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

RESPONDENT'S ORAL ARGUMENT ON CROSS-APPEAL – MISFEASANCE

PRESENTED FOR FILING BY:

MORGAN COAKLE
Solicitors for Plaintiff
Level 9, 41 Shortland Street, Auckland
PO Box 114, Shortland Street, Auckland 1140, DX CP20504
Ph: 09 379 9077 Fax: 09 379 9155
Solicitor dealing with proceeding:
D J MacRae

COUNSEL ACTING:

James Farmer KC
Georgia House
19 Emily Place
Auckland 1010
PO Box 1800
Shortland St, Auckland 1140
Ph: 09 358 7090

RESPONDENT'S CROSS-APPEAL NOTES OF ARGUMENT
MISFEASANCE

Judgments

1 The trial Judge ruled that, taken on its own, the Council's conduct pre-discovery of the consent would not have justified an award of exemplary damages, but its "stubborn obstructive attitude between the time of discovery and July 2011 when the enforcement proceeding was withdrawn was inexcusable and that a "realistic, contrite and apologetic approach by the Council might have salvaged the situation for Mr Daisley" [HCJ 342-343]. The Judge determined that the Council's conduct after discovery of the consent "tipped the balance" in favour of an award.

2 However, the Court of Appeal determined the Misfeasance claim [at 183 and 184] without regard to the conduct of the Council after discovery of the LUC (notwithstanding it did go on to comment that it considered Toogood J placed too much significance on the Council's actions after the LUC was discovered). The Court set the Misfeasance finding aside, both as a matter of pleading and because the necessary element of deliberate wrongdoing or subjective recklessness as to the limits of the Council's legal authority was absent [CAJ. 184].

3 In relation to the pleading, the Court of Appeal considered Mr Daisley's claim did not include a separate and distinct breach of duty by the Council after the discovery of the consent. The Court said at [50] that "The pleaded breaches of duty all concern events which occurred before 14 August 2009" (before discovery of the consent) and "none of the particulars concerning breach of the Council's duty of care plead anything done after 14 August 2009".

4 The Court also states at [183] that the trial Judge did not find that the officers were recklessly indifferent to the limits of their authority, and he was not prepared to find that the Council acted in bad faith. It seems on that basis, the Court of Appeal found that the Council officers' subjective recklessness to the existence of the consent "does not extend to recklessness with respect to their lawful authority to take enforcement action" (such actions being before the consent was discovered).

5 But Toogood J did not rule that the officers were not recklessly indifferent to the limits of their authority. Whilst is correct that Toogood J was not prepared to find that the Council acted in bad faith, it is clear from his judgment [342] that this finding was in relation to conduct prior to the discovery of the consent. It must follow (although not expressly stated in the judgment) that the trial Judge, by awarding exemplary damages, considered the council officers were recklessly indifferent to the limits of their authority (having regard to their conduct over the entire pre- and post- discovery period.

6 It seems the Court of Appeal took the view that because (in its view) Mr Daisley's pleadings did not include allegations of breach after discovery of the consent (which Mr Daisley does not accept), only Council's conduct prior to discovery of the consent is relevant, and because there was no finding that the Council acted in "bad faith" prior to discovery of the consent, the Misfeasance finding is to be set aside. To the contrary, Toogood J took account of the post-discovery conduct which he thought tipped the balance in favour of an exemplary damages award.

Pleadings

7 Both the Court of Appeal and the Council claim that Mr Daisley's pleading did not include particulars of misfeasance extending to anything done after 14 August 2009 [CAJ 86; AWS 1.3]. That is incorrect.

8 The pleadings state (4ASC): **Continued Ultra Vires Action** – the pleadings under this section (paras 123 to 127) relate to the Council's action after the consent was discovered; and **Misfeasance of the Council** – the pleadings paragraphs 173 and 174 refer to the Council's knowledge of the LUC and continued enforcement action.

9 Further, Mr Daisley does not now for the first time, as the Council contends, claim that Misfeasance arises in relation to conduct solely after the consent was discovered. The claim is not based on a distinct breach of duty after discovery of the consent and neither the pleadings nor the appeal are framed in that way

10 Mr Daisley's claim is that the Council's breach of duty pre discovery of the consent continued post discovery, and it was the Council's post discovery conduct (added to its pre-discovery conduct) that gives rise to Misfeasance. The terms of the leave to appeal approved question are consistent with Mr Daisley relying on both pre- and post-discovery conduct.

Law

11 Referring to the elements of Misfeasance set out in *Garrett* and summarised in *Currie*, it must be shown that the Council officers were both recklessly indifferent to the limits of their authority and recklessly indifferent to the consequences for Mr Daisley.

Elements of Misfeasance satisfied

12 It is submitted that the Council was recklessly indifferent to the limits of their legal authority both before and after discovery of the consent. Prior to discovery of the consent, the Council officers knew relevant facts (historic quarry use, commercial rating, mineral notation on title) that made it incumbent on them to diligently search for the consent and not assume that the onus was on Mr Daisley to prove its existence. The Council was found to be breach of section 322(4) of the RMA and it must follow from this that the Council officers were recklessly indifferent to the limits of their authority. After discovery of the consent, the Council maintained enforcement action (instigated on the grounds that Mr Daisley did not have a consent to operate the

quarry) and in doing so it maintained that Mr Daisley was not entitled to operate the quarry.

13 Importantly, after discovery of the consent, the Council officers were recklessly indifferent as to the consequences for Mr Daisley – i.e. whether or not Mr Daisley would be harmed by continuing to maintain their opposition to operation of the quarry. It is submitted it was this conduct with actual/subjective knowledge of the consent which Toogood J considered tipped the balance in favour of an award. In this regard Toogood J states, at [343]:

> I infer that, if the Council had adopted the same attitude towards Mr Daisley's plans to exploit the quarry in October 2009 in the way it embraced Ark's proposals to do the same thing in 2011, Mr Daisley may have been able to persuade his bank to hold off the mortgagee sale of his property. The knowledge that the Council would, at last, facilitate Mr Daisley's ambitions to establish a commercial enterprise on the property may well have made a difference to the views of his bank. It is relevant to the question of exemplary damages, therefore, that the Council continued to maintain an uncompromising position against Mr Daisley until July 2011 when it withdrew the enforcement proceedings and the damage caused by the Council's negligence came to an end.

14 The Court of Appeal recognized the Council's interference with Mr Daisley's business by not immediately discontinuing the enforcement proceeding until after he had sold the property [CAJ. 50]. The Council's conduct, after it had actual knowledge of the consent, must be regarded as being intended to cause harm to Mr Daisley (as articulated in *Bourgoin*) [C-AWS 46-47].

15 Accordingly, the Court of Appeal was wrong to diminish the importance of the Council's failure to withdraw the enforcement proceedings on the grounds that at some point discussions took place between the solicitors for the parties to adjourn the proceedings until ownership was resolved [CAJ. 186]. Any discussions between the solicitors does not excuse the Council's actions. But in any event, by that time the die was cast and the mortgagee sale was in train.

16 For a finding of reckless indifference as to the consequences for conduct, it is not necessary to show (or limited proving) "intent" to cause harm, as contended by the Council. It is sufficient that Council's actions were recklessly indifferent to any harm that may result. But Mr Daisley was harmed by being deprived the opportunity to negotiate with his bank after the consent had been discovered to avoid the sale of the property.

Court's finding that exemplary damages were not necessary

17 The Court of Appeal also considered, in any event, that exemplary damages were not necessary having regard to the substantial award of compensatory damages [CAJ. 185]. But that does not accord with the earlier authorities of *Kuddus and McLaren* [C-AWS 44, 48, 55].

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

D J MACRAE

Counsel for the Respondent

Dated 17 March 2025