defendant
A N D	FOURTH ESTATE HOLDINGS LIMITED AND SCHNEV HOLDINGS LIMITED Eighth Intended Defendant
A N D	TELEVISION NEW ZEALAND LIMITED Ninth Intended Defendant
A N D	

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CP258/94

Details over the page

Hearing: 2 March 2001

Counsel: *details over the page*

Judgment: 6 June 2001

(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP258/94

BETWEEN	KEITH BYRON COLBERT Intended Plaintiff
A N D	THE ATTORNEY-GENERAL First Intended Defendant
A N D	KEITH LEIGH PETERSON Second Intended Defendant
A N D	WELLINGTON NEWSPAPERS LIMITED Third Intended Defendant
A N D	AUCKLAND STAR LIMITED Fourth Intended Defendant
A N D	THE SUN PUBLISHING COMPANY LIMITED Fifth Intended Defendant
A N D	WAIKATO AND KING COUNTRY PRESS LIMITED Sixth Intended Defendant
A N D	WILSON & HORTON LIMITED Seventh Intended Defendant
A N D	FOURTH ESTATE HOLDINGS LIMITED AND SCHNEV HOLDINGS LIMITED Eighth Intended Defendant
A N D	TELEVISION NEW ZEALAND LIMITED Ninth Intended Defendant

Counsel: RJ Warburton for the intended plaintiffs/ respondents
IC Carter & KAnderson for intended first defendant/applicant
Intended second defendant/applicant in person
KM Williams for the intended fourth defendant/applicant
Campbell for the intended eighth defendant/applicant

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Introduction

[1] The intended first defendant and the intended second defendant seek orders:

[a] Striking out the intended plaintiffs' applications under s 4(6B) of the Limitation Act 1950 for leave to bring a defamation action out of time;

alternatively

[b] Dismissing the intended plaintiffs' applications under s 4(6B) of the Limitation Act 1950 for want of prosecution.

[2] The intended fourth and eighth defendants seek orders striking out the intended plaintiffs' applications under s 4(6B) of the Limitation Act 1950 for want of prosecution.

[3] These applications are opposed by the intended plaintiffs.

The history of the matter

[4] The intended plaintiffs allege that they were defamed by the intended defendants in a series of publications in 1988 and 1989 concerning a number of business men who were referred to as the "Gang of Twenty".

[5] The Defamation Act 1992 came into force on 1 February 1993 and applies to all defamation proceedings commenced on or after that date. Its provisions included a section amending the Limitation Act 1950 by inserting in s 4, after ss (6), the following sub-sections:

> (6A) Subject to subsection (6B) of this section, a defamation action shall not be brought after the expiration of 2 years from the date on which the cause of action accrued.

> (6B) Notwithstanding anything in subsection (6A) of this section, any person may apply to the Court, after notice to the intended defendant, for leave to bring a defamation action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law (other than the provisions of subsection (6A) of this section), or by any other reasonable cause.

[6] The effect of the coming into force of this legislation was that the intended plaintiffs, not having commenced defamation proceedings against the intended defendants within two years of the date of the defamation, required – and continued to require – the leave of the Court to commence such proceedings.

[7] The intended plaintiffs filed applications for leave to commence proceedings in June 1994.

[8] Preliminary jurisdictional issues arising from the intended plaintiffs' applications were determined by Smellie J in a reserved judgment delivered on 16 November 1994 and reported as *Russell v Attorney-General* [1995] 1 NZLR 749.

[9] The effect of Smellie J's judgment was to hold that causes of action for defamation accruing before 21 June 1988 were statute-barred and could not validly be made the subject of the application for leave. There remained 14 causes of action which allegedly arose after 21 June 1988 and in respect of which applications for leave could properly be made (although not necessarily granted).

[10] In his judgment, Smellie J fixed costs in the applications "at this juncture", ordering as follows:

> Save in the case of Mr Peterson who appeared for himself, each intending plaintiff will pay each intended defendant the sum of $500 for costs plus Court fees and reasonable disbursements incurred. I further direct that those costs are to be paid forthwith and in any event before any further steps are taken in these proceedings and before further hearings are embarked upon to reach a final conclusion as to

whether or not leave is to be granted in respect of any of the causes of action.

[11] Those costs have not been paid.

[12] The intended plaintiffs lodged appeals to the Court of Appeal against Smellie J's judgment but did not pursue them. They were struck out for want of prosecution in judgments of the Court of Appeal dated 26 April 1999 and 26 May 1999.

[13] The intended plaintiffs then failed to prosecute their applications for leave under s4(6B) of the Defamation Act 1992.

[14] The present applications by the four remaining intended defendants were filed and served variously in December 2000 and January 2001.

First preliminary point: the applicability of rules 186, 477 and 478

[15] Mr Warburton, for the intended plaintiffs, submits that the plaintiffs' applications for leave under s4(6B) of the Limitation Act 1950, being interlocutory applications, are not "proceedings" within the definition of that word in r 3 of the High Court Rules and therefore rr 186, 477 and 478 do not apply.

[16] Mr Carter, for the intended first defendant, concedes that a application for leave to issue proceedings is an interlocutory application and that until leave is granted there is no proceeding. He relies, in making that concession, on the decisions of this Court in *Parris v Television New Zealand Limited* (1996) 9 PRNZ 444, *Colonial Mutual Life Assurance Society Ltd v Wilson Neil Ltd* [1993] 2 NZLR 617 and *Hodge v Residual Health Management Unit* (High Court, Dunedin, CP39/99, 19/5/00, Master Venning), while noting the contrary decision of the late Giles J in *Campbell-White v Prattley* [1999] 3 NZLR 449, which Master Venning declined to follow in *Hodge*.

[17] Counsel for the other intended defendants did not disassociate themselves from this concession.

[18] I do not find it necessary to decide the point, because, even if applications such as the intended plaintiffs' are interlocutory applications and not originating applications, the Court's inherent jurisdiction must allow it to control the use of its process and to apply to the plaintiffs' applications, in the exercise of its inherent jurisdiction, powers similar to those set out in statutory form in rr 186, 477 and 478 in respect of proceedings.

Second preliminary point: the applicability of s 50 of the Defamation Act 1992

[19] Given the concession made by Mr Carter, for the intended first defendant (not departed from by counsel for the other defendants appearing before me), that the plaintiffs' applications are interlocutory applications and therefore not proceedings, s 50 of the Defamation Act 1992 cannot apply.

My findings: the applications to strike out or dismiss for abuse of process

[20] Only the intended first defendant and intended second defendant make application on the ground of abuse of process.

[21] Although the intended plaintiffs' applications are before the Court because of the intended defendants' application (and not because of any steps actively taken by the plaintiffs), the intended plaintiffs' opposition to the intended defendants' applications suggests an intention to proceed with their own applications. That being so, it is appropriate to consider whether, in doing so, they are abusing the process of the Court.

[22] Mr Carter, for the intended first defendant, whose submissions were adopted by Mr Peterson, the intended second defendant, submits that it is an abuse of the process of this Court for the intended plaintiffs to maintain their applications for leave under s 4(6B) of the Limitation Act 1950, given their initial delay in bringing their applications and their subsequent delay in prosecuting their applications (for the history of the matter see paragraphs [4]-[14] of this judgment). He submits that:

[a] The plaintiffs' inaction since, first, the judgment of this Court in November 1994 and, secondly, the judgments of the Court of Appeal in 1999, indicates an absence of any real intention to prosecute their

applications and, if leave is granted, to maintain their proposed defamation claims;

[b] Given the lapse of 12-13 years, even at this stage, the plaintiffs' claims are stale and their prosecution will serve no useful purpose, irrespective of whether the plaintiffs actually intend to prosecute them if given leave.

[23] Mr Carter relies, in support of these submissions, on the decision of the House of Lords in *Grovit v Doctor* [1997] 2 All ER 417 and its application by this Court in *Te Runanga O Ngai Tahu Ltd v Durie* [1998] 2 NZLR 103 and *Barbery Holdings Ltd v Bank of New Zealand* (High Court, Wellington, CP257/92, 12/8/99, Master Thomson).

[24] The leading judgment in *Grovit v Doctor*, ubi supra, was delivered by Lord Woolf. The following passage in his judgment is reported at p 424 e-h of the report:

> Even without this surprising late development, I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.

[25] In *Te Runanga O Ngai Tahu Ltd v Durie*, ubi supra, McGechan J said of the proceeding in that case (at p 107/5-15 and 22-40):

> In that light, are the existing proceedings still relevant? Are they on the other hand obsolete or "stale"? Realistically, they do not remain relevant. The proceeding is directed at earlier 1995 refusals to grant fixtures; fixtures which

no longer were sought once negotiations resumed. The conditions which influenced refusals have changed to a significant degree. Complaints made in the proceeding are now of historical interest only. If, as just envisaged, it becomes necessary for Ngai Tahu to again approach the tribunal, it would be necessary to focus on any fresh refusal or delay, and institute a new proceeding. I do not exclude the possibility earlier conduct pleaded in this present proceeding could be advanced as evidence of later state of mind, but it would not be a cause of action in itself. A fresh refusal would be the cause of action. The same applies to the question of involvement on the part of the Chief Judge.

...

Proceedings are termed in law an "abuse of process" in a range of situations, including situations where there is no intention or is no capacity to take such to trial. Sometimes that situation exists at outset (eg "gagging" writs). Sometimes the situation develops after proceedings have issued, with conditions changing or second thoughts prevailing. That has happened here. Conditions have changed from those which prevailed at the time of issue, and indeed at the time of first adjournment in June 1996. A fresh refusal or delay could warrant fresh proceedings, but that is not the test. The label "abuse" is a technical one, not necessarily pejorative. It is not pejorative here. The proceedings have simply outlived their time. I have allowed them to be "parked", as it has been put, for some two years out of caution, in case premature action might somehow prejudice delicate negotiations. Undoubtedly, in the result there has been a "cloud" over the Chief Judge and Waitangi Tribunal. That is a burden which I have been prepared to countenance, in the public interest, particularly as both are public bodies which might properly be expected to accept the necessity. However, it is against the public interest that such "clouds" continue any longer than absolutely necessary. It no longer is necessary. There is no call to wait for a legislative cesser, which in any event can lead to misunderstandings in itself.

[26] In Mr J G Russell's affidavit in opposition to the defendants' applications, he:

[a] states that he is the plaintiff in CP254/94 and "has been dealing with and assisting Mr Colbert in the associated proceedings" [paragraph 1];

[b] explains the failure to prosecute the appeals to the Court of Appeal by stating:

> ... Counsel appointed to act for the Plaintiff was himself appointed to the High Court bench. It was necessary then for the plaintiffs to instruct alternative Counsel. There had already been difficulty in finding senior Counsel who were not associated in some way with the parties or had been involved in other proceedings involving the same parties. This necessitated further delay and additional cost.

[paragraph 7];

[c] explains the further delay since the striking out of the appeals in April-May 1999 as follows:

> I have been involved in various litigation more particularly with the Commissioner of Inland Revenue since that time.
>
> Although Mr Judd, QC was instructed to deal with the second set of applications to strike out the appeal and he dealt with them, he was not instructed or familiar with the whole of the proceedings.
>
> Since that time, the requirements of a busy accounting practice and in particular the requirements to attend to complex taxation cases has kept me from proceeding. Only recently have I returned, in fact from assisting Counsel instructed to deal with an appeal to the Privy Council in respect of taxation matters.
>
> The various applications in respect of taxation matters with which I have been involved have traversed the Taxation Review Authority, the High Court and the Court of Appeal, with very many hearing days involved, necessitating complex and time consuming instructions to various Counsel.
>
> I have recently entered into a phase of semi-retirement. I will now have the time to devote to this application and the proceeding which I expect will follow it.

[paragraphs 9-13]

[27] Mr Colbert, in his affidavit in opposition to the defendants' applications, says:

> Mr Russell has been assisting me with the preparation and prosecution of my case over the period. I have relied to a large extent on him proceeding with the case.
>
> Even though the case has not been prosecuted forcefully, I understand from Mr Russell that he is now in a position to give it far greater attention.
>
> I am prepared to work diligently to bring this matter to fruition so that a hearing on the merits can be obtained.
>
> [paragraphs 20-22]

[28] Have the intended plaintiffs provided a sufficiently convincing explanation of the reasons for their failure to prosecute their applications to prevent the intended defendants persuading the Court that their delay is proof of an absence of any real intention to proceed? Are the explanations genuine and therefore consistent with a continuing (if unacted upon) intention to prosecute the claims or are they no more than an effort to produce something which might persuade the Court to give the intended plaintiffs the benefit of the doubt, so forcing the defendants (should leave be granted) into the situation where they have seriously to consider settling the proceedings in order to avoid the cost and disruption attendant upon allowing them to go to trial?

[29] I have decided that I cannot dismiss the explanations given as clearly untruthful. I am therefore unable to make a finding that there has not been a continuing intention to prosecute the claims. That being so, I decline to make an order striking out the intended plaintiffs' applications for leave on the first ground of abuse alleged, namely that there is no intention to prosecute them to finality.

[30] So far as the second ground relied on by the first and second intended defendants for orders striking out the intended plaintiffs' applications is concerned (as to which see paragraphs [22][b] and [25] of this judgment), I am not persuaded that those principles justify the dismissal of the present applications as an abuse of the process of the Court. Although there may be difficulties attendant on the trial of these proceedings (if leave is granted to commence them), it cannot, in my view, be said that there is now no point to the proposed proceedings, as was the case in the *Ngai Tahu* case, ubi supra.

[31] I therefore dismiss the applications by the first and second intended defendants to strike out the intended plaintiffs' applications as an abuse of the process of the Court.

My findings: the applications to dismiss for want of prosecution

[32] Consistently with my ruling (in paragraph [18] above) that the Court has power, in the exercise of its inherent jurisdiction, to apply principles similar to those contained in r 478 of the High Court Rules to the plaintiffs' applications, notwithstanding that they are not proceedings, I approach my consideration of this group of applications on the basis of the same principles as were enunciated in relation to r478 and to proceedings by Eichelbaum CJ in *Lovie v Medical Assurance Society NZ Ltd* [1992] 2 NZLR 244.

[33] In *Lovie*, ubi supra, at 248/50-57, the former Chief Justice said:

> Turning to the principles applicable to the substantive issue, the applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since *New Zealand Industrial Gases Ltd v Andersons Ltd* [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed

[34] I have no doubt that, given the delay in taking even the first step to bring the proposed proceedings, ie making their applications for leave, the delay since the taking of that step by each of the intended plaintiffs has been inordinate. The applications were filed and served in June 1994. The preliminary objections taken to the applications by the intended defendants were determined by Smellie J in November 1994. Appeals were lodged in December 1994. The plaintiffs then failed to take any steps in the appeals for a period of over four years. The appeals were struck out for want of prosecution in April-May 1999. The plaintiffs then allowed a further eighteen months to pass before taking any further steps in the applications. When they did take steps, it was in response to the applications by the intended defendants.

[35] The cumulative period of delay of five and a half years since the commencement of these proceedings, without effective action by the intended plaintiffs, cannot be described as anything other than inordinate.

[36] The intended plaintiffs seek to excuse this delay by reference to the factors mentioned in Mr Russell's affidavit in opposition and quoted in paragraph [26] of this judgment.

[37] The matters deposed to by Mr Russell may explain, but they do not excuse, the delay. Clearly what has happened is that Mr Colbert has relied on Mr Russell to handle the proceedings and Mr Russell has chosen to direct his attention to other proceedings, to the exclusion of the applications under the Limitation Act 1950.

[38] So far as the question of serious prejudice is concerned:

[a] there is the obvious inherent prejudice (to the extent that oral evidence will be required at trial) that the memories of witnesses will have dimmed with the passage of time;

[b] specific prejudice is alleged to have been suffered by each of the remaining intended defendants.

[39] The intended first defendant alleges the following specific prejudice:

- Increased exposure for damages and costs, should the intended plaintiffs be given leave to proceed and be successful, because of the diminished pool of intended defendants

- Increased difficulty in assessing damage to reputation where that damage (if proved) has occurred 12-13 years before trial (as a minimum) rather than, say, 2-3 years before trial

- Increased exposure to damages (if liability is established) because of the rise in the upper level of damages for defamation cases over the period

(see, for example, *Television New Zealand Limited v Quinn* [1996] 3 NZLR 24 (CA)

- The death of Mr On Hing, who was the Official Assignee and Registrar of Companies in Auckland in 1988 and the intended second defendant's supervisor at the time of the alleged defamation, which makes it more difficult for the intended first defendant to establish a defence it believes it has to the plaintiffs' claims, namely that the intended second plaintiff exceeded the scope of his authority as an employee of the Department of Justice in making the statements which allegedly defamed the intended plaintiffs

Other allegations as to prejudice were made by the deponents of the intended first defendant; but I do not consider them to be of sufficient merit to require consideration.

[40] The intended second defendant alleges the following specific prejudice:

- The psychological pressure of having had the intended plaintiff's claims hanging over his head for nearly seven years

- The difficulties he will face in refreshing his memory as to the events, given that he is no longer a Government employee and the documentary material on which his statements were based is no longer within his control

- The death of Mr On Hing and his unavailability to give evidence which Mr Peterson contends "may well have established that he was at all material times aware and supportive of the actions I took in the course of the investigation and after it had terminated"

- The departure from New Zealand of Mr David Hellaby, then a Senior Investigative Reporter for "The Dominion" newspaper, the present lack of knowledge as to Mr Hellaby's whereabouts and lack of financial

means to ensure Mr Hellaby's attendance at any trial (should he be willing to attend)

[41] The intended fourth defendant alleges the following specific prejudice:

- The company ceased trading on 1 July 1989. Its directors and shareholders wish to reorganise its affairs but are unable to do so because of the continued existence of these proceedings

[42] The intended eighth defendant alleges the following specific prejudice:

- The matters relied on by the intended second defendant (see paragraph [40] of this judgment)

- The company was sold not long after the article on which the plaintiffs' claim against it are based was published and a large number of staff went overseas, in particular the author of the article and his editor, both of whom would be important at any trial

[43] In his affidavit in opposition to the intended defendants' applications, Mr Russell seeks to meet the arguments advanced by the intended defendants as to the effect of delay on their ability to formulate their cases in defence of any proceedings for which leave is given by arguing that the plaintiffs' cases will turn to a very large extent on documentary evidence, which should still be in existence. He does not, otherwise, seek to counter the evidence on behalf of the intended defendants.

[44] I find that the elements of specific prejudice relied on by the various intended defendants are real and substantial. In particular:

[a] I do not accept Mr Russell's contention that the outcome of these cases at trial (if leave were to be granted) would turn largely on documentary evidence. That documentary evidence has to be placed in the context of the overall situation at the time. That must, necessarily, in my view, involve oral evidence from those involved.

The intended first and second defendants are adversely affected by the death of Mr On Hing and by the dispersal of other departmental officers. Mr Peterson deposes that his ability to mount a defence is also affected by the departure to Australia of Mr David Hellaby and the fact that Mr Hellaby's present whereabouts are unknown. The intended eighth defendant is similarly affected and is also affected by the fact that the identity and whereabouts of the editor of the time is not known

[b] It will clearly be more difficult to assess accurately the damage to the plaintiffs' reputations after this length of time than it would have been had they brought their claims promptly;

[c] In addition there is a risk that, if the plaintiffs succeed, any damages awarded to them will be at a higher level than would have been the case had they brought their claims promptly;

[d] The psychological stress and the effect on an organisation's ability to conduct its affairs in the normal way of having claims such as this hanging over an individual's or organisation's head for an extended period has been recognised (in the case of medical negligence claims) in *Biss v Lambeth Health Authority* [1978] 2 All ER 125 (CA). This clearly applies to the intended second defendant and the intended fourth defendant.

[45] The remaining question is, Is it still possible for justice to be done?

[46] It is my view that it is no longer possible for justice to be done. I am of that view for the following reasons:

[a] As already noted, I do not accept that this is a case which can be determined effectively on documentary evidence;

[b] It follows that the unavailability of witnesses, whether due to death or otherwise, is very relevant, in particular for the intended first defendant, intended second defendant and intended fourth defendant;

[c] It is difficult to conceive how, after the passage of a minimum of 12 years after the alleged defamations, a jury can possibly assess accurately the damage suffered by the plaintiffs (should they establish liability).

[47] I therefore uphold the applications by the intended defendants for orders striking out the plaintiffs' applications for want of prosecution.

The intended plaintiffs' reliance on s 27 of the New Zealand Bill of Rights Act 1990

[48] Mr Warburton prayed in aid s 27 of the New Zealand Bill of Rights Act 1990 to argue that, at the very worst for the intended plaintiffs, the applications by the intended first defendant should be dismissed.

[49] s 27 of the Act reads as follows:

> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
>
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[50] I consider that there is nothing in the approach which I have adopted in the preceding sections of this judgment which infringes the intended plaintiffs' rights under that section.

Orders

[51] I therefore make the following orders:

[a] The intended plaintiff's application in CP254/94 is dismissed for want of prosecution.

[b] The intended plaintiff's application in CP258/94 is dismissed for want of prosecution.

[c] In each case the question of costs is reserved, on the following basis:

[i] Any intended defendant wishing to seek costs against the intended plaintiff in that case is to file and serve within 21 days of the date of this judgment a memorandum specifying the sum sought in respect of costs and the manner in which that sum is calculated, accompanied by such affidavit evidence as may be appropriate to justify calculation of the costs on the basis sought;

[ii] The intended plaintiff against whom any application for costs is made is to file and serve within 35 days of the date of this judgment a memorandum responding to the memorandum or memoranda filed and served by the intended defendants and stating and justifying the amount (if any) which that intended plaintiff accepts is properly payable by way of costs;

[iii] Any intended defendant who has applied for costs is to reply to any memorandum filed and served by the intended plaintiff by memorandum filed and served within 42 days of the date of this judgment.

[52] This judgment is signed at 8.41am on 6 June, 2001.

T Kennedy Grant.

MASTER T KENNEDY-GRANT