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        MOTOR VEHICLE DEALERS INSTITUTE INCORPORATED V
        MOORES SERVICE STATION LIMITED CA CA181/02 3 July 2003
        IN THE COURT OF APPEAL OF NEW ZEALAND CA181/02
        BETWEEN MOTOR VEHICLE DEALERS INSTITUTE
        INCORPORATED Appellant AND MOORES SERVICE STATION
        LIMITED Respondent Hearing: 26 June 2003 Coram: Keith J
        O'Regan J Doogue J Appearances: M P Reed QC and P Morten for
        Appellant M Branch and K A McDonald for Respondent Judgment:
        3 July 2003 JUDGMENT OF THE COURT DELIVERED BY O'REGAN
        J [1] This is an appeal against a decision of Master Faire to set
        aside a statutory demand under which the appellant, the Motor
        Vehicle Dealers Institute Inc (the Institute), demanded payment by
        the respondent, Moores Service Station Limited (the company), of
        the sum of $38,500. That sum was said to be owing as a result of a
        claim by the Institute in respect of the Motor Vehicle Dealers
        Fidelity Guarantee Fund (the Fund). Background [2] The
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owner, Mr Trial, placed his vehicle with “Five Star Auto Court LMVD” for sale on a “sell on behalf of” basis. b) Five Star Auto Court was the trading name of the company which had been approved by the Motor Vehicle Dealers Licensing Board (the Board); c) The transaction was arranged through a Mr Marc Day. d) The vehicle was sold and Mr Trial should have been paid the sum of \$38,500 for it, but the sum was not paid. e) Mr Trial made a claim on the Fund, alleging that the company had breached its obligations under s 59 of the Motor Vehicle Dealers Act 1975 (the Act). f) The Committee of Management of the Fund accepted Mr Trial’s claim and paid him \$38,500, relying on s 39(b) of the Act. g) The Institute then issued the statutory demand in reliance on s 42 of the Act, under which it can, on behalf of the Fund, exercise any rights and remedies of Mr Trial against the company by way of subrogation. The Master’s decision [3] In the High Court, the company argued that the statutory demand should be set aside on two grounds, namely: a) There was a substantial dispute whether the company had any liability to the Institute. The company contended that the Institute could not recover against it, as the company had not committed and was not liable for the act which gave rise to the Institute making payment to Mr Trial from the Fund. In essence, the company said that Mr Trial had been transacting with Marc Day personally, or with a partnership comprising Marc Day and his partner, Brenda Fillingham, and not with the company; b) The decision to make a payment of \$38,500 to Mr Trial was of no effect because it was made in breach of the obligation of the Committee of Management to give the company an opportunity to be heard, and to give reasons for its decision. [4] The Master rejected the second ground, finding that there was no obligation on the part of the Institute to conduct a hearing and give the company an opportunity to appear and make submissions, and also no obligation to give reasons for its decision. That aspect of the decision has not been challenged. [5] The Master noted that, with one exception, the evidence indicated Mr Trial was dealing with the company rather than with Mr Day personally. That exception was that in Mr Trial’s affidavit, he had made a statement which could be construed as indicating that he thought Mr Day was the person with whom he was contracting. The Master also noted that Mr Trial referred to the party with whom he had dealt as Five Star Auto Court, but did not refer to the company. [6] The Master considered the decision of this Court in *Crown Motor Court Ltd v Motor Vehicle Dealers Institute Inc* [1982] 1 NZLR 757, in which this Court found that a motor vehicle dealer’s licence could not be transferred to the benefit of a person other than the original licensee. The Court found that contracts entered into by the purported transferee were entered into by an unlicensed dealer and there was therefore no entitlement to bring a claim against the

Fund. The Master considered this decision supported the company's case. [7] The Master determined that the company had raised a fairly arguable claim that the contract was not with the company but either with Mr Day or Mr Day and Ms Fillingham. Accordingly, he set aside the statutory demand. Facts [8] Most of the key facts are not disputed and can be summarised as follows: a) The company was licensed on 1 April 1998 as a motor vehicle dealer. At all relevant times its directors and shareholders were Mr and Mrs Milner and Mr Milner was the chief executive officer. Its business was originally located at Paeroa. b) On 23 September 1998, Mr Day was approved by the Board as a motor vehicle salesperson for the company until 31 March 1999. This approval was then renewed. c) On 9 December 1998 the company was granted approval by the Licensing Board for the removal of the licence from its site at Paeroa to a site at 1057 Great North Road in Auckland. d) On 22 December 1998, the company was licensed by the Board to trade under the name "Five Star Auto Court". The application for this approval was made by Mr Milner as chief executive officer of the company. e) On 22 December 1998, the company entered into an agreement with Mr Day and Ms Fillingham. This agreement was called "Agreement for Sale and Purchase of a Business" but the place in the standard form agreement for the description of the business was left blank. The total purchase price was \$100,000 of which \$55,000 was payable immediately with the remainder being paid by monthly instalments over a five year period. The agreement said that the full \$100,000 was on account of "stock in trade". There was a term in the agreement under which the company allowed Mr Day and Ms Fillingham to operate "the business" under the company's motor vehicle dealers licence for a two year period from 1 January 1999. The agreement also provided that property in the stock did not pass until payment was received in full, with a requirement that Mr Day and Ms Fillingham maintain the stock level at \$100,000. The agreement said that they would be responsible for any claims made against the company under relevant consumer protection legislation and would be responsible for the costs of moving the motor vehicle dealers licence to new premises. There was also a provision for indemnification of the company against any claims by third parties in connection with the business. f) On 19 July 1999, the company was granted approval by the Board to remove the licence to 3013 Great North Road, Auckland. It was this address which was entered on the documentation involving Mr Trial. Mr Milner made this application to the Board on the company's behalf. g) On 19 June 2000, Mr Trial signed the "on behalf of" agreement, authorising Five Star Auto Court to sell his car on his behalf. h) On 15 August 2000, Mr Milner signed an application to the Board seeking the approval of Mr Day as the person who would personally

supervise, manage and control the conduct of the company's business as a motor vehicle dealer at the company's principal place of business. The Board granted approval for Mr Day to manage the company's principal place of business for a period of one month from 25 August to 25 September 2000 pending determination of the application, but no final determination was ever made. i) During this one month period, Mr Trial's car was sold (on 12 September 2000). The vehicle offer and sale agreement was completed in the name of "Five Star Auto Court LMVD" and the change of ownership from Mr Trial to the purchaser was registered on 15 September 2000. Institute's submissions [9] On behalf of the Institute, Mr Reed QC argued that the Master was wrong to conclude that it was arguable that Mr Trial's dealings were not with the company. He emphasised that the "on behalf of" agreement executed by Mr Trial was with "Five Star Auto Court Licensed Motor Vehicle Dealer, 3013 Great North Road". The only licensed motor vehicle dealer approved to use the trading name "Five Star Auto Court" was the company, and the address shown was the address approved by the Board as the licence address. The agreement was entered into on 19 June 2000, that is at a time when Mr Day was approved to be a salesperson for the company. When Mr Trial's vehicle was sold, the vehicle offer and sale agreement was also entered into by Five Star Auto Court of 3013 Great North Road. The agreement was headed up "Licensed Motor Vehicle Dealer" and it was entered into on 12 September 2000 when Mr Day was the approved manager of the company's business. The claim against the Fund was in respect of a default of "Five Star Auto Court, 3013 Great North Road, New Lynn". The particulars of the claim included a statement by Mr Trial that he had placed his car for sale "with Five Star Auto Court", and later referred to his having sought payment from "Marc at Five Star". [10] In the affidavit of Mr Trial which was before the Master, Mr Trial referred to Mr Day as "a salesman at Five Star Auto Court", and to having signed an agreement with "Five Star Auto Court". He also referred to having visited the Five Star Auto Court premises to seek payment for his car after it had been sold. However, Mr Trial also said in his affidavit "I understood that Mr Day was a licensed motor vehicle dealer and that he had a licence to operate his yard and showroom". It was this last mentioned statement which led the Master to the conclusion that there was an arguable case because Mr Trial was dealing with Mr Day personally and not with the company. [11] Mr Reed argued that that statement had to be read in the context of the other references in the affidavit to Five Star Auto Court, the fact that the "on behalf of" agreement had been with Five Star Auto Court LMVD and the clear reference to Five Star Auto Court in the claim made by Mr Trial on the Fund. [12] Mr Reed pointed out that Mr Milner had remained as the approved

chief executive officer of the company throughout the relevant period and had signed the renewals of the licence, the application for Mr Day to be an approved manager and the application to change the premises of Five Star Auto Court to the address from which the Trial transaction was undertaken. He argued that the fact there had been a purported sale of the business, including a requirement that Mr Day indemnify the company for claims made in respect of sales after the date of that agreement, was a private matter which did not affect the rights of Mr Trial, or those of the Fund which was exercising Mr Trial's rights by subrogation. [13] Mr Reed and Mr Morten made extensive submissions on the issues of ostensible authority which had been the principal focus of the High Court decision. For reasons which will become apparent we do not need to refer to those submissions. Company's submissions [14] On behalf of the company, Mr Branch argued that Crown Motor was authority for the proposition that Mr Day could not be a licensee under the licence held by the company. There is no dispute about that and we therefore do not need to consider that decision any further. Mr Branch argued that clause 18 of the agreement for sale and purchase of the business, under which the company allowed Mr Day and Ms Fillingham to operate the business under the company's licence, was not intended by Mr Milner, as Chief Executive of the company, to make them agents of the company. He said that it would be possible to rectify the agreement if Mr Day and Ms Fillingham agreed to do so. [15] Mr Branch said the approval obtained by the company to appoint Mr Day as manager did not indicate that Mr Day had actually been appointed. In any event, he said the company could have revoked this appointment the day after it was made. Mr Branch said Mr Day had never actually been appointed as manager, and that Mr Trial's affidavit could be interpreted as indicating Mr Trial thought he was dealing with Marc Day personally. He also argued that Marc Day did not have the actual authority of the company or ostensible authority to act on the company's behalf, and that therefore the High Court decision should be upheld in this Court. Decision [16] We accept the Institute's submission that the evidence establishes that Mr Trial was dealing with the company. The company traded under the name Five Star Auto Court and that was the trading name approved by the Board. Its approved address was 3031 Great North Road. Mr Trial's "on behalf of" agreement was with Five Star Auto Court, Licensed Motor Vehicle Dealer. Mr Day was not a licensed motor vehicle dealer and could not enter into a transaction in the name of Five Star Auto Court, LMVD on his own behalf. He had the express authority of the company to operate the company's business under its motor vehicle dealer's licence, under the clause in the agreement for sale and purchase of a business which gave him permission to do so. Mr Milner's interpretation of clause 18,

and the potential for rectification of the clause if Mr Day and Ms Fillingham agreed with it, are irrelevant. The clause is clear, and Mr Day acted on the authority it gave him. [17] We do not attach particular significance to the statement in Mr Trial's affidavit that he thought Marc Day was a licensed dealer. That statement is inconsistent with his earlier reference to Mr Day as being a salesman for Five Star Auto Court and with the statements in his claim to the Fund that he dealt with Five Star Auto Court. Most significantly it is inconsistent with the legal documentation which clearly establishes that Mr Trial's contract was with Five Star Auto Court. The company gave specific authorisation to Mr Day to operate its business under its Motor Vehicle Dealers Licence. Its Chief Executive throughout the relevant period, Mr Milner, arranged for renewal of the licence and, approval of the business premises and approval of Mr Day as manager. It is bound by transactions which it has entered into through the agency of Mr Day. [18] In our view, there can be no substantial dispute the company was liable to pay \$38,500 to Mr Trial. It is now liable to the Institute, on behalf of the Fund, because the Institute is entitled to exercise Mr Trial's rights by subrogation. There is no basis to set aside the statutory demand of the Institute, and we therefore allow the appeal. [19] The Institute is entitled to costs of \$3,000 in this Court together with its reasonable disbursements including the reasonable travelling and accommodation expenses of Mr Reed as agreed or as fixed by the Registrar of this Court. The Institute is also entitled to its costs in the High Court on a 2B basis together with its reasonable disbursements, such costs and disbursements to be as agreed or as fixed by the Registrar of that Court.

Solicitors: Izard Weston, Wellington for the Appellant Harkness Henry & Co, Hamilton for the Respondent

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    ROGER MOSES AND GARY JAMES STEVENS CA CA322/02 9 April
    2003 IN THE COURT OF APPEAL OF NEW ZEALAND CA322/02
    CA323/02 THE ASSISTANT REGISTRAR OF COMPANIES v
    KENNETH ROGER MOSES GARY JAMES STEVENS Hearing: 25
    February 2003 Coram: Keith J McGrath J Glazebrook J
    Appearances: B H Dickey and T Epati for the Appellant R J Asher
    QC for the Respondents Judgment: 9 April 2003 JUDGMENT OF
    THE COURT DELIVERED BY KEITH J The question [1] The
    respondents were charged under s59 of the Securities Act 1978
    and reg 41 of the Securities Act (Contributory Mortgage)
    Regulations 1988. They were directors of a contributory mortgage
    broker, Reeves Moses Harding Mortgage Brokers Ltd, which was
    registered under the 1988 Regulations. The broker offered to the
    public contributory mortgages and managed them. The prosecutor
    alleges that the broker's receipt and disbursement of contributions
    to certain mortgages contravened the regulations in various ways.
    All the informations alleged breaches by the broker and not by the
    directors. The prosecutor alleged however that under reg 41 the
    directors committed offences if the broker of which they were
    directors had contravened the regulations. Regulation 41 reads as
    follows: A broker or a director of a broker who contravenes, or fails
    to comply with, any provision of these regulations commits an
    offence, and is liable on summary conviction to a fine not exceeding
    $5,000. [2] Judge Hole in the District Court held that reg 41 did not
    impose liability on the directors of a broker simply on the basis that
    the broker committed the breach. The prosecutor appealed by way
    of case stated on two questions of law to the High Court. O'Regan J
    dismissed the appeal on the matter in issue before us ([2002] 3
    NZLR 129) and gave leave to the prosecutor to appeal to this Court
    on that issue. [3] The question of law before us is stated as follows
    The question for the opinion of the Court is does the reference to
    'director' in Regulation 41 create criminal liability for a director of
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a broker which is alleged to have breached the Contributory Mortgage Regulations? The District Court and High Court Judgments [4] Judge Hole's reasons for holding that reg 41 imposed liability on a director only if the director contravened the regulations are conveniently summarised by O'Regan J who drew on the Judge's case stated: [a] He believed that the nouns 'broker' and 'director' applied alternatively to the verbs or phrases 'contravenes' and 'fails to comply with'; [b] The use of the word 'who' rather than 'which' made it more likely the interpretation referred to in paragraph [a] above was intended – if directors of corporate brokers were to be liable the Judge thought it was more likely that 'which' would be used; [c] There was nothing in the Regulations, other than Regulation 41, from which it could be ascertained that there was an intention to include personal liability on the part of directors for breaches by a corporate broker; [d] If the interpretation contended for by the Registrar were accepted, the effect would be to require directors to become personally involved in the administration of each contributory mortgage advance. The Judge thought this would have been spelt out with greater clarity if that was the intention; [e] Sections 58 and 59 of the Securities Act make it clear that directors can be liable for certain offences committed by brokers, but those sections provide defences for directors, whereas Regulation 41 does not. It was seen as illogical to have such strict liability in regulations made pursuant to the Securities Act when the Act itself allows for directors to have defences for breaches of the Act. [f] Other provisions of the Regulations (Regulations 12, 14 and 40), impose duties on directors and this could explain why Regulation 41 referred to directors, supporting the contention that Regulation 41 dealt only with breaches by the directors themselves, not with liability of directors of a corporate broker for breaches by the broker; [g] As it was difficult to ascertain the purpose of the regulation in relation to the personal liability of directors, it was permissible to look to the common law, particularly the rule that penal statutes should be construed strictly, and the application of that rule favoured the contention that Regulation 41 did not impose personal liability on directors for breaches of corporate brokers. [5] O'Regan J did not find any assistance in [a] and [b]. He agreed however with [c] and also with [d]: [13] I agree that the requirements of the Regulations are very detailed, and that the normal expectation of a director who is not an executive of a broker, would stop well short of an active personal involvement in the administration of each advance. It is notable that in any other legislation where Parliament has placed a burden on directors in relation to a company's compliance with the requirement, the language has been significantly clearer than in the Regulations and usually there has been some defence for directors which absolves them from liability in certain

circumstances. [6] He gave examples from six statutes and said this: [15] The notable feature of all of these provisions is that the intention to make directors (or others) liable for the actions of a corporate body is expressed with clarity, and there is some limitation on the criminal liability imposed on directors in circumstances where their action or inaction does not justify the imposition of a criminal sanction. That can be contrasted with Regulation 41 which, if interpreted in the way contended for by the Registrar, would impose liability on directors for the actions of corporate brokers without the same clarity and without any form of defence at all. As Mr Asher pointed out, this would mean that a director who was sick or overseas could be liable in circumstances where the director would have no realistic means of guarding against that liability. Mr Asher argued that if such a draconian regime was intended, then the intention would have been expressed more clearly. I accept that submission. [7] Judge Hole's point [e] was also supported. Sections 58 and 59 provided defences to directors (for instance on the basis of immateriality, belief in the truth of the documents, and reasonable excuse): [21] The difference in approach between ss58 and 59 on the one hand and Regulation 41 on the other, supports the argument that it cannot have been the intention of the drafters of the Regulations to impose criminal liability on the directors for all contraventions by corporate brokers of the strict requirements of the Regulations. It also adds weight to the argument previously made that one could reasonably expect a clearer statement of intention to impose criminal liability on directors for contraventions by corporate brokers without any form of defence or exception. [8] O'Regan J disagreed with Judge Hole's conclusion that the three particular provisions of the regulations imposed duties on directors themselves (point [f]). But in terms of point [g] he applied a purposive approach and considered that it was appropriate to construe the regulation strictly because of its penal nature. The argument in this Court [9] The submissions to us covered essentially the same ground as the judgments below. We would add only two points from the submission made by Mr Dickey for the appellant. He emphasised that the result of the High Court judgment was to make the phrase "a director of a broker" of no effect - on the basis, that is, that as had been held in the High Court, the regulations placed no distinct obligations on directors. But, to sustain his argument, he also accepted and submitted that directors would have a no fault defence along the lines indicated by this Court in *Civil Aviation Department v MacKenzie* [1983] NZLR 78. It would not be unreasonable, he submitted, if penalties were imposed on a strict liability basis. [10] We follow essentially the same headings as the courts below and, as will be seen, we are in broad agreement with much but not all of their reasoning. The

words of regulation 41 in their immediate context [11] At first blush reg 41 does appear to be concerned with two different actors who may be in breach of their own distinct obligations : the broker or a director of a broker. To make the director liable for the action of the broker, the drafter would be expected to use different wording and indeed different structure. [12] Such different wording and structure were immediately available to the drafter of the regulation in s59(1) of the Act: 59 Criminal liability for offering, distributing, or allotting in contravention of this Act (1) Subject to subsection (2) of this section, if an offer of a security is made to the public, or a registered prospectus relating to a security is distributed, or a security is allotted, in contravention of this Act, (or, in the case of an interest in a contributory mortgage, in contravention of regulations made under this Act),— (a) The issuer of the security; and (b) Every person who is a principal officer of the issuer at the time of the contravention; and (c) Every promoter of the security; and (d) Every person who has authorised himself to be named and is named in any advertisement or registered prospectus relating to the security as a director of the issuer or as having agreed to become a director either immediately or after an interval of time— each commits an offence, and is liable on summary conviction to a fine not exceeding \$15,000. (We set the provision out as it was at the time of the alleged offence.) “Principal officer” includes a director(s2(1)). Under s59(1) directors plainly may be held liable for breaches by the broker of its obligations. No breach of a distinct obligation owed by the director need be pointed to. [13] If O’Regan J is correct and directors do not have any distinct obligation (para [8] above), with the consequence that the reference to the director in reg 41 would have no effect, the force of the argument based on the words of reg 41 and the contrast with s59 may appear to be answered. But two responses to that answer may be given. The weaker one is that some of the regulations do at least appear to place obligations on directors – those on which Judge Hole relied (regs 12(2), 14(3) and 40). The stronger answer is that reg 40 (we do not consider the other two) does impose a distinct obligation on directors: 40 Persons to whom notice to be given by director of contributory mortgage broker for purposes of section 57A of the Securities Act 1978 For the purposes of section 57A(2)(c) of the Securities Act 1978, every person who is a director of a contributory mortgage broker shall, upon becoming aware of any breach of these regulations, give notice of that breach to every contributor in respect of whom that breach relates. [14] Section 57A(1) places civil liability for loss or damage sustained by reason of the breach of the contributory mortgages regulations on directors of brokers, among others. Under s57A(2)(c), a director is not however liable if, among other things, on becoming aware of the breach the director

gave notice of it to the District Registrar of Companies in Wellington and to any person to whom notice is required to be given under regulations made under the Act – here reg 40. O'Regan J considered that reg 40 had only the purpose of prescribing those to be notified for the purpose of s57A(2)(c) : that was indicated by the use of that phrase at the beginning of the regulation. It followed that the regulation did not impose a distinct obligation on directors. [15] On balance we consider that a distinct obligation probably is imposed. Civil and criminal liability may and do co-exist in this area of law, as in others. A failure to comply with the regulation might not in fact be the subject of civil proceedings and criminal prosecution may be the appropriate sanction. And reg 40, along with reg 41, appears under the heading “General”, by contrast to the headings of the preceding groups of regulations : “Receipt and Disbursement of Contributions By Brokers (regs 18-23); “Receipt and Disbursement of Other Money By Brokers” (regs 24-27); and “Duties of Brokers” (regs 28-39) (emphasis added). [16] We need not decide finally whether reg 40 does impose a distinct obligation on a director. It is enough that that is a real possibility and that the drafter of reg 41 may well have considered that that distinct obligation required a criminal sanction expressly applying to directors. [17] The 1988 regulations were made under s70(1) of the 1978 Act and relate in the present context to s59 (under which the respondents were also prosecuted) and to s58. Section 59(1) is set out above (para [11]). Other relevant parts of those sections are as follows: 58 Criminal liability for misstatement in advertisement or registered prospectus (1) Subject to subsection (2) of this section, where an advertisement that includes any untrue statement is distributed,— (a) The issuer of the securities referred to in the advertisement, if an individual; or (b) If the issuer of the securities is a body, every director thereof at the time the advertisement is distributed— commits an offence. (2) No person shall be convicted of an offence under subsection (1) of this section if the person proves either that the statement was immaterial or that he or she had reasonable grounds to believe, and did, up to the time of the distribution of the advertisement, believe that the statement was true. (3) Subject to subsection (4) of this section, where a registered prospectus that includes an untrue statement is distributed, every person who signed the prospectus, or on whose behalf the registered prospectus was signed for the purposes of section 41(b) of this Act, commits an offence. (4) No person shall be convicted of an offence under subsection (3) of this section if the person proves either that the statement was immaterial or that he or she had reasonable grounds to believe, and did, up to the time of the distribution of the prospectus, believe that the statement was true. ... s59 Criminal liability for offering, distributing, or allotting in contravention of this Act ... (2) No

person shall be convicted under subsection (1) of this section for any such contravention if— (a) The contravention was in respect of matters which in the opinion of the Court dealing with the case were immaterial, or was otherwise such as, in the opinion of the Court having regard to all the circumstances of the case, ought reasonably to be excused; or (b) In the case of a person other than the issuer, in the opinion of the Court dealing with the case, the contravention did not take place with his [or her] knowledge and consent. [18] The 1988 regulations are plainly to be read in the context of the Act under which they were made. The connection is made the closer by the fact that s59(1) includes breach of the regulations as one of the elements of the offence it creates. [19] Three features of these two sections creating criminal offences are relevant to the determination of the meaning of reg 41. They support the interpretation given by the courts below. As mentioned already, the first is the distinct and plain listing of principal officers (including directors) and directors as those who may be criminally liable because of breach of the Act or regulations without any fault by that person. That liability, to go to the second feature, is however balanced by the creation of statutory defences. The wording of these defences varies, to refer to the third feature. [20] Regulation 41 by contrast does not plainly and distinctly list the faultless directors as liable. To turn to the second and third features it does not of course include express defences. The appellant would have us imply such defences for directors if not for brokers. In the context of this legislation however the submission faces two substantial hurdles. The first is that the inclusion of a defence in the Act and its omission from a related regulation creates a strong inference that none is included in the regulations (and a possible argument that in any area of overlap the regulations might be invalid as repugnant to the Act). The second point is that the variations in the formulations, which provide wider defences than MacKenzie would, show how extremely difficult it would be for a court in particular contexts to construct defences. [21] The particular statutory context accordingly supports the interpretation adopted in the District Court and High Court. So, too, does the wider statutory context which provides an array of relevant statutory formulations. Regulation 41 in its wider statutory context [22] Many statutes over a lengthy period have imposed criminal liability on directors for breaches by their corporate body of its obligations. The statutes make it explicit that the obligations in issue are not the obligations of the directors and that the breach is not the director's breach. The apparently draconian character of that liability is however generally lessened by the availability of defences. In both respects, the many other provisions are like ss58 and 59 of the Securities Act. As with those provisions, the defences also recognise that directors, especially non executive directors,

very properly may not have hands on involvement in the day to day affairs of the corporate body. [23] Some of the ameliorating provisions that are included do not take the form of a defence; rather they are included as elements of the offence : for instance where the body is in breach, directors and others who directed, authorised or assented to the breach are liable. That final set of provisions may be seen as imposing a distinct obligation on the directors with a consequent liability in criminal proceedings on the directors. They include the Health Act 1956 s92G (trading in blood), Building Act 1991 s82(3), Resource Management Act 1991 s340(3) and Health and Safety in Employment Act 1992 s56. There are variations even within that small group of recent statutes : in some the element of knowledge of the breach and not taking reasonable steps to prevent it extends to situations where the director could reasonably be expected to know. The provisions can be compared to the parties provision of the Crimes Act 1961 s66 which applies in general to summary proceedings; Summary Proceedings Act 1957 s3(1)(e). [24] As already appears from the provisions of the Securities Act itself variations also appear within the wording of the defence provisions. Under some the directors have a defence if they prove that the company took all reasonable and proper steps to ensure that the requirements were satisfied (eg Companies Act 1993 s376(2), Companies Re-Registration Act 1993 s17(3) and Insurance Companies (Ratings and Inspections) Act 1994 s22(2)). That legislation also recognises the appropriate role of directors by providing them with a defence if they could not reasonably be expected to take steps to ensure that the company complied. Other mitigating provisions concern only the state of mind or the actions of the director (eg Designs Act 1953 s 42(2), Patents Act 1953 s108 and Private Investigators Act 1974 s70(1)), while others, like ss58 and 59 of the Securities Act, provide a defence if the action is immaterial (eg Reserve Bank of New Zealand Act 1989 s89(5) and Securities Markets Act 1988 ss19J(2)). The broader legislative practice and context allows two conclusions relevant to this case. They build on the conclusions reached in relation to reg 41 in the immediate context of the 1988 regulations and the 1978 Act. The first is that the legislature in a wide range of regulatory legislation relating to commercial activity and other matters, such as safety, does routinely address as a distinct matter the criminal liability of directors (and others) in the event that their companies are in breach of the law. The second is that the formulation of that liability can vary in significant ways; a court being asked to apply a mitigating element as part of the offence or as a defence would have a range of choices typically faced by a legislature rather than by a court. [25] The Courts have long recognised a MacKenzie type defence where an offence is not one of full mens rea and where the statute does not expressly

preclude its availability. Absolute liability is to be imposed only by clear terms or necessary implication; *Millar v MOT* [1986] 1 NZLR 660, 668. No such argument is made by the appellant in this case. [26] We do not take this matter any further. It is enough for us to say that the general, as well as the particular, statutory context makes difficult the recognition of only a MacKenzie type defence. That supports the conclusion reached on other grounds that the directors are not liable under reg 41 in the circumstances of this case. The purpose of the regulations [27] But does the purpose of the regulations require that the directors should be liable in the present circumstances? We do not think so. We have little if anything to add to the discussions in the District Court and High Court. As O'Regan J says, this Court has stated the purpose in earlier cases (*Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385, 391, and *Securities Commission v Kiwi Cooperative Dairies Ltd* [1995] 3 NZLR 26, 31) but there is nothing in those statements of purpose and in particular in the regulations to require that the directors be held absolutely or even strictly liable for actions by the broker for which it is liable. Rather, the meaning of reg 41 in its context and in the light of its purpose is that the broker is liable if it is in breach of its obligations and that directors of a broker are liable if they are in breach of theirs. Conclusion [28] It follows that the appeal fails. Any question of costs may be the subject of memoranda. Solicitors: Crown Solicitor, Auckland for the Appellant Lowndes Jordon, Auckland for the Respondents

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<str name="FileNumber">CA322/02,CA323/02</str>

<date name="JudgmentDate">2003-04-09T00:00:00Z</date>

<str name="JudicialOfficer">Justice,Justice,Justice
Keith,McGrath,Glazebrook</str>

<str name="Jurisdiction">Court of Appeal</str>

<str name="Location"><NOT SPECIFIED></str>

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CA185/02 3 July 2003
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GRANT COLIN MORRIS V INTERCHEM AGENCIES LIMITED CA
CA185/02 3 July 2003 IN THE COURT OF APPEAL OF NEW
ZEALAND CA185/02 BETWEEN GRANT COLIN MORRIS Appellant
AND INTERCHEM AGENCIES LIMITED Respondent Hearing: 29
April 2003 Coram: Keith J Blanchard J Glazebrook J Appearances: P
H Thorp for Appellant H Fulton for Respondent Judgment: 3 July
2003 JUDGMENT OF THE COURT DELIVERED BY GLAZE BROOK J
Introduction [1] Mr Morris was employed as sales manager by
Interchem Agencies Ltd. He claims that he was unjustifiably
dismissed. The Employment Court rejected his claim and awarded
damages of \$400,000 to Interchem on the basis of breaches by Mr
Morris of his duty of good faith and fidelity. [2] The alleged
breaches related to an agency held by Interchem for Printpack, a
large supplier of polypropylene film based in the United States, for
the supply of polypropylene film used to wrap cheese slices to
Pastoral Foods (NZ) Ltd, a division of Fonterra. The Employment
Court found that Mr Morris had secured that agency for himself
before his resignation from Interchem and that he had failed to
pass on concerns expressed in August 1998 by Mr Haas of
Printpack about comments made by Mr Evans, the Managing
Director of Interchem. Mr Haas had understood Mr Evans to have
said that Mr Morris should reduce the time he spent on Printpack
and Pastoral. Mr Haas was concerned because, on the contrary, he
wanted Mr Morris to increase his involvement. [3] Mr Morris
appeals both against the decision that he was not unjustifiably
dismissed and the decision that he had breached his contract of
employment. He also appeals against the quantum of damages
awarded. Background facts [4] Mr Evans formed Interchem in 1987
to act as an agent for the importation and sale of chemical
products. Mr Morris joined Interchem in 1991 and rose to the
position of sales manager. Interchem had been supplying Pastoral
with chemicals. Through contacts within Pastoral, Interchem was
appointed Printpack's agent in respect of the polypropylene film
supplied to Pastoral. Mr Morris was appointed as the contact
person in relation to the Printpack agency, including assisting in
the resolution of problems Pastoral encountered with the film. [5]
On 25 August 1998, in a brief meeting at the airport with Mr Haas
and Mr Morris, Mr Evans had raised the issue of whether the time
spent by Mr Morris on the Printpack agency could be reduced. He

asked Mr Haas and Mr Morris to determine the source of the problems with Pastoral and prepare a list of conclusions and proposals to resolve them. Immediately after the meeting Mr Haas and Mr Morris travelled to Taranaki to visit the Pastoral premises. We note at this point that a letter from Mr Morris' former solicitor, Mr Carter, written on his behalf on 22 September said that, on the way to Taranaki, Mr Haas had suggested that Mr Morris might like to resign from Interchem and handle the Printpack account himself and also help Printpack expand into the Australian market. Mr Carter went on to say that Mr Morris said he would think about it but did nothing. Mr Morris in evidence said that Mr Carter had been mistaken about this and that the references were rather to Interchem spending more time on the Printpack agency and helping the expansion into Australia. [6] Mr Morris sent to Pastoral, Mr Haas and Mr Evans a memorandum on the Pastoral visit. Mr Evans' evidence was that the document he saw did not contain proposals for solving the problems with the agency. Mr Haas replied to Mr Morris by facsimile dated 10 September 1998 indicating his desire that Mr Morris should spend more time on the Printpack agency and alluding to the possibility of further opportunities in Australia. Mr Morris' evidence was that Mr Evans must have seen this facsimile. Mr Evans said that he had not. [7] Mr Morris says that he telephoned Mr Haas on 12 September requesting clarification of the 10 September facsimile. His evidence was that they discussed, among other general matters, the fact that Mr Haas was not happy with the efforts Interchem had made on developing the business in Australia. Mr Morris said that he only replied "That's interesting". There was no discussion, according to Mr Morris, about his taking over the agency. [8] It is common ground that on 14 September Mr Evans and Mr Morris met in Tauranga where they jointly visited a customer. There was no discussion during the day they spent together about the Printpack agency and their relationship was normal and cordial. [9] It is also common ground that Mr Morris on 16 September 1998 handed a letter of resignation to Mr Evans giving one months notice effective from that date. Mr Evans' evidence was that Mr Morris then told him that he had the Printpack agency. Mr Morris' version was that he had merely said that he was going to set up his own chemical importing business and that Mr Evans had thereupon shown him a copy of the 10 September facsimile and accused him of plotting to take the Printpack and other agencies. Another Interchem employee, Ms Moore, gave evidence that Mr Morris had gone into her office on 16 September and told her that he had just resigned, that he was taking the Printpack agency and that he would be looking after Pastoral in the Australian market. [10] The following day, after consulting his solicitor, Mr Evans gave Mr Morris a letter informing him that he was suspended. Mr Morris

says that at this meeting Mr Evans told him he was dismissed, searched his briefcase, company car and pockets and marched him off the property. He agrees that he was given a letter relating to suspension but says that this was in a sealed envelope and that he had not been given time to open it. Another Interchem employee, Ms Morse, gave evidence that Mr Morris had told her on that day that he had resigned and that he had mentioned later in the day that he may have the opportunity to work with Printpack on a commission basis. [11] Mr Evans then instructed his staff to check email logs for any communication between Mr Morris and his home email address. They found evidence of an attempt by Mr Morris to transmit a schedule of various chemical suppliers on 24 August 1998. The information had not, however, been transmitted because of a problem with the server. [12] Mr Evans telephoned Mr Haas on 18 September. He was told that Printpack had decided to appoint Mr Morris as its agent in New Zealand with immediate effect. Mr Evans confirmed receipt of this advice by facsimile to Mr Haas on 22 September. Mr Morris claimed that on this same day Mr Haas had telephoned him and he had told Mr Haas that he had left Interchem; and that Mr Haas then said that he wanted Mr Morris to take over the agency immediately and that he would inform Interchem and Pastoral. [13] That same afternoon Mr Evans met with Mr Morris and handed him a letter requiring him to take his annual leave and a further letter requiring undertakings as to confidential information and asking that Mr Morris hand over any such information in his possession. Mr Morris also claimed that Mr Evans grabbed him by the arm and pulled him down the corridor, screaming "Get out of my office immediately". Ms Moore, who had seen Mr Evans and Mr Morris leaving after the meeting, said that she had seen nothing of the alleged assault and that there had been no sign of distress on the part of Mr Morris. Indeed she had assumed from the expression on his face that Mr Morris was feeling happy with himself. [14] The letter of 18 September required Mr Morris to have no contact with any of Interchem's clients during the period he was working out his resignation notice. Mr Morris, contrary to this instruction, had further discussions with Mr Haas and took part in the conference telephone call with Pastoral on the same day. He also during the period of notice made a further site visit to Pastoral. At that visit he acquired orders which he put through for the benefit of his company, Filmchem Agencies Ltd. [15] On 25 September Interchem staff found documents in Mr Morris's computer recycle bin concerning Printpack's expectations of their agent in New Zealand and Pastoral's supply requirements. These documents addressed the future of the Pastoral agency. It appeared that Mr Morris had transferred these documents to his home computer. Mr Haas confirmed that Mr Morris had sent him these documents (although

he did not say when) even though Mr Morris denied ever sending them to Mr Haas. The Employment Court decision [16] As can be seen the Employment Court was faced with sharply conflicting evidence from Mr Morris and Mr Evans, the resolution of which was recognised to be determinative of the outcome. The Judge was conscious that assessing credibility by means of demeanour of witnesses can be unreliable. Nevertheless he considered that his impression of the witnesses was helpful in this case, coupled with the contemporary documentation and the inherent logic (if any) of the statements made. [17] The Judge's impression of Interchem's witnesses was that they were giving honest and accurate testimony, to the best of their recollection. His assessment of Mr Morris' evidence was as follows: Regretfully I did not form the same impression of Mr Morris. His evidence in chief was presented in a dramatic and forthright fashion, although markedly lacking in detail. As soon as the cross-examination started Mr Morris's attitude and body language changed. He became defensive and was given to blustering when he had apparent difficulties in answering questions. There were also lengthy delays in his responses. He was evasive. He did not answer simple questions put to him where the answers could have caused difficulties for his case but instead would give irrelevant, non responsive replies, often repeating the same statement, as though it had been learnt by rote. Mr Morris's demeanour in the witness box did not indicate that he was a witness of truth. [18] It can be seen from this passage that the Judge was not merely judging on demeanour as it is usually thought of but was concentrating on the content of answers to questions and more importantly on Mr Morris not answering questions. [19] As indicated, the Judge also tested his impressions by an examination of the documentary evidence and what he called the inherent likelihood of the accounts. The Judge referred, for example, to the conflict of evidence as to whether Mr Evans had seen the 10 September facsimile before the weekend. The Judge thought it highly unlikely that Mr Evans would have spent the day with Mr Morris on the Monday without mentioning that facsimile if that were so. He also considered it unlikely that Mr Morris would have resigned from his position at Interchem, where he earned a substantial salary, with no clear prospects in mind. [20] In terms of contemporary documentation the Judge relied on the facsimile of 10 September and on the accounts given by Mr Morris and Mr Evans to their respective lawyers at the time of the dispute. The Judge considered, for example, that a number of the factual assertions contained in Mr Evans' written record of the meeting of 16 September could only have come from Mr Morris – for example he held that the most critical point to be found in that record was the reference to Mr Morris saying that, as he did not have sufficient capital, Printpack would invoice the customer directly

and reserve him a commission. That was in the event the arrangement between Mr Morris and Printpack. The Judge also referred to the accounts of Ms Morse and Ms Moore as backing up that of Mr Evans. [21] The Judge was, as a result of his analysis, satisfied that Mr Morris had obtained the Printpack agency prior to his resignation on 16 September 1998 contrary to Interchem's interests and for his own personal benefit. He also found that Mr Morris was suspended on 17 September and not dismissed. The attendance of Mr Morris at work the following day was consistent with continued employment rather than dismissal, as was the attempt to place Mr Morris on annual leave. There was no actual or constructive dismissal but, even if there had been, it would have been justified by the serious misconduct of Mr Morris in taking the Printpack agency for himself while still employed by Interchem. [22] The Judge said it was not necessary in the light of this finding to rule definitively on whether there was a fiduciary relationship between Mr Morris and Interchem in relation to the Printpack agency but expressed the view that the evidence did not go that far. He also rejected Interchem's contention that confidential information had been misused in relation to other Interchem clients, although noting that the evidence gave grounds for suspicion. [23] Interchem was awarded \$400,000 for the loss of the Printpack agency caused by Mr Morris's breach of fidelity. The quantum of damages was assessed on the basis of the likely cash flow that Interchem would have earned had Mr Morris not taken the agency away with him. Judge Travis relied substantially on the expert assessment of Mr Hagen, a chartered accountant retained by Interchem, who assessed the loss at \$485,000. This was on the basis of what the Judge at various points called conservative assumptions. The Judge then, having regard to fuller evidence than available to Mr Hagen, reduced the figure by a further \$85,000, an amount he indicated had been set somewhat arbitrarily. This was to take into account the risk of the Printpack agency being lost at some future time if Pastoral were able to source the film in New Zealand and also a reduction in income that had arisen due to a change in the gauge of the film being provided. No expert witness was called on behalf of Mr Morris. Appellant's submissions [24] Mr Thorp submits first that the Employment Court was wrong in law to hold that Mr Morris was not dismissed on 17 September 1998 because from that date all of the trappings of his employment had been removed from him. [25] Secondly, Mr Thorp submits that the Employment Court was wrong in law to find that Mr Morris took the agency while employed by Interchem. The Employment Court should have accepted Mr Morris' evidence that he had been approached for the first time on 18 September after his dismissal. In addition, even if he had been approached before this point, there was no breach of the duty of loyalty in the circumstances as it was

Mr Haas who approached Mr Morris and not vice versa. [26] Although Mr Thorp acknowledges that this appeal is limited to questions of law he submits that there was an error of law because many of the findings made by the Judge were findings for which there is no evidence or that are inconsistent with the evidence and contradictory of it. Mr Thorp submits that, once what he says are inconsistent and unreasonable findings of fact are put to one side, the evidence at most discloses an employee identifying an employment opportunity with the intention of taking up that opportunity following the termination of his existing employment. [27] Thirdly, Mr Thorp submits that the Employment Court erred in law in assessing damages on the basis of profits that would have been earned by Interchem had it not lost the agency. Damages should have been assessed instead on the basis of the value of any loss by Interchem of any chance it may have had of retaining the Printpack agency following the termination of Mr Morris's employment. There was in fact no loss because Interchem chose not to insist on any period of notice of termination for the agency from Printpack and because the loss of the agency was inevitable after Mr Morris had left Interchem, given Mr Morris's expertise in its operation. [28] Lastly, Mr Thorp submits that Mr Hagen overestimated the damages by failing to allow for the deductions of items of expense included in the gross commission figures upon which he based his calculations as well as by failing to take account of overhead costs of running the agency. Respondent's submissions [29] Mr Fulton, for Interchem, submits that Mr Morris's appeal is essentially a challenge to the Employment Court's findings of fact. This is not legitimate where there is an appeal on questions of law only. There was supporting evidence upon which the Court was entitled to rely in reaching its determination. That is the end of the matter. [30] Mr Fulton submits that nominal damages are inappropriate and that, even if damages are to be for loss of chance, the formulation by Mr Hagen produces an appropriate level of damages. In addition, Mr Fulton submits that Mr Morris accepted the basis for Mr Hagen's assessment at trial. Finally he submits that the evidence is clear that Mr Morris caused the loss of the Printpack agency and that, but for Mr Morris's breach, there was no reason for Interchem to lose it. Discussion [31] The first point we make is that appeals to this Court from the Employment Court are on questions of law only. It would have to be shown, therefore, either that there was no evidence for the conclusion reached by the Employment Court, or that no reasonable court could have come to the conclusion it did on the evidence before it. It is not enough to suggest that the Judge may have been mistaken in relation to certain facts or that there is another more likely interpretation of the evidence. [32] If Mr Evans' version of events was accepted there was clearly evidence for the findings of the

Employment Court, both in relation to the suspension question and the timing of the taking of the Printpack agency. Indeed, if the Court was correct on the suspension question then, on Mr Morris' own evidence, the agency was taken before employment ceased. [33] The Employment Court resolved the conflict of evidence on the basis of a credibility assessment. Even in a general appeal an appellate Court is reluctant to interfere with findings of fact made on the basis of credibility. Where the appeal is on a question of law there would be no basis for interfering unless no reasonable court could have come to the conclusion it did. [34] In this case the Judge relied not only on his credibility assessment, for which he gave cogent reasons, but also assessed the likelihood of the two versions of events. Mr Thorp suggests that, in making his assessment, the Judge ignored other more likely explanations. Even if this is correct, not accepting a possible alternative explanation cannot amount to an error of law. [35] Mr Thorp also pointed to documents that he suggested had been misinterpreted by the Employment Court. In particular he suggests that the facsimile of 10 September cannot be construed as a confirmation of an offer to Mr Morris to take the Printpack agency. We do not accept this submission. Even if Mr Thorp is correct that that was not the most likely interpretation, we consider it was (at least) a possible interpretation, especially if (as Mr Morris' former solicitor's letter suggested) there had been a discussion some two weeks before with Mr Haas about Mr Morris taking on the agency. [36] In any event it does not suffice to show that a Judge has misinterpreted a particular document. For there to be an error of law it must be shown that, on the basis of all the documentary evidence properly interpreted, no reasonable Court could have come to the conclusion the Employment Court did on credibility. [37] We conclude that there has been no error of law shown in the Employment Court decision, either as to the suspension or the timing of the taking of the agency. [38] Mr Thorp's alternative argument is that, even if the arrangement to take the agency had been made before the termination of the employment, there was no breach of the duty of fidelity. This argument is rejected. It is of no moment who makes the first approach. The duty of an employee in such circumstances is to reject categorically any such approach, to report it to his or her employer along with any criticisms made of the employer and to work with the employer to rectify any perceived shortcomings. A similar argument was rejected by Havers J in the case of *Sanders v Parry* [1967] 1 WLR 753 (QB), referred to with approval by Cooke J (as he then was) in his judgment in *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243, 270. [39] We move now to the assessment of damages. We accept Mr Thorp's submission that damages in such cases should be calculated on the basis of the loss of a chance to retain the agency: *Schilling v Kidd Garrett Ltd*. [40] The Judge, in

assessing damages, relied on the expert evidence of Mr Hagen whose methodology was appropriate for assessing the loss of a chance. Mr Hagen assessed the present value as at 1 October 1998 of the net cash flows Interchem would have expected to receive if the agency had not been taken by Mr Morris, less the present value as at 1 October 1998 of any actual net cash flows received or savings made. In assessing the income Interchem could have expected to earn subsequent to Mr Morris's breach Mr Hagen examined the actual revenue earned by Mr Morris and his company from the agency. He then applied a 50% probability factor to reflect the risk that Pastoral may in the future use an alternative film and/or that the Printpack agency may have been lost to Interchem. He said in cross-examination that he was aware that there was no formal contract between Interchem and Printpack and that this factor was included in the 50% allowance. [41] The Judge accepted Mr Hagen's figures and then applied a further discount to take into account the reduction in revenue as a result of a lighter gauge of film being used and the risk of the Printpack agency being lost at some point in the future if Pastoral were able to source the film in New Zealand. Up to this point there is no error. [42] The Employment Court considered that Mr Morris did not owe fiduciary duties to Interchem in relation to the Printpack agency, despite his seniority and the fact that he was effectively in sole charge of that agency. There is no challenge to that finding. This means that damages should have been assessed on the basis that Mr Morris would have been free to approach Printpack once his employment relationship with Interchem was over, provided no confidential information was used either in the approach or in the later running of the agency if the approach were successful. [43] Mr Hagen accepted in cross-examination that he had not taken into account the fact that Mr Morris had no form of restraint on his activities had he chosen to leave Interchem. Mr Hagen said that it would not have been appropriate to take that into account where, as here, there was a suggestion of breach of fiduciary duty and misuse of position and knowledge. It was thus not included in his 50% allowance. Even though the Judge reduced the damages calculated by Mr Hagen by \$85,000 he also did not take into account the fact that Mr Morris would have been free to resign and approach Printpack once his employment relationship with Interchem was over. This was despite the finding, contrary to Mr Hagen's assumption, that there was no breach of fiduciary duty. This was an error of law. [44] This does not mean, however, that we accept Mr Thorp's submission that only nominal damages should have been awarded as there was no chance of Interchem retaining the agency even if Mr Morris had behaved properly. First the court would have to assess the likelihood of Mr Morris having left Interchem at all (or at least having left at the time he did) without the certainty of

having acquired the Printpack agency. Secondly, in assessing the chance of Interchem retaining the agency, it has to be assumed that, even if Mr Morris did decide to give notice, he would not breach his duty of fidelity to Interchem before or during the period of notice. This means that any chance of Interchem retaining the agency must be assessed on the assumption that Mr Morris did not indicate a positive response to the approach from Mr Haas, and reported it to Mr Evans along with the wish Mr Haas had expressed that more rather than less time be spent on the agency, and also on the assumption that Mr Morris was prepared to work with Mr Evans during the period of notice to try to find a solution to the difficulties perceived by Mr Haas. In this connection it must be remembered that Interchem had a pre-existing relationship with Pastoral, which could have been utilised to help retain the agency. [45] Given Mr Morris' seniority and his position as sole contact point for the agency during any period of notice Mr Morris would have been responsible for ensuring as far as possible a smooth transition with which the client was comfortable. The more senior the employee, the more onerous is the duty of fidelity. Arguably a longer period of notice may be required for a senior employee, but in this case Interchem has not asserted that Mr Morris was obliged to give longer notice than one month. [46] A Court would be justified in being conservative in making any assessment of the possibility that an employee might behave properly but still take the business after he left upon working out his notice. Such an attitude is justified by a desire to ensure that a departing employee does not profit from a breach of the duty of fidelity. [47] We do not have sufficient material upon which to make an assessment of damages taking the above factors into account. The question of damages will therefore have to be remitted to the Employment Court. Mr Thorp's final issue as to expenses can be raised with that Court. Result and costs [48] The appeal is allowed on the basis set out above. The matter is remitted to the Employment Court for a reassessment of damages in the light of this judgment. [49] As the appeal has been successful only in part, costs on the appeal will lie where they fall. Solicitors: Garry Pollak & Co, Auckland for Appellant Bell-Booth & Co, Auckland for Respondent

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<str name="FileNumber">CA185/02</str>

<date name="JudgmentDate">2003-07-03T00:00:00Z</date>

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Keith,Blanchard,Glazebrook</str>

<str name="Jurisdiction">Court of Appeal</str>

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    CA65/02 1 April 2003
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      ALLAN CLIFFORD BINNIE V PACIFIC HEALTH LIMITED CA
      CA65/02 1 April 2003 IN THE COURT OF APPEAL OF NEW
      ZEALAND CA65/02 BETWEEN ALLAN CLIFFORD BINNIE
      Appellant AND PACIFIC HEALTH LIMITED Respondent Hearing:
      27 February 2003 Coram: Keith J Tipping J Glazebrook J
      Appearances: D H O'Leary for Appellant L S Taylor and E Warden
      for Respondent Judgment: 1 April 2003 JUDGMENT OF THE
      COURT DELIVERED BY TIPPING J Introduction [1] This appeal and
      cross appeal from the Employment Court (Judge Colgan) concern
      costs. The appellant, Dr Binnie, was employed by the respondent,
      Pacific Health Limited, in Tauranga. He brought common law
      proceedings in the Employment Court claiming damages for breach
      of his contract of employment. He had been suspended and
      subjected to inquiry in relation to suggestions of professional
      misconduct. Judge Colgan found for Dr Binnie after an eight day
      hearing. The Judge made the following findings: [a] Dr Binnie says,
      and I accept, that part of his motivation in bringing and
      prosecuting these proceedings in a public forum was to obtain in a
      public and authoritative way, confirmation of his vindication
      following serious but completely unfounded allegations of
      professional misconduct. [b] I find there were aggravating features
      of [Pacific Health's] conduct towards Dr Binnie that met the
      threshold test of being so flagrant and outrageous that punishment
      of its actions is warranted. [c] [Pacific Health's] was a breach of
      such fundamental and well known employment case law that it is
      surprising it sought for so long to maintain its innocence of any
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wrongdoing. [2] In effect, as the Judge also found, Dr Binnie was, for various reasons, “forced” to bring proceedings in order publicly to clear his name. Pacific Health was insistent that any settlement (a subject to which we will return) should be kept confidential. Dr Binnie was awarded general damages of \$35,000.00, special damages of \$13,023.00 and in addition he received a rare award of exemplary damages of \$10,000.00 based on the second of the findings noted above. These awards were amply justified. Indeed they can fairly be regarded as modest in the light of other awards in employment cases with which we are familiar. [3] Pacific Health also agreed towards the end of the hearing to pay Dr Binnie other special damages totalling \$13,276.71. The proceedings therefore resulted in Dr Binnie recovering a total of \$71,299.71. Pacific Health had made a Calderbank offer prior to hearing of \$50,000.00 plus Dr Binnie’s reasonable costs to that point. This feature is at the heart of the cross appeal and we will revert to it in that context. [4] Against his total recovery of \$71,299.71 Dr Binnie has had to pay his own legal expenses which, inclusive of counsel’s fees and disbursements, came to a total of \$213,262.70. The costs award in his favour, against which this appeal is brought, was of \$80,000.00 plus disbursements of \$12,868.00. The result of all these figures is that after paying his own costs Dr Binnie was left with a shortfall of \$49,095.53. This result, as he understandably says, is all the more stark in view of the fact that the Judge found that he was forced to bring proceedings to clear his name and his employer’s conduct was so flagrant and outrageous that exemplary damages were justified. [5] Dr Binnie’s overall contention, as put in Mr O’Leary’s written submissions, is that: a shortfall of this magnitude in the particular circumstances of this case is inconsistent with equity and good conscience and with the principle that the costs award ought to compensate a party who has been put to expense. [6] The appeal is based on the proposition that, in making his costs award, the Judge erred in principle and failed to take account of relevant considerations. It is also suggested, as foreshadowed in Dr Binnie’s general submission just mentioned, that equity and good conscience required a higher award. The case is governed by the Employment Contracts Act 1991, and in terms of s135 thereof this Court can intervene only if it is shown that the Judge erred in law. Dr Binnie’s contention is that there were errors of law in the three respects just mentioned. The Employment Court judgment [7] Judge Colgan gave close consideration to the recent decision of this Court in *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 which he regarded as analogous to Dr Binnie’s case. He identified the similarities and also the dissimilarities. The Judge correctly said that in the *Alton-Lee* case this Court, while noting that the practice as to costs in the Employment Court was in some respects different from those applying in other courts, stated some

general principles applying to awards of costs in all courts in New Zealand. One of those general principles, as the Judge himself recognised, is that party and party costs should generally follow the event and amount to a reasonable contribution to costs actually and reasonably incurred by the winning party. [8] One of the problems in this case is that the Judge did not directly apply that principle. He did not state expressly whether he found the costs incurred by Dr Binnie to have been reasonably incurred. That was an issue both before the Judge and before us. Mr Taylor, for Pacific Health in this Court (he did not appear below), indicated that his client had objected to the reasonableness of the sum of \$213,262.70 both in itself, and in particular on the basis of what was said to be a lack of detail in the way the costs element of that total (about \$203,000.00) was made up. [9] Mr Taylor also argued that in the light of the way the Judge expressed himself he must be taken to have found that Dr Binnie's costs, although actually incurred, were not reasonably incurred. It is unnecessary to go in detail into the way Mr Taylor contended that this was a clear implication from the Judge's reasoning. The Judge observed at one point that in his view 80% of actual and reasonable costs was an appropriate contribution in the present case. Hence, so it is said, it can be inferred from the award of \$80,000.00 that the Judge considered no more than \$100,000.00 was reasonable. The Judge's discussion of the High Court costs regime and how the case might be approached in terms of that regime was also said to support the conclusion that the Judge implicitly found that Dr Binnie's actual costs had not been reasonably incurred. [10] In the course of his reasoning the Judge made further reference to the Alton-Lee case, saying that there the costs awarded represented about \$10,555.00 per hearing day. The result, in the case of an eight day hearing, would be a total of \$80,444.00. It seems to have been essentially on that basis that the Judge fixed the figure in the present case at \$80,000.00. [11] A further factor which weighed with the Judge was his view that costs payable by a defendant "must" not be disproportionate to the money value of the plaintiff's judgment. Mr Taylor did his best to persuade us that although directing himself in that way the Judge had not in fact taken that absolute approach. It is difficult to be sure because of the need to infer what the Judge's reasoning process was but it is equally difficult to avoid the conclusion that the Judge imposed a mandatory proportionate cap on his award. The proposition that party and party costs must never be disproportionate to the money value of the plaintiff's judgment is too absolute, both in itself and certainly in a case where justified public vindication of reputation is a material factor in the litigation. While it is correct to say that costs payable by a defendant should not lightly be fixed at a level which is disproportionate to the sum recovered by the plaintiff, there will be

cases where disproportion is justified in the court's overall discretion. [12] In approaching the matter as he did, the Judge misdirected himself in law by placing upon himself a mandatory limit to the award of costs. This limit was not appropriate, particularly in the light of the fact that Pacific Health insisted that any out-of-court settlement should be kept confidential. That stance, as the Judge rightly found, forced Dr Binnie to litigate in order to mitigate the damage to his reputation which Pacific Health's conduct must have caused. The Judge's conclusion that there was no "loss" of reputation seems to have been accompanied by the inevitable view that there must have been material damage to Dr Binnie's reputation. Pacific Health's insistence on trying to keep its outrageous conduct out of the public arena can only have exacerbated that damage. In short, the Judge's self-imposed cap represented a material error of law. [13] We are also of the view, in spite of Mr Taylor's argument to the contrary, that the Judge did not appropriately apply the principle that party and party costs should generally follow the event and amount to a reasonable contribution to costs actually and reasonably incurred. What is a reasonable contribution depends on all the material circumstances. This principle, as Mr O'Leary correctly submitted, involves a two step approach. [14] The first step is to decide whether the costs actually incurred by the plaintiff were reasonably incurred. Adjustment must be made if they were not. The second step is to decide, after an appraisal of all relevant factors, at what level it is reasonable for the defendant to contribute to the plaintiff's costs. Potentially that level can be anywhere from 100% to 0%. A starting point at 66% is generally regarded as helpful in ordinary cases. Mr Taylor reflected common practice when he referred to this as the two-thirds rule. If such a starting point is adopted, careful attention must be given to factors said to justify an increase or a decrease. [15] Per day assessments are of course useful in a general way in making the necessary assessments. But there can be hidden dangers in too rigid an application of that approach. This case is a good example. By dint of the history of the case, Dr Binnie was obliged to incur substantially more legal expenses prior to the commencement of the hearing than normal. He needed urgent advice on his summary suspension, and was fully entitled to have legal advice throughout all the events which ensued. These quite extensive costs are likely to have been incurred before any question of commencing and prosecuting proceedings arose. [16] The broad approach of two days preparation for every day of hearing is no doubt also a useful rough and ready guide. It should, however, be reconsidered if, as here, the case was well outside the norm in respect of legal expenses reasonably incurred prior to hearing as a result of the defendant's wrongful conduct. [17] We offer an additional observation on this aspect of the present case.

Legal expenses properly incurred in relation to issues such as wrongful suspension of employees and investigations into their conduct might well be classified as special damages rather than as party and party costs. The latter generally have as their focus the issue of proceedings, preparation for hearing and the hearing itself. [18] If the proportion of Dr Binnie's total costs which might have been classified as special damages were treated as such, the amount of party and party costs would be materially reduced. This would have a significant effect on the proportionality issue. In addition, of course, as special damages the costs in question would be recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution. The line between special damages on this footing and party and party costs will often be blurred at the margins, but the point is valid as a general proposition. We do not wish to encourage unduly precise apportionments in this area. Use of the special damages approach should be reserved for cases in which a proper line can be drawn, albeit only in broad terms. [19] There is however insufficient material before the Court for us to make any reliable apportionment and, as the earlier costs were not claimed as special damages, it is appropriate to regard them as forming part of the plaintiff's actual costs. Appropriately Mr Taylor did not suggest otherwise. The point we have been discussing does, however, have a general relevance to the ultimate disposition of the appeal. [20] Mr O'Leary argued that if the Judge had applied the correct principles, and had taken all relevant factors properly into consideration, he should have awarded costs on a solicitor and client or full indemnity basis (ie. 100% of costs actually and reasonably incurred). We consider there is force in the view that such an approach would have been within a properly exercised discretion. The Judge gave no reason for rejecting the submission that costs should be awarded on a full indemnity basis. He simply said that to do so would not be appropriate. His appraisal appears to have been that a contribution of 80% was appropriate. Bearing in mind the general need for some proportionality, and the fact that this Court does not lightly depart from a discretionary decision of this kind (albeit the absence of reasons is relevant in that respect), we are not persuaded that the Judge's 80% assessment should be altered. That said, we consider that an 80% contribution was at the bottom end of a properly exercised discretion in the circumstances of this case, and we bear that in mind when deciding how we should deal with the suggestion that Dr Binnie's actual costs exceeded a reasonable level. [21] The level of contribution is of course the second step of the two step approach earlier identified. We shall deal with the first step after noting a submission made by Mr Taylor on the full indemnity point. He relied on the decision of Chief Judge Goddard in *Counties Manukau Health Ltd v Pack*

(Auckland Registry, AEC 69/00, 25 October 2002). There the Chief Judge suggested that full indemnity costs should ordinarily be reserved for a case in which the losing party's case was wholly lacking in merit and its stance had been pursued in a way that could be described as reprehensible. With respect, we consider this to be rather too narrow an approach to whether the discretion to award full indemnity costs should be exercised. We recognise that the Chief Judge introduced his proposition with the word "ordinarily" but even on that basis his two criteria are too limiting. Certainly, if these two criteria can be shown to exist, a strong case for full indemnity costs would be present but they should not be regarded as mandatory considerations requiring some special reason to depart from them. For example, the losing party's conduct will be relevant overall, not just in the way the case was pursued. The nature of the conduct which entitles the winning party to relief can be relevant to the level at which costs should be awarded. That said, we are not, for the reasons given above, persuaded that the Judge's 80% assessment should be increased or replaced by a full indemnity approach. [22] That brings us to the crucial question – 80% of what sum? If the Judge meant to say that no more than \$100,000 was reasonable for the "costs and expenses" (see s105 of the Employment Contracts Act 1991) incurred by Dr Binnie then, with respect, we consider this assessment was based on too narrow a legal approach. We have already covered that ground. We must therefore do our best on the information available to determine whether the amount of Dr Binnie's actual costs and expenses was reasonable and, if not, what figure we should substitute. [23] We have given careful consideration to the costs memoranda filed in the Employment Court and the material which accompanied them. The breakdown of the total costs actually incurred by Dr Binnie of \$213,262.70 is solicitor's costs \$7809.95; counsel's fees \$195,412.50; disbursements \$10,040.25. We do not consider any reasonable complaint can be made about the first and the third items, and indeed we do not understand them to be in dispute. We note an adjustment to disbursements in the Judge's award but this is of no present relevance. As regards counsel's fees, we are of the view that it was entirely appropriate for counsel of the seniority of Mr W P Jeffries to have been engaged. The matter was of grave importance to Dr Binnie. His whole career and professional reputation were on the line. [24] Details of relevant attendances over the period of about six months from February 1999 to September 1999 were supplied, as were details of two succeeding periods each of six months. The information supplied for the first period demonstrates that counsel was extensively, and at times intensively, involved over a period which covered Dr Binnie's original suspension through to his resignation and acquisition of

new employment. [25] The next phase was from October 1999 to March 2000. Counsel was involved in protecting Dr Binnie's position with his new employer in the light of difficulties which arose in that respect. Substantial work was then done in preparing proceedings in draft and conferring with Dr Binnie on that subject. Proceedings were commenced towards the end of the period. There then followed quite extensive interlocutory steps, involving questions relating to disclosure of documents, and a number of general matters of pre-hearing management. The way Pacific Health made its pleaded answer to Dr Binnie's case is of relevance. Although Dr Binnie had been exonerated of any misconduct by an independent inquiry, Pacific Health's pleaded defence did not appear to accept that exoneration. This reinforced Dr Binnie's perceived need to go to hearing in order to clear his name in a public and authoritative way. [26] The third period in which counsel's fees are analysed is from April 2000 to August 2000. This period covers the lead-up to the hearing which took place over eight days in August, and of course the hearing itself. At this point the involvement of second counsel on Dr Binnie's side became more substantial. Two counsel were fully justified in the circumstances of this case. Issues involving the need to brief and consider expert evidence were involved. New counsel came into the case on Pacific Health's side. There was very substantial pre-hearing activity, all of a conventional and necessary kind, and then there was the hearing itself. We are not brought to the view that any of the work done by counsel on Dr Binnie's side was unnecessary or unreasonably done. The way Pacific Health was approaching the case must clearly have added to the burdens carried on Dr Binnie's side. The case was such that he was entitled to leave no stone unturned. The point about Dr Binnie's exoneration at the independent inquiry was not conceded until the hearing itself. [27] For all this work senior counsel charged a fee of \$173,700.00 which included the fees of second counsel. GST of \$21,712.50 brought the total fees of counsel to \$195,412.50. Pacific Health's stance in the Employment Court included a complaint about the failure of counsel to particularise their charge-out rates and the hours they had spent. While details of time involved and charge-out rates are often available and supplied, we do not consider such information is a mandatory requirement in a matter such as this, as some of the material emanating from Pacific Health's side seems to imply. We have not reached the point where counsel are obliged to approach charging for their services on that basis. Obviously this kind of information may help, and its absence may invite a degree of caution, but in the end the Court, when considering whether actual costs are reasonable, has to make a judgment, bearing in mind the proper interest of the losing party in the question. [28] That may involve two dimensions: whether the

work performed was reasonably necessary, and whether its cost was reasonable. Here there can be no complaint that any of the work undertaken by Dr Binnie's counsel was unnecessarily done. No evidence is available on either side as to the reasonableness of counsel's costs for the work they undertook. We note that in one of the letters exhibited to the memorandum senior counsel estimated he had spent 650 hours on the case. The work spanned a period of some 18 months and was of a highly important and responsible kind. [29] In the end this Court must make a judgment which does justice to all concerned. Bearing in mind all the matters we have discussed, we find that the costs actually incurred by Dr Binnie were at a reasonable level, given all the circumstances of the case. We find ourselves unable to conclude that they were unreasonable as to amount. The consequence of this conclusion is that Dr Binnie is entitled to recover 80% of those costs from Pacific Health but subject to our consideration of its cross-appeal. [30] As earlier noted, the cross appeal is based on Pacific Health's Calderbank offer made shortly before hearing. That offer was of \$50,000.00 plus costs to that point. The lack of a precise offer for costs made the overall offer more difficult for Dr Binnie to assess and accept. He would obviously have been unattracted to settling with the prospect of an argument about what ought to be paid for his costs to that point. Later events on the costs front demonstrate clearly the difficulties in that respect which could reasonably have been anticipated. Calderbank offers which are not inclusive of costs ought sensibly to propose a specific figure for costs to avoid the sort of problem which faced Dr Binnie. [31] He recovered by judgment a total of \$58,023.0. This included special damages of \$13,023.00. He also recovered the sum of \$13,276.71, which Pacific Health agreed to pay during the course of the hearing. In spite of Pacific Health's submission to the contrary, we consider that the proper analysis of this result is that Dr Binnie recovered more than the Calderbank offer, either \$8,023.00 more or \$21,299.71 more. Even if the recovery of \$13,276.71 were excluded, we can see no case for excluding the special damages of \$13,023.00 for Calderbank purposes. The simple fact is that if he had accepted Pacific Health's offer, Dr Binnie would have recovered \$50,000.00. By going to hearing, he recovered \$71,299.71, or at least \$58,023.00 and achieved the public vindication to which he was entitled. Therefore we do not consider the Calderbank offer assists Pacific Health either on the basis that Dr Binnie failed to beat it, or indeed on any other basis. [32] Mr Taylor made a plea on Pacific Health's behalf, both on the cross appeal and, as we understood it, on the appeal itself, that it had been "punished enough" by the award of \$10,000.00 for exemplary damages. This submission misses the point that party and party costs are not a punishment imposed on the losing party. They are a

contribution to or reimbursement of the costs incurred by the winning party. They are thus entirely compensatory and not punitive at whatever level they are fixed. We have considered all the matters which Pacific Health raised through its counsel, both in written and in oral submissions, in coming to our decision in this case which is, in short, that Dr Binnie's actual costs were reasonably incurred and Pacific Health should pay 80% of them. [33] The appeal is accordingly allowed, and the cross appeal is dismissed. The Employment Court costs order is set aside. We substitute an order that Pacific Health pay Dr Binnie, for his costs in the Employment Court, the sum of \$162,577.96 (being 80% of \$203,222.45) plus \$12,868.00 for disbursements, making a total of \$175,445.96. For costs in this Court, Dr Binnie is awarded the sum of \$5,000.00 plus disbursements, to be fixed if necessary by the Registrar. Solicitors: Tripe Matthews & Feist, Wellington for Appellant Minter Ellison Rudd Watts, Wellington for Respondent

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    PHILIP RUSSELL KING V TV3 NETWORK SERVICES LIMITED And
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OF NEW ZEALAND CA221/02 BETWEEN PHILIP RUSSELL KING Appellant AND TV3 NETWORK SERVICES LIMITED First Respondent AND TOP SHELF PRODUCTIONS LIMITED Second Respondent Judgment: 15 December 2003 JUDGMENT OF THE COURT (AS TO COSTS) DELIVERED BY TIPPING J [1] The first respondent has applied for costs against the unsuccessful appellant despite his having been legally aided. We have considered the submissions filed on each side. We are of the view that there are exceptional circumstances warranting an order against the appellant personally. We do, however, consider that the amount of such order should be tempered because a significant part of the hearing was focused on the negligence issue upon which Mr King had succeeded in the High Court. He was entitled to seek to uphold the ruling in his favour made in that Court. [2] For these reasons we order that the appellant pay the first respondent for its costs of and incidental to the appeal the sum of \$2,500 all in. Solicitors: Thomas Dewar Sziranyi Druce, Lower Hutt for Appellant Grove Darlow & Partners, Auckland for First Respondent

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    ASSISTANT REGISTRAR OF COMPANIES v KENNETH ROGER
    MOSES GARY JAMES STEVENS Coram: Keith J McGrath J
    Glazebrook J Appearances: B H Dickey and T Epati for the
    Appellant R J Asher QC and C Morris for the Respondents
    Judgment: 29 July 2003 JUDGMENT (No. 2) OF THE COURT ON
    COSTS [1] The Court has considered the memoranda filed by
    parties and fixes the costs payable by the appellant to the
    respondents at a single sum of $6,000 plus reasonable costs and
    disbursements, including the travel and accommodation costs of
    counsel, to be fixed by the Registrar in the absence of agreement.
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WARREN BAXTER V WELLINGTON CITY COUNCIL CA CA16/03
 25 September 2003 IN THE COURT OF APPEAL OF NEW
 ZEALAND CA16/03 WARREN BAXTER v WELLINGTON CITY
 COUNCIL Hearing: 25 September 2003 Coram: Keith J Tipping J
 McGrath J Appearances: R M Lithgow for the Appellant S F Quinn
 for the Respondent Judgment: 25 September 2003 JUDGMENT OF
 THE COURT [1] Mr Baxter, the appellant, was convicted in the
 District Court of breaching a Wellington City Council Bylaw which
 read: No person shall live or sleep in a vehicle situated on a road,
 or use a vehicle situated on a road for any other residential
 purpose, without the written consent of the City Planner. (See
 Wellington City Council v Baxter [2003] DCR 242). [2] His appeal to
 the High Court was dismissed as was his application for leave to
 appeal to this Court. This Court did however give special leave to
 appeal under s144 of the Summary Proceedings Act 1957. [3] The
 Wellington City Council now accepts that the bylaw is invalid for
 uncertainty. [4] The parties therefore are agreed, to quote from a
 joint memorandum of counsel: 3.1 That the consolidated by-laws
 1991 clause 17.7.1 is invalid for uncertainty. 3.2 Warren Baxter is
 not guilty of the offence charged in information CRN1085028060.
 3.3 That the conviction should be set aside and no re-hearing
 ordered. [5] Accordingly, by consent, the appeal is allowed and the
 conviction is set aside. There will be no rehearing. [6] The question
 of costs has been agreed between the parties. Solicitors: Phillips
 Fox, Wellington for the Respondent

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the Applicant|C Patterson and L Wati,the Respondents|P M Muir and

S Turner

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A C NIELSEN (NZ) LIMITED V HARRY PAPPAFLORATOS And Ors CA
CA117/03 18 August 2003

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A C NIELSEN (NZ) LIMITED V HARRY PAPPAFLORATOS And Ors
CA CA117/03 18 August 2003 IN THE COURT OF APPEAL OF
NEW ZEALAND CA117/03 BETWEEN A C NIELSEN (NZ) LIMITED
Applicant AND HARRY PAPPAFLORATOS First Respondent AND
COLMAR & BRUNTON RESEARCH LIMITED Second Respondent
AND BRIAN MILNES Third Respondent Hearing: 18 August 2003
Coram: Keith J Blanchard J Tipping J Appearances: C Patterson and
L Wati for the Applicant P M Muir and S Turner for the
Respondents Judgment: 18 August 2003 JUDGMENT OF THE
COURT [1] For the reasons discussed with counsel, this application
for leave to appeal against the decision of the Employment Court is
refused. [2] The respondent is entitled to costs of \$2,500 and
reasonable disbursements, including the travel and accommodation
costs of one counsel, to be fixed by the Registrar in the absence of
agreement. Solicitor: Simpson Grierson, Auckland for the
Respondents

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<str name="FileNumber">CA117/03</str>

<date name="JudgmentDate">2003-08-18T00:00:00Z</date>

<str name="JudicialOfficer">Justice,Justice,Justice
Keith,Blanchard,Tipping</str>

<str name="Jurisdiction">Court of Appeal</str>

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-<str name="Appearances">

Appellants|K J Crossland and L J Meredith,First Respondent|D
Chan,Second Respondent|P W Michalik

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E A M BURNS AND Y J BURNS V THE NATIONAL BANK OF NEW
ZEALAND LIMITED And Anor CA CA159/02 26 September 2003

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E A M BURNS AND Y J BURNS V THE NATIONAL BANK OF NEW
ZEALAND LIMITED And Anor CA CA159/02 26 September 2003 IN
THE COURT OF APPEAL OF NEW ZEALAND CA159/02 BETWEEN
E A M BURNS AND Y J BURNS Appellants AND THE NATIONAL
BANK OF NEW ZEALAND LIMITED First Respondent AND G J C
FERGUSON Second Respondent CP43/02 BETWEEN E A M
BURNS AND Y J BURNS Plaintiffs AND THE NATIONAL BANK OF
NEW ZEALAND LIMITED First Defendant AND G J C FERGUSON
Second Defendant Hearing: 28-29 May 2003 Coram: Keith J
Blanchard J Glazebrook J Appearances: K J Crossland and L J
Meredith for Appellants D Chan for First Respondent P W Michalik
for Second Respondent Judgment: 26 September 2003 JUDGMENT
OF THE COURT DELIVERED BY GLAZE BROOK J Table of Contents
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Mr and Mrs Burns [26] What is spoliation of evidence? [30] Position
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United States [38] Tort of abuse of process [66] Existing remedies
for spoliation [74] Policy issues [85] Do the US cases help? [87]
Should the case go to trial? [89] Result and costs [92] Introduction
[1] In October 1996 Mr and Mrs Burns settled proceedings against
the National Bank for \$15,000. In those proceedings Mr and Mrs
Burns had alleged that the Bank was liable to them as a
constructive trustee for \$52,296 held in what the Burns said was a
brokerage account operated by customers of the Bank, Messrs
Bush and Radburnd. They alleged that this sum had, with the
Bank's knowledge, been transferred to another of the
Burns/Radburnd accounts and applied to reduce their overdraft. [2]
Mr and Mrs Burns now allege that the Bank failed to discover
certain documents in those proceedings and that, if they had had
those documents at the proper time, they would not have settled
the proceedings or at least would have settled on more favourable
terms. They seek summary judgment against the Bank in respect of

alleged misrepresentations contained in the lists of documents filed by the Bank. They ask that the settlement agreement be set aside, the proceedings reinstated and that they be awarded damages for wasted legal costs. In the High Court, Master Gendall refused to enter summary judgment in their favour. [3] Mr and Mrs Burns additionally allege that the Bank and its solicitor, Mr Ferguson, committed the tort of spoliation and seek damages. The tort of spoliation has not previously been recognised in New Zealand and is concerned with the destruction or concealment of property preventing its use in litigation. The Bank and Mr Ferguson applied to strike out this cause of action. In the High Court Master Gendall refused this application. [4] Mr and Mrs Burns appeal against the decision refusing summary judgment. The respondents' application to review the Master's ruling on the strike out has been removed to this Court under s64 of the Judicature Act 1908. Background facts [5] From 1981 to 1993 Mr and Mrs Burns traded in partnership in a business that supplied orchardists with fruit tree rootstock. In the course of that business in 1987 they supplied rootstock to Mr Bush and Mr Radburnd, customers of the Bank, who traded under the name Horticultural Contact. Horticultural Contact was to on-sell the rootstock to third parties. Mr Bush and Mr Radburnd became insolvent and Horticultural Contact did not pay the Burns for the trees. [6] In 1993 the Burns commenced an action against the Bank in the District Court at Hastings alleging that the Bank was liable as a constructive trustee of \$52,296. It was alleged that the Horticultural Contact bank account was a brokerage account with the major part of the funds (after deduction of commission) in that account held in trust for the Burns and other rootstock suppliers. It was alleged that the sale proceeds had in fact been applied towards reducing Horticultural Contact's indebtedness with the Bank, and further that the Bank had been aware that the account was being used in this way, which made the Bank liable as a constructive trustee of the sale proceeds. [7] Discovery was sought from the Bank. Between October 1993 and September 1996 the Bank produced five lists of documents largely through its solicitor, Mr Ferguson. The trial began on 21 October 1996 and one day later was settled, with the Bank agreeing to pay \$15,000 to the Burns to discontinue the action. This compromise was reached on the advice of the Burns' then counsel after indications from the Judge that he considered the account had been conducted on a debtor/creditor basis rather than a brokerage basis at the relevant time. [8] In 1998 Mr Burns was approached by a Mr and Mrs Walker, who operated a similar fruit tree nursery business, to give evidence in a case they were bringing against the Bank. In those proceedings, Walkers Nurseries Ltd v National Bank of New Zealand HC NAP CP 45-95 2 Aug 2001, Ellis J held that Horticultural Contact had agreed to hold money on trust for the Walkers and that a transfer

to another account with the Bank was a breach of fiduciary duty. Because the Bank had knowledge of this, relief was available against the Bank by way of constructive trust. [9] In the course of the Walkers Nurseries proceedings the Bank discovered documents that were not included in the discovery made in the Burns' proceedings. Mr and Mrs Burns allege that they should have been so discovered. Of the 557 documents that were not discovered, a number are, Mr and Mrs Burns allege, of particular relevance. The Bank and Mr Ferguson, who was named as a co-defendant, do not accept that discovery was deficient. Summary judgment appeal High Court decision [10] The application for summary judgment was dismissed by Master Gendall because he was satisfied that there was a fairly arguable defence to the Burns' claim. The Master pointed to evidence that Mr and Mrs Burns were induced to settle on the advice of counsel because of the view taken by the District Court Judge of the nature of the relationship with Horticultural Contact. It was arguable in his view that the non-discovered documents would not have changed that position. The Master was satisfied that there was force in the argument that, on the evidence, the relationship between Mr and Mrs Burns and Horticultural Contact was one of creditor and debtor. Submissions for Mr and Mrs Burns [11] Mr Crossland, for Mr and Mrs Burns, submitted that the Master did not apply the legal principle pertinent to the setting aside of judgments and compromises of actions where one party has concealed relevant documents from the other in discovery. The appropriate test, he submitted, is whether the documents "might" or "may" have affected the result and thus whether the Burns "may" have been misled into settling on terms that they would not otherwise have accepted. He referred to the case of *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 as authority for that proposition. [12] Mr Crossland next submitted that the Master erred in accepting as arguable the Bank's defence that the Burns were not induced to enter into the compromise agreement by the misrepresentation. Evidence led by the Burns that the compromise would not have been entered into and that the action would have been conducted differently had proved the inducement element of the cause of action. [13] Finally Mr Crossland submitted that the Master erred in traversing the Bank's contention that the relationship between the Burns and Horticultural Contact was one of creditor and debtor. As a matter of law a pre-existing fiduciary relationship is not required. What is required is an equitable obligation in respect of the property. In the case of agents contractual debts and equitable obligations can co-exist. The Bank's submissions [14] Mr Chan, for the Bank, submitted that the Burns' reliance on *Quade* is misplaced. That case involved an appeal from a judgment on the basis of newly discovered evidence whereas this case is founded on

misrepresentation under the Contractual Remedies Act 1979 in respect of a contract of settlement. In any event Quade holds that the Court needs to take account of a variety of possibly competing factors before ordering a new trial including the degree of culpability, lack of diligence and the extent of any likelihood that the result would have been different. It is not possible to weigh such factors at a summary judgment stage. [15] In addition, Mr Chan submitted that summary judgment was inappropriate because there were two defences that were (at least) arguable. First it was arguable that the alleged misrepresentation did not induce the Burns to enter into the agreement to settle the District Court proceeding. Rather the Burns decided to settle because the Judge considered that they could not show that Horticultural Contact was their agent, that the account was a brokerage account or that the Bank was aware of this. The documents referred to by the Burns do not help with this argument. Secondly Mr Chan submitted that in any event no remedy would have been available under the Contractual Remedies Act. Discussion on summary judgment [16] We accept Mr Chan's submission that the case of Commonwealth Bank of Australia v Quade (1991) 178 CLR 134 is inapplicable. As he submitted, the issue in Quade was the appropriate test to be applied on an application for a new trial where fresh evidence had come to the notice of the unsuccessful party after trial. The issue here is whether the Bank has a defence to the Burns' allegation that they were induced to enter into the settlement (a contract like any other) by misrepresentations made on behalf of the Bank. [17] We move now to the question of whether there is an arguable defence to the misrepresentation claim. Mr Burns deposed that he and his wife "would not have settled the District Court action for \$15,000 and would have pressed ahead with the case had we had the documents we saw after the case had settled". Mr McKenzie QC, who was counsel for the Burns in the case, was not quite so definite. He deposed that it had become clear during the hearing that the Judge did not consider the Burns to have a prima facie case because he considered that the account was conducted on a debtor/creditor basis at the relevant time. In Mr McKenzie's view it was likely therefore that the Judge would dismiss the Burns' claim (possibly at the conclusion of their case) and award costs against them. The Burns were not on legal aid and had limited resources. He thus advised settlement. [18] Mr McKenzie deposed that in his view the Burns' case would, however, have been strengthened had a number of the since discovered documents been available at the time of trial. He referred in particular to two letters of 27 May 1987 and a memorandum from Mr Sewell (the Bank Manager) to Mr Ferguson of 11 November 1988. He said that the documents would have shown that Mr Sewell had been informed that the Horticultural Contact account was a different type of account from

the other Bush and Radburnd accounts and that there was an obligation to treat it in a different way. The documents also in his view provide evidence that the Bank had been informed that money from the Horticultural Contact account had, with the concurrence of the Bank manager, been paying other debts. He deposed that the failure to discover those documents: ... significantly prejudiced the Burns in the conduct of their proceeding and precipitated settlement discussions which I believe would not otherwise have taken place. Had such discussions taken place, I believe that the outcome of those discussions was likely to have been different, having regard to the impact which this additional and relevant material would have had on advice given to the Burns as to their likely prospects of success were the proceedings to have been continued, or were they to later take their case to appeal. He does not go so far as to say that he would definitely have advised against settlement (or at least settlement on those terms) had the documents been available. [19] In our view it is clearly arguable that settlement on those terms would have taken place in any event. The claim in the District Court had been run on the basis that the Horticultural Contact account was a brokerage account. There was, however, evidence to show that in fact it was operated on a debtor/creditor basis. None of the documents referred to by Mr McKenzie in his affidavit, nor the other documents referred to us by Mr Crossland, support the proposition that the account was operated as a brokerage account. At most the documents show that the Bank may have thought at various times that the account was a brokerage account. This would be beside the point if it were not in fact a brokerage account. [20] It is true, as Mr Crossland submitted, that contractual debts and equitable obligations can co-exist but that does not appear to be the basis upon which the case was run in the District Court. Nor do any of the documents relate to this question. The documents may show that, if there were such equitable obligations and the Bank was aware of these, then the Bank knew those obligations were being breached, but this was, arguably, accepted by the Bank in its statement of defence. The documents do not, however, relate (at least directly) to whether such obligations existed. We observe in passing that, in this regard, the Walkers Nurseries case, referred to above at para [8], appears to differ in a number of material respects from this case, at least on the current state of the evidence. In particular, in that case a separate trust account had been opened, albeit never used. [21] It must be reasonably arguable that the District Court judge would have taken the same view of the case, even if the documents had been available. It must also be reasonably arguable, as a consequence, that the Burns would have been advised to settle for the same reasons as were articulated by Mr McKenzie. It must further be reasonably arguable that they would have accepted that

advice. We therefore agree with the Master that this is not an appropriate case for summary judgment. Strike-out application High Court decision [22] Turning to the strike-out application, the Master pointed out that the tort of spoliation of evidence has not been recognised in New Zealand and that this was the case in Australia and the United Kingdom as well. He indicated that spoliation had been raised as a separate tort recently in Canada and had been accepted in some States in the United States, although there were conflicting authorities in both jurisdictions. [23] The Master noted the Bank's arguments that such a tort would cut across the tort of abuse of process and was unnecessary for policy reasons but concluded "on a small margin" that, given the reluctance courts should show to striking out novel causes of action, it should be considered at a full substantive hearing. Submissions for the Bank and Mr Ferguson [24] Both Mr Chan, for the Bank, and Mr Michalik, for Mr Ferguson, provided detailed submissions. They submitted that the Master's decision not to strike out the Burns' action in tortious spoliation of documents was an error of law. In their submission this Court should reject a new tort of spoliation of evidence for four main reasons. They submitted that: (a) a new tort of spoliation would cut across the established principles of law in the tort of abuse of process; (b) there are existing sanctions and remedies for the conduct sought to be covered by the proposed tort of spoliation and therefore a new tort is not necessary; (c) there are compelling policy reasons militating against the introduction of this new tort; and (d) the United States and Canadian cases relied on by the Burns are of limited help and relevance. [25] Finally Mr Chan and Mr Michalik submitted that it is not necessary to allow the claim to go to trial. Instead this is an appropriate case for striking-out as the policy issues are clear and the pleaded case presumably contains all the facts relied on to establish the claim. Submissions for Mr and Mrs Burns [26] Mr Crossland, for the Burns, submitted that no court can make a significant decision on a new area of law at the strike out stage. The development of the law should be based on actual facts found at trial and not hypothetical facts that are assumed, possibly wrongly, as true for the purposes of strike out. Mr Crossland pointed to the Canadian approach of allowing a claim for the recognition of the tort of spoliation to proceed to trial. [27] In Mr Crossland's submission a tort of spoliation should, in any case, be recognised. The tort protects property rights and is a logical development from other torts involving damage to economic expectancy by unlawful means. This distinguishes the case from abuse of process cases which are founded on an entirely different basis. In addition, traditional remedies may not always be sufficient to compensate any party wronged by a spoliation. [28] Mr Crossland submitted that new torts do not always increase the

likelihood of litigation. Nor should the need for finality in litigation prevent the recognition of the tort. Justice should not be sacrificed for court efficiency and finality when the substance of the tort is that the procedure by which a decision was reached was flawed and unfair. Additionally, the difficulty of assessing damages should not be a ground for refusal to recognise the tort. [29] In any event, Mr Crossland submitted, the benefits of recognising this tort far outweigh any negative perceived consequences. A spoliation tort will promote truth and fairness. Deterrence is also promoted because the potential for damages and publicity will significantly increase, and the policy goal of accurate fact finding will be assisted by the tort since spoliation of evidence prevents fair and proper determination of issues. What is spoliation of evidence? [30] Blacks Law Dictionary (7ed, 1999) 1409 defines spoliation as: The intentional destruction, mutilation, alteration, or concealment of evidence, usu. a document. If proved spoliation may be used to establish that the evidence was unfavorable to the party responsible. [31] Mellinkoff's Dictionary of American Legal Usage (West Publishing, 1992) 610 defines spoliation as: An antique way of saying spoiling or destroying. The act done by someone who hardly anyone but a lawyer would call a spoliator. Spoliation of evidence is then described in Mellinkoff as alteration, destruction, or disposal of a writing or property preventing its use in litigation. The description goes on to say that intentional spoliation supports an inference that the item was unfavourable to the person responsible. It further notes that, in criminal law, spoliation may amount to obstruction of justice and that, in some jurisdictions, intentional or negligent spoliation may be a cause of action in tort for destroying or injuring the case of a plaintiff who needed the evidence. [32] As discussed in more detail below, an independent tort of spoliation has been recognised in some States in the United States. There are two main types of spoliation that have been recognised - intentional spoliation and negligent or reckless spoliation. A defendant in a spoliation case can be either a party to the underlying litigation or a third party. The Burns allege both intentional and negligent spoliation against the Bank and Mr Ferguson. [33] Intentional spoliation includes both destruction and concealment of documents. The elements of the tort were set out by the Ohio Supreme Court in *Smith v Howard Johnson Company* 615 NE 2d 1037, 1038 (1993) as follows: [T]he elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiffs, (2) knowledge on the part of defendant that litigation exists or is probable, (3) wilful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts ... [34] The elements of negligent or reckless spoliation of evidence, as

enumerated by the District of Columbia Court of Appeals, were set out in *Holmes v Amerex Rent-a-Car* 710 A 2d 846, 854 (1998) as follows: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to that action; (3) destruction of that evidence by the duty-bound defendant; (4) significant impairment in the ability to prove the potential civil action; (5) a proximate relationship between the impairment of the underlying suit and the unavailability of the destroyed evidence; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages adjusted for the estimated likelihood of success in the potential civil action. [35] There is some variation in the elements required to sustain a claim for spoliation among the various States. For example in *Tomas v Nationwide Mutual Ins Co* 607 NE 2d 944, 948 (1992) the Court of Appeals of Ohio suggested that, in order to succeed, the plaintiff had to show that, but for the failure to retain the material (in that case the steering mechanism of a vehicle), the plaintiff would have succeeded in the underlying litigation. Some judgments even suggest that it is necessary to resolve the plaintiff's underlying claim before embarking on a spoliation claim in order to prevent speculative recovery in a spoliation action – see e.g. *Federated Mutual Insurance Co Ltd v Lichfield Precision Components Inc* 456 NW 2d 434, 439 (Minn 1990). Others suggest that a single trial is preferable – see e.g. *Boyd v Travelers Ins Co* 652 NE 2d 267, 272 (Ill 1995). While we note these differences in approach, for present purposes we need only concern ourselves with the broad outline of the torts as set out above. Position in the United Kingdom, Australia and Canada [36] An independent cause of action based on spoliation of evidence is not recognised in the United Kingdom or in Australia. The Victorian Court of Appeal recently examined the question of the destruction of documents in *British American Tobacco v McCabe* [2002] VSCA 197. The Court noted the recognition of the tort of spoliation in some United States jurisdictions but said that the tort forms no part of Australian law and that the law in Australia relies upon procedural sanctions. The question on that appeal was, rather, the sufficiency and applicability of the procedural remedies available, not the invocation of a new tort – see paras 163-164. [37] The position in Canada is that there has been a tentative recognition of the tort of spoliation in Ontario, at least to the extent of permitting the issue to proceed to trial – see e.g. *Spasic Estate v Imperial Tobacco Ltd* (2000) 49 OR (3d) 699. But British Columbia has held that there is no such tort in Canada – see *Endean v Canadian Red Cross Society* (1998) 157 DLR (4th) 465. The Supreme Court of Canada is yet to consider the issue. Leave to appeal was granted in *Endean* but the appeal was not pursued. Leave to appeal was refused in *Spasic Estate* but no reasons were given for that refusal. The refusal of

leave cannot be taken as signifying approval of the decision as it may be, for example, that the Court considered the appeal premature as the case was to proceed to trial. Position in the United States [38] The first decision expressly to recognise the tort of spoliation in the United States was the 1984 Californian case of *Smith v Superior Court* 198 Cal Rptr 829 (Cal Ct App 1984) in which parts of a van involved in an accident that caused serious injury were disposed of by the defendant with knowledge of their evidentiary importance. The Court referred to the ability of the common law to develop. New torts could be recognised as the need arose, with the common thread being the idea of unreasonable interference with the interests of others (at 832). As an analogy to the tort of intentional interference with prospective business advantage, the opportunity to win a lawsuit was compared with a reasonable probability of obtaining a contract or profit. The Court considered that a prospective civil action in a product liability case is “a valuable ‘probable expectancy’ that the court must protect from the kind of interference alleged herein” (at 837). The guiding principle for the Court appeared to be that “for every wrong there is a remedy” (at 832). [39] A number of States have since recognised spoliation as a separate tort but more have rejected it, at least on the facts of a particular case. In addition, not all of the States which recognise an independent tort of spoliation accept all forms of spoliation. For example in *Hannah v Heeter* (No. 30962, 30 June 2003) the Supreme Court of Appeals of West Virginia recognised a tort of intentional spoliation of evidence, whether by a party to a civil action or a third party. It rejected a tort of negligent spoliation by a party to litigation and allowed the tort of negligent spoliation by a third party only if that third party had a special duty to preserve the evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty or other special circumstance. In contrast, Alabama does not recognise an independent tort of spoliation at all where the spoliator is a defendant in an action, but does recognise third party spoliation where a third party has knowledge of a pending or potential lawsuit and accepts responsibility for evidence that would be used in the lawsuit – see *Smith v Atkinson* 771 So 2d 429 (2000). [40] It is interesting that the State which first recognised spoliation as an independent tort has now rejected the concept, at least in terms of intentional spoliation. The Supreme Court of California held by majority in *Cedars Sinai Medical Center v The Superior Court of Los Angeles County* 954 P 2d 511 (1998) that there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action in cases in which the spoliation victim knows or should have known of the alleged spoliation before the trial. The minority did not discuss the spoliation issue because of procedural concerns. [41] The majority saw their task as being to weigh the

relevant policy considerations that favour or oppose a tort remedy for first party spoliation. They began by condemning the intentional destruction of evidence. They pointed out that destroying evidence increases the risk of an erroneous decision on the merits of the underlying cause of action and that it can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both. They said, however, that that alone is not enough to justify creating tort liability for such conduct. It was necessary to determine whether a tort remedy for the intentional first party spoliation of evidence would ultimately create social benefits exceeding those created by existing remedies for such conduct and outweighing any costs and burdens it would impose. They had three concerns in this regard - the conflict between a tort remedy for intentional first party spoliation and the policy against creating derivative tort remedies for litigation-related misconduct, the strength of existing non-tort remedies for spoliation, and the uncertainty of the fact of harm in spoliation cases (at 515). [42] They considered that an enquiry into whether there should be a tort remedy for the intentional spoliation of evidence must begin with a recognition that using tort law to correct misconduct arising during litigation raises policy considerations not present in deciding whether to create tort remedies for harms arising in other contexts. They pointed out that, in the past, the Court had favoured remedying litigation-related misconduct by sanctions imposed within the underlying lawsuit rather than by the creation of new derivative torts. They referred in particular to the fact that there is no civil remedy against a witness who commits perjury. The goal in this respect was to promote finality of litigation (at 515-516). [43] The majority then discussed the adequacy of the current non-tort remedies, such as the evidentiary presumption that destroyed evidence was unfavourable to the party which has destroyed it, discovery sanctions, disciplinary sanctions against lawyers involved and criminal sanctions. They concluded that these remedies are extensive and apparently effective as they considered that the problem of spoliation, although real, did not appear to be widespread. They remarked that the reported Californian cases describing instances of intentional spoliation are not numerous (at 517-518). [44] A number of other considerations weighing against the recognition of a tort remedy for intentional first party spoliation were then set out, the first being the uncertainty of harm. The majority said (at 518): It seems likely that in a substantial proportion of spoliation cases the fact of harm will be irreducibly uncertain. In such cases, even if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable to the spoliator, there will typically be no way of telling what precisely the evidence would have shown and how much it would have

weighed in the spoliation victim's favor. Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. The jury could only speculate as to what the nature of the spoliated evidence was and what effect it might have had on the outcome of the underlying litigation. [45] They criticised *Smith v Superior Court* (supra) for failing to distinguish between uncertainty as to the fact of harm and uncertainty as to amount of damage (at 519). The latter would not be a bar to a remedy. Uncertainty as to the fact of harm, however, meant that a tort remedy would not accurately compensate for losses caused by spoliation or correct errors in the determination of issues in the underlying litigation. It would also create the risk of erroneous determinations of liability when the availability of the spoliated evidence would not have changed the outcome of the underlying litigation. [46] The majority also considered that a tort remedy would impose costs that would weigh against the creation of a separate tort remedy. The risk of erroneous liability could lead persons or entities to preserve documents and things of no apparent value, merely to avoid the possibility of spoliation liability. There was also the cost to defendants and the courts of litigating meritless spoliation claims. There could also be inconsistency between the findings in the spoliation action and those in the underlying cause of action, whether tried separately or together. If tried separately there would be the added burden of duplication of evidence through the necessity to re-run the original litigation (at 519-520). [47] Finally they did not consider that the existence of a separate tort of spoliation would significantly increase deterrence of the destruction of evidence beyond that afforded by existing remedies. Nor, given the uncertainty of harm, would a tort remedy more accurately compensate the spoliation victim and thus increase deterrence by reducing the benefit to the spoliator. Neither would it increase the frequency with which destruction comes to light, as the motive and opportunity to discover instances of spoliation were at their greatest during discovery in the underlying action. They concluded (at 521): As we noted at the outset, the intentional spoliation of evidence by a party to the litigation to which it is relevant is an unqualified wrong. We conclude, however, that it is the rare case in which a tort remedy for an intentionally caused harm is not appropriate. The remedies already available in first party spoliation cases to the spoliation victim, especially the evidentiary inference provided by Evidence Code section 413 and the discovery remedies of Code of Civil Procedure section 2023, provide a substantial deterrent to acts of spoliation, and substantial protection to the spoliation victim. Given that existing remedies will in most cases be effective at ensuring

that the issues in the underlying litigation are fairly decided, whatever incremental additional benefits a tort remedy might create are outweighed by the policy considerations and costs described above. By opening up the decision on the merits of the underlying causes of action to speculative reconsideration regarding how the presence of the spoliated evidence might have changed the outcome, a tort remedy would not only create a significant risk of erroneous findings of spoliation liability but would impair the fundamental interest in the finality of adjudication and the stability of judgments. [48] The Supreme Court of California has also by majority rejected an independent tort of intentional spoliation by a third party in *Temple Community Hospital v The Superior Court of Los Angeles County* 976 P 2d 223 (1999). It did so for similar reasons to those set out in *Cedars-Sinai*, including the same considerations relating to the desirability of finality in litigation. The majority said (at 229): We are reluctant to provide disappointed litigants a second opportunity to seek the compensation they sought in the original lawsuit, even if they seek it against a party not involved in the original lawsuit. We also are reluctant to require courts to provide a forum for parties who seek to avoid the effect of a prior judgment by asserting that a collateral wrong improperly affected the verdict. The spoliation tort not only would provide the disappointed litigant a second opportunity to seek compensation, it would require retrial of the first case in order to permit the plaintiff to demonstrate in what respect the alleged spoliation altered the outcome of the first trial. Indeed, the matter might still continue, for spoliation in the second trial might give rise to yet a third lawsuit. [49] The Court noted, as it had in *Cedars-Sinai*, that perjury by a witness is not actionable in tort. The Court saw third party spoliation of evidence as analogous to perjury by a witness. As in the case of spoliation by a party, one party unfortunately may be deprived of critical evidence or of a defence, or remain uncompensated for an injury (at 229-230). The Court concluded, however (at 230), that this potential injustice cannot be avoided “if we are to escape what we have identified as the greater harm of subjecting parties, witnesses, and the courts to unending litigation over the conduct and outcome of a lawsuit”. The Court acknowledged that perjury and spoliation are distinguishable in the sense that, if perjury is discovered before or during trial, it may be possible to expose the falsehood through cross-examination, whereas the absence of evidence that has been suppressed by a non-party sometimes may foreclose a claim altogether. The Court continued (at 230): Nonetheless, our desire-for the benefit of litigants, witnesses, and the courts – to avoid endless litigation makes us reluctant to permit a party who is disappointed in the verdict in one case to have a second opportunity to obtain compensation or other relief from a new

defendant whose spoliation of evidence assertedly brought about the disappointing verdict on the underlying claim. [50] The majority also considered that, to the extent there was a real problem with third party spoliation, such spoliation would often be exposed in the underlying litigation. They pointed out that there is in any event likely to be little motivation for intentional spoliation when the third party is wholly divorced from the litigation. They also referred to the uncertainty of the fact of harm and the causation issues discussed in *Cedars-Sinai* but with the added dimension that, where the third party spoliator is not acting at the behest of a party, both parties to the litigation may be victimised by the destruction of evidence and it may be difficult to determine who has suffered the loss (at 230-231). [51] They considered that the burdens and costs of recognising a tort remedy for third party spoliation were considerable and probably greater than in the case of first party spoliation, if for no other reason than that the cost to potential defendants was so much larger, especially with regard to the burdens it could impose on third parties to retain evidence. They said (at 232): We believe the broad threat of potential liability, including that for punitive damages, might well cause numerous persons and enterprises to undertake wasteful and unnecessary record and evidence retention practices. Medical providers, for example, might feel constrained to retain contaminated surgical devices and byproducts of medical procedures out of fear of liability. [52] The majority recognised that there were some differences between parties to litigation and third parties in that some of the sanctions, such as the evidentiary inference as well as many of the discovery sanctions, were not available in respect of third party spoliation. The majority nevertheless considered that there were sufficient sanctions, including contractual remedies, if a duty to preserve evidence arose through contract. They said (at 232): The victim of third party spoliation, however, is not entirely helpless. Some discovery sanctions are available to punish third party spoliation, including monetary and contempt sanctions against persons who flout the discovery process by suppressing or destroying evidence....A criminal sanction remains available under Penal Code section 135, as are disciplinary sanctions against attorneys who may be involved in spoliation. ...We observe that to the extent a duty to preserve evidence is imposed by statute or regulation upon the third party, the Legislature or the regulatory body that has imposed this duty generally will possess the authority to devise an effective sanction for violations of that duty. To the extent third parties may have a contractual obligation to preserve evidence, contract remedies, including agreed-upon liquidated damages, may be available for breach of the contractual duty. Criminal sanctions, of course, also remain available. [53] They went on to say that, if existing remedies appear limited, that may well be

because third party spoliation has not appeared to be a significant problem in the Californian courts. They considered that the non-party who is not acting on behalf of a party but is independently motivated to destroy evidence with the intent to interfere in the outcome of litigation between other parties must be a rarity, perhaps because such destruction can subject the non-party to criminal prosecution (at 232). [54] Finally the majority said that their conclusion that California should not recognise a tort of intentional spoliation by a third party was strengthened by the anomaly that would be created if there was liability for third party spoliators when the Court in *Cedars-Sinai* had held there was no liability on litigants who engage in such behaviour to obtain an advantage in their own litigation. They concluded (at 233): ...the benefits of recognizing a tort cause of action, in order to deter third party spoliation of evidence and compensate victims of such misconduct, are outweighed by the burden to litigants, witnesses, and the judicial system that would be imposed by potentially endless litigation over a speculative loss, and by the cost to society of promoting onerous record and evidence retention policies. [55] We have described the two majority judgments of the Supreme Court of California in some detail because they conveniently set out the policy considerations against recognising spoliation as a separate tort. It is also significant that the decisions are from the State which first recognised the tort. [56] On the whole, the cases in which the tort has been recognised do not discuss the policy issues favouring the establishment of a separate tort in much detail. Recognition of the tort is based on the disapproval of spoliation and a desire to ensure an effective and appropriate remedy for the wronged party. These themes and that of deterrence also pervade the academic commentaries that favour recognition of the independent tort. We set out below a selection of the academic commentary which helpfully details the policy considerations favouring the recognition of a tort of spoliation. [57] Steffen Nolte in "The Spoliation Tort: An Approach to Underlying Principles" (1994) 26 *St Mary's LJ* 351 suggests the establishment of an independent tort is necessary because the existing remedies are inadequate, in particular against third party spoliators. He says (at 355): In effect, traditional procedural and nonprocedural remedies are flawed by their limited scope, their inadequate preventive effect, and their failure to provide the victim with just compensation. [58] An independent tort, with the possibility of both punitive damages and compensatory damages, would, in his view, provide a further level of deterrence. He acknowledges the difficulty of calculation of damages in spoliation cases but considers (at 396) that a relaxation of the damages standard is justified because spoliation of evidence: ...constitutes serious discovery abuse, violating the spirit of liberal discovery, orderly

judicial procedures, and traditional notions of fair play in civil litigation. [59] Nolte also acknowledges the increased likelihood of litigation and the conflict with the goal of finality. He comments, however (at 398-399): Although these concerns are justifiable, the goal of justice should not be sacrificed for the goals of court efficiency and finality. Importantly, jurisdictions adopting the spoliation tort have not reported an avalanche of lawsuits reflecting endless litigation. [60] Professor Nesson in "Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action" (1991) 13 Cardozo L Rev 793 makes the same point about the inadequacy of existing remedies. In particular he points out (at 801) that what is often referred to as the ultimate sanction, the dismissal of a claim or a defence, is not in fact punitive: [C]ourts have maintained that defaulting a defendant or dismissing a plaintiff deters future spoliation. This is sophistry. There is nothing punitive in imposing default or dismissal in a case the spoliator would have lost anyway. [61] Pati Jo Profahl in "Smith v Superior Court: A New Tort of Intentional Spoliation of Evidence" (1985) 69 Minn L Rev also favours the recognition of an independent tort of spoliation, stressing the public interest in deterring the destruction of evidence. The article says (at 972-3): The benefits of recognizing a tort cause of action for the intentional spoliation of evidence outweigh any burdens that may result to potential defendants. The new tort promotes both public interests, by enhancing the administration of justice and deterring the destruction of evidence, and private interests, by providing an injured plaintiff with a realistic opportunity to receive compensation for injuries. Any burden imposed on potential defendants would be minimal and may be largely avoided. If, for example, the duty to preserve evidence proves excessively costly to the custodian, the court may order the evidence transferred to the other party and charge that party with the duty of keeping the evidence at its own cost. The obligation imposed thus may be seen as merely a duty to not spoliator rather than an affirmative duty to preserve evidence. It is also pointed out (at 979) that the imposition of a default judgment can only apply where there is no proper response to an order compelling discovery. It does not deal with destruction of evidence before the proceedings were instituted. [62] Jay E Rivlin in "Recognizing An Independent Tort Action Will Spoil A Spoliator's Splendor" (1998) 26 Hofstra L Rev 1003 also considers the traditional remedies inadequate and in particular the fact that they are tied to the trial. The article says: The traditional spoliation remedies suffer from numerous shortcomings: the remedies do not send a deterrence message to potential spoliators; the remedies are only geared to be used during a trial and not after; the remedies do not adequately address the situation when a nonparty spoliates; and the remedies do not momentarily compensate the victimized litigant who usually

bears the full cost of discovering the spoliation. Although the traditional remedies have been available to the courts for centuries, spoliation is still a major problem facing the legal system today. [63] The article points to the slight risk of being caught compounded by the leniency of the penalties that would not outweigh the enormous benefits of withholding evidence if viewed from the perspective of the Justice Holmes' "bad man", the person who considers only the material consequences of his actions (a reference to the 1897 address of Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harv L Rev 457, 459). Rivlin asserts that once a case is settled there is virtually no chance of the spoliation being discovered "because the victimized litigant has no occasion, incentive, or practical means to further investigate the case". The article concludes with a focus on the deterrent effect of punitive damages awards: Punitive damages for grossly wanton conduct would bolster the deterrence effect of the intentional tort. There would be a new factor in the cost/risk- benefit calculation. The potential spoliator would no longer believe that the analysis is weighted heavily in favour of spoliating evidence. The chances of being caught would increase if liability is extended to when the 'fraud' is discovered. Economically, with potential compensatory and punitive damage awards, the cost of being found liable for the spoliation would be much greater. [64] Lawrence Solum and Stephen Marzen, in "Truth and Uncertainty: Legal Control of the Destruction of Evidence" (1987) 36 Emory LJ 1085, identify (at 1166) three ways in which legal rules can help rectify the destruction of evidence. These are punishment (by which they primarily mean deterrence), promotion of accuracy and compensation. They say: ...a legal rule might make destruction of evidence a criminal act; the function of that legal rule would be punishment. Or a legal rule might impose an adverse inference on a party or deem a particular issue in a lawsuit admitted by that party; in this case, the purpose of the legal rule might be further accuracy. Lastly, a legal rule might seek in some rough way to redress the imbalance caused by the destruction of relevant evidence; the function of this rule would be compensation of the disadvantaged party. In general, the three ways in which a legal rule may rectify evidence destruction may be termed the 'functions' of that rule. [65] The authors suggest that it is important to distinguish between these three functions in analysing which of the possible remedies is appropriate. They see the independent tort of spoliation as primarily serving the ends of compensation. They appear to see the tort as a last resort and recognise the uncertain nature of the damage. They say (at 1193-4): One approach to the development of an integrated strategy for the legal control of destruction in civil litigation would begin with consideration of the suitability of each of the doctrines to serve the accuracy,

compensatory, and punitive functions. For example, the spoliation inference is most readily adaptable to the accuracy function. In some cases, drawing the spoliation inference will allow the underlying civil litigation to proceed with some confidence that the outcome will likely be the same as if the evidence had not been destroyed. In contrast, the spoliation tort seems best adapted to providing compensation for the loss to the victim of spoliation. Whereas the spoliation inference is usually an all-or-nothing matter – the inference may or may not suffice to enable the victim to win – the spoliation tort allows a damage award tailored to the lost expectancy. Selection of doctrine may also be constrained by precedent in a given jurisdiction, especially in the case of the spoliation tort. Analysis should begin by returning to the policies favoring legal controls on evidence destruction and the ways (functions) in which these policies might be served. Truthseeking and fairness to litigants would both be served by techniques which restore the accuracy of the original proceedings. Thus, if the substance of destroyed evidence may be reconstructed from other sources, or if reconstruction would plainly not have affected the outcome of the proceeding, a monetary discovery sanction might be all that is appropriate under the circumstances. Alternatively, if the destructive act results in the irretrievable loss of evidence, but the lost evidence is relevant to a limited issue or issues in the case, a nonmonetary, issue-related discovery sanction or an adverse inference instruction might be in order. If the accuracy of the original proceeding cannot be restored, the trial judge should weigh the materiality of the evidence and the reason for its destruction in deciding whether to order dismissal of the complaint or a default judgment. If discovery sanctions are too severe, a less definite instruction explaining the spoliation inference should be considered. If the particular destructive act renders the spoliation inference inadequate – for example, in a case in which it is difficult or impossible to speculate what the outcome in the underlying litigation would otherwise have been – the victim might be left to pursue an action in tort. In that case, the objective would be to compensate the victim for the loss of an expectancy of admittedly uncertain dimensions. Tort of abuse of process [66] The Bank's and Mr Ferguson's first submission was that a new tort of spoliation would undermine the existing tort of abuse of process. The cause of action for abuse of process arises when a party has misused the processes of the court for an improper and ulterior purpose, such as extortion or oppression. The leading case is *Grainger v Hill* (1838) 4 Bing NC 212; 132 ER 769. In that case the mortgagee of a vessel had the owner arrested, ostensibly for non-payment of the mortgage debt (claimed well before it was due). The true purpose was to compel the owner to hand over the register of the vessel without which the ship (the mortgagee's security) could not sail.

The owner alleged that the mortgagee had abused the process of the law by applying it to extort property from him and successfully claimed damages for the loss of the voyages which he could not undertake without the register. The abuse of process was not the commencement of proceedings for the debt which the mortgagee knew was not owing but the commencement of the proceedings with the aim of extorting the register, an object wholly collateral to the proceedings – see the discussion in *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281, 290-293. [67] Presenting a false case does not amount to abuse of process (although of course other sanctions could operate). As is said in Stephen Todd (ed) *The Law of Torts in New Zealand* (3ed, Brookers, 2001) 963, referring to the cases of *Cabassi v Vila* (1940) 64 CLR 130 (HCA); *Hargreaves v Bretherton* [1959] 1 QB 45; *Marrinan v Vibart* [1963] 1 QB 528 (CA) and *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 470 (CA): The distinction is between corruptly trying to win a case and corruptly using it for a collateral purpose. This also explains why the tort does not extend to a person who dishonestly presents a false case for the purpose of advancing or sustaining his or her claim or defence in civil proceedings, or who gives perjured evidence in a criminal action. [68] Mr Chan and Mr Michalik submitted that spoliation of evidence is a form of presenting a false case and that this has been excluded from the tort of abuse of process for good policy reasons, including the goal of promoting finality of litigation. This Court, they submitted, should refuse to recognise spoliation as a separate tort for the same reasons as in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 where this Court struck out a claim that an insurance investigator owes a plaintiff a duty of care when investigating the plaintiff's insurance claims. One of the reasons given was that the alleged duty would cut across established principles of law in other fields and in particular would deprive defendants of protections those laws provided, such as, in the case of defamation, qualified privilege – see the judgment of Richardson J at 309. [69] In this case the suggested independent tort of spoliation does not cut across other areas of law in the sense that protections available under those other areas would not be available. It is thus not quite the same situation as the Court was dealing with in *South Pacific Manufacturing Co Ltd*. Nevertheless it would extend tort law into the area of litigation-related misconduct during the course of proceedings, an area which has been seen as not properly within the established litigation based torts. While this does not necessarily rule out recognising the new tort, it does indicate that there should be a large measure of caution exercised before overturning such a long-standing policy choice. [70] Mr Crossland submitted that spoliation is distinct from abuse of process because

spoliation is concerned with the protection from interference of a plaintiff's property right whereas abuse of process is concerned with the misuse of the legal process to gain a collateral advantage. On this analysis, however, any litigation based misconduct must potentially interfere with a property right. This would mean, therefore, that perjury should be included in any new tort. [71] Mr Crossland recognised that there is a resemblance between perjury and spoliation in that both involve truth suppression, but argued that it is only a superficial resemblance. They are, in his submission, quite different. Perjury, in the sense of giving false evidence in court, is by its nature committed in a public forum where opposing counsel has the opportunity to expose the truth through cross-examination. Spoliation of evidence, on the other hand is, in his submission, committed in secret. In addition, Mr Crossland submitted that the purpose behind immunity from civil suit for perjury is that witnesses are not discouraged from giving evidence, a matter which does not apply to spoliation. [72] We acknowledge that there are differences between perjury and spoliation. We are not convinced, however, that the differences are so great as to justify a different approach. To the extent that any alleged spoliation involves alteration of documents, while the alteration would have occurred in private, the altered document would nevertheless be available for cross-examination (and forensic analysis). There is also the opportunity to cross-examine at trial in relation to whether documents have been concealed or destroyed. While one of the reasons for immunity from civil suit for perjury would not be likely to apply to intentional spoliation at least, the other purpose served by not allowing a civil suit for litigation based misconduct is the goal of ensuring finality of litigation. This goal would be compromised by the ability to issue further proceedings for spoliation as much as it would be by allowing proceedings related to other litigation based misconduct. The existence of the tort may also encourage over-complete discovery which can increase cost and serve to obscure the truly relevant documents. It may also serve to undermine the aim of the reforms recommended by the Law Commission (if they are implemented) to limit the discovery process – see General Discovery (NZLC R78, 2002). [73] Finally we remark that the recognition of spoliation as an interference with a property right would mean that a defendant would have difficulty seeking compensation based on the tort of spoliation if a plaintiff or third party had spoliated evidence as it would be difficult for a defendant in most circumstances to point to a chose in action or “probable expectancy” to protect unless the latter phrase is seen as including a “probable expectancy” of not losing a lawsuit. This would, however, unduly stretch the concept of property. Existing remedies for spoliation [74] The second point made on behalf of the Bank and Mr Ferguson was that a wide

range of remedies already exist in New Zealand for the non-disclosure of documents and there is no need for any further remedy. The existing remedies include provisions in the High Court Rules such as r277, which provides for sanctions in circumstances where a party makes default in complying with any interlocutory order, including a discovery order. Possible sanctions include dismissal of a plaintiff's claim or striking out a defence. Rule 317A provides that a non-party who wilfully and without lawful excuse fails to comply with a discovery order is guilty of contempt of Court. There are also the existing principles related to contempt of court and the possibility of disciplinary action against any legal practitioner involved, as well as criminal sanctions. These include ss108-117 of the Crimes Act which define perjury and related crimes, including fabricating evidence, ss231 and 232 proscribing fraudulent destruction and concealment of documents and ss266, 266A and s266B relating to forgery and fraudulent use of documents. [75] In addition, the presumption *omnia praesumuntur contra spoliatores* (all things are presumed against the spoliator) arises – see for one of the earliest examples *Armoury v Delamirie* (1721) 1 Str 505; 93 ER 664 (KB). See also *The Ophelia* [1916] 2 AC 206 in which Sir Arthur Channell stated (at 229-230): If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him, and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position that he is without the corroboration which might have been expected in his case. [76] Mr Crossland submitted that the existing remedies are largely ineffective in cases of this nature in that most are only available in the course of litigation. They thus provide inadequate compensation for those, like the Burns, who discover spoliation after trial or after settling the action. Insofar as criminal sanctions are concerned, he submitted that police priorities would mean such offences are rarely prosecuted. There is thus inadequate deterrence. Criminal sanctions against a spoliator are also unlikely to compensate the wronged party. Mr Michalik and Mr Chan on the other hand submitted that these remedies must be effective as so few cases have arisen in the New Zealand context. [77] The Californian Supreme Court also took the view, based on the number of cases in the Californian courts, that the problem was not widespread there. As has been seen, the commentators in the United States who favour the recognition of an independent tort take a contrary view. They say that the problem is widespread but hidden and cite surveys of lawyers that, they say, highlight the problem. While we are not aware of any similar surveys that have

been conducted in New Zealand, the Law Commission in its report, General Discovery (NZLC R78, 2002), cited submissions that suggested the problem was more widespread in New Zealand than the Law Commission had originally thought. It said (at para 23): We do not and cannot know the extent to which litigants cheat in the preparation of discovery lists by concealing or destroying potentially damaging documents. Submitters suggested to us that observations in our preliminary paper that “the received but perhaps over-sanguine view is that generally speaking there is honest compliance” recorded an unduly cosy assumption too shaky to serve as an adequate foundation for rule making. It was suggested that experienced litigants, aware of their discovery obligations, may conceal inconvenient documents from their own lawyers. It was asserted, moreover, that the ongoing shift away from professionalism towards a more business oriented approach to lawyering meant that it can no longer be assumed that solicitors will continue to respect their obligations. We are unpersuaded by this last point. It would be a remarkably foolish lawyer who would risk the disciplinary sanctions (which could include striking off) that would result if it were found out that the lawyer had been a party to discovery abuse. We agree, however, that the sanctions need strengthening. [78] Even assuming that the problem is in fact widespread in New Zealand, we do not consider that the answer is the recognition of an independent tort of spoliation. In terms of deterrence, the addition of a further remedy would obviously have some effect but in the circumstances this is unlikely to be great. The United States jurisdictions which recognise the tort have a variety of ways of assessing damages. The one that is the most prevalent is that which calculates damages on the basis of the loss of a chance. In *Holmes v Amerex Rent-A-Car* 710 A 2d 846, 853 (DC 1998) the court held that: ...in an action for negligent or reckless spoliation of evidence, damages arrived at through just and reasonable estimation based on relevant data should be multiplied by the probability that the plaintiff would have won the underlying suit had the spoliated evidence been available. [79] Oliver Wendell Holmes’ proverbial bad man, referred to in para [63] above, could reason that, without spoliation he would pay 100% of damages whereas with spoliation he risked paying only a lesser percentage. Any cost/benefit analysis would thus favour spoliation. In the United States context the addition of punitive damages may change that equation – see e.g. *Dale v Dale* 78 Cal Rptr 2d 513 (Cal App 1998). In New Zealand, however, exemplary damages awards are traditionally not high. We also consider that a person not deterred by the possibility of criminal conviction is unlikely to be deterred by a possible civil sanction. [80] In terms of the effectiveness of criminal sanctions we are not prepared to assume that the police, whatever their policing priorities, would

ignore crimes that strike at the heart of the justice system. We thus do not accept Mr Crossland's argument that criminal sanctions are ineffective. We also note, as did the Law Commission in the passage quoted above, that any legal practitioner involved in spoliation risks disciplinary sanctions and in extreme cases the ultimate sanction of being unable to continue practising as a lawyer. This must provide a powerful deterrent, at least to lawyers. [81] Another concern expressed has been that the existing remedies inadequately compensate the victims of spoliation. In this regard we agree with the majority of the Californian Supreme Court in *Cedars-Sinai* (discussed in para [45]) above when they said that there is in fact a risk of erroneous liability findings with a separate spoliation tort due to the uncertainty of the fact of harm. There is thus a risk that some victims would be overcompensated. Equally, if the damages are calculated on the basis of loss of a chance, some victims will be undercompensated. A party winning at trial does not have its damages reduced by the percentage chance it had of losing the case. [82] There is also the criticism that the existing remedies are not effective when spoliation is discovered after trial or, as in the case of the Burns, after settlement. In this regard we would favour remedies which would allow, in suitable cases, another trial in the underlying litigation rather than there being a separate cause of action for spoliation which carries the risk of inconsistency of result. If there has been concealment of documents then in any re-run of a case these documents would be taken into account and there would also be the possibility of adjustment of costs. If documents have been destroyed then a similar result can be achieved through the evidentiary presumption, except in rare cases. It must of course be recognised that before there can properly be an inference that the spoliated document is unfavourable to the cause of the party who has destroyed it, there must be some evidence of its contents - see *Wigmore on Evidence* (3ed, 1940) s291. The presumption could also only serve to strengthen a plaintiff's case and not to prove it. An inference cannot be a total substitute for evidence. In some cases - likely to be few - the result of this will be the total inability to bring an action because the party has no evidence as to the nature of the documents that have been destroyed and no other evidence. This is unfortunate but policy in this area should not be driven by the rare case. [83] Finally we note that the Law Commission in its report *General Discovery* (NZLC R78, 2002) recommended the strengthening of existing remedies, not the creation of new remedies. For example, it recommended (at para 24) strengthening the sanctions for wilful discovery abuse by making those sanctions mandatory unless the party in default satisfies the Court that there are special reasons why an order should not be made. It also considered that, because compliance

with discovery obligations is difficult to police and is heavily dependent on the list-maker's sense of obligation, it is appropriate to restore the requirement that discovery lists be verified by affidavit (para 27). [84] The Rules Committee, the statutory body responsible for procedural rules in New Zealand's main courts, released a consultation paper on 19 September 2003 seeking comment on proposed amendments to the discovery process in the High Court Rules based on the Law Commission Report. The proposed amendments do not include the Law Commission's recommended mandatory sanction for discovery abuse. They do, however, require that discovery lists are to be verified by affidavit (proposed rule 295(2) at p13), and go further in codifying the solicitor's obligation to ensure that his or her client understands and fulfils their discovery obligation faithfully (proposed rule 296 at p14). It is not the time for the courts to be creating new remedies when the Law Commission has so recently reported and the matter is under consideration by the Rules Committee, which as the Law Commission recognised, is the legislator in this case, and when the effectiveness of the changes to the discovery provisions have yet to be tested. Policy Issues [85] Mr Michalik and Mr Chan also submit that there are policy reasons for not recognising a separate tort. These have been set out in detail by the Californian Supreme Court, as discussed at paras [40]-[54] above, and we agree with their analysis. In short, the policy reasons that favour non-recognition include that alternative remedies are available, that the fact of damage is too speculative and that the tort is potentially inconsistent with the policy favouring final judgments, since a plaintiff who lost the primary lawsuit may bring a second separate suit by establishing that a piece of relevant evidence was destroyed or concealed. This creates the possibility of inconsistent results. While New Zealand does not, to the same extent as California, require "an antidote for the fevers of litigation" (Cedars- Sinai at 515), this Court should still be wary about adopting a new tort that could have the consequence of undermining the finality of adjudication and producing further litigation. [86] In addition, Mr Michalik submitted that recognising a tort of third party spoliation by lawyers acting for the opposing party would have the potential to place those lawyers in a position of conflict. A lawyer owes a duty to the court and to his or her client. Possible spoliation liability could unacceptably interfere with the relationship between a lawyer and his or her client by creating an inconsistent duty towards an opposing party. We accept this submission. Do the US cases help? [87] As has been seen, there is no consensus even in the United States as to whether an independent tort of spoliation should be recognised. The trend appears to be against recognition, and significantly the State that first recognised the tort has now rejected it, probably in all its manifestations. Although Cedars-Sinai

and Temple related to intentional spoliation we consider the reasoning is equally applicable to negligent spoliation. In Daniel F Gourash (ed) *Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence* (American Bar Association, 2000) 65, the authors consider that these decisions, and others between 1998 and 2000, may signal a trend away from adopting spoliation of evidence as a separate tort. They point out that, of the jurisdictions to recognise spoliation of evidence as a separate tort for the first time, only a handful have done so since 1995. In the circumstances we do not consider the United States cases of assistance. There is a similarity to the position in *South Pacific Manufacturing Co Ltd* where Cooke P said (at 293) of the duty the plaintiffs had argued for in that case that had been recognised by some United States courts: ...it is not, as yet at any rate, a widespread or uncontroversial development. For New Zealand purposes it can be of only limited help. [88] Jurisdictions such as Australia and the United Kingdom have traditionally been seen as more like New Zealand and those jurisdictions do not recognise a separate tort of spoliation. We also observe that most of the spoliation cases that have arisen in the United States relate to personal injury litigation which here is covered by the accident compensation regime. In addition, the legal tradition in the United States is more activist, especially in the area of tort law, than it has been in New Zealand – see the discussion in John Fleming *The American Tort Process* (Clarendon, 1988) 32. In particular, Professor Fleming notes the pressure on the legal system to cope with social change since the last world war, particularly in the field of tort law. He considers that in the United States, more than elsewhere, it has fallen almost exclusively to the courts, unaided by legislation, to determine the direction and pace of legal adjustment. That is not generally the position in this country. Should the case go to trial? [89] We have had very full argument on all aspects of spoliation. We agree with Mr Chan and Mr Michalik that we have sufficient information at this stage to come to a view on whether the tort should be recognised in New Zealand. This case is distinct from, say, a negligence claim alleging a novel duty of care where the exact relationship between the parties is required to be determined in order to decide whether a duty should be imposed. [90] The position here is similar to that in the *South Pacific Manufacturing Co Ltd* case where this Court struck out claims of the existence of a duty of care owed by an insurance investigator investigating a plaintiff's insurance claim. Although accepting that the discretion to strike out was one to be exercised only sparingly, Casey J (at 311) considered that case appropriate for a striking out application because the nature of the work undertaken by insurance investigators was well known and the Court was able to assess the relevant policy considerations. [91] In the present case the

relationships between the parties are well understood. The parties' roles, as opponents in litigation, and legal counsel are likewise well understood, as are the duties and responsibilities attaching to each role. It is difficult to see what further information would be forthcoming if a full trial were held. We thus have felt able to deal with the matter at this stage and, for the reasons we have already canvassed, we do not consider that an independent tort of spoliation (whether negligent or intentional and whether first party or third party) should be recognised in New Zealand. Result and costs [92] The Burns' appeal against Master Gendall's refusal to enter summary judgment in their favour is dismissed. [93] The decision of Master Gendall dismissing the National Bank of New Zealand Ltd and Mr Ferguson's application to strike out the Burns' second alleged cause of action in spoliation is set aside and the strike-out application is granted. [94] Costs of \$8,000 plus reasonable disbursements are awarded to the Bank. Costs of \$4,000 plus reasonable disbursements are awarded to Mr Ferguson. Solicitors: Stace Hammond, Hamilton for Appellants Minter Ellison Rudd Watts, Wellington for First Respondent Morrison Kent, Wellington for Second Respondent

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<str name="FileNumber">CA159/02,CP43/02</str>

<date name="JudgmentDate">2003-09-26T00:00:00Z</date>

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Keith,Blanchard,Glazebrook</str>

<str name="Jurisdiction">Court of Appeal</str>

<str name="Location"><NOT SPECIFIED></str>

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-<str name="Appearances">

Ministry of Fisheries|P A McCarthy and B H Arthur,Challenger
Scallop Enhancement Co Ltd and Tasman and Sounds Recreational
Fishers Inc|T J Castle and A G Stallard,NZ Marine Farming
Association Inc and J M Goulding and R J Curtis|R D Crosby and Q A
M Davies,Marlborough Aquaculture Limited and R P Roach|D J
Clark,Third and Fourth Respondents|No Appearance

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CHIEF EXECUTIVE, MINISTRY OF FISHERIES And Anor V NEW
ZEALAND MARINE FARMING ASSOCIATION INC And Ors CA
CA182/02 25 September 2003
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CHIEF EXECUTIVE, MINISTRY OF FISHERIES And Anor V NEW
ZEALAND MARINE FARMING ASSOCIATION INC And Ors CA
CA182/02 25 September 2003 IN THE COURT OF APPEAL OF
NEW ZEALAND CA182/02 CA191/02 BETWEEN CHIEF
EXECUTIVE, MINISTRY OF FISHERIES Appellant in CA191/02
AND CHALLENGER SCALLOP ENHANCEMENT COMPANY
LIMITED AND TASMAN AND SOUNDS RECREATIONAL FISHERS
INC Appellants in CA182/02 AND NEW ZEALAND MARINE
FARMING ASSOCIATION INC First Respondent AND JAMES
MAURICE GOULDING AND ROBERT JOHN CURTIS Second
Respondents AND SANFORD (SOUTH ISLAND) LIMITED Third
Respondent AND TREBLE TREE HOLDINGS LIMITED Fourth
Respondent AND MARLBOROUGH AQUACULTURE LIMITED Fifth
Respondent AND RAYMOND PETER ROACH Sixth Respondent
Hearing: 19 and 20 August 2003 Coram: Keith J Blanchard J
McGrath J Appearances: P A McCarthy and B H Arthur for Ministry
of Fisheries T J Castle and A G Stallard for Challenger Scallop
Enhancement Co Ltd and Tasman and Sounds Recreational Fishers
Inc R D Crosby and Q A M Davies for NZ Marine Farming
Association Inc and J M Goulding and R J Curtis D J Clark for
Marlborough Aquaculture Limited and R P Roach No Appearance
for Third and Fourth Respondents Judgment: 25 September 2003
JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J
Introduction [1] Establishment of a marine farm requires two
permits. The first is a coastal permit, which is a type of resource
consent granted by a local authority to do something in a coastal
marine area that otherwise would contravene any of ss12 or 14-15B
of the Resource Management Act 1991 (RMA): see s87(c) of the
RMA. From the commencement of the RMA on 1 October 1991
until 7 July 1993 when Part 4A of the Fisheries Act 1983 (enacted
as part of the Resource Management Amendment Act 1993) came
into force, that was the only permit required for a new marine
farm. (Marine farming leases or licences granted prior to the RMA
continued to be controlled also under the Marine Farming Act 1971
but no such leases or licences were necessary for farms established
after the commencement of the RMA.) [2] The second necessary
permit is a marine farming permit issued by the Director-General

(the chief executive of the Ministry of Fisheries) under Part 4A of the Fisheries Act 1983. Section 67J(2) of that Act stipulates that a marine farming permit shall only be issued to a person who holds a coastal permit for the area applied for (not being one currently affected by the aquaculture moratorium imposed by Part 6 of the RMA). So would-be marine farmers must hold a coastal permit before a permit under Part 4A of the Fisheries Act can be issued to them. The questions [3] There are two questions in issue in this appeal. The first is whether someone who has obtained from the local authority (the regional council) a coastal permit for a marine farm can proceed to erect the structure of the farm in the permitted area in anticipation of the issue of a marine farming permit by the Ministry provided that no actual farming takes place until the second permit issues. The High Court has held that this may occur. [4] There is no direct prohibition to be found in the Fisheries Act but the position taken for the Ministry is that s12 of the RMA, and particularly subs(2), read with subs(4)(a), prevents erection of a structure in the coastal marine area until it is lawfully possible actually to use it for marine farming. As relevant, s12 of the RMA provides: 12 Restrictions on use of coastal marine area (1) No person may, in the coastal marine area,— ... (b) Erect, reconstruct, place alter, extend, remove or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or ... unless expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or a resource consent (2) No person may, in relation to land of the Crown in the coastal marine area, or land in the coastal marine area vested in the regional council,— (a) Occupy any part of the coastal marine area; or (b) Remove any sand, shingle, shell, or other natural material from the land— unless expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent. ... (4) In this Act,— (a) Occupy means the activity of occupying any part of the coastal marine area— (i) Where that occupation is reasonably necessary for another activity; and (ii) Where it is to the exclusion of all or any class of persons who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent; and (iii) For a period of time and in a way that, but for a rule in the regional coastal plan and in any relevant proposed regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons, whether in a physical or legal sense;— and occupation has a corresponding meaning: [5] The second question is about the matters concerning which the Director- General must be satisfied under s67J(8) of the Fisheries Act 1983. That section reads: 67J

Marine farming permit (1) No person shall farm any fish, aquatic life, or seaweed except under the authority of— (a) A marine farming lease or licence [under the Marine Farming Act 1971]; or (b) A marine farming permit; or (c) A licence issued under the Freshwater Fish Farming Regulations 1983. (2) A marine farming permit shall only be issued— (a) To a person who holds a coastal permit for the area applied for (not being a coastal permit to which section 150E(3) or (6) of the Resource Management Act 1991 applies); or (b) To a person who holds a certificate of compliance in respect of the area applied for. (3) A marine farming permit shall not be issued for an area greater than the area to which the coastal permit or certificate of compliance relates. (4) Every application for a marine farming permit shall be made to the Director-General in writing in the prescribed form (if any) and shall be accompanied by— (a) A copy of the coastal permit, or application for a coastal permit, or certificate of compliance; and (b) The fee prescribed under section 89(1)(ic) of this Act. (5) An application for a marine farming permit may be made at any time, whether or not a coastal permit has been granted, but a marine farming permit shall only be issued after the relevant coastal permit has been granted. ... (8) The Director-General may not issue a marine farming permit unless he or she is satisfied that the activities contemplated by the application would not have an undue adverse effects on fishing or the sustainability of any fisheries resource. (9) A marine farming permit shall— (a) Specify the area in which the permit may be exercised; and (b) Specify the fish, aquatic life, or seaweed that may be farmed in that area. (10) A marine farming permit may be issued on conditions— (a) That require the keeping of specified records and the return of specified information to the Director-General: (b) That provide for the temporary transfer of the marine farm to sites other than the area specified in the permit in circumstances— (i) Where such transfer is permitted by a rule in a regional coastal plan or a resource consent; and (ii) Where serious damage is caused or likely to be caused to the marine farm or the wellbeing of the farmed fish, aquatic life, or seaweed is likely to be threatened; and (iii) Where the transfer will not increase adverse effects on fishing or the sustainability of any fisheries resource: (c) That the Director-General considers necessary or desirable to avoid, remedy, or mitigate adverse effects on fishing or the sustainability of any fisheries resource: (d) That provide for the review of the conditions of the permit at specified periods during the term of the permit. [6] Also to be noted is s67L: 67L Effect of marine farming permit (1) Notwithstanding anything to the contrary in this Act, a marine farming permit shall authorise the holder of the permit— (a) To farm within the permit area; and (b) To possess, take, and sell the farmed fish, aquatic life, or seaweed— (i) That have been lawfully acquired; and (ii) That are specified in

the marine farming permit— subject only to the terms and conditions of the permit and to the provisions of this Part of this Act. (2) A marine farming permit shall give the person named in that permit as holder of the permit the exclusive right to take the farmed fish, aquatic life, or seaweed in the area to which the permit relates. (3) A marine farming permit shall not authorise the holder of the permit to take naturally occurring fish, aquatic life, or seaweed. [7] The question is whether the Director-General must take into account under s67J(8) the effects of the erection of the marine farm structure on fishing or on the sustainability of any fisheries resource, i.e. such effects of the structure's mere presence in the permitted area, or whether, instead, the Director-General is confined to a consideration of such effects of the use of the structure for marine farming. [8] In the High Court certain declarations were made relating to the second question and against which both sides appeal. In summary, Neazor J concluded that the Director-General is not authorised to decide whether structures should be built in the coastal marine area and cannot alter the local authority's decision (the grant of the coastal permit) allowing the erection of structures; and that when considering an application for a marine farming permit the chief executive may take into account the likely effect on fishing of operating a marine farm on the structures. [9] At issue is the division of jurisdiction between the consent authority under the RMA and the Director-General under the Fisheries Act. Central to it is the allocation of functions to be found in s30 of the RMA, which relevantly provides: 30 Functions of regional councils under this Act (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region: ... (d) In respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of— (i) Land and associated natural and physical resources: (ii) The occupation of space on land of the Crown or land vested in the regional council, that is foreshore or seabed, and the extraction of sand, shingle, shell, or other natural material from that land: ... (vii) Activities in relation to the surface of water: ... (2) The functions of the regional council and the Minister of Conservation under subparagraph (i) or subparagraph (ii) or subparagraph (vii) of subsection (1)(d) do not apply to the control of the harvesting or enhancement of populations of aquatic organisms, where the purpose of that control is to conserve, use, enhance, or develop any fisheries resources controlled under the Fisheries Act 1996. The parties to the appeal [10] The appellants are the chief executive of the Ministry of Fisheries and organisations representing commercial fishers who are not marine farmers (for example, scallop dredgers whose activities may be restricted by the presence of marine farms) and recreational fishers. They say that a coastal permit does not authorise the

construction of a marine farm before a marine farming permit is obtained. The respondents are an association of marine farmers and individual marine farmers, some of whom hold coastal permits and either have had marine farming permit applications declined or are awaiting a decision from the Ministry (now also affected by the moratorium). They have cross-appealed against the finding that the chief executive can take into account the effect of operating the structure of a marine farm. They say that the local authority has exclusive jurisdiction to consider the effects of structures. Marine farming [11] As both questions concern the interpretation of statutory provisions it is not necessary to give any factual history of the permit applications made by some of the respondents or those they represent. But it may be helpful to make brief mention of some of the material before the Court about the process of physically creating marine farms. They are typically for farming mussels, dredge oysters and scallops and also finfish, such as salmon. Mussel farms, which are the most common type of marine farm, can be of considerable size, currently in the Marlborough area ranging from less than one hectare to 500 hectares. Applications in the pipeline are for areas up to 10,000 hectares. A typical longline structure consists of parallel 100 metre long backline ropes, 15-50 metres apart, held up on the surface by large floatation buoys spaced approximately 20 metres apart. Each longline is anchored at both ends to the sea floor. The mussels are grown from culture ropes suspended in the water from the longlines. We were told from the Bar that a typical 2.8 hectare farm might contain up to 100 tonnes of mussels. (The presence of the mussels in great quantity may have a considerable effect on the seabed below and on surrounding waters, that being an effect of the use of the structure in the farming process - rather than of the presence of the structure itself - which it is accepted that the Ministry may take into account.) [12] During the process of construction when numerous anchors have to be dragged into place, considerable disturbance of the sea floor and sea life growing or living there can occur, and obviously once the farm structure is in place other fishers are unable to access the area. Some forms of marine farming, such as salmon farming, may require even more substantial structures, including dormitory buildings, which will cast a shadow on the seabed. These are examples of effects of the presence of the structure with which the jurisdictional issue in this appeal is concerned. The High Court judgment [13] Neazor J said that it could not be suggested that Parliament was unaware of the "two permission/ two processes situation" in respect of marine farming. He noted that s30(2) of the RMA was amended by the Resource Management Amendment Act 1993 (to add reference to subparas(ii) and (vii) of subs(1)(d)). That occurred on the same day as Part 4A was inserted into the Fisheries Act. [14] The Judge's

attention had been drawn by counsel for the Ministry to the definition of “fishing” and “marine farming” in the Fisheries Act: fishing means the catching, taking, or harvesting of fish, aquatic life, or seaweed; and includes any activity that may reasonably be expected to result in the catching, taking, or harvesting of fish, aquatic life, or seaweed; and also includes any operation in support of or in preparation for any activities described in this definition: marine farming means the activity of breeding, hatching, cultivating, rearing, or ongrowing of fish, aquatic life, or seaweed for harvest; but does not include— (a) Any such activity undertaken pursuant to regulations made under section 91 of this Act; or (b) Any such activity where fish, aquatic life, or seaweed are not within the exclusive and continuous possession or control of the holder of a marine farming permit; or (c) Any such activity where the fish, aquatic life, or seaweed being farmed cannot be distinguished, or be kept separate, from naturally occurring fish, aquatic life, or seaweed— and to farm has a corresponding meaning which includes any operation in support of, or in preparation for, any marine farming: Neazor J rejected the proposition that the words “operations in preparation for marine farming” were sufficient to authorise the Ministry to decide whether a structure for the purposes of marine farming might be built in the coastal marine area. In the context of the two statutes, he said, the words did not bear the weight sought to be put upon them particularly when they were read against the background of previous legislation which had explicitly placed such matters in the hands of the Ministry, and when the provisions of the RMA are specifically directed to such issues. The Judge said that it was very unlikely indeed that Parliament intended to give a regulatory power on such a potentially significant issue in such an indirect way. [15] Neazor J said that the resource consent was stage one of the process. If an applicant obtained a resource consent, he said, the prohibition in s12 of the RMA had been overcome. Stage two of the process involved the consideration under the Fisheries Act which was not to be minimised. He saw the meaning of the words in s67J(8) “the activities contemplated by the application” as of great importance. Counsel for the present respondents would have had the words narrowed (in the case of scallops) to the attachment of lines and of spat and the growing and harvesting procedures, so that the relevant “effects” would also be in a narrow compass; almost down to the housekeeping of the farm. The Judge considered that “to farm” as defined in the Fisheries Act was wide enough to cover everything concerned with having and operating a marine farm other than the erection of structures. He said that “the activities contemplated” were operating a marine farm of the kind contemplated in a particular area “and everything involved in such an operation”. The Ministry had to be satisfied that the activities

contemplated by the application, i.e. operating a marine farm in that place, would not have an undue adverse effect on fishing. “Fishing” by definition meant the catching, taking or harvesting of fish, aquatic life or seaweed: In context, the Ministry’s consideration must include the effect of the operation of a marine farm on those who wish to use the fisheries resource in a way which may conflict with what the would-be marine farmer wants to do. For the Ministry so to act would be consistent with the legislature’s removal from the RMA process of “the control of the harvesting or enhancement of populations of aquatic organisms where the purpose of that control is to conserve, use, enhance or develop any fisheries resources controlled under the Fisheries Act 1996”. If the Ministry was not so to act, the Judge said, Parliament has provided a deficient mechanism for the protection of an important and valuable resource. [16] The Judge then made the declarations which have been summarised above (in para[8]). He also made a declaration that the issue of a coastal permit does entitle the holder of it to erect a structure for marine farming before a marine farming permit has been issued by the Ministry. He said that the erection of such a structure is not within the definition of “marine farming” in the Fisheries Act 1983 or within the meaning of s67J(1) of that Act, but he pointed out that, whilst the erection of a structure in accordance with the resource consent would be lawful, it might also be a wasteful exercise in terms of money if it were done before a marine farming permit was granted, because the would-be marine farmer would have no assurance of ever being able to use that structure for marine farming purposes.

Right to erect structure prior to issue of marine farming permit [17] We deal first with the question of entitlement to erect a structure intended to be a marine farm on the basis of a coastal permit alone, before a marine farming permit has been issued. [18] For the Ministry, Mr McCarthy accepted that neither the Fisheries Act 1983 nor the RMA contained a directly expressed prohibition. But he said that when s12 of the RMA is read in the context of that Act as a whole, an inherent or implied prohibition is to be found. Section 12(2) prohibits occupation of any part of the coastal marine area unless allowed by (inter alia) a resource consent. Occupation must be for a purpose. The definition of “occupy” contemplates that there will be an activity going beyond the mere act of occupying, notwithstanding that occupation is in itself an activity: citing *Port Otago Ltd v Hall* [1998] 2 NZLR 152, 158. A coastal permit is granted for the purpose of marine farming. Until the structure can be used for that purpose, the activity of occupying the coastal marine area is not therefore authorised by the resource consent, and because by its physical presence the structure will exclude others from the space it occupies, the occupation is contrary to s122(5) of the RMA which provides: (5) Except to the extent— (a)

That the coastal permit expressly provides otherwise; and (b) That is reasonably necessary to achieve the purpose of the coastal permit,— no coastal permit shall be regarded as— (c) An authority for the holder to occupy a coastal marine area which is land of the Crown or land vested in a regional council to the exclusion of all or any class of persons; or (d) Conferring on the holder the same rights in relation to the use and occupation of the area against those persons as if he or she were a tenant or licensee of the land. [19] For the respondents, Mr Crosby and Mr Clark raised several objections to the this interpretation of s12(2). It was suggested that if there has to be some activity going beyond mere occupation of space, stationary objects such as channel markers and monuments could not be installed and there might have to be monitoring of structures to ensure that the “secondary activity” was always being carried out – that structures were being used for an approved purpose. It was also submitted that it would be odd if use of a coastal permit were dependent on the issue of a marine farming permit when the Ministry has no statutory power to extinguish a marine farming permit if a marine farm is not in fact developed. [20] Counsel drew attention to the long delays which occur between the grant of a coastal permit and the issue of a marine farming permit. Section 125 of the RMA has until recently provided for the lapsing of a resource consent after two years (since the 1993 amendment the period is now five years) unless an extension is obtained. It would be difficult to satisfy the cumulative requirements for an extension (including the need to show substantial progress or effort towards giving effect to the consent and to obtain approval from all adversely affected persons). It was submitted that for practical reasons it is desirable that those who have obtained a coastal permit can immediately proceed to erect the structures they intend to use in their marine farms. [21] In our view, Mr McCarthy’s argument is correct. It is highly unlikely that Parliament would ever have allowed, simply upon the grant of a coastal permit, the erection in a coastal marine area of structures, often in themselves rather unattractive, which might never be able to be used and which would by their presence exclude other persons from the space. Section 12 has been recently discussed by this Court in *Hume v Auckland Regional Council* [2002] 3 NZLR 363 at paras [11] and [12]. There is in s12(2) a prohibition on occupying land in a coastal marine area unless that is expressly allowed by a rule in a plan or by a resource consent. A coastal permit does not in our view allow occupation except for the purpose for which it is granted. Occupation, as defined in subs(4), means the activity of occupying “where that occupation is reasonably necessary for another activity”. It cannot be said that occupation by a structure authorised only for the purpose of an activity, marine farming, which is not yet lawful and may never

become lawful - because a marine farming permit may be declined - is at that time reasonably necessary for the activity of marine farming. It will not become reasonably necessary until the marine farming permit has issued. Section 122(5) is to the same effect. [22] There is no force in the objections mentioned by counsel for the respondents. The analogy drawn between marine farming structures and other stationary objects is spurious. We accept that the term "another activity" requires more than mere occupation, although it does not require animation; it is enough that the object fulfils some lawful function. For example, a stationary object like a marker or a monument occupies its space for a purpose, respectively warning of some hazard, or commemorating some event or person of historical significance. The relevant "activity" is characterised by the function carried out. The same cannot be said of a marine farming structure, when it is unable lawfully to carry out its function, viz. marine farming, until a marine farming permit is obtained. [23] We fail to see why the Ministry's lack of power to cancel a permit because a marine farm is not developed has any relevance to this question. [24] Any difficulty with s125, which we accept does exist, can be simply overcome by adoption of the practice of deferring the commencement of the coastal permit under s116(1) of the RMA until the marine farming permit issues. The time period stipulated in s125 then does not run until the second permit is available. We were advised that that has in fact been the more recent practice in the Canterbury and Tasman areas. We should add that, for the purpose of s67J(2), a person can be regarded as holding a coastal permit if it will commence simultaneously with the issue of a marine farming permit. Functions of the Ministry [25] It is not to be expected that the legislature would have left a gap between the RMA and the fisheries legislation whereby neither the regional council nor the Ministry of Fisheries could consider the effects on fish and marine life of the presence in a coastal marine area of a structure intended to be used for marine farming. And, in our view, when the provisions of the two statutes are closely considered there is indeed no such gap. [26] In respect of a coastal marine area, s30(1)(d) of the RMA gives the regional council functions for the purpose of giving effect to the RMA concerning land and associated natural and physical resources (subpara(i)) and the occupation of space on land of the Crown or vested in the regional council that is foreshore or seabed (subpara (ii)). It also gives the regional council functions in respect of any actual or potential effects of the use, development or protection of such land (subpara (v)) and in respect of activities in relation to the surface of water (subpara (vii)). But s30(2) then limits functions (i), (ii) and (vii). The council can perform no such functions applying to "the control of the harvesting or enhancement of populations of aquatic organisms,

where the purpose of that control is to conserve, use, enhance or develop any fisheries resources controlled under the Fisheries Act 1996". [27] The term "fisheries resources" is widely defined in s2 of the 1996 Act. It means any one or more stocks or species of fish, aquatic life or seaweed, and that Act provides for controls over them. Clearly both the term "fisheries resources" and the term "aquatic organisms" in s30(2) cover all kinds of fish, shellfish and marine plants which may be the subject of marine farming. The regional council may still exert controls over harvesting or enhancement of populations of these species, but not if those controls are for the purpose of conservation, use, enhancement or development. A control designed to prevent or limit adverse effects likely to be caused to an existing population of a species by the erection of a marine farm structure would certainly be a control for the purpose of conserving that resource. But is it a control over "enhancement" of the resource? We think that it is - that someone intent on conserving a species will, if successful, necessarily enhance it, in the sense of increasing its size by natural growth and reproduction, and that will be the intention of the conservation. It may be said also, as Mr McCarthy submitted, that a control concerned with access to the existing resource is a means of ensuring that it is available for harvesting, and so it can be said that in preventing or limiting such an adverse effect on access caused by the erection of a structure there is a control over harvesting. But, whether that is right or not, there is certainly in that function a control of "enhancement" of the resource for the purpose of conservation and enhancement. And, to dispose of an issue on which counsel for the respondents differed between themselves, because of the breadth of the Fisheries Act 1996, which relates to all kinds of fishing, that function would extend to controls relating to recreational fishing. [28] The view we have taken is consistent with s6 of the 1996 Act which provides that no provision in any regional plan or coastal permit is enforceable to the extent that it provides for the allocation to one or more fishing sectors in preference to any other fishing sector of access to any fisheries resources in the coastal marine area or the conferral on any fisher of a right to occupy any land in the coastal marine area or any related part of the coastal marine area, if the right to occupy would exclude any other fisher from fishing in any part of the coastal marine area. It is also consistent with subs(2) of s6 which enables a coastal permit to be issued authorising the erection in the coastal marine area of any fish farm structure or other structure. As we have already held, it does not follow from the granting of a coastal permit that the holder can immediately proceed to erect the structure. [29] We have, for these reasons, come to the conclusion that in s30(2) Parliament has precluded a regional council from considering in connection with an application

for the grant of a coastal permit for a marine farm whether the structure will have effects on existing populations of aquatic organisms constituting a fisheries resource. Turning then to the powers of the Ministry in respect of the issue of marine farming permits, and bearing in mind that it is very unlikely that Parliament would have wished that no consideration be given to such effects during the consent/permitting process, we find in s67J(8) the stipulation that the Director-General may not issue a marine farming permit unless satisfied that “the activities contemplated by the application would not have an undue adverse effect on fishing or the sustainability of any fisheries resource”. Mr Crosby and Mr Clark argued strenuously that, as the application does not relate to the structure, but only to the use which it is intended to make of it in carrying out marine farming, the contemplated activities were only those related to that use, and did not cover the prior erection of the structure. We reject that argument, which would of course leave a gap in the overall legislative scheme. We consider that because, as we have held earlier in this judgment, a marine farm structure cannot be erected before a marine coastal permit is issued, the activities in contemplation must include the creation of the structure on or from which the marine farming will occur. The distinction sought to be drawn by the respondents is in our view very artificial, particularly when it is understood that the regional council’s functions under the RMA do not include controls on enhancement of aquatic organisms for the purposes mentioned in s30(2). [30] The view we have taken receives some support from the definition of “to farm” which appears in the definition of “marine farming” in the Fisheries Act 1983 and includes “any operation in support of, or in preparation for, any marine farming”. Section 66L provides that a marine farming permit authorises the holder “to farm” within the permitted area. In our view, the erection of a structure for a marine farm, which cannot be undertaken until both permits have been obtained, is properly to be regarded as an operation (the performance of a work) in preparation for the farming. Counsel for the respondents submitted that the work of creating the structure was not a preparation for farming because it was too remote from the actual farming. The analogies were suggested of building a fishing boat or putting an unbaited hook into the water. But, whatever one may think of those situations, when the permitting process is complete and the structure is being built, in place in the water, with the intention of attaching the culture ropes or other farming equipment, what is occurring is in our view to be regarded as an act of preparation for the marine farming and so within the definition. [31] Counsel for the respondents also made much of the absence from the debates preceding the 1993 legislation of anything indicating an awareness on the part of members that the Ministry was having restored to it,

in practical effect, powers which it had previously had under the Marine Farming Act 1971 and which had been removed in 1991. Counsel pointed out that Part 4A was explained by the Minister to the House as a means of giving marine farmers rights of property in their stocks, including spat which they brought into their farms. It had been appreciated that a resource consent could not create a right of property. [32] Part 4A was introduced at a relatively late stage by way of Supplementary Order Paper and the debates were quite brief. The report of the Select Committee commented rather obscurely that “no appropriate permit is available for marine farming” and there is reference in the debates to something having been forgotten by a former Minister of the Crown. The parliamentary material is, then, unhelpful. To return to the legislation itself, it is quite plain that a permitting system for marine farms was being put in place and that the Director-General was being required not to issue permits unless satisfied in terms of subs(8) of s67J. Far more was being done than merely providing marine farmers with property rights. That could have been done without a process for the issuing of permits. And, significantly, as we have already seen (para [13] above), amendments were at the same time made to s30(2) of the RMA, further limiting the powers of regional councils in respect of the control of the occupation of space and activities in relation to the surface of water in the coastal marine area. The limits on a council’s powers have already been discussed. It is inconceivable that while their ability to consider effects on fisheries resources was being limited, the power to consider such effects was not being correspondingly conferred on the Ministry. It is indeed curious, as the respondents submitted, that no reference was made in Part 4A to structures (compare the references in the Marine Farming Act and the RMA) but the fisheries legislation has been much amended over the years, often in a piecemeal way, and is far from being internally consistent. Its drafting deficiencies have led to numerous cases both in the High Court and in this Court. Seen in this light, the absence of any reference to structures does not indicate to us that the Ministry was intended to be restricted to considering the effects of the use of structures for marine farming and was to have no power to consider the effects of the structures themselves. It is, as we have said, an unlikely distinction, particularly as it would leave a gap in the legislative scheme. [33] Mr Clark drew our attention to s150E of the RMA, recently inserted in connection with the current aquaculture moratorium. It provides, in subs(3), that no person may do anything under a coastal permit until the moratorium has expired in relation to the area that the permit relates to. In view of our conclusions, it seems to be an unnecessary provision, but it may well have been done out of caution, in the knowledge that the present case was still before the courts. Result [34] The appeals

are allowed and the cross-appeals are dismissed. The declarations made in the High Court are set aside. There will be costs on the appeal in the sum of \$7,500 to the Ministry and \$4,000 to the appellants represented by Mr Castle, together in each case with their reasonable disbursements, to be fixed if necessary by the Registrar and to be borne as to one-half by the parties represented by Mr Crosby and as to the other half by the parties represented by Mr Clark. Solicitors: Crown Law Office, for Ministry of Fisheries Daniel-Smith Stallard & Hunter, Nelson for Challenger Scallop Enhancement Co Ltd and Tasman and Sounds Recreational Fishers Inc Gascoigne Wicks, Blenheim for NZ Marine Farming Association Inc and J M Goulding and R J Curtis Wisheart MacNab & Partners, Blenheim for Marlborough Aquaculture Ltd and R P Roach

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