

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2012-404-33
[2012] NZHC 2190**

IN THE MATTER OF an application pursuant to the Criminal
Proceeds (Recovery) Act 2009
AND IN THE MATTER OF the Mutual Assistance in Criminal
Matters Act 1992

BETWEEN THE COMMISSIONER OF POLICE
Applicant

AND KIM DOTCOM
First Respondent

AND BRAM VAN DER KOLK
Second Respondent

AND MEGASTUFF LIMITED
Third Respondent

AND MONA DOTCOM
Interested Party

Hearing: 16 August 2012

Counsel: A Toohey and R Hearn for the Applicant
W Akel and R Gapes for First Respondent
A Lloyd for Interested Party

Judgment: 29 August 2012

**JUDGMENT OF POTTER J
on application by first respondent for variation
of restraining order**

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 1 p.m. on 29 August 2012.

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Introduction

[1] By application dated 26 July 2012 the first respondent, Kim Dotcom (Mr Dotcom) seeks:

- (a) An order varying the order for registration of the foreign restraining orders made on 18 April 2012 so as to exclude Mr Dotcom's investment of \$10m in New Zealand Government bonds from the properties and assets which are subject to that restraining order; and
- (b) An order for the sale of motor vehicles subject to the restraining order except the seven vehicles listed in a schedule attached to the application.

Because of concerns about the market generally and the Official Assignee's report dated 2 August 2012 filed as an attachment to the notice of opposition of the Commissioner of Police (the Commissioner) this application was varied in the course of submissions to seek an order for sale "on a gradual basis" of nine specified vehicles only (but not their number plates).

[2] The Commissioner opposes the order sought under [1](a) on various grounds stated under the headings "Legal fees", "186 Mahoenui Valley Road" and "Balance of Funds" (referring to the balance of the \$10m Government bonds).

[3] The Commissioner abides the decision of the Court under [1](b) to the extent that sale of some or all of the cars would better secure their value.¹

¹ An updated report from the Official Assignee foreshadowed at the hearing in the Commissioner's oral submissions is dated 17 August 2012 and was filed on 21 August 2012. The Official Assignee says that after reading the submissions of Mr Dotcom regarding the possible sale of restrained vehicles, with only nine cars being put forward for potential sale his preference would be to offer these vehicles for sale over a period of time with an appropriate marketing strategy for each vehicle. He states that his agents, Turners Auctions, would provide the most cost effective avenue for sale of these vehicles.

Background

[4] The Government of the United States of America seeks the extradition of the first and second respondents and Messrs Mathias Ortmann and Finn Batato on charges relating to the activities of the business of Megaupload Limited. It alleges that they were part of a conspiracy to commit racketeering, criminal copyright infringement and money laundering, to the value of US\$175m.

[5] Assets of the respondents are restrained under two foreign restraining orders issued in the United States and registered in New Zealand by this Court on 18 April 2012 pursuant to s 56 of the Mutual Assistance in Criminal Matters Act 1992 (MACMA). The restrained assets include \$10m in New Zealand Government bonds and motor vehicles the subject of this application, two properties at “The Prom” in Auckland (one of which is a residential property), specified bank accounts, electronic goods, jewellery and art work.

Court order dated 18 April 2012

[6] In a judgment dated 18 April 2012 (the April judgment)² I ordered that two foreign restraining orders issued in the United States on 10 January 2012 and 25 January 2012 relating to the assets of the respondents located in New Zealand be registered in New Zealand subject to:

- (a) The conditions set out in orders of this Court made on 29 February 2012 and 21 March 2012; and
- (b) Leave being reserved to the respondents with the consent of the applicant to apply for further conditions in relation to payments to be met out of the respondents’ restrained property for:
 - (i) payment of debts incurred by the respondents;
 - (ii) payment of the respondents’ legal expenses;

² *The Commissioner of Police v Dotcom* [2012] NZHC 634.

(iii) such further expenses as may be allowed by the Court.

[7] The conditions referred to in [6](a) above related to the release of certain of the restrained assets of Mr Van Der Kolk for living expenses, Megastuff Limited towards payment of creditors, Mrs Dotcom for medical and living expenses, and Mr and Mrs Dotcom:

- (a) as to the sum of \$20,000 per month for living expenses in satisfaction of their applications for living expenses pursuant to s 28(1)(a) of the Criminal Proceeds (Recovery) Act 2009 (CPRA). These payments were to be derived from interest on the \$10m Government bonds;
- (b) as to a maximum of \$40,000 per month from the RaboDirect account 03-1791-0122323-00 in the name of Kim Dotcom to a limit of \$301,758.70 available from that account.

[8] It provided that Mr and Mrs Dotcom could make further applications for any matter other than living expenses and that the above orders could be taken into account if such further applications were made.

[9] The conditions also provided for the release of specified vehicles for the use of Mr and Mrs Dotcom and Mr Van Der Kolk.³

The application

[10] Mr Dotcom's application is made pursuant to leave reserved by the April judgment as set out above⁴ and ss 35 and 134(1)(i) of the CPRA.

[11] Mr Dotcom identifies in affidavits dated 25 July and 9 August 2012, as further developed in counsel's submissions, that he seeks release from the restraining order of the \$10m New Zealand Government bonds so they may be used as security to raise a loan to pay the following expenses:

³ Minor amendments to the conditions have subsequently been made by consent, but none are material to the present application.

⁴ See above at [6](b).

1	Legal expenses:	
(a)	Legal expenses as at 24 July 2012 ⁵	\$2,695,000
(b)	Mrs Dotcom's legal expenses with MinterEllisonRuddWatts as at 2 August 2012	123,000
(c)	Provision for future legal costs	\$2-2,500,000
2	Expenses relating to the Dotcom Mansion at 186 Mahoenui Valley Road, Coatesville:	
(a)	Rent due 14 February 2012 - payable to A Lentino to repay a loan for the first quarter's rent \$250,000, and as to the balance to Lurcher Limited, the landlord \$750,000	\$1,000,000
(b)	Rent due 14 February 2013	\$1,000,000
(c)	Property maintenance 27 February 2012 - 15 June 2012 ⁶	\$ 179,735.15
3	Rothken Law Firm (Mr Dotcom's US lawyers) for fees, travel and accommodation expenses	\$ 300,000
4	Megastuff Limited creditors	\$ 530,000
5	Diggory Brooke, Megastuff's accountant (provisional)	\$ 51,500 plus GST
6	Tax	\$ 61,000

Mr Dotcom's assets and liabilities

[12] At my direction, following the hearing of the application, Mr Dotcom filed an affidavit sworn 20 August 2012 setting out to the best of his information and belief his assets and liabilities, and identifying those assets that are subject to restraining orders in New Zealand and elsewhere.

⁵ The amount claimed is for the legal expenses of Mr Davison QC, Mr Foley (counsel for Mr Van De Kolk and Mr Ortmann and Mr Batato) and Simpson Grierson who are solicitors for all respondents in this proceeding and for Mr Ortmann and Mr Batato. (Mr Ortmann and Mr Batato are not parties to this proceeding but are parties to other proceedings to which the legal costs relate). At paragraph 123 of the memorandum of counsel in support of the application dated 26 July 2012 there is reference to \$82,400 having been paid "by an overseas supporter". It is unclear whether this payment has been taken into account in the amount of \$2.695m claimed for legal fees.

⁶ In oral submissions Mr Akel referred to the schedule of expenses totalling \$179,735.15 annexed to the affidavit of Mr Dotcom sworn 25 July 2012 as evidencing expenditure of about \$40,000 per month in respect of the Dotcom Mansion property requiring an estimated total of \$480,000 for maintenance costs in respect of each of the 2012 and 2013 years.

[13] Mr Dotcom lists the items referred to in schedule 1 attached as assets that have not been restrained in New Zealand.⁷ The Commissioner submits that the list is inadequate as no values are provided “and some of the descriptions are unhelpfully vague”. Mr Dotcom says that some of the assets do not have a quantifiable value and it is unlikely that items such as second hand furniture and chattels would have any significant value on sale.

[14] Given the extent of the property restrained I tend to the view that if any of the property identified as unrestrained had any significant value it would already have been restrained or become the subject of a further application for restraint. Neither Mr Dotcom nor the Commissioner has identified any property in this category. On the basis of the information available, I do not consider that the items identified by Mr Dotcom as unrestrained in New Zealand would, if sold, make anything other than a very limited contribution towards the significant expenses claimed.

[15] Annexed to this affidavit is a copy of an affidavit of Glenn Alexander, a Trial Attorney with the United States Department of Justice dated 13 February 2012. At paragraph 11 he refers to a number of overseas assets characterised as “forfeitable” and said to be “not insubstantial” which, for various reasons, including “logistical challenges”, were not seized. In an affidavit of Jay Prabhu of the United States Attorney’s office in Virginia, dated 22 August 2012, also states that these items have not yet been seized, but are “forfeitable” in the United States.

[16] These assets include a 2010 Rolls Royce Phantom Coupe, a 1989 Lamborghini and a Harley Davidson motor cycle. Mr Dotcom says in his affidavit that he assumes these items had been restrained or had now been seized.

[17] By memorandum dated 23 August 2012, the Commissioner accepts that while these assets are not restrained and therefore the Court must take them into account,⁸ the Commissioner does not suggest that they be sold to pay expenses arising in New Zealand.

⁷ I note the Commissioner claims that the personalised number plates are restrained property being attached to the restrained motor vehicles.

⁸ Under s 28(3) of the CPRA.

[18] Mr Dotcom also refers in his affidavit to debts he has incurred in New Zealand and other jurisdictions, including significant amounts for legal costs.

Statutory framework

[19] The Court's jurisdiction to place conditions on and vary registered foreign restraining orders is defined by ss 28 and 33-36 of the CPRA. These provisions apply to foreign restraining orders registered under s 54 of the MACMA by virtue of s 134(1)(d) and (h)-(j) of the CPRA. The only provision that does not apply is s 28(2), which prevents the Court from allowing legal expenses to be met out of restrained property.⁹ This specific exclusion indicates that legal expenses may be met out of property restrained under a foreign restraining order.

[20] Leave was reserved, by consent, for the respondents to apply for further conditions in relation to payment of debts, legal expenses and such further expenses as may be allowed by the Court, to be met out of Mr Dotcom's restrained property.¹⁰

[21] These conditions may be made under s 28 of the CPRA:

28 Conditions on restraining order

- (1) A court may make a restraining order subject to any conditions the court thinks fit including, without limitation, conditions that provide for the following to be met out of a respondent's restrained property:
 - (a) the reasonable living costs of the respondent and any of his or her dependants:
 - (b) the reasonable business expenses of the respondent:
 - (c) the payment of any specified debt incurred by the respondent in good faith:
 - (d) any other expenses allowed by the court.

[22] Mr Dotcom also relies on s 33(1), which provides that further orders may be applied for by the applicant for the restraining order, a person with an interest in the restrained property, or any other person with the leave of the court.

⁹ Under s 134(1)(d) only s 28(1), (3), and (4) apply to applications relating to foreign restraining orders.

¹⁰ See above at [6](b).

[23] Under s 34, on an application under s 33(1), the Court “may, if it considers it appropriate, make further orders in relation to the restrained property (which may, but need not, be an order of any 1 or more of the types referred to in section 35).” A further order may be made at any time before the expiry of the associated restraining order.

[24] Section 35 provides a non-exhaustive¹¹ list of the types of further orders that the Court may make. These include, relevantly, an order varying the restrained property to which the order relates, an order varying any condition to which a restraining order is subject, and an order relating to the Official Assignee that regulates the manner in which s/he may exercise his or her powers or duties or directs him or her to sell restrained property to preserve its value.¹²

[25] Section 36 sets out the impact of those orders. The only part of s 36 that is likely to be relevant here is subs (4), which provides that the proceeds of a sale of restrained property by the Official Assignee are restrained property.¹³

Legal expenses

[26] Mr Dotcom has applied for the release of funds to meet legal expenses. The Commissioner accepts that the Court has power to impose conditions on the restraining order to provide for payment of legal costs out of restrained funds. The issue between the parties is the nature and extent of those costs.

Submissions

[27] Mr Dotcom submits that funds may be released to meet legal expenses that are not subject to a reasonableness requirement or judicial oversight, but are subject to the limits of wastefulness and dishonesty. It is submitted that the CPRA grants the Court significant latitude to make any orders it considers appropriate, and that this

¹¹ This follows from the wording of s 34(1): “which may, *but need not*, be an order of any 1 or more of the types referred to in section 35”, and s 35: “*Without limiting the generality of section 34(1)*, a court may, on an application under section 33(1), make 1 or more of the following further orders ...”

¹² Section 35(a), (b), (e), respectively.

¹³ See also s 12(2) to like effect in relation to foreign restrained property.

wide jurisdiction should not be artificially constrained. This is supported with Mr Dotcom's interpretation of ss 28(1)(d) and 34(1) in the context of the overall statutory scheme, the New Zealand Bill of Rights Act 1990, and *Solicitor General v Panzer*¹⁴ and *Director of Public Prosecutions v Vella*.¹⁵

[28] The Commissioner is not opposed to the release of funds to pay Mr Dotcom's legal costs, but submits that the amount claimed is excessive and evidentially deficient. As the release of funds to meet "excessive legal fees" would be contrary to the restraining order regime and the contingent public interest in the restrained funds, he submits that "judicial scrutiny or oversight as to reasonableness" is required. He supports these submissions with his interpretation of s 28(1)(d) alongside the legislative history of the CPRA and comments made in *Vella* and *Panzer*. He notes that in a domestic context, it is expected that defence costs will be met by unrestrained property and/or legal aid, and submits there is no indication in the legislation that it was intended that indemnity costs would apply in an international context.

Issues

[29] The broad issue is one of statutory interpretation: is the omission of the word "reasonable" from s 28(1)(d) to be interpreted as excluding a reasonableness requirement, or should a reasonableness requirement be read into the provision, at least in the context of legal costs, to accord with s 28(1)(a)-(c)?

[30] This issue may be considered by reference to the principles distilled from *Panzer* and *Vella*, in light of Mr Doctom's rights under NZBORA.

Case law

[31] The parties' disagreement on the interpretation of s 28(1)(d) relates to the Commissioner's reliance on *Panzer*, which was based on legislation that included a

¹⁴ *Solicitor-General v Panzer* [2001] 1 NZLR 224.

¹⁵ *Director of Public Prosecutions v Vella* (1993) 61 SASR 379.

requirement that legal costs be reasonable; and Mr Dotcom's reliance on *Vella*, which involved legislation that did not include this requirement.

[32] *Vella* is a decision of the Full Court of the Supreme Court of South Australia. The defendant in that case was committed for trial for the manufacture of methamphetamine. He owned three properties, which were held under restraining orders that were subsequently varied to permit the sale of the properties. The proceeds were restrained in a bank account. The defendant applied for a variation of that order under the Crimes (Confiscation of Profits) Act 1986 for access to the restrained funds in order to pay his legal costs. The relevant issue was the determination of the amount for legal expenses that it was appropriate to release. Similarly to s 28(1)(d), the Crimes (Confiscation of Profits) Act vested the Court with a general discretion to release funds for the "payment of specified expenditure", which included legal costs.

[33] King CJ identified the fundamental principle "that a person accused of crime is entitled to employ, out of his own resources, the legal representation of his choice".¹⁶ He emphasised the importance of this principle by reference to the following passage from *Director of Public Prosecutions v Saxon*:¹⁷

Australia is a party to the International Covenant on Civil and Political Rights. It is now a party to the Optional Protocol of that Covenant. Under Art 14.3(d) of the Covenant in the determination of a criminal charge against a person he is entitled to the 'minimum guarantee' (relevantly) to 'defend himself ... through legal assistance of his own choosing'.

[34] This right had to be balanced against the fact that the property may be the property of another:¹⁸

It is, ostensibly, [the accused's] own property which is restrained by the orders made under the Act. How he accumulated that property may be a matter of speculation. Doubtless it may be the subject of evidence and argument as his criminal proceedings unfold. But he should not be deprived of the use of his property for the proper defence of those proceedings unless the Act so obliges such a course.

¹⁶ At 381.

¹⁷ *Director of Public Prosecutions v Saxon* (1992) 28 NSWLR 263 at 274 (cited at 381).

¹⁸ *Ibid.*

[35] King CJ afforded greater weight to the former principle and rejected the Solicitor-General's submission that access to the restrained property for legal expenses should be limited by reason of the State's contingent interest. He considered that the restrained property was not part of a potential compensatory fund or property of which the State may have been deprived by the alleged offending. The purpose of the legislation was to deny the offender the fruits of his criminal activity, with the State receiving the funds as a by-product of that purpose. The purpose was not defeated by the accused's access to his property to the extent necessary to secure legal representation of his choice:¹⁹

If he is found not guilty, he has merely used his own money. If he is convicted and an order for forfeiture is made, the amount of the legal expenses, although not available for forfeiture, is nevertheless money of which the offender has been deprived by the proceedings... An expensive defence, which does not go to the point of being wasteful, is not to be thought of as a luxury to which an accused person is not entitled out of property subject to forfeiture. The importance of a professionally conducted defence in our adversarial criminal justice system has recently been stressed by the High Court ... It is an assumption of the adversarial system that the more highly skilled the presentation of the case on either side, the more likely it is that a just result will be achieved.

In general, I consider that the defendant should be entitled to engage the solicitor and counsel of his choice and to have his defence conducted in the manner which he and his legal advisers wish. He should have access to his property to the degree necessary for that purpose, that is to say to the degree necessary to pay the fees ordinarily charged by the solicitor and counsel of choice for a case of this kind.

[36] King CJ concluded that it was not the Court's role to regulate the fees charged on the basis of reasonableness; but that it should ensure that the restrained property is not depleted wastefully or dishonestly.

[37] Olsson J weighed the principles in a similar way, observing that in circumstances where the merits of an application are "unresolved and unresolvable", the Court should favour the construction of the Act that causes "the least potential injustice upon an alleged offender", especially "where that hardship goes directly to [his] capacity ... to mount a proper defence to a serious criminal charge".²⁰

¹⁹ At 382.

²⁰ At 387.

[38] However, Olsson J said that it would “clearly be inappropriate for the Court to confer a *carte blanche*”, and that the quantum of legal costs must be carefully evaluated. He considered that this evaluation should be context and facts-based, as it would be inappropriate and impractical to adopt a rigid policy. As a result, the Court required evidence that the defendant would be unable to secure a proper defence without release of the funds, or that this would cause undue hardship. This necessitated a full disclosure of the defendant’s assets, liabilities, and other interests.²¹

[39] *Vella* was considered in *Panzer*, a decision of the Full Court of the High Court of New Zealand. The respondent in *Panzer* applied to vary a restraining order to meet his “reasonable expenses in defending any criminal proceeding” under the Proceeds of Crime Act 1991 (the predecessor to the CPRA). The Proceeds of Crime Act provided for funds to be released to meet the respondent’s “reasonable expenses in defending any criminal proceedings”.

[40] The Court referred to a distinction drawn in *Director of Public Prosecutions v Saxon* between an accused allegedly “caught red-handed with the funds of others” and an accused who may well have an interest in the restrained property. There is a stronger argument in favour of making an order releasing the funds in the latter case.²² The Court identified the deterrent aim of the Proceeds of Crime Act and the potential public interest in the restrained funds, which had to be balanced against the defendant’s right of access to an adequate defence. It cited a lengthy passage from *Vella* that discussed the importance of the defendant’s right,²³ and noted that the reasoning in *Vella* was approved by Chambers J in *Solicitor-General v Nathan*.²⁴ However, while agreeing broadly with King CJ’s approach, the Court distinguished *Vella* on the basis that the Proceeds of Crime Act specifically required an assessment of the reasonableness of the fees allowed and the defence provided.²⁵ The Court went on to undertake such an assessment and to provide guidelines for assessing reasonable fees in such cases.

²¹ At 388.

²² At [12].

²³ At [16], citing *Vella* at 382.

²⁴ *Solicitor-General v Nathan* HC Auckland M483-IM99, 12 February 2001 (cited at [17]).

²⁵ At [17].

Application

[41] Section 28(1)(d) of the CPRA does not include a specific requirement that legal fees be reasonable. It is drafted in broadly similar terms to the provision of the Crimes (Confiscation of Profits) Act that was considered in *Vella*. The presence or absence of a reasonableness requirement was critical to the analysis and outcome in both *Vella* and *Panzer*. *Vella* distinguished previous cases that were based on provisions that included a reasonableness standard;²⁶ and was, in turn, distinguished in *Panzer* on the basis that the provision it considered did not include a reasonableness requirement. Following this approach, the reasoning in *Panzer* should only be applied if a reasonableness requirement should be read into s 28(1)(d).

[42] The Commissioner submits that as s 28(1)(a)-(c) of the CPRA incorporates reasonableness requirements, subs (d) should be interpreted in the same way, following the *ejusdem generis* principle. Mr Dotcom replies that if the legislature intended to confine the Court's consideration of "other expenses", it would have stated "other reasonable expenses" as it did in the Proceeds of Crime Act; and that the omission to do this in s 28(1)(d) of the CPRA indicates that it intended that the power be broadly exercised.

[43] Under s 28, the Court has a wide discretion to make a restraining order "subject to any conditions the court thinks fit, including, without limitation", provision for the costs and expenses listed in the subsections to be met out of the restrained property. To read in the word "reasonable" in s 28(1)(d) would significantly limit this wide discretion, and compelling reasons will be required to support its inclusion. In this context, such reasons would include those which point towards the importance of the preservation of the State's contingent interest in the restrained property and away from Mr Dotcom's right to access of counsel of his choice.

²⁶ At 381-382. The cases were *Director of Public Prosecutions v Saxon* (to the extent that the reasoning applied to the reasonableness standard) and *NSW Crime Commission v Fleming* (1991) 24 NSWLR 116.

[44] The *Director of Public Prosecutions v Saxon* distinction mentioned in *Panzer*²⁷ is relevant in this case. Both the State and Mr Dotcom have a contingent interest in the restrained funds. The funds are Mr Dotcom's, though restrained by the State. Mr Dotcom has not been "caught red-handed with the funds of others". If Mr Dotcom is proved guilty, the State will receive the restrained funds as a financial windfall – the funds would not repay the State or form a compensatory fund.²⁸ Following *Panzer* and *Vella*, there is a stronger argument in favour of the release of the funds where the restraint and potential confiscation would deny the alleged offender his own property (subject to the contingent interest of the State), rather than the fruits of his criminal activity.

[45] Mr Dotcom's rights under the NZBORA and the International Covenant on Civil and Political Rights further tip the balance in his favour.²⁹ The State's contingent interest in the restrained property is of a punitive nature and limited to depriving Mr Dotcom of the fruits of his alleged offending. In contrast, Mr Dotcom's access to counsel is supported by his rights to natural justice,³⁰ to be presumed innocent until proven guilty,³¹ and to consult and instruct a lawyer and to have adequate time and facilities to prepare a defence.³² It is generally assumed that the right to access defence counsel includes the right to counsel of the defendant's choice (though exceptions apply to legally-aided persons).³³

[46] In this case, there is no evidence that this right has been exercised in an irresponsible manner. Mr Dotcom has been obliged to respond to the proceedings initiated by the United States authorities and there is no evidence that he has unnecessarily prolonged the proceedings or otherwise acted irresponsibly in relation to his defence.

²⁷ See above at [39].

²⁸ See also *Vella* at 382, per King CJ.

²⁹ Where legislation can be interpreted consistently with rights guaranteed by the New Zealand Bill of Rights Act 1990, that interpretation should be preferred (ss 4-6).

³⁰ Section 27(1).

³¹ Section 25(c) and (e).

³² Section 24(c) and (d).

³³ See *Clee v Attorney-General* HC Auckland CIV-2010-404-7101, 12 November 2010 at [89]-[96]. See also *Vella* at 382, cited in *Panzer* at [16].

[47] The contextual factors identified above are heavily weighted towards Mr Dotcom's right of access to counsel of his choice and are not counterbalanced by the State's concern in preserving its contingent interest. Thus, in terms of the interpretation of s 28(1)(d), I do not consider that there are any strong principles that would direct the Court towards reading a reasonableness requirement into s 28(1)(d).

[48] In the absence of a reasonableness requirement, the *Vella* approach is applicable to s 28(1)(d).³⁴ I conclude that Mr Dotcom should be allowed access to his restrained property to pay legal expenses relating to his defence on a solicitor and client basis, provided that the costs are not wasteful or dishonestly incurred and claimed.

Section 28 (3) of the CPRA

[49] Acceptance of the *Vella* approach necessitates an enquiry into "such amount as is necessary to fund an adequate, but not extravagant, defence of the criminal proceedings in question". But there is a preliminary matter to be determined. Olsson J said:³⁵

... I have no difficulty with the proposition that, in general, funds ought not to be released unless and until the Court is satisfied that it is, indeed, the situation that an applicant will otherwise not be able to fund a proper defence at all, or will only be able to do so with undue hardship and difficulty. Clearly a full disclosure will need to be made, in each instance, as to the residual assets and liabilities of the person concerned and any funds which that person might indirectly control. ...

[50] The disclosure requirement is reflected in the mandatory consideration in s 28(3):

- (3) In determining whether or not to make a restraining order subject to a condition, the court must have regard to the ability of a respondent to meet the reasonable living costs, expenses, or debt concerned out of property that is not restrained property.

³⁴ This also accords with the comments made in *Panzer* at [17].

³⁵ *Vella* at 388.

[51] I refer to the previous section in this judgment under the heading “Mr Dotcom’s assets and liabilities.”³⁶ On the basis of the evidence and information available to the Court, the unrestrained assets of Mr Dotcom in New Zealand are unlikely to have any significant value. Unrestrained overseas assets, said to have a “not insubstantial” value,³⁷ are not available to pay legal expenses in New Zealand.

[52] On any view of the matter, the legal proceedings in which Mr Dotcom has been involved to date in responding to the charges and processes of the United States authorities in New Zealand have been significant, complex and in many respects novel. The associated legal expenses, on whatever basis they are assessed, will be significant.

[53] On the available information I conclude, without difficulty, that Mr Dotcom does not have the ability to meet, or make a meaningful contribution to, his legal expenses from unrestrained property available or accessible for that purpose.

Appointment of an independent Queen’s Counsel

[54] I turn to the issue of the quantum of legal costs to be funded. In *Vella Olsson J* said:³⁸

Secondly, it would clearly be inappropriate for the Court to confer a *carte blanche* on Vella, if he truly has no means of otherwise funding his defence. Once again, bearing in mind the intention of the legislature, the quantum of legal costs to be funded – both as to the daily and hourly rates and specific cost items on which they ought to be based and also their ultimate total amount needs to be the subject of careful evaluation and oversight. In that regard I do not think that it is appropriate, or even practical, for the Court to adopt any rigid policy applicable to all cases.

The circumstances of each case will necessarily dictate the proper mode of exercise of discretion. There will need to be a reasonable balancing of the consideration of promoting the reasonable freedom of an offender to seek representation of his or her own choosing, on the one hand, with the need to ensure that assets potentially subject to forfeiture are not unduly dissipated on the other.

³⁶ See above at [12]-[17].

³⁷ See above at [15].

³⁸ *Vella* at 388.

[55] The Commissioner accepts that there is no issue as to the bona fides of the legal expenses claimed.

[56] Counsel for Mr Dotcom have provided the Court with lengthy submissions, explanations and documentary evidence concerning the complexity of the legal issues and the amount of research, preparation, and Court time that the proceedings have demanded. However, the Commissioner says that he is unable to comment on the wastefulness or otherwise of the legal expenses due to the lack of invoices and other specific evidence.

[57] While these proceedings have clearly required experienced counsel and involved required considerable time and effort, which would be reflected in significant fees, it is not clear how the Court could properly or appropriately evaluate quantum on the basis of assertion alone. I agree with the comments of Olsson J, as well as the submissions of the Commissioner, that further evidence is required relating to the assessment of the legal fees claimed, and that the process requires some oversight. Mr Dotcom and his lawyers cannot be given a carte blanche.

[58] However, I do not consider that this determination should be made by the Court. Not only is there the issue of the legal costs presently claimed but these proceedings are ongoing and there will be the need for assessment of future legal expenses. A practicable independent supervisory jurisdiction needs to be established that can be applied on an ongoing basis.

[59] I consider an appropriate solution is to appoint an independent Queen's Counsel to review the fees and disbursements charged to Mr Dotcom and to report the result of his or her assessment to the Official Assignee, Mr Dotcom and the Commissioner. Such an approach was taken in *Re Simpson & Ors*³⁹ where, as in this case, the history of the matter and the ongoing situation required a mechanism to ensure oversight of the fees incurred.⁴⁰

³⁹ *Re Simpson & Ors (statutory managers of Allan Hubbard & Margaret Hubbard)* HC Timaru CIV-2010-476-581, 17 March 2011.

⁴⁰ At [48].

[60] I consider that this process enables the competing interests in this case to be fairly balanced and sufficiently meets the Crown's concern as to the lack of evidence provided in relation to the legal expenses claimed.

Criteria

[61] The criteria by which the independent Queen's Counsel should be guided include, but are not limited to the following:⁴¹

- (a) The amount expended should be appropriate to fund an adequate, but not extravagant, defence of the proceedings in question.⁴²
- (b) Mr Dotcom is entitled to engage counsel of his choice and to have his defence conducted in the manner in which he and his legal advisors wish.⁴³
- (c) An expensive defence, which does not go to the point of being wasteful, is not a luxury to which Mr Dotcom is not entitled.⁴⁴
- (d) The fees should not be such as to deplete wastefully or dishonestly the restrained property in which there is a contingent public interest.
- (e) Reference should be had to –
 - (i) The fees in the range ordinarily charged by the solicitor and counsel of choice for the class of work and for a case of the kind in question.⁴⁵

⁴¹ I also note for the attention of the supervising Queen's Counsel, the requirement in [72] below, and the factual check required relating to \$82,400 paid, referred to in Fn 5 above.

⁴² *Vella* at 387-388.

⁴³ *Ibid* at 382

⁴⁴ *Ibid*.

⁴⁵ *Ibid*.

- (ii) The factors referred to in rule 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which are attached as schedule 3.⁴⁶

Costs of supervising Queen's Counsel

[62] The costs of the Queen's Counsel in exercising this supervisory jurisdiction shall be a first charge on the fund ordered by this judgment as a provision for future legal expenses.⁴⁷ The costs shall be reasonable for the work undertaken. The account shall be rendered by the Queen's Counsel to the Official Assignee and copied to Mr Dotcom and the Commissioner. The Official Assignee shall forthwith pay the account from the fund provided for future legal expenses but shall not at any time pay more than at that time is available from such fund. If either party disputes the reasonableness of the costs, leave is reserved for further direction to be sought from the Court, but payment of the account rendered shall not be delayed pending determination of any such application.L

Legal expenses of co-defendants

[63] Mr Dotcom has applied for funds to be released from his restrained property to meet the legal expenses of his co-defendants, Messrs van der Kolk, Ortman, and Batato, whose assets and property are restrained worldwide. They and their counsel have been involved in the majority of the hearings to date, with Simpson Grierson acting as instructing solicitors. Mr van der Kolk's funds are restrained in New Zealand, with an allowance for living expenses. I am advised that Mr Ortman and Mr Batato have no unrestrained assets or funds, as their application to release funds in Hong Kong has been unsuccessful.

[64] While acknowledging that s 28(1) may be directed to his legal expenses, Mr Dotcom seeks the release of the bond so that he can pay "all outstanding legal fees",

⁴⁶ The factors in rule 9 are directed to determining the "reasonableness of a fee in respect of any service provided by a lawyer to a client". The determination required in this case is not the "reasonableness" of the fees charged, but the factors in rule 9.1, not all of which will be applicable in this case, should be considered in assessing the fees charged in accordance with the criteria set out in this paragraph.

⁴⁷ See below at [79]-[83].

including those of his co-defendants. He submits that all of the hearings and associated attendances on his behalf have involved his co-defendants. Counsel for Mr Dotcom advances a general submission that s 34(1) of the CPRA provides the Court with a broad discretion to make further orders that the Court considers appropriate, which may include the co-defendants' legal expenses.

[65] The Commissioner opposes the release of funds to meet the co-defendants' legal expenses. He says that the portion of Simpson Grierson's fees that is attributable to them is not specified; that no authority is cited for the use of restrained property to meet their legal fees; that the co-defendants have substantial restrained assets of their own, either in New Zealand or overseas; and that s 28(1) applies to Mr Dotcom's funds, and Mr Dotcom's sense of responsibility to his co-defendants cannot provide the basis for the release of funds.

[66] Two issues arise: does the Court have jurisdiction under the CPRA to release the funds of one defendant to cover the legal expenses of his co-defendants; and if so, would it be appropriate to do so here?

[67] The jurisdictional issue is, again, one of statutory interpretation. The application appears to be made under the wide s 28(1)(d) provision "any other expenses allowed by the court." However, as a matter of statutory interpretation, this is unlikely to be successful. The wording of s 28(1) is directed towards the respondent's living costs, expenses and debts. The only other persons identified are the respondent's "dependants", defined as his or her "child" or "a member of [his or her] household". These dependants are those who would experience financial hardship as a direct result of their personal relationship with the defendant, and are conceptually distinct from unrelated co-defendants. There is no principled basis to extend s 28(1) to include Mr Dotcom's co-defendants.

[68] The general reliance of counsel for Mr Dotcom on s 34(1) requires consideration of s 33(1):

33 Applying for further orders

- (1) An application for a further order may be made by—
 - (a) the applicant for the restraining order with which the further order is associated; or
 - (b) a person with an interest in the restrained property or proposed restrained property with which the further order is associated; or
 - (c) the Official Assignee; or
 - (d) with the leave of the court, any other person.

[69] Section 33(1) is drafted in wider terms than s 28(1). It defines the persons who can apply for further orders, and subs (1)(b) and (c) make it clear that these may include third parties. While the co-defendants do not have an interest in Mr Dotcom's restrained funds, they have an ongoing and relevant interest in the proceedings. These interests have been represented by counsel alongside Mr Dotcom's interests. It may be consistent with the Court's broad powers under ss 34-35 to read subs (1)(d) as including Mr Dotcom's co-defendants.⁴⁸

[70] However, the Court may only make orders under s 34 where an application has been made under s 33(1). No such application has been made by the co-defendants in these proceedings; and the Commissioner has had no specific application to answer.

[71] That aside, I am not persuaded that funds of Mr Dotcom in which the State has a contingent interest should be released to pay the legal expenses of his co-defendants (some of whom are not parties to these proceedings). I acknowledge that the co-defendants being also represented by Mr Dotcom's lawyers, Simpson Grierson, and his counsel Mr Davison QC, when their interests in relation to the various proceedings have coincided or been consistent, is a sensible strategy which is likely to have had inherent costs savings. However, the State's contingent interest in

⁴⁸ Comments regarding the latitude of ss 34 and 35 were made in *Chanwai v Commissioner of Police* HC Rotorua CIV-2010-463-544, 31 March 2011 at [11]-[12], though the Court in that case declined to apply s 35(c) in that case.

Mr Dotcom's restrained funds cannot be made subservient to Mr Dotcom's sense of obligation to his co-defendants.

[72] Accordingly it will be necessary for the supervising Queen's Counsel to ensure that the legal expenses claimed in respect of Mr Dotcom do not include services that relate to the co-defendants, as distinct from Mr Dotcom.⁴⁹ Mr Foley's legal expenses may not be met from Mr Dotcom's restrained funds.⁵⁰

Legal expenses of Mrs Dotcom

[73] Mrs Dotcom has an interest in Mr Dotcom's restrained property under the Property (Relationships) Act 1976. This is not in dispute. In this respect her position differs from the position of the other respondents and co-defendants of Mr Dotcom. Mrs Dotcom has not been charged with any offence. However, appropriately, she has had separate legal representation by MinterEllisonRuddWatts who on her behalf have been involved in general oversight of the proceedings and in applications to the Court for release of funds for living expenses for herself and others who are dependants of Mr Dotcom and in respect of her personal property.

[74] Mrs Dotcom states in an affidavit dated 2 August 2012 that her legal expenses to date with MinterEllisonRuddWatts are \$123,000. She supports Mr Dotcom's application for the release of the \$10m NZ Government bonds and seeks that from the proceeds of the proposed borrowing on the security of the bonds, her legal expenses be paid.

[75] While acknowledging that because Mrs Dotcom has an interest in the restrained funds her legal expenses could be funded from that source, the Commissioner noted the absence of any formal application and was concerned that the sum claimed, \$123,000, must be subjected to appropriate oversight.

[76] Mrs Dotcom is entitled under s 33(1)(b) to apply for further orders from the Court, she being a person with an interest in the restrained property. Though she has

⁴⁹ Legal expenses appropriately incurred by Mr Dotcom which also had relevance for one or other or all of the co-defendants, should not, for that reason alone, be excluded.

⁵⁰ The quantum of Mr Foley's fees has not been advised.

not made a formal application under s 33(1), Mr Dotcom and the Commissioner are aware of the nature of her application and responded to submissions by her counsel, Mr Lloyd, at the hearing. The Court has a broad discretion to make further orders under s 34 in relation to the restrained property.

[77] I conclude that Mrs Dotcom should be allowed access to Mr Dotcom's restrained property to pay her legal expenses assessed on the same basis as Mr Dotcom's legal expenses, so far as the criteria are applicable to Mrs Dotcom and her situation. The quantum of such expenses will be subject to the oversight of the supervising Queen's Counsel upon the same terms and conditions as by this judgment are to apply to the legal expenses claimed by Mr Dotcom.⁵¹

[78] This basis for assessing Mrs Dotcom's legal expenses recognises the jeopardy and urgency she has faced, along with Mr Dotcom, in relation to these and related proceedings. It should not be treated as a precedent or indication in respect of any future legal expenses she may incur.

Provision for Mr Dotcom's future legal expenses

[79] Mr Dotcom seeks provision for future legal expenses on the basis that there will be major ongoing attendances, given that the Commissioner has either filed a notice of appeal or indicated a firm intention to appeal Winkelmann J's judgments in the search warrants case, that uphold the decision of Judge Harvey ordering disclosure in the extradition proceeding, and should it be adverse to the prosecuting authorities, her judgment following the remedies hearing. The extradition hearing is tentatively set down for three weeks commencing on 25 March 2013. Counsel for Mr Dotcom notes the possibility of appeals arising from that hearing also. Mr Dotcom seeks to have set aside an amount in the vicinity of \$2-2.5m on account of future legal expenses. He submits that jurisdiction exists within the leave reserved provision of the April judgment and under s 34(1) of the CPRA.

⁵¹ See above at [54] to [62].

[80] The Commissioner submits on the authority of *Panzer*, that it would be only in exceptional and unusual circumstances that a payment of a lump sum was appropriate.⁵²

[81] I agree that the broad discretion vested in the Court to make further orders varying any condition to which a restraining order is subject permits an order of the kind sought by Mr Dotcom. I consider this is an exceptional and unusual case.

[82] However, any amount for future legal fees is necessarily speculative. If legal proceedings are ongoing to the extent that provision made for future legal expenses is exhausted, Mr Dotcom will need to make a fresh application to the Court. However, given the orders I will make which allow for borrowing on the security of the \$10m New Zealand Government bonds to fund payments authorised by this judgment, it is sensible that some reasonable provision be made for future legal expenses to avoid the necessity for further Court applications and further borrowing on the security of the bonds to cover legal expenses in the near future.

[83] I therefore order that \$1m be set aside as a fund for Mr Dotcom's future legal expenses. Payment of legal expenses from this fund will be subject to the same supervisory jurisdiction as current legal expenses. Any future legal expenses claimed by Mr Dotcom's legal advisers must be reviewed by the supervising Queen's Counsel and paid by the Official Assignee, in accordance with the criteria and process set out above. Any part of the fund for future legal expenses which is unexpended shall be held by the Official Assignee on interest bearing deposit.

[84] For the avoidance of doubt, this provision does not apply to Mrs Dotcom. The foreshadowed legal proceedings do not relate to her.

⁵² In *Panzer* that observation was made concerning a lump sum for future living expenses.

Expenses relating to 186 Mahoenui Valley Road, Coatesville

The lease

[85] The property at Mahoenui Valley Road, Coatesville, which I shall call “the Dotcom Mansion” is leased from Lurcher Limited by Vestor Limited, a Hong Kong based company of which Mr Dotcom is the sole shareholder and director. The lease is dated 17 December 2009 and is guaranteed by Mr Dotcom under a previous name “Tim Vestor”. The lease adopts the Auckland District Law Society 2008 (5th edition) form of lease, with amendments. The premises are described in the first schedule as 186 Mahoenui Valley Road, Coatesville. The term of the lease is three years from 14 February 2010, expiring on 12 February 2013. The rent is \$1m per annum payable annually in advance on 14 February in each year. The “Business Use” for the premises is stated to be “Occupation as a residence by the Guarantor, Tim Vestor and his immediate family”.

[86] Clause 46 provides a right for the tenant to terminate the lease on three months prior written notice but the tenant will not be entitled to a refund of any prepaid annual rental on exercise of its right of early termination.

[87] Clause 47 relates to improvements which require the landlord’s prior written consent. By clause 48 ownership of all improvements passes to the landlord at no cost. Mr Dotcom says that he has spent \$6.5m on improvements to the property, made with the landlord’s consent.

[88] Clause 49 refers to an option deed (to which I shall return shortly), and provides for termination of the lease on settlement date as defined in the option deed, upon exercise by the tenant of its option to purchase.

[89] Clause 50 provides for a bond of US\$50,000 to be paid to the landlord.

[90] The tenant is obliged to maintain the interior of the premises and to be responsible for the care of the grounds, yards, fences, water and drainage systems.

Lease variation

[91] Earlier this year, when Mr Dotcom found that he and Vestor Limited were unable to pay the rent due under the lease when his property was restrained, a variation of lease was negotiated with Lurcher Ltd. It is recorded in a deed dated 5 March 2012. This gave the tenant the right to elect to pay the annual rent quarterly in advance instead of annually in advance each year. If a quarterly payment was not paid on due date then the full annual rent for the relevant year of the lease term became due and payable immediately (less any quarterly payments paid on account of that year's rent). If the tenant terminated the lease under the early termination provision in cl 49, the unpaid balance of the annual rent for the relevant year became due and payable immediately.

[92] Mr Dotcom arranged a loan of \$250,000 from a friend, Mr Lentino, to pay the quarterly instalment of rent due in February 2012. In May 2012, by an exchange of letters, the landlord agreed to accept a delay of three months in payment of the rental instalment then due, provided the balance of rent for the year (\$750,000) was then payable in one lump sum. The landlord also agreed to continue to fund the maintenance on the property, on the basis that Mr Dotcom would refund the maintenance costs when he was in funds to do so. The proposal was that the landlord be reimbursed in August 2012 for the maintenance costs he had expended, when the balance of the rent for 2012 became payable.

Option deed

[93] The option deed bears the same date as the lease, 17 December 2009. It provides an option for Mr Dotcom (named Tim Vestor in the option deed) to purchase the leased property for the price of US\$18m during the "option period", being the earlier of the date of termination of the lease or 17 December 2012. If the option is exercised, settlement is to take place within five working days of the exercise of the option.

[94] Exercise of the option is subject to any consent required from the Overseas Investment Office. Mr Dotcom says in his affidavit dated 25 July 2012, that he will

not require that consent after 27 September 2012 as he will by then be “ordinarily resident” in New Zealand. He says he fully intends to purchase the property as it is the home of himself and his family and he has expended over \$6.5m in permanent improvements, the value of which would be lost to him if he does not exercise his right of purchase.

[95] To this end, Mr Dotcom proposed that the United States authorities release the sum of US\$18m of his funds restrained in Hong Kong to enable him to purchase the property, on the basis that the property would then become subject to the restraining order. That proposal was declined by the Hong Kong Department of Justice in a letter dated 2 August 2012 to Mr Dotcom’s Hong Kong lawyers.

[96] Mr Dotcom says that if he cannot purchase the property, he intends to continue paying the annual rental of \$1m payable quarterly in advance, to preserve the option to purchase and to retain the benefit of the property for his family.

Mr Dotcom’s application

[97] In his affidavit dated 9 August 2012 Mr Dotcom says that he has funded Vestor Limited for the payments due under the lease, and Vestor Ltd in turn has used that money to pay lease rental and other moneys due to Lurcher Limited. He has also funded the substantial improvements (approximately \$6.5m) to the Dotcom Mansion.

[98] He states that the bank accounts of Vestor Limited held limited funds and that these have been restrained under restraining orders made in Hong Kong on 18 January 2012. He notes that the credit balance in the account of Vestor Limited as at December 2011 was approximately HK\$518,841, so that even if the restraint over Vestor Limited’s funds was lifted, Vestor would have insufficient funds to meet the lease obligations. Given that Vestor Limited has no available funds to meet the lease obligations because of the restraining orders in New Zealand and overseas, Mr Dotcom wants to be able to fund Vestor Limited to meet its lease obligations as he has done in the past, to preserve the benefit of the lease and the option to purchase.

The Commissioner's opposition

[99] The Commissioner opposes the application for restrained property to be applied in respect of the obligations of Vestor Limited under the lease. The Commissioner submits that:

- (a) Such expenses are not reasonable, do not directly relate to Mr Dotcom, and are not consistent with the purposes of the CPRA, being to restrain moneys that are likely to end up being public moneys.
- (b) The ongoing lease obligations in respect of the property are a “living expense” which is precluded by the Court’s order of 21 March 2012⁵³ and rent is plainly a living expense. At the time the order for living expenses was made Mr Dotcom and his family were living at his house at 5H The Prom which he owns. There is accordingly no need for any extra rent for the Dotcom Mansion to be allowed as living expenses in addition to the generous living expenses already awarded.
- (c) If the Court decides the rent and outgoings under the lease are not living expenses then the Court must consider whether the amounts claimed are:
 - (i) debts incurred in good faith under s 28(1)(c) of the CPRA; and
 - (ii) “any other expenses allowed by the court” under s 28(1)(d) of the CPRA.

[100] The Commissioner submits that the amounts claimed are not debts incurred by Mr Dotcom in good faith because:

- (a) The debts are not his, but debts of a related company. Section 28(1)(c) applies only to debts “incurred by the respondent”.

⁵³ See above at [8].

- (b) The \$250,000 debt to Mr Lentino incurred personally by Mr Dotcom, was incurred after the restraining order was in place and in full knowledge of it. To allow respondents to incur debts post-restraint, to later be paid out of restrained property, would render the entire restraining order regime futile. Further, Mr Dotcom did not obtain prior approval of the Court before incurring the debt.
- (c) The general power to allow “other expenses” in terms of s 28(1)(d) should be interpreted *ejusdem generis* with the preceding paragraphs and the purposes of the CPRA. This requires reasonableness and good faith and that the expense/debt relates to the respondent (or his dependants). In this context the Commissioner repeats that the obligations under the lease are those of the tenant Vestor Limited, not Mr Dotcom, and that Mr Dotcom has no need of the property to house his family because he owns two substantial neighbouring properties at 5H The Prom which adjoin the Dotcom Mansion, which was initially Mr Dotcom’s bail address when he was released from custody.

[101] The Commissioner also suggested that it was available to Mr Dotcom and Vestor Limited to let the Dotcom Mansion to generate income to meet their obligations under the lease, while the family remained in residence at The Prom. I did not receive full submissions on this point but my perusal of the lease indicates that it is at least strongly arguable that assignment and sub-letting are not permitted by the lease. This is because the “Business Use” is specified in the first schedule as “Occupation as a residence by the guarantor, Tim Vestor and his immediate family”. The standard assignment and sub-letting provisions of the lease in cl 44 have been entirely deleted. The lease is not particularly well drawn,⁵⁴ but the combination of the specified “Business Use” and the deletion of the assignment and sub-letting standard provision indicates that the parties intended that only Mr Dotcom and his family would be the occupants of the property during the term of the lease.

⁵⁴ For example while the annual rent is specified in the first schedule as \$NZD1m payable annually in advance each year on 14 February, cl 1.1 provides for the annual rent to be paid by equal monthly payments in advance.

[102] The Commissioner further submits that the option Mr Dotcom holds over the Mansion is effectively worthless because it expires in December of this year and he will not be able to exercise it by that date because his assets are restrained and there are insufficient assets in New Zealand to pay the purchase price of US\$18m.

Evaluation

[103] I consider first the issue as to “living expenses”. The April judgment carried forward the conditions set out in the orders made on 29 February 2012 and 21 March 2012. The order of 21 March 2012 provided for living expenses of \$20,000 per month.⁵⁵ It also provided that Mr and Mrs Dotcom may make further applications for any matter other than living expenses.

[104] The orders of 21 March 2012, which varied the conditions of the order made on 29 February 2012, were made by consent as conditions to which the interim foreign restraining order made on 1 February 2012 and at that time in force, was subject. The consent orders were made in the context of an application by the Commissioner to extend the interim foreign restraining order dated 27 February 2012. An extension to 21 March 2012 was granted on 29 February 2012. On 21 March, without opposition from the respondents and the interested party, the interim foreign restraining order was extended until 20 April 2012. In the April judgment orders were made as set out above.⁵⁶

[105] In an affidavit dated 28 February 2012 in relation to the Commissioner’s application for registration of the foreign restraining orders, Mr Dotcom sought the release of funds:⁵⁷

... to cover my family’s living costs as set out in the Tables 1 and 2 in exhibit “C” of this affidavit.

[106] Table 1 of exhibit “C” listed “Living costs for Dotcom family (Approximate)”, totalling \$28,678 per month. Table 2 listed staff costs of \$24,012

⁵⁵ See at [7]-[8] above.

⁵⁶ See above at [6]-[8].

⁵⁷ At paragraph 16 of Mr Dotcom’s affidavit sworn 28 February 2012.

per month, and one-off personal costs (relating to the impending birth of twins to Mr and Mrs Dotcom) and tax totalling \$210,650.⁵⁸

[107] In Table 3 are listed annual property costs in relation to 186 Mahoenui Valley Road of \$1m in respect of the lease and repayment of loan, and \$600,000 plus GST in relation to maintenance, a total of \$1,600,000 per annum. Storage costs totalling \$7,048.73 per month are listed separately in Table 4.

[108] On 29 February 2012, following a hearing on that date, there were orders by consent that Mrs Dotcom be paid from the funds held by the Official Assignee:

- (a) \$12,650 for medical expenses;
- (b) \$20,000 for living expenses; and
- (c) for release of the 2010 Toyota Vellfire motor vehicle.

[109] On 21 March 2012 there were consent orders that there be released to Mr and Mrs Dotcom by the Official Assignee \$20,000 per month for living expenses, \$40,000 per month out of the funds in the RaboDirect bank account, and a vehicle for the use of Mr Dotcom.

[110] While paragraph 6.2 of the orders of 21 March 2012 provided that further applications by Mr and Mrs Dotcom might not relate to “living expenses”, these having been agreed as provided in the order at paragraph 6.1.1, I consider it is clear from the context in which the application and orders were made, that “living costs” in terms of paragraphs 6.1 and 6.2 of the order of 21 March 2012, did not include “property costs” as itemised in Table 3 of Appendix C to Mr Dotcom’s affidavit of 28 February 2012.⁵⁹ The following matters indicate that this is so:

⁵⁸ The amount included for tax shown as due by 1 April 2012 was \$198,000. Mr Dotcom in a subsequent affidavit has advised that his tax liability is \$61,000.

⁵⁹ See above at [107].

- At paragraph 16 of his affidavit, Mr Dotcom seeks the release of funds “to cover my family’s living costs as set out in Tables 1 and 2 in exhibit C”. Tables 1 and 2 do not include property costs which are listed in Table 3.
- The sum of \$20,000 per month for living expenses, ordered by consent on 21 March 2012, is roughly consistent with the listed living expenses (excluding staff wages) in Table 1 of exhibit C (\$28,678 per month) and the one-off payment of \$20,000 for living expenses ordered by the Court on 29 February 2012.
- The amount ordered by consent for “living expenses” of \$20,000 per month cannot logically or reasonably be regarded as inclusive of the property costs listed in Table 3 of schedule “C” equating to about \$140,000 per month.

[111] While “living costs” in terms of s 28(1)(a) of the CPRA may usually be regarded as including rent and outgoings in respect of the home of the respondent and his or her dependants, in this case that was clearly not so.

[112] I accordingly conclude that Mr Dotcom is not precluded by the provision in paragraph 6.2 of the order of 21 March 2012⁶⁰ from making a further application in relation to property costs.

[113] I turn to consider the issue of whether the lease obligations are those of Mr Dotcom and whether they were incurred in good faith.

[114] The obligation to pay rent under the lease to Lurcher Limited arose when the lease was entered into on 17 December 2009. This of course was well prior to the restraining orders made in 2012. While Vestor Limited is the tenant, Mr Dotcom as the guarantor is liable under the lease if Vestor Limited fails to meet the payments due. Mr Dotcom’s affidavit dated 9 August 2012 evidences the inability of Vestor Limited to meet the payments due under lease, both because its assets are restrained in Hong Kong and because in any event it had insufficient assets to meet the payments under the lease. Thus, Vestor Ltd has defaulted under the lease and Mr

⁶⁰ Carried forward in paragraph 2.2 of schedule 3 of the orders in the April judgment.

Dotcom has become liable as guarantor. The payments due under the lease are a legal liability incurred by Mr Dotcom before the restraining orders were made. Further, the restraining orders against Mr Dotcom's assets prevent him funding Lurcher Ltd.

[115] The liability of Vestor Limited as tenant and Mr Dotcom as guarantor of the lease, is a contractual liability under the lease which exists regardless of where Mr Dotcom and his family reside.

[116] Vestor Limited could not have been expected to exercise the right to terminate the lease on three months notice pursuant to cl 49 of the lease, in order to avoid liability for the rent of \$1m due on 14 February 2012. Notice would have been required to be given to Lurcher Limited by 14 November 2011 which was well before the restraining orders were made on 1 February 2012. In terms of the lease the annual rent of \$1m became a debt due and owing by the tenant on 14 February 2012.

[117] While the right of cancellation on three months notice subsists, as well as depriving the Dotcom family of their home, cancellation would result in the loss of the annual rental due on 14 February 2012 and in the loss of the improvements made, estimated by Mr Dotcom to be in the vicinity of \$6.5m. This is inconsistent with the principle that the least injustice should be caused to an alleged offender against whom charges are unproven.

[118] I do not accept the Commissioner's submission that Mr Dotcom "will inevitably lose the \$6.5m invested in the alterations to the property" because it is "currently impossible for [him] to exercise the option to purchase the Mansion, given his lack of access to funds".

[119] While the option deed provides for exercise of the option by 17 December 2012 or earlier termination of the lease, clearly Mr Dotcom intends to enter into an arrangement with the landlord to rent the property for a further year and to defer the date by which the option to purchase under the option deed 2009 must be exercised. The landlord has shown a willingness to co-operate with Mr Dotcom's requests to

defer payment of rent, to vary the deed of lease so that rent may be paid quarterly rather than annually in advance, and on an interim basis to meet payments for maintenance and care of the property notwithstanding these are part of the tenant's obligations under the lease. It thus cannot be excluded that Mr Dotcom will be able to make arrangements with the landlord which will preserve the security provided by the option deed to purchase the property, assuming the availability to Mr Dotcom of funds in the foreseeable future.

[120] The debt to Mr Lentino for \$250,000 to pay one quarter's rent due on 14 February 2012 was a debt incurred in good faith. Vestor Limited and Mr Dotcom were already liable to the landlord for \$1m for rent due on 14 February 2012. The advance from Mr Lentino simply gave Mr Dotcom some breathing space to negotiate with the landlord and enabled him to reduce the indebtedness under the lease to the landlord by \$250,000, leaving a balance of \$750,000 owing in respect of the 2012 rent.

[121] I conclude that the lease rent of \$1m due on 14 February 2012 and the property maintenance costs of \$179,735.15 to 15 June 2012, are debts incurred by Mr Dotcom in good faith.

[122] The Commissioner says that in considering the application for release of restrained funds, the release of approximately \$300,000 from the RaboDirect bank account under paragraph 6.1.2 of the order of 21 March 2012, was to be taken into account if further applications were made. He notes that the schedule to the affidavit of Mrs Dotcom dated 2 August 2012 shows staff monthly costs for the period March to June 2012 of \$159,984.26. This equates to about \$40,000 per month, being the equivalent of the amount released from funds in the RaboDirect account. In addition, the schedules provided by Mrs Dotcom show that expenditure on living expenses has exceeded by about \$8,000 during this period, the amount released for living expenses under paragraph 6.1.1 of the order of 21 March 2012. The Commissioner is critical of "such an extraordinary amount" having been spent on living expenses without any attempt to repay debts incurred or legal fees, and submits that this fact should be taken into account in considering the application.

[123] Mr Lloyd, on behalf of Mrs Dotcom, said in oral submissions that the \$40,000 per month released from the RaboDirect account was not identified as being for staff expenses because the Commissioner would not agree. But it seems clear that the \$40,000 per month released from the restrained funds under paragraph 6.1.2 has been applied, essentially at that rate, in meeting staff costs in the four months from March to June 2012.

[124] The \$40,000 per month released under paragraph 6.1.2 of the 21 March 2012 order was not identified for any particular purpose. Mr and Mrs Dotcom have elected to apply these funds to meeting staff costs. At that rate, the fund supporting these payments will be exhausted by October 2012 with insufficient funds available to meet the full \$40,000 payment in October 2012. Given that these funds were not directed to any specific expenditure, I do not consider it appropriate to take them into account in determining whether and to what extent, orders should be made for release of restrained funds to meet legal expenses or property expenses, which are distinct and separate from living and household expenses. However, that decision is not to be interpreted as indicating any approval or support for ongoing funding of the \$40,000 per month from restrained property after the amount available in the RaboDirect bank account has been exhausted. Matters such as the potential to let the unoccupied property at The Prom may well become relevant, but this is not a matter on which there is evidence before the Court.

Conclusions re property expenses

[125] I conclude that access to Mr Dotcom's restrained property should be allowed for payment of:

- (a) Rent due under the lease on 14 February 2012 amounting to \$1m, to be applied by Mr Dotcom in repayment of the loan of \$250,000 from Mr Lentino and in payment of the balance of the lease rent due by Vestor Limited to Lurcher Limited on 15 August 2012; and

- (b) Property expenses met by the landlord, Lurcher Limited, as itemised in schedule C to the affidavit of Mr Dotcom dated 25 July 2012 totalling \$179,735.15.

[126] It is not appropriate to order provision for future rent due under the lease on 14 February 2013. The final expiry date of the lease is stated to be 12 February 2013. Whether the lease remains in effect at that date will, I anticipate, depend on successful negotiations between Mr Dotcom and the landlord. Any subsequent application for release of restrained property to meet any future payment of rent will depend on all the circumstances that may exist at the time of the application, including the continuation of the lease and the option to purchase.

[127] Nor do I consider it appropriate to make any order in respect of outgoings on the property beyond those specified and claimed. Again, liability for such outgoings beyond February 2013 will depend on the terms and conditions of any variation of the lease or a new lease which is then in effect. Mr Akel's submission that about \$40,000 per month is required for outgoings and maintenance on the basis of past expenditure as identified in schedule C referred to above⁶¹ falls well short of the specificity required to justify an order under s 28(1)(d) of the CPRA.

Other expenses

Rothken LawFirm - \$300,000

[128] Mr Dotcom seeks a global sum of \$300,000 for legal fees, travel and accommodation expenses of his United States lawyers, the Rothken Law Firm. He says Mr Rothken has come to New Zealand on three occasions to see him in connection with this case. No breakdown or details of the amount claimed has been provided. Mr Dotcom simply states that he wishes to reimburse his United States lawyers.

⁶¹ See at Fn 6.

[129] Mr Akel referred to s 34 of the CPRA in support of the contention that there is no jurisdictional limitation on payment of fees for counsel resident outside of New Zealand.

[130] The Commissioner opposes the application, referring to the absence of authority, the absence of details or supporting documents, and the absence of any justification for US counsel to travel to New Zealand when, for example, video-conferencing would facilitate consultation. The Commissioner submits that another important consideration is that the United States Court has already declined an application in that jurisdiction for release of funds to pay counsel's fees and that it would be contrary to international comity to allow Mr Dotcom to achieve in New Zealand what he could not achieve in the relevant primary jurisdiction, in this case the United States.

[131] While s 34 confers a broad discretion on the Court, I do not consider the Court should exercise its discretion to permit the release of restrained property to cover these claimed fees and expenses, essentially for the reasons advanced by the Commissioner.

Megastuff Limited creditors - \$530,000

[132] Mr Dotcom says that although he is not personally liable for the accounts of Megastuff he would like to see the balance due to creditors paid. As at 20 January 2012, this balance has been calculated by Mr Brooke, Megastuff's accountant, as \$634,741.94. \$74,000 derived from funds in bank accounts of Megastuff, and \$30,000 held in the trust account of Simpson Grierson arising out of a settlement of a dispute reached by Megastuff, have been applied pro rata in payment of creditors pursuant to consent orders made by the Court.

[133] The Commissioner opposes the release of Mr Dotcom's restrained assets to pay creditors of Megastuff, submitting that the Court has no "legal ability" to deduct funds from Mr Dotcom's restrained assets for this purpose.

[134] I accept that submission. The amounts previously made available for payment pro rata of the creditors of Megastuff, were funds of Megastuff. Despite Mr Dotcom's wish to see paid the company's creditors, whom he describes as primarily owner/operator small businesses and workers in the Coatesville area, there is no proper basis upon which restrained assets should be released for this purpose.

Diggory Brooke - \$51,500 plus GST (provisional)

[135] For the same reasons, there is no basis upon which Mr Dotcom's restrained funds should be released to meet the obligations of Megastuff for the attendances of its accountant since 23 January 2012.

Tax - \$61,000

[136] Mr Dotcom states in his affidavit dated 25 July 2012 that he has a tax liability for the year ending 31 March 2012 of about \$61,000, revised from \$198,000.

[137] There is no evidence provided of this debt. If the debt was incurred in good faith, the Court has jurisdiction under s 28(1)(c) of the CPRA to make the restraining order subject to a condition that provides for the debt to be met out of Mr Dotcom's restrained property. I would anticipate that if Mr Dotcom furnishes appropriate evidence of a bona fide tax liability, the parties will be able to agree to a consent order from the Court in relation to that liability, as has been the case with other payments the subject of previous consent orders.

Sale of cars

[138] As explained at [1](b) above, Mr Dotcom now seeks the sale on a gradual basis of nine cars. They are listed in schedule 2.

[139] The Commissioner opposes the sale of cars to make funds available for release to Mr Dotcom but says it is a separate and legitimate question whether the sale of some or all of the cars would better secure their value.

[140] The Official Assignee's first report dated 2 August 2012 lists 27 items including motor cars, jet skis and motor cycles. In annexure A the total "notified value" of these vehicles is stated as \$4,692,344. I understand this to be Mr Dotcom's assessment of value. The Official Assignee's valuation is a total of \$2,576,000.

[141] Annexure B to the Official Assignee's report shows the estimated return from the sale of 11 motor cars and the jet skis through Turners Auction and Simes Darby Group. The valuation of Turners Auction for these items is approximately \$1.3m. That is also Simes Darby's valuation at the upper end, but they also provide a valuation at the lower end of \$1.16m. There would be commission and other costs involved in achieving sales, as recorded in annexure B. Annexure C shows the cost of stowage of the same items, amounting to approximately \$57,000 over a three year period. This schedule also calculates depreciation and insurance and maintenance costs over a three year period.

[142] The Official Assignee's further report dated 17 August 2012, filed following the hearing, proposes that the nine cars put forward by Mr Dotcom for potential sale should be sold over a period of time with an appropriate marketing strategy for each vehicle. He expresses the view that his agents, Turners Auctions, will offer the most cost effective avenue for sales of these vehicles because the contractual arrangements he has with Turners Auctions will minimise marketing, sale and insurance costs.

[143] There seems to be some measure of agreement that a "fleet style" sale would not produce an acceptable return and that the vehicles should be sold gradually with an appropriate marketing strategy for each vehicle. There is a difference of opinion as to who should market the vehicles for sale.

[144] I anticipate the parties will be able to achieve a good measure of agreement in relation to the marketing strategy and the appropriate approach to a gradual sale of these vehicles. However, the Official Assignee has the custody and control of the vehicles. In the absence of agreement to alternative arrangements for sale, I consider his agent, Turners Auctions, or an agent of his choice, should be instructed in relation to the sale of the nine vehicles listed in the schedule.

[145] I will order that the nine vehicles listed in schedule 2 be sold by the Official Assignee on a gradual basis in accordance with a marketing strategy to be developed to achieve the best prices reasonably available for the vehicles and the most cost effective basis for sale. The sale will not, at this stage, include the number plates for these vehicles which Mr Dotcom has asked be excluded from sale. I reserve leave for the parties and the Official Assignee to seek further directions from the Court, but I expect the parties to use their best endeavours to settle details relating to the sale of these vehicles by agreement, within the terms of the orders.

[146] As to the remaining restrained cars and other items, the parties should confer as to the best method for achieving maintenance of value and as to the timing and most effective method for the future sale of the items, utilising the information provided by the Official Assignee in his report dated 2 August 2012.

[147] The proceeds of any item sold will form part of the restrained property under the Official Assignee's custody and control pursuant to s 12(2) of the CPRA. The net sale proceeds are to be held in an interest-bearing account pending further order of the Court.

Summary of Conclusions

[148] By way of a summary, I set out below the payments that may be made from advances to be secured against the \$10m New Zealand Government bonds to be released from Mr Dotcom's restrained property on the terms and conditions in this judgment. The amounts for legal expenses are provisional, being subject to the supervisory regime set out in this judgment:

	<u>New Zealand Dollars</u>
(a) Mr Dotcom's legal expenses (say)	\$2,600,000.00 ⁶²
(b) Mrs Dotcom's legal expenses (say)	\$ 123,000.00

⁶² Amount claimed, \$2,695,000, rounded down as costs of co-defendants are excluded (see above at [63]-[72]). The rounding involves no element of assessment.

(c)	Provision for Mr Dotcom's future legal expenses	\$1,000,000.00
(d)	Lease rent on Dotcom Mansion due 14 February 2012	\$1,000,000.00
(e)	Property expenses from 27 February 2012 to 15 June 2012 as per schedule provided by Lurcher Limited	<u>\$ 179,735.15</u>
	Total	\$4,902,735.15

Other authorised expenses

Capitalised interest at (say) 13% for (say) 15 months ⁶³	\$ 800,000.00
Borrowing and legal expenses (say)	<u>\$ 300,000.00</u>
Total (estimate - rounded)	\$6,000,000.00

Orders

[149] *Release of \$10m New Zealand Government Bonds*

- The order for registration of the foreign restraining orders made on 18 April 2012 ("the restraining order") is varied to exclude from the properties and assets which are subject to that restraining order, \$10m in New Zealand Government bonds: register reference GOV/T415: maturity date 15 April 2015: interest rate 6% ("the bonds") upon the following conditions:

- Mr Dotcom may use the bonds for the purpose and only for the purpose of providing security for advances of an amount sufficient to cover:

⁶³ Counsel for Mr Dotcom advised in a memorandum dated 22 August 2012 that the interest rate is anticipated to be in the range of 12-14%.

- (i) the amounts ordered by the Court in this judgment (once ascertained pursuant to the supervisory regime defined in this judgment and the criteria set out at [61] above); and
 - (ii) capitalisation of interest on the amount so borrowed for the period of the loan (that period to expire not earlier than 16 November 2013 and not later than 15 April 2015, the maturity date for the bonds); and
 - (iii) fees and expenses (including legal costs) incurred in establishing the loan facility.
- (b) The lender shall take a specific security over the bonds to secure advances of the amount specified in (a) above.
- (c) The equity in the bonds (subject only to the above borrowing) shall remain subject to the restraining order: s 12(2) of the CPRA.
- (d) All drawdowns of advances under the security shall be paid by the lender direct to the Official Assignee. The Official Assignee shall thereupon release from the funds so held payments in accordance with the orders in this judgment. The Official Assignee shall not at any time or from time to time be required to release any amount in excess of funds received from the lender.
- (e) Any unexpended part of the advances paid by the lender to the Official Assignee which has not been released for payments in accordance with the orders in this judgment shall be held by the Official Assignee and placed on interest-bearing deposit.

Supervisory regime

- 2 (a) I appoint Mr Alan Galbraith QC to exercise the supervisory regime defined in this judgment as set out at [54]-[62] above relating to the legal expenses of Mr Dotcom and Mrs Dotcom, until further order of the Court.
- (b) All material and information provided by the legal advisers of Mr Dotcom and Mrs Dotcom to the supervising Queen's Counsel in relation to the supervisory regime shall remain confidential to them and the supervising Queen's Counsel.⁶⁴

Sale of cars

- 3 (a) The Official Assignee shall arrange the sale of the nine motor vehicles listed in schedule 2 to this judgment by a gradual process, employing marketing strategies appropriate to realise the best price (net of costs) reasonably obtainable for each of the vehicles.
- (b) In considering the most appropriate agent for sale of the vehicles or any of them the Official Assignee shall take into account any proposals by Mr Dotcom, but shall be at liberty to employ Turners Auctions or any other agent he thinks fit for the sale of all or some of the cars.
- (c) The proceeds of sale of the motor vehicles shall remain subject to the restraining order: s 12(2) of the CPRA.
- 4 The restraining order as subsequently varied by orders of this Court, shall otherwise remain in full force and effect.

⁶⁴ Counsel for Mr Dotcom claimed that this material and information was also privileged. The Commissioner disagreed. I do not have the necessary information and expressly do not rule on this issue.

5 Leave is reserved for the applicant, the first respondent and the Official Assignee to apply for further directions and orders relating to this judgment and the orders made.

Leave reserved

[150] There is necessarily detail involved in the orders and directions in this judgment. Leave is reserved for the parties, the supervising Queen's Counsel and the Official Assignee to seek clarification relating to the orders and directions by application made within three working days of the date of issue of this judgment.

Costs

[151] I received no applications for costs. As both parties have had some measure of success I consider costs should lie as they fall.

Patten, J.

SCHEDULE 1
Unrestrained assets of Mr Dotcom as listed in his affidavit dated
20 August 2012

- (a) Some furniture and sundry other chattels that are stored at a warehouse in Tarndale Grove, Albany as described in the attached list.
- (b) Multiple New Zealand personalised number plates.
- (c) Some of the chattels and fixtures in the Mansion at 186 Mahoenui Valley Road, such as light fittings.
- (d) A variety of trademarks, domain names, and a patent.
- (e) Copyright or joint copyright in a number of songs;
- (f) Shares in “private” companies, all of which are themselves restrained (such as Vestor Limited and Megaupload) or which are “shell companies” with no significant assets of their own.

	Furniture	
1.	Red low leather armchairs	7
2.	Beige low leather armchairs	6
3.	White canvas armchairs	4
4.	Red leather armchair	1
5.	3 piece black material oval couch	1
6.	Orange leather chair	1
7.	3 piece black material oval couch	1
8.	Black and white coffee table	1
9.	Super king mattresses	5
10.	Super king base sets	5

11.	King mattresses	3
12.	Round headboard base (king)	1
13.	Square headboard base (king)	1
14.	Large super king base set with drawers	1
15.	Large 3 drawer silver top cabinet	1
16.	Large 8 drawer silver top cabinet	1
17.	Large TV table cabinet	1
18.	Large wooden cabinet	1
19.	Large wooden outside cabinet	1
20.	Large glass display cabinets	2
21.	Large wooden dining table	1
22.	Leather and metal 5 drawer cabinet	1
	Car parts	
23.	Rims and tyres	20
24.	Bare rims	4
25.	Black leather race seat	1
26.	Front car spoilers	4
27.	Car bonnets	2
	Televisions	
28.	46" Samsung televisions	3
29.	50" B&O television	1
30.	55" Samsung television	1
	Miscellaneous	
31.	20 foot white container	1
32.	Technogym treadmill	1
33.	2-door fridge/freezer	

SCHEDULE 2
Cars to be sold

1. 2009 Mercedes E500
5. 2008 Rolls Royce Coupe
6. 2010 Mercedes E63
7. 2010 Mini Cooper Coupe
8. 2010 Mercedes ML63
10. 2009 Mercedes ML 62
13. 2011 Toyota Hilux
15. 2010 Mercedes CL63
22. 2010 Mini Cooper

(The numbers refer to the RO Schedule numbers in Annexure A to the Official Assignee's report dated 2 August 2012).

SCHEDULE 3

Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

SR 2008/214

Pursuant to sections 94 and 95 of the Lawyers and Conveyancers Act 2006, the New Zealand Law Society, with the approval of the Minister of Justice and after consultation in accordance with section 100 of that Act, makes the following rules.

Chapter 9

9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:

- (a) the time and labour expended:
- (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
- (c) the importance of the matter to the client and the results achieved:
- (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
- (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
- (f) the complexity of the matter and the difficulty or novelty of the questions involved:
- (g) the experience, reputation, and ability of the lawyer:
- (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
- (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
- (j) any quote or estimate of fees given by the lawyer:
- (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
- (l) the reasonable costs of running a practice:
- (m) the fee customarily charged in the market and locality for similar legal services.