

**IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI O AOTEAROA**

**SC 59/2024**

**BETWEEN**                      **WHANGAREI DISTRICT COUNCIL**  
  
   **Appellant**  
  
**A N D**                            **MALCOLM JAMES DAISLEY**  
  
   **Respondent**

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**SUBMISSIONS BY CROSS APPELLANT ON MISFEASANCE AND  
EXEMPLARY DAMAGES**

Dated: 15 November 2024

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**PRESENTED FOR FILING BY:**

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## Summary

1. The Cross Appellant (Mr Daisley) submits that the Court of Appeal was wrong to reverse the High Court's Judgment that the Council's conduct amounted to misfeasance in public office that required additional censure in the form of exemplary damages [HCJ 341]. In particular, it is submitted that the Court of Appeal, having agreed that Council officers were subjectively reckless as to the existence of the resource consent, was wrong to refuse to extend that finding to recklessness with respect to their lawful authority to take enforcement action [J. 83].
2. At the heart of the High Court Judge's factual analysis was his finding that that Council officers were persistently of the view that it was for Mr Daisley to prove the existence of a resource consent, notwithstanding strong evidence relating to the fact that the quarry had been operated substantially over a long period of time and had been rated by the Council accordingly. That led the Judge "to infer that the Council's officers were wilfully blind to the prospect that a consent existed and did not undertake a diligent search of the Council's records before issuing the first or any subsequent abatement notice" [HCJ 331]. A reasonably diligent inquiry into the existence of a consent by searching the Council's records would, the Judge held, have revealed the existence of the consent [HCJ 332].
3. To those findings, the Judge added that the Council's continued "stubbornly obstructive attitude" after the resource consent had been discovered in maintaining the enforcement proceedings for almost two years and in seeking to disavow the continued validity of the consent "tipped the balance" in favour of a finding of misfeasance in public office and in an award of exemplary damages [HCJ 342].
4. The Court of Appeal, in ruling that "an additional award was [not] necessary to sanction the Council, having regard to the substantial award of compensatory damages" in Mr Daisley's favour [J. 185], failed to take into account the substantial harm done to Mr Daisley by the forced sale of the quarry by his bank. As the High Court Judge said, a "realistic, contrite and apologetic approach by the Council might have salvaged the situation for Mr Daisley, despite five years of being ground down by the Council's resistance to his proposals" [HCJ 342]. He may, the Judge said,

have been able to persuade his bank to hold off the mortgagee sale of his property" [HCJ 343]. The opportunity loss of that situation is not reflected in the compensatory damages awarded.

5. Further, following *McLaren*, an award of compensatory damages should not be taken into account when considering grounds for awarding exemplary damages, which is based solely on the conduct in question.

#### **Narrative of Facts**

6. In 2004 Mr Daisley bought a rural property which included a quarry that he intended to operate commercially. A land use consent (**LUC**) permitting the activity had been issued in 1988 by the former County Council. The Council at all material times held the LUC, but it did not disclose its existence, notwithstanding a LIM request.
7. Mr Daisley began quarrying in reliance on the historical quarrying performed on the land and on the basis the Council had authorised his right to quarry his land in the sense that he had existing use rights known to the Council.
8. A reasonable search of the records would have located the LUC "without difficulty". But instead of searching the Council records to verify Mr Daisley's claim, council officers issued abatement and infringement notices to stop Mr Daisley from quarrying, insisting that he did not have an LUC or existing rights. The failure to conduct a diligent search before issuing abatement notices and taking other enforcement action was a clear breach of section 322(4) of the Resource Management Act, which provides that an abatement notice shall not be served unless the enforcement officer has reasonable grounds for believing that grounds exist for issuing one. Toogood J in the High Court held that this requirement "imposes on the enforcement officers of the Council a duty, in the carrying out of their regulatory and enforcement actions, to take all reasonable steps to establish the existence of the grounds asserted to support their enforcement action" [HCJ. 117(e)].
9. The High Court found the Council was negligent in relation to record keeping and in the diligence of its search for an LUC, or similar permission for quarrying activities before taking enforcement action [HCJ. 230]. This

action ultimately led to a forced sale of the quarry by Mr Daisley.

10. On 18 September 2009, Mr Daisley's counsel at the time issued an Official Information Act request to the Council. Within 30 minutes of this request being lodged, the Council's representative contacted counsel and informed them five historic files had been found. The LUC was within those files [HCJ. 10].
11. On 28 September 2009, Mr Daisley filed an affidavit in opposition to the Council's enforcement proceedings, which contained copies of the Council's records proving the issue of the 1988 LUC. The Council however continued its legal proceedings against Mr Daisley and those proceedings remained on foot until they were eventually withdrawn on 4 July 2011, nearly two years after the discovery of the LUC.
12. In December 2009, Mr Daisley was forced to sell the property at 25% below market value due to pressure from the bank and the ongoing enforcement action by the Council.<sup>1</sup> In May 2011, the purchasers of the property applied for an LUC that was materially the same as the LUC Mr Daisley applied for in 2006. The Council granted the purchasers a variation to the 1988 LUC in those terms.

### **Judgments below**

13. The High Court found that the Council's conduct amounted to misfeasance in public office that requires additional censure [HCJ. 341]. During the period from 2004 to the discovery of the consent in September 2009, the Council had deemed corporate knowledge of the existence of the consent and acted recklessly in assuming the consent did not exist, despite evidence to the contrary.
14. An important consequence of the Council's assumption was that it took the position that the onus was on Mr Daisley to establish that he had legal authority to operate the quarry [HCJ. 324 – 334]. Toogood J held that the persistent view of the Council that it was for Mr Daisley to prove the existence of a resource consent led him to infer that the Council's officers were wilfully blind to the prospect that a consent existed, and

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<sup>1</sup> CB 201.0001 at [81] and HCJ at [12].

they did not undertake a diligent search of the Council's records before issuing the first or any abatement notice [HCJ. 331]. A diligent search should have revealed the existence of the file containing the consent [HCJ. 332].

15. The High Court found that this recklessness alone did not meet the high bar for exemplary damages. The Court found that the Council's "stubbornly obstructive attitude between September 2009 and July 2011" [HCJ. 342] after the consent was discovered 'tipped the balance' towards a finding of misfeasance in public office and an award of exemplary damages in the sum of \$50,000.
16. The Court of Appeal found that the standard for misfeasance in public office was not met and set aside that finding along with the award for exemplary damages [J. 184]. In particular, it held that the ruling that Council officers were subjectively reckless to the existence of the consent did not "extend to recklessness with respect to their lawful authority to take enforcement action" [J. 183]. It is submitted that that finding fails to take account of the effect of the failure to comply with section 322(4) of the RMA, which imposes a limit on the exercise of the authority to serve abatement notices, a limit which was recklessly ignored.

### **The Council's position**

17. The Council (based on its submissions opposing Mr Daisley's application for leave to cross appeal) seeks to uphold the Court of Appeal's Judgment relating to misfeasance and exemplary damages in its entirety. It acknowledges that there was no dispute in the Court of Appeal that *Garrett* stated the applicable legal test.<sup>2</sup> Misfeasance in public office, according to *Garrett*, has three elements relating to the position and conduct of the officers:

- (a) Occupied public office and exercised regulatory powers in that office;
- (b) Knowingly exceeded the scope of their legal authority or

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<sup>2</sup> Submissions for the Cross-respondent – Opposing Leave to Appeal at [13].

alternatively acted with reckless indifference as to the limits of their authority;

- (c) Caused harm to Mr Daisley in circumstances where the officers acted with malice, knew that their conduct was likely to cause harm or were recklessly indifferent as to the result.

18. The Council says that element [(b)] J of the *Garrett* test had not been (and could not be) satisfied. It says that the Court noted that the High Court *"did not find that the officers were recklessly indifferent to the limits of their authority"* [J 183]. While it is true that the High Court did not use that wording, it is submitted that the Judge's finding that the position that the Council officers took, based on a reckless assumption that there was no lawful authority to operate the quarry, that the onus was on Mr Daisley to establish one and the failure to observe the reasonable grounds requirement of section 322(4) of the RMA by undertaking a diligent search of the Council's records which would have revealed the consent, is tantamount to a finding of reckless indifference to the limits of the Council's authority to issue enforcement proceedings. The Court of Appeal was in error in rejecting a submission to that effect [J 183].
19. Important in this respect (as emphasised by the Judge) is the failure of the Council to acknowledge the fact that Mr Daisley was not required to prove that he had lawful authority to operate the quarry, a failure which led to the Council wrongly assuming authority to issue abatement notices and to take (and continue) enforcement proceedings.
20. The Council also submits that Mr Daisley is not entitled to a finding of misfeasance in relation to the Council's conduct after the LUC was discovered in September 2009, because Mr Daisley's pleaded claim was limited to Council's liability for misfeasance based on conduct by the Council before the LUC was found, and there is no pleaded "independent grounds for liability in misfeasance".
21. It is submitted that the pleading covers the conduct of the Council both pre- and post- discovery of the consent, which is clearly how Toogood J considered it when taking into account the conduct of the Council cumulatively in finding misfeasance and awarding exemplary damages. The misfeasance cause of action begins at paragraph 207 of the 4<sup>th</sup>

Amended Statement of Claim which repeats and incorporates paras. 13-149 and 166-182. Paragraph 173.2 alleges that after Council officers knew of the consent and they “elected to continue with the [Council’s] course of enforcement action notwithstanding that such conduct was ultra vires”. The ultra vires action, in continuing the enforcement action, is pleaded in paras. 123-127. The basic misfeasance factual allegations (covering the enforcement action from the beginning are pleaded in paras. 166-182. Para. 174 alleges that these actions were pursued deliberately interfering with the plaintiff’s business in full knowledge of the LUC file and the consent contained in it or, in the alternative, “with reckless/wilful disregard to determine if the quarry activities were indeed consented and lawful”.

22. In this regard the Council seeks to draw a distinction between the Council’s conduct prior to the discovery of the LUC, which it says relates to a misfeasance claim, and the Council’s conduct after discovery of the LUC, which it says relates to exemplary damages. Council relies on the Court of Appeal’s observation at [86] that Mr Daisley’s pleading did not include particulars of misfeasance extending to anything done after 14 August 2009. (That observation by the Court of Appeal is disputed, by reference to the submission in the last paragraph).
23. Accordingly, says the Council, neither the High Court nor the Court of Appeal made findings on whether the Council officers’ conduct and knowledge after September 2009 supplies an independently sufficient basis for liability.
24. However, in seeking to overturn the Court of Appeal decision in relation to misfeasance, Mr Daisley does not rely on an independent breach of duty by the Council after discovery of the LUC. The breach of duty (which is uncontested) arose prior to discovery of the LUC, and the misfeasance claim relates to Council’s conduct both prior to and subsequent to discovery of the LUC.
25. Further, Mr Daisley’s claim included an allegation that the Council, through its enforcement action, deliberately interfered with Mr Daisley’s business. On discovery of the LUC it was clear the enforcement action was unjustified, and the Court of Appeal recognised that Council’s

interference, by not immediately discontinuing the enforcement proceeding along with the last abatement and infringement notices, continued until Mr Daisley sold the property [J. 50].

**First ground of appeal - misapplication of knowledge standard on the facts**

26. The Court of Appeal erred in fact and/or law in declining to award exemplary damages by focusing solely on the Council officers' recklessness as to the existence of the LUC, which the Court found did not extend to their lawful authority to take enforcement action.
27. From 2004 to 2009 Mr Daisley was persistent in his view that he was lawfully entitled to operate the quarry on the property and during that period the Council was persistent with opposing Mr Daisley in that regard.
28. Mr Daisley brought an application for a resource consent, which the Council opposed. On 31 July 2009 the Council filed an application in the Environment Court seeking an enforcement order preventing Mr Daisley undertaking any mineral extraction on the property.
29. The justification and grounds for the order were set out in an affidavit from local authority officer, Mr Barnsley. In essence, the Council's position was that mineral extraction on the property was unlawful because there was no relevant resource consent permitting it. Mr Barnsley said that:

8        From time to time during the period of Council's investigation into this matter, Mr Daisley has personally asserted existing use rights as the basis for his continued activities; however, he has failed to provide any proof of these rights. The basis of his claim would appear to be that the previous owner of the property worked the quarry for some years, however that has never been established and indeed it seems improbable that any previous such activity would have been at a similar scale to the level of activity undertaken since Mr Daisley bought the property in 2004. In any event, it has never been established that the present scale of activity was ever lawfully established or has been continuous at that level, so any existing use rights claim may have been lost ....

10       In conclusion, issues surrounding unlawful mineral extraction

activities on the Knight Road property, in contravention of District Plan rules and without resource consent have been ongoing for over four years ...

30. It is submitted that the LUC held on the Council's files clearly gave Mr Daisley the requisite legal right and authority to undertake lawful mineral extraction on the property.

*Knowledge of the consent*

31. Mr Daisley's affidavit attaching the 1988 LUC was served on the Council in September 2009. From this point, the Council was:
- (a) Put on notice of its prior wrong, being reckless as to the existence of the LUC; and
  - (b) Fully informed as to the existence of the LUC and its implications for Mr Daisley, namely his legal right and authority to undertake lawful mineral extraction on the property.
32. This knowledge is a higher standard of knowledge than that imputed by their conduct prior to that date. As found in the High Court, the Council's knowledge and conduct after the LUC was found is relevant to an award of exemplary damages, which the High Court considered to be "stubbornly obstructive".
33. The High Court judgment records [HCJ. 110] that the lawyer representing the Council reported to Mr Daisley's lawyer at the time that, notwithstanding discovery of the LUC, the Council was not planning to withdraw the enforcement proceeding.
34. On 29 October 2009, following the Council withdrawing abatement and infringement notices, the Council's lawyer wrote to Mr Daisley's lawyer proposing that further conditions be placed on the scope of the LUC, including limiting the volume of extraction permitted from the property, allowed hours of extraction and placing limitations on the nature of extraction.<sup>3</sup>

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<sup>3</sup> CB 304.0114.

35. Further, on 29 January 2010 the Council's lawyer wrote to Mr Daisley's lawyer advising that the Council was aware that the property was subject to a mortgagee sale, and so agreement was sought from Mr Daisley to cease any quarrying work for two months (presumably to allow for the sale to proceed). It was noted in the letter that if Mr Daisley was not agreeable to this "then Council may have to apply for an Interim-Order should quarrying activity occur before the terms of any consent can be "regularised".<sup>4</sup>
36. However, upon discovery of the LUC and having withdrawn the abatement and infringement notices, the Council did not have lawful authority to continue with the enforcement proceedings and prevent Mr Daisley from undertaking any mineral extraction or quarrying activity on the property under the LUC, notwithstanding its view that any terms of the LUC ought to be clarified or varied.
37. The High Court at [97] recognised Mr Daisey's right to undertake mineral extraction under the LUC when commenting on Council's subsequent decision to grant a variation to the consent to the subsequent owner of the property, Ark, as follows:

The Council's decision to grant a change of conditions to Ark as the holder of a resource consent, rather than to require Ark to apply for a new consent, establishes beyond question that a valid consent for the extraction of minerals from the quarry existed in Mr Daisley's favour throughout the period of his ownership. Moreover, it is clear the Council accepted that position in 2010, making its pleading in the proceeding that the 1988 LUC expired in 1990 more than a little surprising.

38. The High Court Judge went on to find at [101]:

I am satisfied that, if the Council had revealed the existence of the 1988 LUC when Mr Daisley applied for a resource consent founded on the 2006 Quarry Management Plan, Mr Daisley would have been entitled to adopt the approach taken by Ark five years later. No evidence was advanced by the Council to suggest that it would have treated such an approach by Mr Daisley in 2006 any differently from the way it responded to Ark's proposals in 2011. Nothing in the evidence leads to any conclusion other than that it is

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<sup>4</sup> CB 304.0127.

probable the Council would have granted Mr Daisley a variation in 2006 that reflected the conditions the Council applied to the Ark application.

39. It follows that one reasonable option available to the Council after discovery of the LUC was to allow Mr Daisley to operate the quarry on the terms of his 2006 application for consent.
40. It is submitted the Court of Appeal erred in summarily dismissing the Council's conduct after discovery of the LUC on the basis that "...matters were in the hands of solicitors not the Council officers, and resolution was complicated by Mr Daisley's understandable failure to give his counsel instructions after he yielded to his bank's pressure to sell the property".
41. The fact that solicitors were involved and/or that it was difficult to obtain instructions from Mr Daisley does not excuse Council's conduct in refusing to withdraw the enforcement proceedings and permit Mr Daisley from operating the quarry under the LUC. Of course, Council's solicitor could only have been acting under instructions from the Council and it matters not that there was no 'resolution' as to any further terms.
42. The Council continued with the enforcement action until July 2011, after it was satisfied that Mr Daisley had no further involvement in the property.

*Knowing its actions would cause harm*

43. The court in *Garrett v Attorney-General*<sup>5</sup> held that where an official has actual appreciation of the consequences that could result from disregard of its duty, or was recklessly indifferent as to those consequences, the bar for misfeasance in public office would be met.
44. The Council's knowledge of the LUC imputes upon it an awareness that its prior actions in failing to locate the LUC had caused harm, and its deliberate decision to continue the enforcement proceedings against Mr Daisley (refusing to withdraw those proceedings) would or would likely cause further harm (it is noted that reckless indifference does not require

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<sup>5</sup> *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA); applied in *Rawlinson v Rice* [1997] 2 NZLR 651.

actual knowledge that harm will, in fact, result).

45. The authority in *Bourgoin SA v Ministry of Agriculture, Fisheries, and Food* states:<sup>6</sup>

If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not "intend" the consequences or the act that was not "aimed" at the person who, it is known, will suffer from them.

46. The finding in the High Court of misfeasance in a public office which justified an award of exemplary damages was not solely on the basis that the Council was reckless in relation to the enforcement action. Its failure or refusal to withdraw the enforcement action, knowing that it prevented Mr Daisley from undertaking any mineral extraction or quarrying activity on the property causing him further loss/harm, was the determining factor in tipping the balance to meet the threshold for an award of exemplary damages.
47. The Court of Appeal's focus was on the recklessness of the Council prior to the discovery of the LUC, and it erred in not taking into account the Council's knowledge, deliberate decision and its actions following discovery of the LUC in September 2009. Irrespective of the Council's conduct prior to the disclosure of the LUC, its conduct after that date was done with actual knowledge and was therefore "intended" (as set out in *Bourgoin*) to cause harm to Mr Daisley.

### **Second proposed ground of appeal - compensatory damages insufficient**

48. The Court of Appeal also erred in law in its finding that an additional award was not necessary to sanction the Council having regard to the substantial award of compensatory damages.

#### *Exemplary damages are required to fill a lacuna*

49. The Court of Appeal's decision departs from the line of authority established in *Kuddus v Chief Constable of Leicester*<sup>7</sup>, and *McLaren Transport Limited v Somerville*<sup>8</sup>, that exemplary damages will fill a lacuna in the law resulting in injustice to the damaged party, and that they are

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<sup>6</sup> *Bourgoin SA v Ministry of Agriculture, Fisheries, and Food* [1986] QB 716 (CA) at 777.

<sup>7</sup> *Kuddus v Chief Constable of Leicester* [2001] UKHL 29.

<sup>8</sup> *McLaren Transport Limited v Somerville* (1996) 2 ERNZ 336 (CA).

designed to punish and deter.

50. The High Court found that the Council's conduct had been obstructive and uncompromising [HCJ. 340]. Both Courts found that the Council's failure to withdraw proceedings and grant the consent after discovery of the LUC had done Mr Daisley a considerable wrong which could not be put down to simple inadvertence [HCJ. 340 and J. 186].
51. The court in *McLaren Transport* found that exemplary damages are to be awarded based on the conduct in question. That conduct is not temporally limited,<sup>9</sup> and can extend from the date of the breach up to the time a judgment is issued.
52. The Council's actions beyond the date of the breach (being the date on which they became aware of the consent) must be considered. Given the extent of the Court's language in relation to these actions, there is a clear lacuna in the law which, if left unchecked, would result in injustice to Mr Daisley as the damaged party.
53. Furthermore (as discussed below) there is a need for exemplary damages in this instance to punish the Council and provide deterrence from future similar actions by officers or agents in a public office.

*Compensatory damages insufficient*

54. The Court of Appeal found that exemplary damages were not required to sanction the Council, having regard to the substantial award of compensatory damages [J. 185].
55. The court in *McLaren* found that any award of compensatory damages should not be taken into account when considering grounds for awarding exemplary damages.<sup>10</sup> The function of exemplary damages includes punishment and condemnation. It is submitted that in the present case exemplary damages are entirely appropriate given the substantial harm done to Mr Daisley by the forced sale of the quarry by his bank. As the High Court Judge said, a different approach by the Council following the discovery of the resource consent, including the immediate withdrawal

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<sup>9</sup> *McDermott v Wallace* [2005] 3 NZLR 661 (CA), at [102].

<sup>10</sup> *McLaren*, above n 8, at 432 – 433.

of the enforcement proceedings, might have salvaged the situation for Mr Daisley and he may have been able to persuade his bank to hold off the mortgagee sale [HCJ 343]. The opportunity loss to Mr Daisley is not reflected in the compensatory damages awarded.

Dated this 15<sup>th</sup> day of November 2024

A handwritten signature in blue ink, appearing to read 'jmacrae', is positioned above a horizontal line.

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J A Farmer KC / D J MacRae  
Counsel for the Respondent

I certify that, to the best of my knowledge, this submission is suitable for publication.

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D J Macrae  
Counsel for the Respondent

Dated 6 March 2025