IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2014-404-167
[2015] NZHC 1146

BETWEEN	SUSAN CARREL MACKEN, PETER FRANCIS TOBIN WARREN AND CHRISTOPHER NORMAN LORD Applicants
AND	RONALD PETER JERVIS AND KATHLEEN JERVIS Respondents

Hearing: 6 May 2015

Counsel: F Whyte for Applicants
S A Connolly for Respondents

Judgment: 27 May 2015

JUDGMENT (NO. 2) OF HEATH J

This judgment was delivered by me on 27 May 2015 at 2.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Lee Salmon Long, Auckland
Barratt-Boys Law Practice, Auckland
Counsel:
S A Connolly, Newmarket

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The application

[1] On 6 May 2015, I heard an application for costs by Mr and Mrs Jervis, arising out of my judgment of 23 December 2014.[1] I dismissed a proceeding brought by the trustees of the Macken Family Trust (the Trust) to obtain relief under the landlocked land provisions of the Property Law Act 2007 (the Act), in respect of properties at 24 and 24A Wiles Avenue, Remuera. The facts are set out fully in that judgment. I repeat them only to the extent necessary to determine the present application.

[2] Two substantive issues were raised in the proceeding.[2] The first was the jurisdiction of the Court to make an order of the type sought. The second was whether, if jurisdiction existed, relief should be granted as a matter of discretion. Although I made some observations about the conditions on which I might have granted relief if jurisdiction existed, the Trust's claims failed for want of jurisdiction. Undoubtedly, Mr and Mrs Jervis were the successful parties in the litigation.

[3] Mr Connolly, for Mr and Mrs Jervis, seeks costs, on their behalf. Primarily, indemnity costs are sought.[3] If that claim were unsuccessful, an alternative claim is made for increased costs.[4] If neither of those claims succeeded, costs are sought on a standard scale basis.[5] For the purpose of this proceeding, costs have been classified on a Category 2 basis.[6]

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1 *Macken v Jervis* [2014] NZHC 3408.
2 Ibid, at para [5].
3 High Court Rules, r 14.6(4).
4 Ibid, r 14.6(3).
5 Ibid, rr 14.2–14.5. See also, the extract from *Bradbury v Westpac Banking Corporation* [2009] 3 NZLRE 400 (CA) at para [27], set out at para [6] below.
6 Ibid, r 14.3. *Macken v Jervis* HC Auckland CIV-2014-404-167, 9 May 2014, (Minute of Associate Judge Doogue) at para [1].

[4] Mr Whyte, for the Trust, submits either that no costs should be ordered in favour of Mr and Mrs Jervis, or they should be reduced below the level of standard scale costs.[7] In addition, there are challenges to expenses incurred by two expert witnesses called by Mr and Mrs Jervis. These expenses are claimed as disbursements.[8]

The High Court costs regime

[5] The general rule is that all questions of costs in relation to a proceeding are within the discretion of the High Court.[9] That said, the High Court Rules set out a series of principles to inform the decision on costs.[10] Specific guidance is given both in respect of increased costs and indemnity costs[11] and circumstances in which costs might either be reduced or refused.[12] That guidance does not derogate from the general discretion that the Court possesses to determine costs on the merits of a particular case.[13]

[6] The differences among the types of costs orders sought by Mr and Mrs Jervis was explained by Baragwanath J, for the Court of Appeal, in *Bradbury v Westpac Banking Corporation*:[14]

> [27] The distinction among our three broad approaches – standard scale costs, increased costs and indemnity costs – may be summarised broadly:
>
> (a) standard scale applies by default where cause is not shown to depart from it;
>
> (b) increased costs may be ordered where there is failure by the paying party to act reasonably; and
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> (c) indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[7] Rule 14.7 of the High Court Rules deals with circumstances in which a successful party might be refused costs, or have its costs reduced below the amount

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7 Ibid, r 14.7.
8 Ibid, r 14.12.
9 Ibid, r 14.1.
10 Ibid, r 14.2.
11 Ibid, r 14.6(3) and (4).
12 Ibid, r 14.7.
13 Ibid, r 14.1(2).
14 *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA), at para [27].

for which it would otherwise be entitled. Those circumstances include such considerations as whether a successful party has failed to comply with Court directions or has (unreasonably) advanced claims (or defences) that lack merit.[15]

[8] Generally, costs will follow the outcome of a proceeding. In *Manukau Golf Club Inc v Skoye Venture Ltd*,[16] the Supreme Court made it clear that, in most cases, only brief reasons are required for decisions on costs. Giving the judgment of the Court, Chambers J said:

> [16] We wish to make clear a court does not have to give reasons for costs orders where it is simply applying the fundamental principle that costs follow the event and the costs awarded are within the normal range applicable to that court. So here, had the Court of Appeal awarded costs in the Club's favour on a standard appeal basis, no further explanation would have been required. It is only when something out of the ordinary is being done that some explanation, which may be brief, should be given.

Unfortunately, the issues raised by counsel in this case require more detailed reasons to be given.

Preliminary observations

[9] The submissions I received on costs, and the information provided to support each party's position, reflect the way in which the litigation was conducted. The proceeding has not advanced the interests of either party. Dr Macken (the occupier of 24 Wiles Avenue) continues to drive over that part of the driveway to which she has no legal right to pass and re-pass. Although leaving the security gate open to avoid criticism on the costs application, Mr and Mrs Jervis prefer to keep (and at times since my substantive judgment have kept) it shut at convenient times. If the parties wish to take those stances until the problem comes to a head when either wishes to sell, so be it.

[10] In my substantive judgment I suggested a means by which the parties might resolve their differences.[17] I recorded that my hope of resolution was probably

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15 High Court Rules, r 14.7(f).
16 *Manukau Golf Club Inc v Skoye Venture Ltd* [2013] 1 NZLR 305 (SC).
17 *Macken v Jervis* [2014] NZHC 3408, at paras [35]–[37].

"forlorn".[18] I was right to be pessimistic. The intelligent people involved still cannot resolve their differences in a pragmatic way.

[11] Those observations are made only to explain why the parties take opposed positions on questions of costs. I am not taking into account that post-judgment conduct in determining whether, and if so in what amount, costs should be awarded. As with the substantive dispute, I analyse the competing positions by applying controlling legal rules in a principled way.

Should costs be awarded other than on a "standard" basis?

[12] Mr Connolly bases his claim for indemnity costs on correspondence that has passed between solicitors for the parties on a "without prejudice save as to costs" basis. Correspondence of that type may be taken into account by a Court when determining costs.[19] I deal first with that aspect of the application.

[13] On 6 March 2014, following the issue of the proceeding but before the time by which the statement of defence had to be served, Mr and Mrs Jervis' then lawyer wrote to the solicitors for the Trust proposing a settlement, in these terms:[20]

> 7. For the avoidance of doubt, my clients' previous offer is set out again. In full and final settlement of proceedings CIV-2014-404-0167 the parties are:
>
> 7.1 The Defendants will grant to the Plaintiffs a right of way over the area marked [Strip B] in the attached plan.
>
> 7.2 The Plaintiffs will grant an easement to the Defendants', which enables the Defendants to open and close their gate, over the right of way area marked [Strip A] in the attached plan.
>
> 7.3 The Plaintiffs will be responsible for any costs necessary to give effect to this agreement.
>
> 7.4 The proceedings will be discontinued with no issue as to costs.
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> 8. The foregoing offer:

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18 Ibid, at para [39].

19 Ibid, r 14.11.1.

20 I have amended references in all of the without prejudice correspondence to reflect the way in which the strips of land were referred to at the substantive hearing; namely Strip A and Strip B: generally, see *Macken v Jervis* [2014] NZHC 3408 at paras [2] and [9].

8.1 Enables your client to have access to her garage.

8.2 provides no less access to your client than that which she currently enjoys in that a block wall prohibits access to her property over the remainder of the driveway.

8.3 Resolves the issue which has arisen between the parties regarding my clients' gate which, when closed, obstructs the Right of Way.

This offer was to remain open until midday on 14 March 2014, seven days before the date on which the statement of defence had to be filed.

[14] That offer was not accepted. In a detailed reply of 7 March 2014, the solicitors for the Trust stated:

Your clients' offer

10. Our clients have previously considered your clients' offer. Our clients do not consider it unreasonable to have rejected that offer in the past and that position has not altered.

11. The question of your clients' gate is a separate one to the question of our clients' access to the garage on the property. Our clients do not consider that the two issues can be equated and it is not, in our clients' view, appropriate that they be considered together.

12. In response to the matters raised in your letter we also note:

    (a) Unnecessary costs would be involved in surveying and defining legally the further rights of way those suggested in your letter;

    (b) The grant of a right of way over only a limited portion of the driveway would not be in accordance with the Subdivision Consent; and

    (c) Our clients see it as necessary and proper to preserve the right of access to the rear portion of the driveway and the possibility of access to the rear part of the property for maintenance and other purposes.

13. Our clients believe that, in respect of the right of way, they have done all that is reasonably possible to address this issue and to explain their reasons for not agreeing to the proposals put forward by your clients.

14. The filing and the pursuit of these proceedings is unfortunate and our clients reasonably sought to avoid that through our initial correspondence. However, our clients believe that, there are strong supporting reasons for seeking the relief set out in the application

and that, in the absence of an agreement, they are now justified in taking this course.

Our clients' counter offer

15. If your clients are willing to consent to the granting of a right of way over [Strip B] then:

    (a) our clients are willing to meet the costs of that; and

    (b) our clients are willing to discontinue the present proceeding with no issue as to costs.

[15] The counter offer was not accepted. A further proposal to settle was made by Mr and Mrs Jervis' lawyer by letter of 1 August 2014 to the solicitors for the Trust. That proposal was:

5. In full and final settlement of these proceedings my clients will grant your clients a right of way over the whole of [Strip B] in consideration of your clients:

    5.1 Making a contribution towards the Respondents' legal costs in the sum of $9,000.00;

    5.2 Moving my clients' gate (at your clients' cost) to the boundary and infilling the additional space created with a pedestrian gate, as previously addressed with Harrison Grierson, to avoid an encroachment onto the new right of way.

    5.3 Paying for any costs necessary to give effect to this agreement;

    5.4 Discontinuing the proceedings with no issue as to costs.

[16] This offer was conveyed after witness statements had been prepared and served on behalf of the Trust but before the same exercise had been completed by Mr and Mrs Jervis. The offer remained open until 5 August 2014. The date by which Mr and Mrs Jervis were to serve witness statements was 20 August 2014.

[17] On 8 August 2014, the solicitors for the Trust wrote to Mr and Mrs Jervis' lawyer rejecting the proposal. They said:

2. We note the following points in relation to your letter:

    (a) Your client has been aware, since well before the commencement of proceedings, that the omission of the right of way was in error and was the result of Harrison

Grierson's mistake. We believe that to now suggest otherwise is incorrect.

(b) Our client has attempted, on a number of occasions and by a variety of mediums (personally, through Harrison Grierson and through solicitors) to discuss how the proceedings could sensibly be resolved.

(c) Those offers have not been accepted due to your clients' insistence on:

(i) intermingling the issues of the misplaced gate and the right of way; and

(ii) suggesting that only a limited right of way be granted and that our clients give your clients exclusive use over the rear portion of the driveway in return (see your letter of 6 March 2014).

(d) These matters have, from the inception, been fundamentally misconceived as:

(i) Even ignoring the issue of the right of way, your clients' gate remains completely misplaced, and its placement is entirely unrelated, whether legally or factually, to the issue of the omission of the right of way; and

(ii) Your client's previous offer was impractical and likely to result in far greater cost and effort than the simple reinstatement of the right of way and in no way granted her access to the rear of her property in relation to certain essential services;

As such, our clients do not believe that it was unreasonable for them to have rejected your clients' previous offer.

(e) Our clients consider it inevitable that, for the reasons set out in Ms Macken's affidavit, the Court will find that access across the whole of the [Strip B] is entirely natural and necessary and without it the property is landlocked. The position suggested at (6) of your letter is unlikely to be correct.

(f) Our clients do not consider that any compensation would be payable in respect of the reinstated right of way. It is not possible to see any negative effect on the value of your clients' property resulting from the imposition of the correct easement. Any suggestion that there is a change in value resulting from a change in the position of the gate will be considered irrelevant to the issues in the proceeding.

[18] The solicitors for the Trust put forward a further counter proposal:

6. Our client proposes that:

   (a) Your clients consent to the right of way being reinstated over the whole of the [Strip B];

   (b) Your clients escape any of the costs associated with implementing that solution (legal and/or surveying); and

   (c) Each party bear their own costs of the proceeding.

7. Our clients believe that your clients' stance thus far has not been reasonable. As such, our client believes that the above offer represents a more than fair resolution of the issue concerning the right of way.

[19] In a letter of 11 August 2014, Mr and Mrs Jervis' lawyer rejected the counter offer but extended the time for acceptance of their offer on 8 August 2014, until 13 August 2014. No settlement was reached.

[20] One of the grounds for increasing costs is where, without reasonable justification, a party has failed to accept an offer of settlement to dispose of the proceeding.[21] The offer is usually made in accordance with r 14.10, which refers to written offers made on a "without prejudice except as to costs" basis. Rule 14.10 is a legislative endorsement of a practice developed as a result of a judgment of the Court of Appeal of England and Wales, in *Calderbank v Calderbank.*[22] In its early days, such an offer was known as a *Calderbank* letter.

[21] The origins of a *Calderbank* letter were explained by the Court of Appeal, in *Health Waikato Ltd v van der Sluis*.[23] Delivering the judgment of the Court, McGechan J said:[24]

> The *Calderbank* letter procedure gained its first open recognition in England in *Calderbank v Calderbank* [1975] 3 All ER 333, a case in the matrimonial jurisdiction where payment into Court was not "a course which would be appropriate" (at p 342 per Cairns LJ). Albeit obiter, the English Court of Appeal approved (ibid) the possibility of a protected offer which could be disclosed after substantive decision as bearing upon costs. After some intermediate development, and some doubts, the possibility was revisited and refined in *Cutts v Head* [1984] 1 All ER 597. The Court recognised an offer of settlement before trial, made without prejudice but expressly reserving the right to produce after substantive judgment on questions of

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21 High Court Rules, r 14.6(3)(b)(v).
22 *Calderbank v Calderbank* [1975] 3 All ER 333 (CA).
23 *Health Waikato Ltd v van der Sluis* (1997) 10 PRNZ 514 (CA).
24 Ibid, at 520.

> costs, was available where issues extended beyond a "simple money claim". For a claim of the latter variety, payment-in was the appropriate procedure. The practice gained some currency in New Zealand. This Court cautioned in *Andrews v Parceline Express Ltd* (1994) 7 PRNZ 712; [1994] 2 ERNZ 385, that like restraint was needed in relation to damages at common law, including general damages for distress, arising from breach of contract.

[22] The Court then referred to the first iteration of what is now r 14.10; r 46A of the 1986 version of the High Court Rules. McGechan J continued:[25]

> On its face, the rule is widely framed. It was not available before or at the substantive trial in the present Employment Court case, and any reconciliation or modifications to traditional principle which may be necessary can await a more appropriate case. Rule 46A does, however, tend to demonstrate the modern acceptability, from a policy standpoint, of *Calderbank* practice on a fully discretionary basis, notwithstanding the continued existence of traditional payment-in procedures under rr 347 et seq.

[23] Rule 14.11 of the High Court Rules now explains the effect of an offer made on a "without prejudice except as to costs" basis. It does so in a way that meets some of the concerns expressed by McGechan J in *Health Waikato Ltd v van der* Sluis. It states:

> **14.11 Effect on costs**
>
> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.
>
> (2) Subclauses (3) and (4)—
>
> (a) are subject to subclause (1); and
>
> (b) do not limit rule 14.6 or 14.7; and
>
> (c) apply to an offer made under rule 14.10 by a party to a proceeding (party A) to another party to it (party B).
>
> (3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—
>
> (a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or
>
> (b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.
>
> (4) The offer may be taken into account, if party A makes an offer that—

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[25] Ibid, at 521.

(a) does not fall within paragraph (a) or (b) of subclause (3); and

(b) is close to the value or benefit of the judgment obtained by party B.

[24] The first point is that the existence of such an offer is only one factor to be taken into account by a Court that is determining questions of costs.[26] This is consistent with the primary rule that all questions of costs are in the discretion of the Court.[27] While r 14.11 does not expressly deal with the use of such an offer to found a claim for increased or indemnity costs, it is clear that the existence of such an offer is a factor to be taken into account, as a matter of discretion, in determining whether the party from whom costs are sought has acted reasonably.[28]

[25] The nature of the acrimonious dispute between these neighbours cried out for a pragmatic solution. That did not happen.

[26] The way in which the Trust couched its offers of settlement[29] made it clear that negotiations would not proceed if the issue of access to the whole of Strip B was linked with the need for Mr and Mrs Jervis to close the security gate across Strip A. Separation of those two issues was unrealistic in the context of a dispute between neighbours.

[27] Further, the Trust proceeded on the (incorrect) assumption that it was entitled, as of right, to have its position accepted by Mr and Mrs Jervis, even though the latter had acquired their property without knowledge of the error made by those responsible for completing the subdivision. Contrary to what was asserted by the solicitors for the Trust, it was not "inevitable" that this Court would find that without access to the whole of Strip B the Trust's property was "landlocked".[30] In fact, I held that there was no jurisdiction to make an order because the property was not

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26 High Court Rules, r 14.11(1). Note: r 14.11(3) and (4) remain subject to that general discretion: r 14.11(2)(a).

27 Ibid, r 14.1; see also para [5] above.

28 See *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA), set out at para [6] above.

29 See paras [14], [17] and [18] above.

30 See para 2(e) of the letter of 8 August 2014 from the solicitors for the Trust to the solicitors for Mr and Mrs Jervis, set out at para [17] above.

"landlocked".[31] I found that the Trust was seeking to compel Mr and Mrs Jervis to yield their legal (and indefeasible) property rights without compensation.[32]

[28] It is equally clear that Mr and Mrs Jervis took unreasonable positions on facts that were not capable of *bona fide* dispute. After proper inquiry had been made, it was never open to argue that the inability for Dr Macken (as occupier) to pass and re-pass over Strip B was caused other than by an error on the part of those responsible for completing the subdivision that led to the creation of 24A Wiles Avenue.

[29] Further, in an offer made before witness statements had been prepared and served by them, on 1 August 2014, Mr and Mrs Jervis required the movement of their security gate and infilling of additional space created with a pedestrian gate, to avoid encroachment onto a new right of way.[33]

[30] In addition, when presenting their case in Court, Mr and Mrs Jervis sought to argue that an alternative means of access through other parts of the road frontage of the Trust property should be created to deal with the problem. Those contentions were never likely to succeed.

[31] I am not prepared to award either indemnity or increased costs based on the Trust's failure to accept proposals made by Mr and Mrs Jervis. Nor am I prepared to refuse or reduce costs otherwise payable to Mr and Mrs Jervis on the basis of their conduct. In my view, each of the parties (at various times) acted unreasonably. I regard their conduct as a neutral factor, for the purposes of determining costs.

Why "standard" costs must be ordered

[32] My starting point is that Mr and Mrs Jervis were successful in defending the proceeding. The Trust asserted that its property was landlocked. I found it was not.

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31 *Macken v Jervis* [2014] NZHC 3408, at paras [30]–[32].
32 Ibid, at para [31].
33 See para 5.2 of the letter sent by the solicitor for Mr and Mrs Jervis to the solicitors for the Trust, set out at para [15] above.

The Trust lost. There was no power for this Court to make the orders sought. As a result, Mr and Mrs Jervis are entitled to costs on a Category 2 basis.[34]

[33] Having regard to differences between counsel in the calculation of costs on that basis, they shall be fixed by the Registrar.

Disbursements for expert witnesses

[34] The jurisdiction of the Court to award disbursements is set out in r 14.12 of the High Court Rules. The term "disbursement" is defined:

> 14.12 Disbursements
>
> (1) In this rule,—disbursement in relation to a proceeding,—
>
> (a) means an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs; and
>
> (b) includes—
>
> (i) fees of court for the proceeding:
>
> (ii) expenses of serving documents for the purposes of the proceeding:
>
> (iii) expenses of photocopying documents required by these rules or by a direction of the court:
>
> (iv) expenses of conducting a conference by telephone or video link; but
>
> (c) does not include counsel's fee.

[35] A disbursement that is claimed and verified is included in the costs awarded for a proceeding to the extent that it is:[35]

> (2) …
>
> (a) of a class that is either—
>
> (i) approved by the court for the purposes of the proceeding; or
>
> (ii) specified in paragraph (b) of subclause (1); and

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34 See para [3] above.

35 High Court Rules, r 14.12(2).

(b) specific to the conduct of the proceeding; and

(c) reasonably necessary for the conduct of the proceeding; and

(d) reasonable in amount.

[36] Despite r 14.12(2), the Court has power to reduce or disallow a disbursement that is disproportionate to the circumstances of the proceeding.[36]

[37] Mr Whyte submits that for disbursements to be claimed, they must be both "reasonably necessary to the proceeding and reasonable in amount".[37] He contends that the expert evidence called by Mr and Mrs Jervis from Mr Blakely (in respect of the resource management implications of alternative access) and Mr Gamby (in respect of the valuation of the right of way for compensation purposes) was unnecessary. Further, he submits, that inadequate information has been provided about the fees payable to the expert witnesses, or how they were reasonably incurred.

[38] In accordance with my usual practice, I intend to leave the assessment of disbursements to a Registrar.[38] He or she will have power to call for a report into the validity of the expert witness's expenses, if necessary to decide the application.[39] All I need do for present purposes is to repeat views I have already expressed that the claim that alternative access to the Trust property should be required (or was reasonable) was likely to fail[40] and that the question of compensation was one that may have required resolution in the exercise of the Court's discretion, had it had power to grant relief under s 329 of the Act.[41]

[39] On that basis, I leave the assessment of the disbursements claimed for the Registrar.

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36 Ibid, r 14.12(3).
37 Ibid, r 14.12(2).
38 Ibid, r 14.12(4).
39 Ibid, r 14.12(5).
40 See para [30] above.
41 *Macken v Jervis* [2014] NZHC 3408, at paras [24] and [25], and [29]–[32].

Costs on the costs hearing

[40] While I agree with counsel's submission that there is power to award costs on a costs hearing itself,[42] having regard to the factors I have taken into account in determining the basis on which costs are to be calculated and disbursements are to be fixed, I decline to do so on the facts of this case.

Result

[41] I award costs in favour of Mr and Mrs Jervis on a 2B basis, together with reasonable disbursements. Those costs and disbursements shall be fixed by the Registrar. Those costs will not include those relating to the hearing (on costs) of 6 May 2015.

P R Heath J

Delivered at 2.00pm on 27 May 2015

[42] Based on authorities such as *Body Corporate Administration v Mehta* [2013] NZHC 213 at para [85] and *Auckland Regional Council v Arrigato Investments Ltd* (2002) 16 PRNZ 217 (HC) at para [21].