IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA **SC 59/2024**

BETWEEN	**Whangarei District Council** Appellant / Cross-Respondent
AND	**Malcolm James Daisley** Respondent / Cross-Appellant

SUBMISSIONS FOR THE CROSS-RESPONDENT

Dated 18 December 2024

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May it please the Court—

Part A: Introduction, overview and issues

1 Summary of WDC's submissions on appeal

1.1 The Court of Appeal held that the Whangārei District Council (**WDC**) was not liable for misfeasance in public office because, in exercising statutory powers of enforcement under the Resource Management Act 1991 (**RMA**), no officer knowingly breached, or was recklessly indifferent to, the scope of their legal authority.[1] It overturned the High Court's liability finding and quashed the associated exemplary damages award of $50,000.

1.2 Even if the Court had upheld the finding of misfeasance, it said that it would not have imposed exemplary damages. No additional award of that kind was needed to sanction WDC, having regard to the substantial compensatory damages award. Furthermore, and contrary to the High Court's decision, WDC's conduct in the Environment Court proceeding following the discovery of the LUC in 2009 did not provide a justifiable basis for a punitive award.

1.3 WDC submits that the cross-appeal should be dismissed because it asks this Court to determine WDC's liability in misfeasance based on a claim that was not pleaded or determined in the courts below. For the first time, Mr Daisley alleges that WDC's conduct following the discovery of the LUC in September 2009 provides an independent basis for liability, divorced from the Council's conduct before 2009 (in respect of which the Court of Appeal found WDC not liable). This is inappropriate on a final appeal without the benefit of findings by the lower courts. Mr Daisley did not appeal the Court of Appeal's decision that WDC is not liable for misfeasance based on its conduct before the LUC was discovered. His submissions seek to reopen the point which is not within the grant of leave and should be dismissed.

1.4 In any case, WDC's conduct both before and after discovery of the LUC does not meet the well-settled legal test from *Garrett v Attorney-General* for liability in misfeasance.[2] Neither party challenges that test. Rather, the appeal turns on the application of settled principles to the facts.

1.5 Firstly, in relation to WDC's pre-discovery conduct, WDC did not exercise its public powers unlawfully. Had WDC known of the LUC, the High Court found that it would still have been entitled to take enforcement action in 2005 on the grounds that Mr Daisley's quarrying breached the terms of the LUC. Even if the enforcement action was ultra vires, there is no finding by the lower courts that WDC's officers intentionally or recklessly exceeded their powers. Nor is such a finding tenable given the concurrent findings that WDC did not know of the LUC's existence. Without that knowledge, WDC cannot have known or appreciated a risk that the quarrying was (partially) authorised by a consent.

1.6 Secondly, in respect of WDC's post-discovery conduct, there are no findings by either Court as to whether the *Garrett* criteria are met. By reference to the

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1 *Whangarei District Council v Daisley* [2024] NZCA 161 [CA judgment] on appeal from *Daisley v Whangarei District Council* [2022] NZHC 1372, (2022) 23 ELRNZ 839 [HC judgment].

2 *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA).

evidence that was before the High Court, WDC submits that its conduct after the LUC was discovered in 2009 was not illegal. Within a month, it withdrew the then-current abatement and infringement notices against Mr Daisley and sought to negotiate a settlement of the Environment Court proceeding which would permit Mr Daisley to lawfully quarry his land pursuant to a varied and expanded LUC. WDC kept the proceeding on foot with Mr Daisley's consent as a possible mechanism for securing that outcome. After the land was sold to Ark Contractors Ltd, WDC eventually settled the proceedings on largely the same terms that it had offered to Mr Daisley in 2009. Accordingly, WDC did not intentionally / recklessly exceed its power to cause Mr Daisley harm.

1.7 Exemplary damages are not available given that WDC has not, nor can be, found liable for misfeasance. Even if WDC were liable, the Court of Appeal correctly held that its conduct did not require a punitive response.

Part B: Applicable law and lower court judgments

2 Misfeasance test in *Garrett v Attorney-General*

2.1 Misfeasance in public office is an intentional tort.[3] The rationale of the tort is to prevent injury to members of the public caused by deliberate or "conscious disregard of official duty" and "dishonest wrongful abuses" of public powers.[4] Its elements are settled by the leading judgment in *Garrett* and applied in later decisions.[5] Applied to this case, the four limbs are:

(a) **Public office** — the WDC officers must be public officers.

(b) **Unlawful conduct** — the WDC officers must have acted/omitted to act (in purported exercise of their public power) in an unlawful way either:

(i) intentionally, i.e. actually knowing that their acts/omissions were beyond the scope of their legal authority; or

(ii) with reckless indifference as to whether they were acting outside of those legal limits.

(c) **Intention** — the WDC officers must have acted or omitted to act:

(i) with malice towards Mr Daisley or knowing that their conduct was likely to cause harm; or

(ii) with reckless indifference (applying the subjective formulation) as to whether Mr Daisley would be harmed.

(d) **Resulting loss** — Mr Daisley must have suffered loss which is caused by the actions of the WDC officers.

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3 *Garrett*, above n 2, at 350.

4 *Garrett*, above n 2, at 350 endorsing Clarke J's decision in *Three Rivers District Council v Bank of England (No 3)* [1996] 3 All ER 558 (QB) at 632–633. See also the discussion in Stephen Todd (ed) *Todd on Torts* (online ed, Thomson Reuters) at ch 18.

5 In particular, *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195 which summarised the limbs of the misfeasance test at [40] drawing on previous Court of Appeal authorities including *Garrett*.

3 Judgments below — WDC ultimately not liable for misfeasance

3.1 In the lower courts, the principal issue was whether WDC acted with the prohibited *mens rea* in [2.1(b)]–[2.1(c)] above in relation to its conduct before the LUC was discovered in September 2009. The High Court found WDC liable for misfeasance without making a finding as to [2.1(b)]–[2.1(c)]. The Court of Appeal overturned the High Court's decision. Its findings did not (and could not) support a conclusion that WDC's officers intended to exceed the scope of the enforcement powers and cause harm to Mr Daisley or were reckless as to those facts.

High Court held WDC liable for misfeasance

3.2 The High Court held WDC liable for misfeasance in public office and awarded exemplary damages. Summarising the Court's findings:

(a) The 1988 LUC permitted Mr Daisley to commercially quarry his land in compliance with the terms of the consent and subject to the provisions of the RMA (addressed below).[6]

(b) No WDC officer knew about the existence of the LUC when exercising their RMA enforcement powers.[7] There was no evidence that WDC's officers knew about the 1988 LUC and deliberately withheld knowledge of its existence from Mr Daisley.[8] Nor was the High Court Judge wiling to draw an inference to that effect.[9]

(c) Instead, the High Court reasoned that WDC officers took the view that Mr Daisley had to prove that he had "existing use rights or otherwise prove the existence of a valid consent making commercial quarrying at the Knight Road property lawful".[10] The High Court found that WDC's view of the burden was legally flawed after it reconciled the conflicting case law of the Environment Court and the earlier Planning Tribunal.[11] Correctly analysed, those decisions "appear[ed] to confirm" the High Court's reading of the RMA, namely that that WDC carried the burden of proving "the existence of a consent and its terms".[12]

(d) By taking the contrary view, WDC "*acted recklessly*" in assuming that the LUC did not exist, despite evidence to the contrary, and in failing to diligently search for it before issuing abatement/infringement notices.[13]

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6 HC judgment, above n 1, at [98]–[100] as to scope of the LUC. See at [235]–[236] and [500] (and below at [5.4(b)] and [7.17]) regarding how Mr Daisley's quarrying did not comply with the terms of the LUC.

7 HC judgment, above n 1, at [307], [336] and [342].

8 At [307]. See also the discussion at [318]–[323]. Rather, the Court held that WDC had corporate knowledge of the LUC by reason of facts "making it reasonable" to attribute such knowledge to WDC. But corporate knowledge was insufficient to justify an exemplary response: see at [312].

9 At [307].

10 At [324]. See also at [107].

11 At [325]–[330].

12 At [329].

13 At [331], [337] and [342]. The High Court described this in [331] as wilful blindness. However, the Court of Appeal noted that the High Court did not rely on the wilful blindness concept and instead had "expressly based the inference on the Council's persistent and, as he saw it, reckless view that it was for Mr Daisley to prove the consent": see CA judgment, above n 1, at [165].

(e) WDC's conduct prior to the discovery of the LUC in 2009 was reckless but not malicious. It did not reach the exemplary damages threshold.[14] What tipped the scales, the High Court found, was WDC's "stubbornly obstructive attitude between September 2009 and July 2011" after the LUC was discovered.[15] The Court said that a "contrite and apologetic approach by the Council might have salvaged the situation".

Court of Appeal reversed misfeasance finding and exemplary award

3.3 Applying orthodox legal principles, the Court of Appeal reversed the liability finding on misfeasance as the *mens rea* elements from *Garrett* could not be satisfied on the High Court's findings. It held:

> [181] Mr McLellan argued that the Judge's findings on equitable fraud cannot simply be repurposed for the misfeasance claim. We agree. Misfeasance requires that the official knew their conduct was in breach of duty. … As Blanchard J explained for the Court in *Garrett*, misfeasance is an intentional tort which has at its base conscious disregard for the interests of those affected by official decisions. …
>
> [183] The Judge did not find that the officers were recklessly indifferent to the limits of their authority. He was not prepared to find that they acted in bad faith. Mr Farmer argued that recklessness was established by the Council's failures to keep the 1988 land use consent reasonably available when it archived the paper file, to diligently search for the consent, and to acknowledge the evidence of existing use. We do not agree. The first of these items is too remote to amount to subjective recklessness with respect to Mr Daisley, and there is in any event no evidence about the knowledge of Council staff responsible for archiving at the time. We have accepted that Council officers were subjectively reckless to the existence of the consent but that finding does not extend to recklessness with respect to their lawful authority to take enforcement action.

3.4 Driven by its conclusions on liability, the Court of Appeal quashed the award of exemplary damages. Based on Tipping J's judgment in *Couch v Attorney-General*, exemplary damages were unsustainable because WDC's conduct lacked the necessary "element of conscious wrongdoing".[16] Mr Daisley only pleaded exemplary damages in respect of the misfeasance cause of action.[17]

3.5 Separately, the Court indicated (in obiter) that had the Council been liable for misfeasance, the Court would not have awarded exemplary damages. First, an exemplary response was not required given the substantial compensatory damages awarded in respect of the negligence action. Second, it disagreed with the High Court's view that WDC's behaviour following discovery of the LUC justified an award of exemplary damages.[18]

Part C: Narrow scope of cross-appeal and summary of grounds

4 Cross-appeal limited to WDC's conduct after LUC discovered

4.1 The question for resolution by this Court is what the legal consequences are (if any) of WDC's conduct *after* the discovery of the LUC in September 2009.

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[14] At [342].
[15] At [342].
[16] CA judgment, above n 1, at [184] referring to *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [178] per Tipping J.
[17] At [49] and [184].
[18] At [185]–[186].

Mr Daisley's appeal does not challenge the Court of Appeal's conclusion that none of the WDC officers knowingly or recklessly exceeded the scope of their legal authority *before* the LUC was located in September 2009. His cross-appeal does not seek to overturn the Court of Appeal's finding that WDC is not liable for misfeasance or exemplary damages for WDC's conduct prior to the discovery of the LUC.

4.2 Rather, Mr Daisley's appeal is limited to the narrow question of whether WDC is guilty of misfeasance and ought to pay exemplary damages on the basis that from September 2009 it had actual knowledge of the LUC and yet allegedly failed to promptly withdraw its enforcement proceedings. The narrow scope of the appeal is made clear in the cross-appeal application, leave submissions and substantive written submissions.

Approved grounds for Mr Daisley's cross-appeal

4.3 The two grounds of cross-appeal are as follows:[19]

(a) Misapplication of knowledge standard — the Court of Appeal erred in fact and/or law in concluding that the WDC officers' recklessness as to the existence of the LUC did not extend to recklessness with respect to their authority to take enforcement action (the **Liability Ground**).

(b) Exemplary damages necessary — the Court of Appeal erred in law in finding that exemplary damages were not necessary to sanction WDC (the **Exemplary Damages Ground**).

The Liability Ground addresses WDC's alleged misfeasance after 2009

4.4 In explaining the Liability Ground of appeal, Mr Daisley's application to cross-appeal expressly limited the appeal to WDC's conduct following discovery of the LUC. The application advanced two sub-grounds,[20] which are elaborated on in Mr Daisley's substantive appeal submissions of 15 November 2024:[21]

(a) Knowledge of LUC — after Mr Daisley informed WDC of the existence of the LUC in 2009, the Council had actual subjective knowledge of the consent. It is the Council's "knowledge and conduct *after the LUC was discovered*" and its failure to "withdraw the enforcement action" that is "relevant to an award of exemplary damages", not WDC's recklessness as to the "enforcement action" before 2009.[22] The High Court held that it was the post-discovery conduct which justified exemplary damages. Accordingly, the Court of Appeal allegedly erred by focusing on WDC's recklessness regarding the LUC prior to 2009,[23] rather than the "higher standard of knowledge" held by WDC from September 2009 onward.

(b) Knowledge of harm — once it became aware of the LUC in September 2009, WDC had actual subjective knowledge of its prior wrong and the

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19 See the Notice of Application for Leave to Bring Cross-Appeal [NOA] at [10] and Submissions for Application for Leave to Bring Cross Appeal [Leave Submissions] at [17]–[33].

20 NOA at [13]–[15].

21 Submissions by Cross-Appellant on Misfeasance and Exemplary Damages (15 November 2024) [Cross-Appeal Submissions] at [26]–[47] regarding the Liability Ground and [48]–[55] regarding the Exemplary Damages Ground.

22 NOA at [15]; Leave Submissions at [18]–[19]. See also Cross-Appeal Submissions at [26]–[42].

23 Leave Submissions at [17]; Cross-Appeal Submissions at [31]–[32].

harm to Mr Daisley.[24] By failing to promptly withdraw the enforcement proceeding, WDC knowingly committed a further/ongoing breach that it "knew would likely result in further loss".[25] Irrespective of the Council's conduct prior to discovering the LUC, Mr Daisley submits that its post-discovery conduct occurred with "actual knowledge" and was intended to cause harm.[26]

The Exemplary Damages Ground: Relief for WDC's post-2009 conduct

4.5 Similarly, the cross-appeal application on the Exemplary Damages Ground is confined to WDC's post-2009 conduct. The leave application advanced two sub grounds,[27] which are elaborated on in the cross-appellant's submissions:

(a) Exemplary damages required to fill lacuna — Mr Daisley contends that awarding exemplary damages is necessary to sanction WDC's conduct following discovery of the LUC in September 2009. WDC was held by Toogood J to have been obstructive and uncompromising in failing to promptly withdraw the enforcement proceedings and "grant the consent after discovery of the LUC".[28] The High Court's finding was expressly in relation to WDC's conduct "between September 2009 and July 2011".[29] Mr Daisley submits that WDC's actions "beyond the date" on which WDC became aware of the consent should be sanctioned to fill a lacuna that would otherwise result.[30]

(b) Compensatory damages insufficient — Mr Daisley also contends that the Court of Appeal erred in law in treating compensatory damages as sufficient to sanction the Council. Rather, he submits that exemplary damages are appropriate given WDC's post-discovery conduct, i.e. its alleged failure to immediately withdraw the enforcement action to allow Mr Daisley to persuade his bank not to carry out a mortgagee sale.[31]

5 No basis for misfeasance liability for WDC's pre-2009 conduct

5.1 Despite not appealing the point, Mr Daisley now submits that the Court of Appeal erred in reversing the finding that WDC was liable in misfeasance for its pre-2009 conduct.[32] He seeks to argue that the High Court did decide that WDC acted with the prohibited *mens rea* state in [2.1(b)]–[2.1(c)] above even though the Court did not express its finding using the language of *Garrett*. He says that recklessness can be inferred from WDC's (i) reckless assumption that no LUC existed, (ii) incorrect belief that it was for Mr Daisley to prove that his quarrying was lawful and (iii) failure to comply with its duty under s 322(4) of the RMA by diligently searching the Council's records for the LUC before issuing abatement notices. Before this Court, he asserts

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24 NOA at [13]; Leave Submissions at [21]; Cross-Appeal Submissions at [44].
25 NOA at [14]. See also Leave Submissions at [23]–[25]; Cross-Appeal Submissions at [46]–[47].
26 Leave Submissions at [23]–[25]; Cross-Appeal Submissions at [46]–[47].
27 NOA at [16]–[19] and Leave Submissions at [27]–[33].
28 Leave Submissions at [28]; Cross-Appeal Submissions at [50]–[52].
29 HC judgment, above n 1, at [342].
30 Leave Submissions at [29]–[30]; NOA at [19]; Cross-Appeal Submissions at [50]–[52].
31 NOA at [16]–[19]; Leave Submissions at [32]–[33]; and Cross-Appeal Submissions at [54]–[55].
32 Cross-Appeal Submissions at [18]–[19].

without substantiation that the Court of Appeal's decision erred in not treating factors (i)–(iii) as "tantamount to a finding of reckless indifference".[33]

5.2 Were this Court to permit Mr Daisley to argue that unpleaded ground, WDC submits that the Court of Appeal did not err. It correctly determined that WDC did not intentionally / recklessly exceed the scope of its RMA powers, with the effect that the *Garrett* criteria are not met.

5.3 Firstly, Mr Daisley's argument as to WDC's alleged recklessness has already been considered and rejected by the Court of Appeal.[34] He has not identified any credible error its analysis. As noted above, the Court held that factors (i)–(iii), as relied on by Mr Daisley, only establish that WDC was reckless as to the LUC's existence (a finding that WDC disputes in its limitation appeal). What is required under *Garrett*, though, is a finding that WDC knowingly or recklessly acted beyond the scope of its lawful authority.[35] The Court of Appeal held that the recklessness finding in relation to equitable fraud under the Limitation Act 1950 could not be "repurposed for the misfeasance claim".[36] WDC's subjective recklessness did "not extend to their lawful authority to take enforcement action".[37]

5.4 Secondly, WDC submits (elaborating on the Court of Appeal's analysis) that none of the High Court's reasoning or conclusions can support a finding that WDC is guilty of misfeasance for its pre-discovery conduct:

(a) Logically, WDC cannot have acted with the prohibited *mens rea* unless it knew of the LUC. Without knowledge, WDC cannot have known or appreciated a risk that the enforcement proceeding lacked foundation (as alleged by Mr Daisley) on the grounds that the quarrying was authorised by the consent. Instead, WDC could only be guilty of negligence in instituting an enforcement proceeding without first having diligently verified that the quarrying was illegal. Knowledge of the LUC is, therefore, a logical pre-requisite to a finding that WDC knowingly or recklessly exceeded the scope of its enforcement power as required by *Garrett* in [2.1(b)]–[2.1(c)]. That logical pre-requisite fails on these facts given the concurrent findings that WDC did not know of the LUC prior to its discovery in September 2009.

(b) Even if WDC had known of the LUC, its RMA enforcement proceeding would not have been without foundation. The High Court held that the LUC was not unconstrained.[38] Quarrying was limited to red brown rock taken from a specific location on the land and was susceptible to limitations that might be imposed by WDC to mitigate environmental impacts.[39] Mr Daisley's quarrying activity did not comply with these restrictions, leading the High Court to find that it was "likely the Council would have been entitled to issue an abatement notice and take

[33] Cross-Appeal Submissions at [18].
[34] CA judgment, above n 1, at [183].
[35] See above at [2.1].
[36] CA judgment, above n 1, at [181].
[37] At [183].
[38] HC judgment, above n 1, at [98]–[99].
[39] At [98]–[99].

enforcement proceedings in 2005" (albeit on a different basis to that actually taken by the Council).[40] Accordingly, there is no basis for a conclusion that WDC was guilty of misfeasance because its enforcement action exceeded the scope of its powers.

5.5 Despite these findings, the High Court found misfeasance based on WDC's "recklessness" in assuming that the LUC did not exist. The Judge expressed the critical misfeasance finding in these terms:[41]

> Although I have held that no Council officer knew that the 1988 LUC had been granted; that they did not act maliciously and that the Council's deemed corporate knowledge of the existence of the consent is insufficient to attract an exemplary response, I am satisfied that the Council's officers acted recklessly in assuming the consent did not exist, despite evidence to the contrary, and in failing to make proper inquiries at relevant times, especially when issuing enforcement proceedings.

The High Court reached that conclusion based on the persistent but incorrect view held by WDC's officers that it was for Mr Daisley to prove "that he had existing use rights or otherwise prove the existence of a valid consent making commercial quarrying at the Knight Road property lawful".[42] Because of that view, the High Court held that WDC failed to "undertake a diligent search of the Council's records" before issuing abatement notices[43] and, instead, merely carried out a "cursory search of the Council's then current files".[44] WDC "assumed" that no consent existed and, in doing so, it "must have disregarded the contrary inference from" facts which suggested there may have been historical quarrying at the property.[45]

5.6 Properly interpreted, however, the Court's recklessness finding was simply a reiteration of its earlier conclusion that WDC was negligent. WDC was guilty of maladministration in failing to properly perform its duties. That does not support a broader proposition that WDC intentionally or recklessly exceeded the scope of its powers by bringing enforcement proceedings with the intent to cause Mr Daisley harm.

5.7 In any case, the High Court erred in inferring recklessness from the Council's incorrect view about where the burden of proof lay. First, there was no finding that WDC's officers knew or believed that WDC had the burden but nevertheless intentionally and wrongfully cast it onto Mr Daisley. Nor would there be a basis for such a finding. Second, WDC's interpretation as to the burden of proof was not unreasonable. The High Court reached its conclusion after reconciling conflicting authorities. WDC did not undertake the same exercise of trying to parse conflicting jurisprudence. Accordingly, the WDC officers were negligent but no more.

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40 At [100].
41 At [342].
42 At [324]. See also at [331] and [342].
43 At [331].
44 At [332].
45 At [333].

Part D: Misfeasance not established for WDC's post-2009 conduct

6 Cross-appeal seeks fresh findings on unpleaded misfeasance claim

6.1 As noted, the cross-appeal advances the narrow claim that WDC ought to be held liable for misfeasance based on its conduct only after the discovery of the LUC in September 2009. That formulation of the claim is fresh: it was not pleaded in the High Court. Nor have the lower courts made any findings as to whether WDC's post-discovery conduct provides an independently sufficient basis for liability. The cross-appeal should be dismissed because it is inappropriate in the context of a final appeal for this new and unpleaded allegation to be determined.

6.2 First, Mr Daisley's fourth amended statement of claim alleged that WDC was liable for misfeasance based on WDC's conduct before September 2009:[46]

(a) Misfeasance was alleged on the basis that WDC's officers commenced enforcement action and exceeded the scope of their powers with either actual knowledge of the LUC (rejected by the High Court Judge) or, in the alternative, having "wilfully elected … not to properly ascertain or determine the accuracy" of its view that quarrying was not permitted by an LUC.[47] Accordingly, the pleading was expressly confined to the officers' knowledge, wilful blindness or recklessness regarding the LUC when issuing abatement/infringement notices; making representations that Mr Daisley's quarrying was unlawful and that no consent had been granted; opposing Mr Daisley's application for a resource consent; and taking enforcement action in the Environment Court. All of this conduct pre-dated discovery of the LUC.[48] This is reinforced by the pleading that Mr Daisley did not "discover" WDC's misfeasance "until on or about 21 September 2009" and that the harm caused was the lost opportunity to commercially quarry the land.[49]

(b) The Court of Appeal's decision underscores these points. In relation to the misfeasance cause of action, it said the "pleaded breaches of duty all concern events which occurred before 14 August 2009".[50] None of the particulars of misfeasance extend to anything done after this date.[51]

(c) While the pleading refers to "Continued Ultra Vires Action", the Court of Appeal correctly interpreted that as a "pleading of continued injury and mala fides rather than a distinct breach of duty" following discovery of the LUC in September 2009.[52] However it is characterised, the alleged ultra vires conduct by WDC after 2009 is not relied on in the pleading

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46 Fourth Amended Statement of Claim (16 November 2018) [101.0019].

47 See at [166]–[182]. The Cross-Appeal Submissions argue that [173.2] of the pleading alleges that WDC is liable for misfeasance because it "elected to continue" enforcement action even though it had knowledge of the LUC. That allegation does not relate to WDC's conduct after discovery of the LUC in 2009. Rather, the allegation in that paragraph (and surrounding paragraphs) was that WDC either had actual knowledge of the LUC or was wilfully blind to the existence of the LUC when it took enforcement action etc against Mr Daisley.

48 The Court of Appeal endorsed this analysis of the pleadings at [47] of the CA judgment.

49 101.0019 at [210]–[213].

50 CA judgment, above n 1, at [50].

51 At [86].

52 At [50].

as an independent basis for holding WDC liable for misfeasance.[53] The pleading relies on WDC's pre-2009 conduct.

6.3 Secondly, as a result of the pleadings, neither the High Court nor the Court of Appeal made any findings as to whether WDC's post-2009 conduct does provide an independent basis for a finding of misfeasance. Put another way, the lower courts did not address WDC's liability exclusively for its post-2009 conduct, divorced from the pre-2009 conduct (in respect of which WDC has been found not liable). Turning to the judgments in more detail:

(a) The High Court decision treated WDC's post-2009 conduct as relevant to exemplary relief, not misfeasance. Having reviewed the pleadings, the High Court held that the misfeasance claim relied on the "same allegations of fact" as the negligence action.[54] It concluded that WDC breached its duties to Mr Daisley by failing to keep a copy of the LUC in its current files and failing to conduct diligent searches when (i) the first abatement notice was issued in 2005, (ii) Mr Daisley applied for, and WDC opposed, a resource consent and (iii) each time it issued subsequent abatement notices and filed the enforcement application in the Environment Court on 31 July 2009.[55] WDC was also continuously in breach of its duties "throughout the period from September 2006 to September 2009".[56] The Court then turned to the WDC officers' *mens rea* and found they were reckless in assuming that the LUC did not exist.[57] It is apparent from the decision that WDC's liability was founded in its recklessness, but the Court did not view that as misfeasance of a kind justifying additional censure. Instead, it was WDC's conduct *after* discovery of the LUC that "tips the balance" in favour of an award.[58]

(b) Importantly, the High Court did not make a finding that WDC's decision to keep the enforcement proceedings on foot (discussed in depth later) was unlawful. At its highest, the Court described WDC's conduct as "obstructive and uncompromising resistance", "stubbornly obstructive", and "inexcusable".[59] However, the Court did not analyse or make any finding that WDC acted beyond its powers, let alone that WDC knew or was reckless in that regard. That is understandable — the High Court addressed WDC's later conduct in the context of relief, not liability.

(c) The Court of Appeal also distinguished between WDC's conduct before September 2009 (relevant to liability) and its later conduct (relevant to exemplary damages).[60] This approach was consistent with the High Court's decision and the way in which counsel for Mr Daisley defended

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53 Paragraphs [166]–[181] of the pleading do not refer to anything done by WDC after September 2009. The pleaded ultra vires conduct at [123]–[127] is not relied on as providing an independent basis for holding WDC liable in misfeasance: see at [166]–[182] and [207]–[213].

54 HC judgment, above n 1, at [115]–[116].

55 At [230].

56 At [240].

57 At [342].

58 At [342].

59 At [340] and [342].

60 CA judgment, above n 1, at [179]–[184] (dealing with pre-discovery conduct and the *Garrett* test for liability in misfeasance) and [185]–[186] (dealing with post-discovery conduct and exemplary damages).

the High Court decision in submissions.[61] The Court of Appeal also disagreed with the High Court's characterisation of WDC's conduct after the LUC was discovered in 2009.[62]

6.4 For the reasons submitted, Mr Daisley's appeal raises a fresh argument as to WDC's liability in misfeasance. Neither of the lower courts made findings on whether the Council officers' conduct and knowledge after September 2009 provides an independent basis for liability. Consequently, this Court is being asked to determine a new unpleaded claim without the benefit of lower court findings. This is inappropriate on a final appeal and Mr Daisley's cross-appeal should be dismissed for this reason alone.

7 Misfeasance for post-2009 conduct is factually unsustainable

7.1 The gravamen of Mr Daisley's cross-appeal is that WDC should be held liable in misfeasance because after discovering the LUC, it intentionally exceeded the scope of its powers by continuing the RMA enforcement action with intent to cause harm. On that basis, Mr Daisley alleges that [2.1(b)]–[2.1(c)] of the *Garrett* test are satisfied. First, he says WDC persisted with the enforcement action "until July 2011" and only withdrew the proceeding after being satisfied "Mr Daisley had no further involvement in the property".[63] Second, by acting in that way, Mr Daisley claims that WDC intended to inflict harm which should be condemned through a misfeasance finding.[64]

7.2 Not only is that submission not supported by the lower courts' findings, it is directly contradicted by the evidence. Taking the Court of Appeal's decision as a helpful starting point, the Court summarised WDC's post-2009 conduct in this way (when explaining the inappropriateness of exemplary damages):[65]

> [W]e think the Judge attached too much significance to the Council's failure to withdraw the enforcement proceeding after it disclosed the 1988 land use consent. In his view this behaviour tipped the scales in favour of exemplary damages. We agree with him that the Council did not immediately withdraw and apologise, as it manifestly ought to have done. It had done Mr Daisley a considerable wrong which could not be put down to simple inadvertence. It risked adding insult to injury by keeping the proceeding on foot. It even threatened in January 2010 to seek an interim order. But by that time 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. It was his counsel who pragmatically proposed that the Council's application remain on hold until ownership was resolved. The new owner, Ark, then agreed to the enforcement proceeding remaining on hold while its resource consent application was processed. That was not Ark's decision to make, but Mr Barnsley had withdrawn the current abatement notice in his letter of 15 October 2009 and it seems to have been assumed that Mr Daisley had no ongoing exposure. The point of keeping the proceeding on foot was only to ensure that quarrying would not continue in the interim, and Mr Daisley no longer had any interest in working the quarry.

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61 CA judgment, above n 1, at [183] summarising the submissions for Mr Daisley.
62 At [186].
63 Cross-Appeal Submissions at [42].
64 At [47].
65 CA judgment, above n 1, at [186].

7.3 The Court of Appeal's summary contradicts key features of Mr Daisley's new misfeasance claim. WDC quickly withdrew the abatement and infringement notices on 15 October 2009. Despite that, WDC maintained the proceedings at the suggestion of Mr Daisley's own lawyer and with the consent of the new landowner. From October 2009 onward, the purpose of the proceeding was no longer to sanction Mr Daisley for unlawful quarrying. Rather, the purpose was to ensure that quarrying would not continue until it was legally authorised through amendments to the LUC conditions. In the interim, Mr Daisley had no ongoing legal exposure. Nor did he have an interest in quarrying the land pending the sale to Ark Contractors Ltd.

7.4 For those reasons, Mr Daisley's characterisation of WDC's conduct is without merit and is unsupported by the evidence. WDC's conduct did not involve an intentional or reckless abuse of power for the purpose of harming Mr Daisley. The balance of this part of the submissions expands on propositions in [7.2]–[7.3] by reference to the evidence before the High Court.

WDC withdrew the abatement / infringement notices in October 2009

7.5 On 22 September 2009, Mr Daisley swore an affidavit in opposition to WDC's enforcement action.[66] Exhibit M was the 1987 application by Henry and Charles Adams to establish a quarry. The former Whangārei County Council granted their application and issued the LUC (Exhibit N).

7.6 WDC had no knowledge of the LUC before it was discovered in 2009, as held by the High Court and the Court of Appeal. WDC issued the abatement and infringement notices on the basis that Mr Daisley's quarrying activities were "neither expressly allowed by a resource consent nor an existing use".[67]

7.7 Less than a month later, by letter of 15 October 2009, Gary Barnsley (WDC enforcement officer) notified Mr Daisley:[68]

> I write further to our many previous correspondences in this regard, which included the issue of abatement notices and infringement notices (including subsequent reminder notices) and in light of recent developments in this matter.
>
> Please now be advised that the abatement notices as issued on 28 November 2008 against Malcolm James Daisley and Daisley Contracting Ltd, and the Infringement Notices (and subsequent reminder notices) as issued on 5 March 2009 (and 8 April 2009), against Malcolm James Daisley and Daisley Contracting Ltd are hereby formally withdrawn.
>
> I can also advise that the infringement fee of $750.00 in each case, a total of $1500, which had been referred to Council's debt collection agency for collection as an unpaid debt, has also been cancelled and the debt collection agency has been advised accordingly.

7.8 The 28 November 2008 abatement notice and the 5 March 2009 infringement notice were the two notices underpinning WDC's application for enforcement orders in the Environment Court. The notices were referred to and exhibited to Mr Barnsley's affidavit of 31 July 2009, being WDC's affidavit in support of the application for orders under s 316 of the RMA.[69] As the Court of Appeal

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66 304.0001.
67 For example, 303.0020–303.0021.
68 304.0113.
69 303.0001.

noted, Mr Barnsley withdrew the "current abatement notice in his letter" and it "seems to have been assumed that Mr Daisley had no ongoing exposure".[70]

Mr Daisley agreed to initial adjournment to allow factual investigation

7.9 WDC's lawyers, Thomson Wilson Law (**TWL**), wrote to Mr Daisley's lawyers on 28 September 2009 noting that "Council consider there is room to agree on the terms of the Enforcement Order to the satisfaction of all parties" and that an "agreed position" could be reached such that a hearing of WDC's proceeding was "no longer required".[71] Within a week of learning of the LUC, WDC's lawyers had initiated the process of seeking a consensual settlement.

7.10 On about 1 October 2024, TWL reached an agreement with Wayne Peters, Mr Daisley's solicitor, on the "terms of an Interim Enforcement Order",[72] but the agreement was withdrawn after Mr Daisley instructed Mr Casey KC to represent him in the Environment Court.[73]

7.11 The following day, TWL spoke with Mr Casey to seek a resolution of WDC's proceeding in light of the discovery of the LUC. Mr Casey made a note of the discussion,[74] including:

(a) The parties agreed to vacate the hearing scheduled for 7 October 2009 in the Environment Court on WDC's application for enforcement orders against Mr Daisley under s 316 of the RMA.

(b) TWL agreed that the LUC changed the basis for WDC's existing action. But it noted other possibilities requiring exploration, e.g., the prospect that the LUC may have lapsed or was subject to conditions.

(c) TWL wanted to agree the terms of an enforcement order regarding the conditions for future quarrying. Contrary to the earlier position reached between TWL and Mr Daisley's solicitor, Mr Casey told TWL that it was unlikely Mr Daisley would consent to an enforcement order. But he told TWL that Mr Daisley may be prepared to enter a voluntary agreement.

7.12 That same day, TWL filed a memorandum in the Environment Court seeking orders by consent that the proceeding be adjourned to enable both parties to carry out factual investigations.[75] The memorandum recorded a joint position reached with Mr Casey after he took instructions, and so the adjournment occurred with Mr Daisley's consent. The memorandum stated:[76]

> Mr Casey and I agree that before matters can be taken any further, a factual enquiry of the terms and circumstances of the previous planning permission needs to be completed. Once done, both parties need to properly and fully consider their positions regarding the possibility of amending or withdrawing the application for an Enforcement Order. The Court's invitation to assist the parties … in coming to the terms of an Interim Enforcement Order is certainly appreciated. However, Mr Casey and I agree that until such time as the factual enquiry has been completed, the

70 CA judgment, above n 1, at [186].
71 304.0095.
72 304.0103.
73 304.0103.
74 304.0099.
75 304.0103.
76 304.0103. See also HC judgment, above n 1, at [110].

parties cannot meaningfully take the matter forward and indeed, the Council would not wish to do so.

7.13 The parties jointly requested that the hearing of the enforcement proceeding on 7 October 2009 be "*vacated and that the application be suspended*". They requested a further reporting date of 30 October 2009 regarding the outcome of the parties' factual investigations.

WDC tried to consensually resolve the legal dispute over terms of LUC

Consensus that the LUC did not confer unlimited quarrying rights

7.14 Throughout October 2009, WDC's and Mr Daisley's lawyers investigated the terms of the LUC and the scope of lawful quarrying. Although there was not complete consensus, they agreed that the LUC did not grant an unlimited right to quarry the property. That is important context because (as discussed below) it explains why the parties later agreed to keep the Environment Court proceedings on foot as a possible mechanism for implementing agreed variations, clarifications or conditions of the LUC to allow future quarrying. It also shows that WDC had a legitimate basis for not immediately withdrawing the enforcement proceeding, contrary to Mr Daisley's submissions.

7.15 Mr Casey wrote a letter of advice dated 5 October 2009 stating his opinion that the LUC was not unconstrained.[77] He said it was likely the LUC only authorised quarrying on the part of Mr Daisley's property marked on the plan lodged with the application for the LUC. Mr Casey also advised that quarrying could not be undertaken within 20 metres of the site boundary. He requested confirmation that the "quarry operation is within" the permitted area because "quarrying outside that area is probably not covered by the consent". Finally, Mr Casey advised that quarrying activity is subject to the general requirement in s 17 of the RMA that every person has a duty to avoid, remedy or mitigate any adverse environmental effects whether or not the activity is consented.

7.16 WDC itself identified constraints on the LUC's scope which it conveyed to Mr Casey on 29 October 2009.[78] First, the LUC expressly confined quarrying to the "extraction of red brown rock". Second, and consistently with Mr Casey's advice, the consent applied only to the area marked on the approved location plan. Drawing those elements together, WDC took the view that the LUC is "limited to red brown rock in the approved quarry pit location". Neither of these conditions had been complied with. WDC observed that Mr Daisley had excavated "blue rock and that the quarry pit … is in an entirely different location from that approved under the 1988 Consent".

7.17 Pausing there, it is significant that the High Court concluded that WDC's interpretation was correct. It held that the LUC was confined to "red brown rock and, at least by implication, to rock taken from a specific location on the property".[79] The Court also decided that the "operation of the quarry was always susceptible to limitations that might be imposed by [WDC] upon a review to address environmental concerns".[80] Given those limitations, the

[77] 304.0105. See also HC judgment, above n 1, at [111].
[78] 304.0114.
[79] HC judgment, above n 1, at [98].
[80] At [98] citing ss 128(1) and 129 of the RMA.

High Court said it was likely that WDC "would have been entitled to issue an abatement notice and take enforcement proceedings in 2005" for breach of the terms of the LUC (had WDC known of the LUC's existence).[81] Later, it went further and held that the "first abatement notice was probably justifiable" (i.e. even if WDC had known of the LUC) as the quarrying proposed under Mr Daisley's 2006 quarry management plan involved extracting "all types of rock rather than brown rock as per the original consent conditions and from an area not covered by the 1988 LUC".[82]

Enforcement proceeding kept alive as a vehicle for reaching an agreed position

7.18 Despite the constraints imposed by the LUC, WDC's 29 October 2009 letter recorded the Council's willingness to "*regularise*" Mr Daisley's non-compliant quarrying activities using an "appropriate legal mechanism".[83] The High Court described the 29 October 2009 letter as a proposal by WDC of "conditions allowing quarrying to continue".[84] Far from seeking to prohibit quarrying (as alleged in Mr Daisley's submissions to this Court), WDC sought to reach an agreed position to allow continued quarrying subject to conditions to address the "current effects of the quarry". WDC's letter concluded by noting that further discussion was required regarding the "appropriate legal mechanism to secure these conditions". WDC expressed a preference to "agree the terms of an Enforcement Order under the umbrella of the application current[ly] before the Court".

7.19 WDC annexed proposed conditions to its 29 October 2009 letter.[85] Under the proposal, Mr Daisley's quarrying operations would be allowed to occur in line with a Quarry Management Plan (**QMP**) approved by Northland Regional Council.[86] WDC proposed 8 further conditions, which were modifications to ones proposed by Mr Daisley in his 2006 application to WDC for an LUC.[87] These included conditions as to volumes of material to be quarried, traffic movements, hours of operation, noise and vibration effects of blasting etc.

7.20 On the same day, TWL filed an updating memorandum in the Environment Court seeking an extension of time for negotiations.[88] It noted that "discussion is currently occurring between the parties in the hope that *conditions can be agreed under which the quarry activities can continue*". Further, the memorandum recorded that the parties were still discussing "the

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81 At [100].

82 HC judgment, above n 1, at [500]. See also at [235] (noting that the Mr Daisley's quarrying was "outside the permitted conditions of mineral extraction") and [236] (holding that WDC "may have been justified in issuing the first abatement notice").

83 304.0114.

84 HC judgment, above n 1, at [112].

85 304.0116.

86 The QMP was prepared on Mr Daisley's behalf as part of the requirements for his application to WDC for a land-use consent and to Northland Regional Council for a consent to undertake rock extraction and related activities: 301.0203, 301.0206 (WDC application), 301.0209 (the original QMP), 306.0021 (application to the Northland Regional Council) and 302.0078 (NRC recourse consent approving QMP subject to additional conditions). See HC judgment, above n 1, at [92].

87 See the QMP at 301.0209. See also the HC judgment, above n 1, at [61]–[63], [90]–[96], [100], [513] and [547] noting that the conditions imposed in the consent variations granted to Ark in 2011 were founded on Mr Daisley's 2006 quarry management plan. The conditions imposed by WDC on the Ark consent in 2011 were, in turn, based on the conditions WDC proposed to Mr Daisley in its 29 October 2009 letter. See below at [7.26].

88 304.0117.

legal mechanism" for securing the conditions, including the possibility of "an agreed form of an Enforcement Order". In the meantime, WDC asked that its enforcement action be put on hold and an extension of time granted until 20 November 2009 to report back to the Court about the negotiations.

7.21 On 20 November 2009, Mr Casey replied to TWL's letter and confirmed that Mr Daisley agreed "on the whole" with WDC's conditions,[89] and requested amendments to three of the conditions 3.[90]

Sale of property to Ark Contractors Ltd delayed consensual resolution

7.22 By November 2009, the High Court found that Mr Daisley was "committed to the sale of the Knight Road property".[91] In July 2009, Mr Daisley resolved to sell the property under pressure from Westpac Bank to "retire his increasing indebtedness to the bank",[92] which also required him to sell a number of other properties in his portfolio.[93] After discovery of the LUC in September 2009, he offered to sell the property to Bruce Patterson (contractor and developer), but this was not approved by Mr Daisley's bank.[94] On 2 December 2009, the day before a mortgagee sale, Mr Daisley agreed to sell at a forced sale price to Ark Contractors Ltd.[95]

7.23 Given that Mr Daisley was "committed" to selling the property, the High Court found that "not much else was done" regarding the Environment Court action after WDC's October 2009 letter.[96] That much is apparent from the evidence:

(a) Little progress was made between October and December 2009 on the parties' efforts to negotiate a resolution of the enforcement proceeding. WDC filed a memorandum on 1 December 2009 to seek a further reporting date of 21 December 2009 because Mr Casey had not been able to respond to WDC's "latest proposal" for conditions that would allow the quarry operation to continue.[97]

(b) Still not having received a response, TWL wrote to Mr Casey on 22 January 2010.[98] It reiterated WDC's desire that the proceeding be "resolved by agreement". However, if no response to WDC's proposal for an agreed resolution was received by 25 January 2010, TWL noted it would seek amended orders or declaratory relief so as to "determine the extent of [Mr Daisley's] consent". No application eventuated.

(c) On 26 January 2010, Mr Casey responded to TWL and suggested that the parties jointly apply to the Environment Court for a further extension in relation to the enforcement proceeding.[99] He noted that he had not been able to get instructions from Mr Daisley, who was working through

89 304.0119.
90 Given the correspondence that followed between the parties, it is not clear whether Mr Casey's letter was received by the WDC or, if so, whether it may have been overlooked.
91 HC judgment, above n 1, at [112].
92 At [8].
93 At [557].
94 At [433].
95 At [12].
96 At [112].
97 304.0120.
98 304.0125.
99 304.0126.

the process of selling the property. The Court of Appeal described this as a pragmatic proposal by Mr Daisley's lawyer that WDC's application "remain on hold until the ownership was resolved".[100] WDC agreed to Mr Casey's proposal and filed a memorandum to that effect in the Environment Court.[101] WDC's consent was conditional on there being an undertaking that quarrying activities would not occur until "the conditions of any consent" were settled so any unlawful quarrying could be "regularised". The Court of Appeal held that the purpose of keeping the enforcement proceeding on foot was "*only* to ensure that quarrying would not continue in the interim".[102] By this point, however, Mr Daisley had no interest in quarrying the property given its imminent sale.

WDC resolved terms of LUC with new owner — Ark Contractors Ltd

7.24 The sale of the property to Ark Contractors Ltd settled on 29 January 2010.[103] Following the sale, WDC sought to agree the LUC's terms with Ark, given the need to "regularise" the quarrying for the reasons noted at [7.14]–[7.17]. The parties sought to "settle" the Environment Court proceedings.[104] While they worked toward that outcome, the parties requested that the court proceeding "remain on hold".

7.25 Ark first sought to resolve the terms of the LUC with WDC by applying for an existing use certificate on 17 January 2011.[105] Ark confirmed that it agreed to comply with the conditions WDC had proposed to Mr Daisley in its settlement letter of 29 October 2009 (albeit with minor modifications).[106] The High Court decision explained the context:

> [90] On 17 January 2011, Ark applied to the Council for an existing use certificate under s 139A of the RMA, founded on the use of the 1988 LUC. The submissions of Ark's counsel in support of the application noted, however, that the use that was then being carried out on the land was the quarrying of blue rock rather than red brown rock and that the quarry pit was in a different location on the site from that shown on the plan that accompanied the 1988 application. It is noteworthy that the application was for the extraction of up to 50,000 BCM of material and was based on the 2006 Quarry Management Plan that Mr Daisley had submitted in support of his 2006 resource consent application.
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> [91] The Council considered that what was proposed by Ark was not compatible with an existing use right under the 1988 LUC because the scale of Ark's then-current activities and the proposed operation were beyond the existing consent or District Plan limits. The Council's lawyers suggested that Ark should either seek a variation of the 1988 LUC or a new consent.

7.26 Taking up that suggestion, on 3 May 2011, Ark applied to WDC for a "change to conditions" of the LUC under s 127 of the RMA "on the basis that it was the

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[100] CA judgment, above n 1, at [186].
[101] 304.0127.
[102] CA judgment, above n 1, at [186].
[103] HC judgment, above n 1, at [12].
[104] 304.0136.
[105] See 304.0140 (existing use certificate application of 15 December 2010), 304.0142 (supporting affidavit of Paul Keller) and 304.0146 (letter from Matthew Casey KC to WDC lodging application).
[106] See at [16]–[17] of the lodgement letter (304.0146) and [8] of the supporting affidavit (304.0142). The main modifications were to add a new condition 2 requiring that no quarrying occur within 20 metres of the boundary and amending condition 7 to allow 4 annual blasts rather than 1. The new condition 2 was "added for the avoidance of doubt": see at [8] of 304.0142.

holder of a resource consent".[107] Ark sought to incorporate WDC's proposed conditions into a varied LUC, as agreed with WDC. The High Court held that the conditions imposed on the amended Ark consent were "founded on" and largely reflected "those which had been suggested by Mr Daisley's advisers when Mr Daisley submitted the 2006 QMP in support of his own resource consent application".[108]

7.27 WDC granted Ark's variation application on 30 May 2011.[109]

WDC withdrew proceeding against Ark Contractors Ltd in July 2011

7.28 Having resolved the terms of Ark's amended LUC, WDC moved to withdraw the Environment Court proceeding. The proceeding was no longer required as a vehicle for agreeing the scope of the LUC given that this result had been achieved with Ark's variation application. By this point, Ark was the relevant counter-party rather than Mr Daisley, who no longer owned the property. So on 23 June 2011, WDC sought Ark's consent to withdrawing the proceeding "with no further issue".[110] Ark immediately consented to the withdrawal. Its lawyers added that Ark is "owner of the land to which the proceeding relates" and that "Mr Daisley, the former owner, has no ongoing involvement".[111]

7.29 Judge Newhook confirmed that the Environment Court proceeding had been successfully withdrawn by order dated 4 July 2011.[112] Importantly, the order clarified that by this point, Mr Daisley was no longer party to the proceedings.

Part E: Outcome and relief

8 WDC not liable in misfeasance for pre- or post-discovery conduct

8.1 In summary, WDC is not liable in misfeasance for its conduct prior to or after the discovery of the LUC in September 2009.

Scope of cross-appeal and unpleaded misfeasance claim

8.2 First, WDC's conduct following discovery of the LUC in 2009 was not pleaded or determined below as an independent basis for misfeasance liability. It was only relevant to the award of exemplary damages. Mr Daisley is, therefore, asking this Court to determine a new misfeasance action as the first instance decision-maker without the benefit of the lower courts' views. WDC submits that the cross-appeal should be dismissed for this reason alone.

8.3 Second, Mr Daisley has not appealed the Court of Appeal's finding that WDC is not liable for misfeasance based on its pre-discovery conduct because the *Garrett* criteria are not satisfied. To the extent that Mr Daisley's submissions seek to reopen that point, WDC respectfully submits that his argument is not within the grant of leave and should therefore be dismissed.

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[107] HC judgment, above n 1, at [91]. See 304.0181 (application for change to conditions dated 29 April 2011), 304.0194 (accompanying report) and 304.0185 (lodgement letter of Matthew Casey KC dated 3 May 2011).
[108] HC judgment, above n 1, at [513] and [547].
[109] At [96]. See also 304.0186 and 304.0189.
[110] 304.0230.
[111] 304.0229.
[112] 304.0233.

The *Garrett* criteria are not met for WDC's pre- or post-discovery conduct

8.4 In any case, the *Garrett* test for misfeasance is not met in respect of either the Council's pre or post-discovery conduct. To summarise:

(a) No unlawful conduct — the High Court held that Mr Daisley's quarrying did not comply with the restrictions imposed by the LUC with the result that the first abatement notice was justified, and it was likely the Council would have been entitled to "take enforcement proceedings in 2005" albeit on a different basis to the one actually taken by WDC. The LUC was not a complete defence to the Environment Court proceedings. Accordingly, WDC did not exceed the scope of its enforcement powers.

(b) No knowledge / recklessness — even if the enforcement proceeding was ultra vires, there is no finding by the High Court or Court of Appeal that WDC's officers knowingly or recklessly acted beyond the scope of their powers. Nor is such a conclusion tenable in light of the concurrent findings that no WDC officer knew of the existence of the LUC. Without knowledge of the LUC, WDC cannot have known or appreciated a risk that Mr Daisley's quarrying was (partially) authorised by a consent. The High Court's finding that WDC was reckless as to the LUC's existence is insufficient under *Garrett* for the same reason. Additionally, the High Court's recklessness finding simply reiterated its earlier conclusion that WDC had negligently failed to perform its duties; it does not support the broader proposition that WDC recklessly exceeded its lawful authority.

8.5 Turning to WDC's post-discovery conduct, the *Garrett* test is not satisfied:

(a) No unlawful conduct — neither the High Court nor the Court of Appeal made a finding that it was illegal for WDC to not immediately withdraw the Environment Court proceeding. WDC had a proper purpose behind keeping the Environment Court proceeding alive, namely to retain it as a possible legal mechanism for implementing agreed variations to the LUC to authorise quarrying. In any case, without proof of unlawful conduct in the relevant period, there can be no finding of misfeasance.

(b) No knowledge / recklessness — neither of the lower courts held that WDC knowingly or recklessly exceeded its legal authority by not immediately withdrawing the Environment Court proceeding. Nor did they hold that WDC intended to cause Mr Daisley harm or was reckless in that regard. Those findings are not available on the evidence, especially given that WDC sought to negotiate a settlement of the Environment Court action with Mr Daisley that would allow him to lawfully quarry his land pursuant to a varied and expanded LUC.

9 Exemplary damages are not available or justified

9.1 Exemplary damages are not available given that WDC has not, nor can be, found liable for misfeasance. As noted by the Court of Appeal, Mr Daisley's

pleading only sought exemplary damages for the misfeasance action.[113] The Court of Appeal was therefore correct to quash the exemplary award.

9.2 Even if WDC were liable in misfeasance, Mr Daisley has not identified any credible error in the Court of Appeal's decision that exemplary damages were unwarranted. His principal argument is that exemplary damages are justified in light of the High Court's conclusion that WDC's conduct was obstructive and uncompromising after the discovery of the LUC in September 2009.[114] That overlooks the Court of Appeal's decision that the High Court "attached too much significance to the Council's failure to withdraw the enforcement proceeding".[115] For the reasons already submitted ([7.1]–[7.29]), the Court was correct not to regard WDC's post-2009 conduct as rising to the level of seriousness requiring a punitive response.

9.3 Secondly, Mr Daisley submits that the Court erred in its obiter observation that exemplary relief was unnecessary having regard to the "substantial award of compensatory damages".[116] He contends that this reasoning is prohibited by *McLaren Transport Ltd v Sommerville*.[117] In fact, *McLaren* stands for the principle that exemplary damages do not have a compensatory function. The Court of Appeal's observation was that, having regard to the sizeable damages award against WDC, a separate exemplary damages award was unnecessary to sanction the Council. In other words, the size of the compensatory award addressed sufficiently the functions usually reserved for exemplary damages awards such as deterrence.

10 Relief on cross-appeal

10.1 The cross-respondent seeks the following orders:

(a) The cross-appeal is dismissed;

(b) Costs and disbursements with certification for second counsel.

Dated: 18 December 2024

Publication certification: Counsel certify that, to the best of their knowledge, these submissions are suitable for publication and do not contain suppressed information.

D H McLellan KC | F P Divich | S O H Coad
Counsel for the cross-respondent

[113] CA judgment, above n 1, at [49] and [184]. See 101.0069 at [213].
[114] Cross-Appeal Submissions at [50].
[115] CA judgment, above n 1, at [186].
[116] At [185].
[117] Contrary to the cross-appellant's submissions (e.g. at n 8), *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 is a decision of the High Court (per Tipping J) not the Court of Appeal.