# Employment Court of New Zealand



## Kaipara District Council v McKerchar [2017] NZEmpC 102 (18 August 2017)

Last Updated: 22 August 2017

**IN THE EMPLOYMENT COURT AUCKLAND**

**[2017] NZEmpC 102**

**EMPC 148/2016**

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN KAIPARA DISTRICT COUNCIL Plaintiff

AND ALAN MCKERCHAR Defendant

Hearing: (by memoranda filed on 30 June, 14 July and 11 August 2017) Appearances: S J Turner and B Heenan, counsel for the plaintiff

A F Drake and R Gillies, counsel for the defendant

Judgment: 18 August 2017

**COSTS JUDGMENT OF JUDGE B A CORKILL**

### Introduction

[1] Before the Court is an application for costs which follows a judgment delivered by former Chief Judge Colgan on 12 May 2017.1

[2] In that decision, the Court concluded that a claim made by the Kaipara District Council (the Council) against Mr Alan McKerchar should be struck out, as being in breach of an agreement between the parties not to sue each other; and that its claim against Mr McKerchar for penalties for breach of an employment

agreement should be struck out for time limitation reasons.

1 *Kaipara District Council v McKerchar* [2017] NZEmpC 55.

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[3] The Court concluded that Mr McKerchar's counterclaim against the Council should also be struck out as being beyond the jurisdiction of the Employment Relations Authority (the Authority) or the Employment Court, since the settlement agreement on which the counterclaim was based was not made pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[4] Costs were reserved with a timetable being imposed that would have ensured Chief Judge Colgan could have resolved any application for costs prior to his retirement. However, on 28 June 2017, counsel requested a revised timetable so that this could no longer be the case.

[5] In a minute issued on 29 June 2017, Chief Judge Colgan recorded these views:

If it assists the parties and the Judge who is to determine costs, my present view is that there were no delays attributable to

the parties or their counsel, or other factors which may have increased costs unnecessarily to this point. Further, although the case has been concluded on interlocutory applications, my view is that it would not be appropriate simply to deal with costs affecting interlocutory applications generally. The cross-applications for striking out the substantive proceedings had necessarily to be argued intensively and it was appropriate that there was a hearing of evidence on these issues. It is my assessment, also, that a substantially larger amount of time and effort went into the defendant's application to strike out the plaintiff's proceedings than did the plaintiff's application to dismiss the defendant's proceedings.

[6] Mr McKerchar has applied for costs. He submits that he was largely successful in that the claim brought by the Council was struck out; he says that although the Court concluded that his counterclaim against the Council could not proceed in this jurisdiction, he can pursue it in the ordinary civil courts. He also says that his costs are fair and reasonable.

[7] The primary position of the Council is that costs should lie where they fall;

alternatively, Mr McKerchar is entitled to a modest award of costs only.

[8] The parties entered into a Deed of Settlement (the deed), which contained a clause compromising future litigation between them.2

[9] The Council claimed that it became aware only subsequently of information which confirmed Mr McKerchar had breached his employment agreement in a number of respects which were unknown, or at least insufficiently known, to the Council prior to his resignation. It issued proceedings claiming damages for those alleged breaches. The Authority removed those proceedings to the Court.3

[10] In pleadings filed in the Court, Mr McKerchar contended that the settlement agreement was a complete answer to the Council's claim for damages against him. He also alleged that the Council breached the settlement agreement by releasing details of it to the public. The Council responded to this counterclaim by asserting that since the agreement did not meet s 149 of the Act, the Court did not have jurisdiction to enforce it.

[11] Given these pleadings, each party then filed an interlocutory application to strike out the claim of the other party, supported by an affidavit in each case.

[12] Those applications were heard by the Court over two days. I am advised that the first day involved the hearing of evidence; and on the second day submissions were received. Thereafter the judgment of the Court was issued.

[13] Chief Judge Colgan found that the Council was sufficiently aware of potential claims against Mr McKerchar at the date of the settlement agreement. It determined that these were covered by the agreement to settle all claims. The Council's claim was accordingly struck out.4 Mr McKerchar's counterclaim was also struck out, since the settlement agreement was not made pursuant to s 149 of the

Act, which may have made it justiciable in the Authority.5

2 At [9].

3 *Kaipara District Council v McKerchar* [2016] NZERA Auckland 203

4 *Kaipara District Council v McKerchar*, above n 1, at [270].

5 At [278].

[14] For Mr McKerchar it was submitted in summary that he is entitled to an award of costs for the following reasons:

a) The primary principle is that costs follow the event. The key issue in this matter was whether the Council could pursue its claims against Mr McKerchar; those claims were struck out. His counterclaim was not the main issue before the Court; although the Court found it did not have jurisdiction to hear it, Mr McKerchar says he can now pursue it in the ordinary civil courts.

b) The normal starting point is to take two-thirds of reasonable costs, with the ability to adjust that figure to take into account the conduct of the parties.

c) The case was legally complex and a comparatively large amount of time was necessary in the circumstances. There were voluminous documents.

d) The Council brought a claim having received legal advice which referred in effect to the question of whether it could do so, having regard to the settlement agreement. That factor justified an increase award of costs, since the Council's claim was speculative in nature and brought despite legal advice which attended to the hurdle of the settlement agreement.

e) Mr McKerchar's actual costs were $52,000 plus GST. However, in a supplementary memorandum filed for Mr McKerchar, it

was submitted that this sum could be reduced so as to take account of the attendances which were undertaken when responding to the Council's strikeout application. On this basis, it was contended that the costs incurred with regard to the application to strikeout the Council's claim were

$46,652.60 plus GST. The starting point should accordingly be

$31,101.73 plus GST, increased by $7,500 to take account of the fact

that the Council's claim was speculative. It was submitted that disbursements of $249.85 should also be awarded.

**The Council's opposition to the claim for costs**

[15] For the Council it was submitted in summary that there are five key factors that should be considered, as follows:

(a) Both parties had an equal measure of success. Costs should accordingly lie where they fall.

(b) The Court's Guideline Scale (the scale) for the assessment of costs should be the starting point. Applying the scale, costs of both parties were approximately the same, because the same interlocutory applications were prepared for and opposed. This analysis supported the submission that costs should lie where they fall.

(c) A proper breakdown of costs relating to the Council's successful

application had not been provided on behalf of Mr McKerchar.

(d) Mr McKerchar unreasonably refused to attend mediation, which deprived the Council of an opportunity to settle the matter without the need of the cost of litigation being incurred.

(e) Mr McKerchar had no reasonable prospect of success in bringing his counterclaim in the Court, as it was clearly in the wrong jurisdiction having regard to the Court of Appeal's dicta in *JP Morgan Chase Bank NA v Lewis*, the authority which the Court had relied on in deciding that the counterclaim should be struck out.6

**Principles**

[16] Clause 19 of Sch 3 to the Act governs the award of costs in this Court. Furthermore, reg 68 of the Employment Court Regulations 2000 provides that in the

6 *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618.

exercise of its discretion, the Court may have regard to any conduct of the parties tending to increase or contain costs.

[17] Both parties have referred to the well established cost principles which were set out in the Court of Appeal judgments of *Victoria University of Wellington v Alton-Lee;*7 *Binnie v Pacific Health Ltd*8 and *Health Waikato Ltd v Elmsly*.9

[18] Under these principles, a 66 per cent contribution to the reasonable costs as determined by the Court is normally regarded as fair and reasonable, but that percentage contribution may be adjusted upwards or downwards, depending on the particular circumstances.

[19] Counsel also addressed the Court's scale. The Practice Direction which introduced it stated that the scale was not intended to replace the Court's ultimate discretion under the statute as to whether to make an award of costs, and, if so, against whom and how much. It was intended to be a factor in the exercise of the Court's discretion.

**Analysis**

*Mixed measure of success?*

[20] The principle issue for resolution is whether Mr McKerchar succeeded on what he says was the key issue; if so, is it appropriate to conclude that costs should follow that event? The alternative approach, which is advanced for the Council, is that this was a case where there was a mixed measure of success; thus costs should lie where they fall.

[21] In determining this issue, reference should be made to the following statement in *Elmsly*, where the Court of Appeal said:

[39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the

7 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48].

8 *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14].

9 *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [17].

reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

[40] The result of the present case was that Dr Elmsly was awarded relief and it would appear (given that there was no Calderbank letter) that he had to go to Court to receive that relief. Conventional practice (probably influenced by the way in which the old payment in rules used to operate) has been to regard a plaintiff in this situation as having an entitlement to costs. While this is no doubt a simplistic and not entirely logical approach, it is reasonably straightforward to apply. Further, it is not unjust to defendants, providing judges are prepared to react appropriately where there has been a *Calderbank* offer. In any event, whatever the merits of the current costs practice, there is nothing out of the ordinary in the conclusion of the Judge that Dr Elmsly was entitled to costs.10

[22] In considering this dicta, it is necessary to have regard to the factual circumstances which were before the Court. Dr Elmsly had claimed $137,000 for breaches of his employment contract, but had recovered only $15,000.11 His costs were approximately $72,000 (including a modest disbursement of about $1,300). The Employment Court had awarded him approximately half of his actual costs, which were rounded to $36,000. The Court of Appeal concluded that whilst it would have been open to conclude that each party be left to pay their own costs, the implicit conclusion of the Employment Court that the plaintiff had sufficient success at trial

to warrant an award of costs was also open to it.

[23] However, later in the judgment, the Court of Appeal stated that the trial Judge had concluded that at least a majority of the hearing time had been associated with issues on which the plaintiff had failed. The Court said that whilst New Zealand courts did not usually award costs on an issue-based basis, the failure of a

"successful party" on so large a scale could not properly be ignored.12

[24] It was decided that the trial Judge had not assessed the plaintiff's relative lack of success at trial correctly; he had been awarded a contribution to costs on issues in which he had failed, which was plainly wrong.13

10 To similar effect are the earlier statements of the Court of Appeal in *Packing In Ltd (in liq) v*

*Chilcott* [2003] NZCA 124; (2003) 16 PRNZ 869 (CA) at [5] – [6].

11 At [20].

12 At [44], at para 3.

13 At [44] and [45].

[25] Accordingly, the Court of Appeal fixed $30,000 as the proportion of the costs reasonably incurred by the plaintiff in relation to the issues in which he succeeded; two-thirds recovery of that figure was awarded, being $20,000.14

[26] The facts of the present case are rather different from those which fell for consideration in *Elmsly*. In that case, Dr Elmsly succeeded by establishing some aspects of his claim, but did not succeed in establishing others. Here, Mr McKerchar succeeded on the application he brought, and the Council succeeded on the application it brought. That said, I have regard to the general principles which were outlined in *Elmsly*.

[27] When considering the extent of attendances which were devoted to each application for strikeout, the following factors arise:

a) First, the views of Chief Judge Colgan; he considered that a substantially larger amount of time and effort went into the defendant's application to strike out the plaintiff's proceedings than did the plaintiff's application to dismiss the defendant's proceedings.15

b) Next, an analysis of the judgment shows that the main claim brought by the Council was factually and legally complex. It required the Court to review a significantly greater volume of evidence as well as authorities than it was necessary to review when considering Mr McKerchar's counterclaim. I shall return to this point.

c) The counterclaim was described by Chief Judge Colgan as being "less complex".16 This was the case because the judgment of the Court of Appeal in *J P Morgan Chase Bank NA v Lewis* led to a clear conclusion that a breach of the settlement agreement which had been entered into in this particular case could not found a cause of action in the specialist

employment institutions.17

14 At [48].

15 At para [5] above.

16 *Kaipara District Council v McKerchar*, above n 1, at [277].

17 At [285].

d) Although the damages sought by the Council against Mr McKerchar for breaches of express and implied contractual obligations had not been quantified, the proceeding arose in the context of the Council contending that it had suffered very significant losses as a result of the alleged breaches.18 It is apparent that Mr McKerchar successfully resisted a claim of some significance.

e) The Council's claim was not straightforward given the provisions of the settlement agreement. This was apparently recognised prior to the commencement of the proceedings because the plaintiff issued a press release confirming it intended to take action against its former Chief Executive, stating:

Legal advice suggested that the settlement agreement Mr McKerchar signed with the former Council may impact on the success of any action.

The Council places some emphasis on the word "may". Although it could not be said that the claim should never have been brought, it could not be regarded as having certain prospects of success.

f) Although the Council succeeded in obtaining an order of strikeout in respect of Mr McKerchar's counterclaim, it is open to him to bring it in the courts of ordinary jurisdiction. That is not to say that such a claim would succeed, merely that it has not been brought to an end, unlike the Council's claim.

g) I also note that the Council has not brought an application for costs in respect of its success in obtaining a strikeout order in respect of Mr McKerchar's counterclaim.

[28] Taking all these factors into account, I conclude that although each party succeeded in striking out the claim brought by the other, the primary application was Mr McKerchar's application to strike out the Council's claims. I also consider that there was a sufficiently clear delineation in the two applications as to permit an issue

by issue analysis. To rule that costs should lie where they fall would mean that the

18 Discussed at [22] – [28].

Council would avoid a costs liability which it should, in the circumstances, meet. I conclude that Mr McKerchar's application for costs should be considered on the basis of the success which he achieved. But in doing so, a careful assessment will need to be made to ensure he recovers costs which relate only to his successful application, and that there is recognition of the Council's success.

*Reasonable costs?*

[29] In light of that conclusion, it is next necessary to consider whether the sum claimed is fair and reasonable for costs purposes.

[30] Originally, Mr Drake, counsel for Mr McKerchar, submitted that the Court should proceed on the basis of the actual costs which Mr McKerchar had incurred,

$52,000 plus GST. On behalf of the Council, Ms Turner submitted that insufficient detail had been provided on behalf of Mr McKerchar as to the costs he incurred in dealing with the Council's application to strikeout his counterclaim. I issued a minute asking for a response to this submission, which was provided in Mr Drake's supplementary memorandum.

[31] Mr Drake acknowledged that the costs incurred in responding to the Council's strikeout application may not be claimable; he therefore proposed a reduction. However, the Court was advised that there was no specific apportioning of time spent on Mr McKerchar's opposition to the Council's claims, or on time spent on his counterclaim. Although it was difficult in these circumstances to apportion time, an attempt to do so was made by deleting certain attendances which referred specifically to the application to strikeout the counterclaim; and by reducing time spent at the first day of the hearing by 20 per cent. As it happened, Mr McKerchar had not been charged for the attendance of either counsel at the second day of the hearing, so this item did not arise for consideration. These adjustments resulted, as I indicated earlier, in the total amount which Mr Drake submitted could be considered for the purposes of Mr McKerchar's application, namely, $46,652.60 plus GST.

[32] Against that background the submissions made for the Council must be considered. Ms Turner submitted that the interlocutory applications were

straightforward, with one affidavit filed by each party, submissions and a short hearing. As already mentioned, she also said

that there was no adequate apportionment of time between the two applications. Accordingly, she argued that the invoiced sum was not an appropriate basis for a costs assessment by the Court. Ms Turner also stated that this submission was reinforced by reference to calculations which she advanced, based on the scale.

[33] These submissions of counsel require a consideration of three issues:

a. Do the invoiced sums provide a reasonable basis for assessing Court ordered costs?

b) In exercising the Court's discretion, should the Court have regard to, or

base its assessment on, the scale?

c. How should the question of legal attendances on the unsuccessful application be treated?

[34] The first issue requires consideration of the question of whether the application on which Mr McKerchar succeeded was straightforward. The record shows that the Court was required to analyse a complicated and lengthy history of events, and legal issues of some complexity. A day was devoted to the hearing of oral evidence. Multiple submissions were presented: the Council filed five submissions, and Mr McKerchar filed three; then these were addressed orally on the second day of the hearing. The application to strike out the Council's claim, as I have already said, was complex both legally and factually. The invoiced sums reflect these realities.

[35] On the issue of whether those sums were reasonable, Ms Turner also submitted that whilst the assistance of second counsel, Mr Gillies, was undoubtedly convenient and helpful for the presentation of Mr McKerchar's case, it was not an instance where such an appearance was necessary, to the point where the cost of this should be visited against the Council.

[36] I do not accept this submission. Second counsel also appeared for the Council. In my view, both sides were justified in taking this step. It is apparent from the invoices that Mr Gillies was regularly involved in the preparation of Mr McKerchar's case throughout. I accept that for the purposes of this particular case, it was also appropriate for him to appear at the hearing.

[37] To this point, the invoiced sums are reasonable for the totality of the attendances which were undertaken.

[38] Next, I consider the references which were made to the scale; Ms Turner said that certain calculations which she advanced based on the scale reinforced her submission that the invoiced sums were excessive for costs purposes.

[39] Reference to the scale is not straightforward in this case. The Council's submission provided a calculation based on a successful interlocutory application as filed by a defendant. However, time allocations for some steps were modified.19

Then the Court was invited to compare the figure so produced, $21,631, with a comparative calculation for a successful interlocutory application filed by a plaintiff. It was submitted this produced a figure of $24,084. The difference was due to assumptions made as to time allocations for attendances at the commencement of the proceeding.

[40] The submission assumes that the Court should conclude that each party succeeded to the same extent. That is contrary to the conclusion I reached earlier. Accordingly, it is not appropriate to apply the scale in the manner advanced for the Council.

[41] Mr Drake also referred to the scale. He suggested that Category 3, Band C should apply. But that would also be unfair, since it would result in a figure significantly in excess of Mr McKerchar's actual costs.

[42] The result is that the Court is not assisted by the references of counsel to the scale in the present case.

19 Steps 2, 24 and 33.

[43] This is a case where the Court must focus on the invoiced sums. There is, however, the question of an appropriate apportionment. It is appropriate to fix the proportion of costs which were reasonably incurred by Mr McKerchar in relation to the issue on which he succeeded; and then allow for a percentage recovery of that figure. Any increase or decrease from that starting point can then be considered, in light of counsel's submissions on those possibilities.

[44] Whilst I am satisfied that the total sum invoiced to Mr McKerchar of $52,000 plus GST may well be a reasonable amount for the totality of attendances which were required for both applications that were before the Court, I am not satisfied that reductions referred to in Mr Drake's supplementary memorandum provide a reliable basis for isolating the costs of Mr McKerchar's successful application. It will be recalled that some items have been removed, and a 20 per cent reduction was made for one day of the hearing. There are two problems with this approach. The first is that time was not recorded in a methodical way so as to delineate between the two applications; reliance is now being placed on descriptions in the relevant invoices which it appears were not intended to be used for a costs assessment by the Court. Secondly, the 20 per cent

reduction for the hearing time is light.

[45] Standing back, I conclude for present purposes that three quarters of Mr McKerchar's costs were incurred in dealing with his application to strike out the Council's claim. I reduce the initial figure of $52,000 to $39,000.

[46] It is usual, as the next step, to allow recovery of 66 per cent of reasonable costs to produce a starting point figure.

[47] Had the Council applied for costs in respect of the success it achieved, supported by invoices, I would have allowed recovery on this basis because there would be an offset for an award in favour of the Council.

[48] However, the Council has not made such an application; nevertheless its success is relevant and must be acknowledged. This is a case where a party's partial

success should be recognised by reducing the costs award to which the "successful"

party would otherwise be entitled.20

[49] Accordingly, I allow 40 per cent rather than 66 per cent, which is a figure of

$15,600.

[50] In his supplementary memorandum, Mr Drake advised the Court that Mr McKerchar was not registered for GST. He also submitted that Mr McKerchar has not been in paid employment since his departure from the Council, and that he is now a pensioner. Taking these particular factors into account, there should be an uplift on the 40 per cent figure, equivalent to GST on that sum, to $17,940. This is the appropriate starting point.

*Increase/decrease?*

[51] Mr Drake submitted that there should be an increase from the starting point. He argued that the Council's claim was speculative in light of legal advice that the settlement agreement may impact on the success of counsel's intended action; thus there should be an increase of $7,500.

[52] However, a similar assessment as to the prospects of success of Mr McKerchar's counterclaim in this jurisdiction could also have been made. The deed of settlement was not a record of settlement under s 149 of the Act. Chief Judge Colgan found that it was clear on the basis of the Court of Appeal's judgment in *J P Morgan Chase* that Mr McKerchar's counterclaim could not be brought in this jurisdiction. It might well have been thought that it would be difficult for Mr McKerchar to successfully resist a strikeout application in this jurisdiction.

[53] Both sides faced potential difficulties in their respective cases. I am not persuaded that there should be any adjustment from the starting point figure on these

grounds.

20 *Godfrey Hirst Ltd v Cavalier Bremworth* [2013] NZHC 2256; *Clearwater Cove Apartments*

*Body Corporate No 170989 v Auckland Council* [2014] NZHC 467.

[54] The final issue relates to a submission that unnecessary costs were incurred by the Council due to an alleged failure on the part of Mr McKerchar to mediate.

[55] Reliance is placed on dicta in the Court of Appeal, in *Gallagher Group Ltd v*

*Walley*, where the Court held, with regard to a refusal to attend mediation: 21

In the present case, with the benefit of hindsight, it is readily apparent that a great deal of money has been spent by the parties in contested litigation in pursuit of overambitious outcomes. Mediation at the outset could have avoided that and likely would have left both parties no more dissatisfied than they are now. Quite apart from the likely costs consequences, to refuse mediation is to reject an efficient means of resolving differences so that money otherwise to be spent on costs can be retained for allocation to

[56] In the course of its consideration of this issue, the Court of Appeal endorsed what was said by Chief Judge Goddard in *Open Systems Ltd v Pontifex.*22 In that instance the Court stressed that the Employment Contracts Act 1991 lay "... great emphasis upon creating a climate in which the parties are encouraged to resolve their differences". It was stated that although parties do not have to agree to settle in mediation, there "... would be few cases in which a party could be justified in refusing even to explore this avenue".23

[57] Similar conclusions may be expressed with regard to the importance of mediation under the current Act.

[58] The evidence relied on by the Council to support its submission that Mr McKerchar failed to attend mediation is

incomplete. It covers the exchanges between counsel on this topic up until 9 March 2016.

[59] However, on 21 June 2016, when issuing its determination that the proceeding should be removed, the Authority stated that the parties were still attempting to resolve requests for information between themselves, which Mr Drake

had earlier stated would be necessary before mediation could be undertaken.[24]

21 *Gallagher Group Ltd v Walley* [1999] NZCA 333; [1999] 1 ERNZ 490 (CA) at [38].

22 *Open Systems Ltd v Pontifex* [1995] NZEmpC 278; [1995] 2 ERNZ 211.

23 At 217.

24 *Kaipara District Council v McKerchar*, above n 3, at [10].

[60] It is also to be noted from that determination that the issues between the parties had been the subject of intense media scrutiny.25 The Authority Member considered there were matters of public interest which were sufficiently significant as to justify removal. Given the nature of the issues which had arisen between the parties, and the potential extent of them, it may well have been optimistic to conclude that the parties could have reached an agreement at mediation and thereby reduced costs.26

[61] Following removal to this Court, it was noted that mediation had not yet occurred, and that the parties would now consider whether they would attend a Judicial Settlement Conference (JSC). A JSC could only have taken place if both parties agreed to such a possibility. It is evident from the Court's file that mutual consent for a JSC was not given. Nor is there any evidence of a Calderbank offer being advanced which may have protected the Council if the matter was indeed capable of settlement.

[62] In the absence of detailed evidence as to how the mediation issue unfolded after 9 March 2016, I do not consider it appropriate to conclude that a costs adjustment should be made because mediation did not occur.

**Result**

[63] The Council is to pay Mr McKerchar $14,800.50 as a contribution to his costs.

[64] He also seeks a disbursement in the sum of $249.85. Since no objection to this possibility has been raised for the Council, I infer that it is accepted the disbursement was reasonably incurred. I conclude that reimbursement of this sum

should also be given.

25 At [23].

26 At [27].

[65] The total amount to be paid is accordingly $18,189.85

B A Corkill

Judge

Judgment signed at 4.00 pm on 18 August 2017