PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT

IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

[2023] NZACC 118 **ACR 248/21 and ACR 71/22**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	AD Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 18 July 2023
Held at: Auckland/Tāmaki Makaurau

Appearances: K Koloni for the Appellant
B Marten for the Accident Compensation Corporation

Judgment: 26 July 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for weekly compensation - s 209(4), and costs – s 148(2)-(3), Accident Compensation Act 2001 ("the Act")]

Introduction

[1] The appeals lodged by the appellant are as follows:

(a) ACR 248/21: lodged on 2 November 2021 in respect of a Reviewer's decision dated 28 September 2021. The Reviewer dismissed an application for review of the Corporation's decision of 15 June 2020

relating to the appellant's weekly compensation, and made an award of costs.

(b) ACR 71/22: lodged on 16 February 2022, in respect of a Reviewer's decision dated 19 January 2022. The Reviewer dismissed an application for review of the Corporation's decision dated 19 July 2021 assessing the appellant's entitlement to interest under section 114 of the Act.

Background

[2] In the mid-1970s through to the early 1980s, on a number of occasions during her childhood, the appellant's father sexually abused her.

[3] On 27 June 1994, the appellant saw Dr Grant Spencer. On 4 July 1994, the Corporation received an application for cover for the abuse, dated 1 September 1978 to 1980.

[4] On 6 July 1994, the Corporation requested the name of the appellant's approved counsellor who would be able to provide a more thorough report on which the Corporation could make a cover decision. On 20 September 1994, the appellant provided the name of her counsellor, and, on 27 September 1994, the Corporation contacted the counsellor.

[5] On 25 November 1994, Ms Dianne Gunn, Family Therapist, provided a report recording the appellant's claim that she had been the victim of sexual abuse and that this had had a profound effect on her.

[6] On 7 December 1994, the Corporation replied to Ms Gunn, requesting details of the specific nature of the abuse.

[7] On 31 March 1995, Ms Gunn replied that her report was not sufficient to substantiate the appellant's claim as the counselling sessions had related to the family's responses to the disclosure of sexual abuse. Ms Gunn noted that she was no longer treating the appellant.

[8] On 11 April 1995, the Corporation asked the appellant for the name and address of her counsellor, and noted that if it did not obtain this information it would have to decline the claim for cover. The Corporation did not receive a response, and a lengthy period then ensued without further contact from the appellant.

[9] In June and November 2012, the appellant discussed the ongoing impact her abuse was having on her with her GP, Dr Lynette Ashby. The appellant mentioned that she was receiving counselling.

[10] On 31 January 2013, Dr Ashby wrote to the Corporation seeking cover for the appellant's mental injury secondary to sexual abuse, giving the date of injury as 31 January 1982.

[11] On 19 March 2013, the Corporation wrote to the appellant stating that she already had a claim for cover for this injury, referring to the 1994 claim.

[12] On 30 August 2013, a support sessions plan provided the appellant with counselling sessions, pending her decision on whether to seek a full cover assessment. However, in October 2013, she stopped these sessions on the basis that she was coping. Accordingly, on this occasion, no cover was granted.

[13] From 1 October 2013, the appellant took out a Cover Plus Extra (CPX) contract at the agreed value of $50,000, and weekly compensation was based on 100% of the agreed value. The contract was subject to terms and conditions which included:

> 3 Application of the Act
>
> 3.1 The Policy wording applies (in accordance with sections 208 to 2011) where it expressly differs from what is otherwise provided for in the Accident Compensation Act 2001 (the Act).
>
> 3.2 Otherwise, the Policy applies subject to and in accordance with the Act.
>
> …
>
> 4 Care and recovery
>
> 4.1 If you suffer an incapacity resulting from a personal injury during the period of the Policy and you have cover for that personal injury, your weekly compensation payments will start seven days after your incapacity.

> 4.2 The Policy does not cover any personal injury you suffered before the start date of the Policy. …

[14] In the information provided by the Corporation on how to apply for CPX, it was stated that "if you agree with the terms and conditions of your policy offer, sign and return it within 28 days". The declaration section (for the applicant's signature) in the application form began with the heading: "We recommend you obtain professional independent advice relevant to your personal circumstances before signing this form."

[15] The CPX contract was renewed on an annual basis, and the renewal letter referred to the terms and conditions of the policy on the reverse of the letter.

[16] After the appellant entered into the CPX contract, a further lengthy period ensued before the Corporation was contacted by her about cover or entitlements.

[17] On 9 April 2019, the appellant saw her GP, Dr Chantelle Kahl, and explained that emotions related to her previous sexual abuse had resurfaced, and that she was not coping with work. Dr Kahl provided an ACC medical certificate with the diagnosis of sexual abuse, and declaring the appellant as fit for eight hours per week.

[18] On 6 June 2019, the Corporation had an early planning report completed by Ms Cecile Canovas, Counsellor, who took a detailed history of the appellant's abuse and subsequent symptoms.

[19] On 8 August 2019, Dr Dipti Pereira, Psychiatrist, provided a report in which he diagnosed the appellant with post-traumatic stress syndrome (PTSD) and dysthymia, caused by the abuse she had suffered as a child.

[20] On 11 October 2019, Dr Pereira certified that the appellant's mental injury had incapacitated her from her employment for the past two years.

[21] On 30 October 2019, Ms Lorna Burns, the Corporation's psychology advisor, reported that the appellant's PTSD was caused by her childhood abuse and was

therefore a covered injury. The date of injury was 27 June 1994, the date the appellant first sought treatment.

[22] On 1 November 2019, the appellant's claim for cover for PTSD was approved by the Corporation, with the date of injury determined as 27 June 1994 (the date she first received treatment for her mental injury).

[23] On 22 November 2019, Dr Rachael Wilson, the Corporation's medical advisor, requested a more detailed report on the appellant's employment impacted by her mental injury. On 28 January 2020, 3 February 2020 and 7 April 2020, Dr Pereira provided further information.

[24] On 14 May 2020, the Corporation acquired information from IRD and MSD in relation to the appellant's finances, relevant to the calculation of her entitlements.

[25] On 15 June 2020, the Corporation issued a decision stating that it owed the appellant $58,312 gross in backdated weekly compensation for the period 16 April 2019 (date of first incapacity) to 25 May 2020. This payment was made on the basis of her actual income for the tax year ended 31 March 2019 of $70,000, not on the basis of her $50,000 CPX contract. The Corporation's internal advice was that, as the appellant did not hold the CPX contract at the date of accident (26 June 1994), the CPX policy did not cover that injury.

[26] On 9 April 2021, the appellant applied for a review of the Corporation's decision, and also applied a review querying why the Corporation did not provide interest to the appellant for late payment of weekly compensation. At the ensuing case conference for the reviews, the Corporation noted that it had yet to make a decision in relation to the payment of interest.

[27] On 19 July 2021, the Corporation informed the appellant that it was also making a $270.67 interest payment in respect of the delay in paying her backdated weekly compensation. The payment covered the period from 14 May 2020, the date the appellant's weekly compensation stopped, to 23 June 2020, the date her weekly

compensation was paid. On 30 August 2021, the appellant applied for a review of this decision.

[28] On 31 August 2021, review proceedings were held in respect of the Corporation's decision of 15 June 2020. On 28 September 2021, the Reviewer dismissed the application for review, on the basis that the Corporation correctly assessed the appellant's weekly compensation according to her earnings as a shareholder employee. The Reviewer awarded costs in relation to this review and also limited costs in relation to the review relating to interest.

[29] On 2 November 2021, the appellant filed a late appeal (ACR 248/21) against the Reviewer's decision of 28 September 2021.

[30] On 22 December 2021, review proceedings were held in respect of the Corporation's decision of 19 July 2021 relating to interest. On 19 January 2022, the Reviewer dismissed the application for review of the Corporation's decision on the basis that the Corporation correctly assessed the appellant's entitlement to interest.

[31] On 16 February 2022, the appellant filed an appeal (ACR 71/22) against the Reviewer's decision of 19 January 2022.

[32] On 27 June 2022, the Court granted the appellant's application for the late filing of her appeal (ACR 248/21) against the Reviewer's decision of 28 September 2021.

[33] Following the hearing of the appeal on 18 July 2023, Ms Koloni sent an email to the Court stating that she had just received a document regarding the Corporation's process of handling medical certificates of incapacity and CPX policies. The document (as described by Ms Koloni) noted that, if the client was fit for selected work, the Corporation had to check the life area to see if a work trial had been approved or if the client had Cover Plus Extra (CPX) policy; if so, the Corporation would approve the incapacity and set "no" to abatement.

Relevant law

[34] Section 21A of the Accident Compensation Act 2001 ("the Act') provides:

> (1) This section applies to persons who suffered personal injury that is mental or nervous shock suffered as an outcome of any act of any other person, which act—
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> (a) was performed on, with, or in relation to the claimant (but not on, with, or in relation to any other person); and
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> (b) was within the description of any offence listed in Schedule 1 of the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act); and
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> (c) was performed before 1 July 1992 (including before 1 April 1974) and was performed—
>
> (i) in New Zealand; or
>
> (ii) outside New Zealand, and the claimant was ordinarily resident in New Zealand within the meaning of the 1992 Act when the act was actually performed.
>
> (2) For the purpose of subsection (1),—
>
> (a) the personal injury is deemed to have been suffered on the date of the first treatment that the claimant received for that personal injury as that personal injury; and
>
> (b) that first treatment must have been received on or after 1 July 1992 and before 1 July 1999; …

[35] Sections 100-103 provide that a claimant with a covered injury and who lodges a claim for weekly compensation is entitled to receive it if the claimant is determined to be incapacitated in relation to her employment.

[36] Section 209 provides:

> (1) The Corporation must discuss with the self-employed person the options available to the self-employed person and determine a level of weekly compensation that fairly reflects the likely costs of incapacity for the self-employed person having regard to—
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> (a) an estimate of the person's income, net of business costs; and
>
> (b) an estimate of the cost of any required replacement labour; and
>
> (c) such other matters as may be relevant to the particular case.
>
> (2) The amount determined under subsection (1) must not be—

(a) less than 80% of the amount of weekly earnings specified in clause 42(3) of Schedule 1; or

(b) more than the maximum amount of weekly compensation specified in clause 46 of Schedule 1.

(3) The weekly compensation to be provided by the Corporation under this section must be set out in a written agreement between the Corporation and the self-employed person that includes—

(a) the date on which the right to receive weekly compensation will start, which may be the date on which the agreement is made or any later date; and

(b) the period for which the agreement has effect; and

(c) the details of the weekly compensation to be provided under the agreement; and

(d) those provisions of Parts 2 and 4 of Schedule 1 that are to apply and those provisions that do not apply; and

(e) the levy payable and the time at which it becomes payable; and

(f) any other agreed terms.

(4) The agreement has no effect in respect of any personal injury suffered before the date the agreement is entered into.

[37] Clause 31 of Schedule 1 of the Act provides:

Use of income tax returns in determining earnings

If the Corporation is determining earnings under this Part in relation to a self-employed person or a shareholder-employee, it must take an income tax return into account, if—

(a) the claimant has given the return to the Commissioner; and

(b) the Corporation considers that the return, and any related accounts, have not been unreasonably influenced by—

(i) the fact of the claimant's incapacity; or

(ii) the effects or likely effects of the incapacity on the claimant's income or business activities.

[38] Section 114 provides:

(1) The Corporation is liable to pay interest on any payment of weekly compensation to which the claimant is entitled, if the Corporation has not made the payment within 1 month after the Corporation has received all information necessary to enable the Corporation to calculate and make the payment.

(2) The Corporation is liable to pay the interest—

(a) for the period from the date on which payment should have been made to the date on which it is made (the liability period); and

(b) at the interest rate or rates for the liability period.

(3) The period described in subsection (2)(a)—

(a) does not include the day on which the payment should have been made; and

(b) includes the day on which the payment is made.

[39] Section 148 of the Act provides:

…

(2) Whether or not there is a hearing, the reviewer-

(a) must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant:

(b) may award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review:

(c) may award any other person costs and expenses, if the reviewer makes a review decision in favour of the person.

(3) If a review application is made and the Corporation revises its decision fully or partly in favour of the applicant for review before a review is heard, whether before or after a reviewer is appointed and whether or not a review hearing has been scheduled, the Corporation must award costs and expenses on the same basis as a reviewer would under subsection (2)(a).

[40] In *Alderson*,[1] Judge Beattie stated:

> [15] … the appellant to have entered into an arrangement with the respondent under the provisions of Sections 208 and 209. Those provisions are there to assist self-employed persons such as the appellant was but only if the agreement was made with the respondent before any circumstance of claim had arisen. Thus it was the case that when the appellant commenced his self-employed contracting he could have made such an arrangement with the respondent to cover the contingency of loss of income as a consequence of injury.
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> [16] I cannot accept Mrs Aubrey's submission that the respondent owed a legal duty to notify the appellant of this opportunity. Quite the contrary, I find that the obligation is upon the appellant to familiarise himself with the ACC

[1] *Alderson v Accident Compensation Corporation* [2006] NZACC 129.

provisions as it may affect him and it is for him to seek out the necessary advice and take the necessary steps that may be required to fully protect him.

[41] In *Palmer*,[2] Judge Joyce stated:

> [30] Then there would be the issue of whether the Corporation could be determined to be acting "in trade" and that is problematic in itself. Then too - and fundamentally - even if somehow in some way (and I certainly cannot identify a "somehow" or a "some way") the Fair Trading Act might elsewhere be invoked, the jurisdiction in which I sit is simply and only that established by the accident compensation legislation, It is not a jurisdiction encompassing any application of the Fair Trading Act.

[42] In *Beauchamp*,[3] Judge Spiller stated:

> [26] In terms of section 148(3) of the Act, if a review application is made and the Corporation revises its decision fully or partly in favour of an applicant before a review is heard, the Corporation must award costs and expenses on the same basis as a reviewer would where he or she makes a decision fully or partly in favour of the applicant. It follows that this provision operates only where the Corporation has previously made a decision which is then revised in favour of the applicant before a review hearing. A "decision" has been defined in the High Court as "mak[ing] up one's mind, to make a judgement, to come to a conclusion or resolution".
>
> [27] In Ms Beauchamp's case, the basis on which her review applications were made was the failure to issue decisions, thus giving rise to the complaint of unreasonable delay in implementing a SRNA report issued over four months previously. The decision of the Corporation of 8 October 2020, in relation to matters arising from the SRNA report, was a new decision and not a revised one. It was only at this point that the Corporation made up its mind, made a judgement, and came to a conclusion or resolution. This Court therefore finds that the Corporation did not have jurisdiction to make the award of costs in terms of section 148(3) of the Act, and dismisses the appeal on this basis.

[43] In *Kacem*,[4] Justice Tipping stated in the Supreme Court:

> [32] … a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

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2 *Palmer v Accident Compensation Corporation* [2012] NZACC 320.
3 *Beauchamp v Accident Compensation Corporation* [2022] NZACC 140.
4 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

Discussion

Weekly compensation

[44] The issue in this case is whether the Corporation correctly calculated the appellant's weekly compensation on the basis of her actual earnings, rather than the amount in her CPX agreement entered into on 1 October 2013.

[45] Ms Koloni, for the appellant, submits as follows. The Corporation's decision in paying weekly compensation on the basis of the appellant's taxable earnings from IRD was incorrect. The appellant had a valid CPX contract in place at the date of incapacity, which was annualised and the levies for which were paid. The ACC Brochure (which forms part of the contract) states, as to claims, that her pre-agreed payment starts once the claim has been accepted. The appellant did not have cover or become incapacitated for her mental injury before the contract was entered into. The contract's marketing material was misleading and did not adequately alert the appellant to prior personal injuries not being covered. She seeks reasonableness and fairness in accordance with the Act and contract law, and for recognition of the CPX contract in place and the benefits this afforded her. Section 209(4) should be interpreted in light of its context, within sections 208-212. There is also the issue of how the Corporation should have handled the appellant's CPX agreement (referred to in paragraph [33] above).

[46] This Court acknowledges the above submissions. However, the Court notes the following considerations.

[47] First, the appellant suffered sexual abuse prior to 1992, and she first sought treatment for her mental injury on 27 June 1994. In accordance with section 21A(2)(a), that was the date on which she was deemed to have suffered the injury.

[48] Second, the appellant entered into the CPX agreement on 1 October 2013, and so her deemed injury date was prior to this contract. Section 209(4) of the Act provides that an agreement for the purchase of weekly compensation (such as a CPX agreement) has no effect in respect of any personal injury suffered before the date the agreement is entered into. This Court can find no provision in the Act

(particularly in sections 208-212, which provide for the purchase of weekly compensation by self-employed persons), or in the process document referred to by Ms Koloni after the hearing, that derogates from the meaning and effect of section 209(4)).

[49] Third, clause 4.2 of the CPX terms and conditions states that "the Policy does not cover any personal injury you suffered before the start date of the Policy". The CPX terms and conditions thus expressly confirm the effect of section 209(4) of the Act. Clause 3 of the terms and conditions notes that "the Policy applies subject to and in accordance with the Act", except where it expressly differed from what is provided in the Act. The existence of the terms and conditions was referred to in the information provided by the Corporation on how to apply for CPX, and in the annual renewal letter. The application form recommended that the applicant obtain professional independent advice relevant to personal circumstances before signing the form. This Court is therefore not satisfied that the CPX agreement and its accompanying information were misleading to the extent of nullifying the terms and conditions of the contract. In any event, this Court's jurisdiction is only that established by the accident compensation legislation, and does not encompass any application of consumer legislation such as the Fair Trading Act.[5]

[50] Fourth, in the absence of an applicable CPX agreement, clause 31 of Schedule 1 of the Act requires the Corporation to take into account income tax records in determining earnings for the purpose of calculating weekly compensation.

[51] In light of the above considerations, this Court finds that the Corporation correctly decided to calculate the appellant's weekly compensation on the basis of her actual earnings, rather than the amount in the CPX agreement entered into by the appellant.

Interest

[52] The issue here is whether the Corporation correctly calculated interest on the appellant's backdated weekly compensation.

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5 *Palmer*, above note 2, at [30].

[53] Ms Koloni submits as follows. The Corporation's decision as to weekly compensation affects the calculation of back-dated interest that was also payable. The appellant's first incapacity occurred on 9 April 2019 and this was covered by the CPX contract, and therefore interest on backdated weekly compensation should apply from a month after 9 April 2019, in terms of section 114(1). Instead, there were delays by the Corporation leading to interest being paid only from 14 May 2020.

[54] This Court acknowledges the above submissions. However, the Court notes the following considerations.

[55] First, as found above, the Corporation correctly decided that the CPX agreement that the appellant had entered into did not apply to weekly compensation arising out of her mental injury.

[56] Second, the date from which the Corporation is liable to pay interest on weekly compensation is one month after the Corporation has received all the information to enable to Corporation to calculate and pay the appellant's weekly compensation.[6] Weekly compensation is payable only in respect of covered injuries.[7] As noted above, clause 31 of Schedule 1 of the Act requires the Corporation to take into account income tax records in determining earnings for the purpose of calculating weekly compensation.

[57] Third, the chronology in respect of the Corporation's decision on weekly compensation is as follows:

(a) on 1 November 2019, cover was granted to the appellant for her mental injury;

(b) on 22 November 2019, the Corporation's medical adviser requested a more detailed report on the appellant's employment caused by her mental injury;

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6 Section 114(1).
7 Section 67(a).

(c) on 28 January 2020, 3 February 2020 and 7 April 2020, Dr Pereira (the psychiatrist who diagnosed the appellant's mental injury) provided further information;

(d) on 14 May 2020, the Corporation acquired information from IRD and MSD in relation to the appellant's finances, relevant to the calculation of her entitlements; and

(e) on 15 June 2020, the Corporation issued a decision stating that it owed the appellant $58,312 gross in backdated weekly compensation.

[58] In light of the above chronology, this Court finds that the appellant is not entitled to interest on weekly compensation prior to the date of 14 May 2020 chosen by the Corporation, in terms of the requirements of section 114(1) of the Act.

Review costs

[59] In the review decision of 28 September 2021, the Reviewer noted that some of the costs sought by Ms Koloni for the interest review included costs already awarded for the weekly compensation matter (such as participation in the case conference, research and preparation and disbursements). However, the Reviewer did award the cost of lodging the application ($136.35).

[60] Ms Koloni submits as follows. The Reviewer's decision on costs in relation to the review challenging interest was wrong in law. Under section 148(3) of the Act, where the Corporation revises a decision after a review application has been made, the Corporation must pay costs to the applicant.

[61] The Court notes these submissions but points to the following considerations.

[62] First, the Court finds that there are no grounds under section 148(3) of the Act on which the Corporation was required to award costs. This section requires payment of costs and expenses if a review application is made and the Corporation *revises its decision* in favour of the applicant for review, before a review is heard. In the appellant's case, no decision had been made by the Corporation on interest at the time the review application raising the issue of interest was lodged on 9 April 2021,

and so no decision was *revised* in favour of the appellant.[8] The Corporation's decision followed over three months after the review application was lodged.

[63] Second, this Court finds no grounds under section 148(2) of the Act for the Reviewer to have awarded costs in addition to those awarded for the review regarding delay. The criteria for a successful appeal regarding the exercise of discretion are stricter than in the case of a general appeal. The criteria are: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.[9] This Court's assessment of the Reviewer's findings in relation to review costs reveals that none of these criteria has been met. The Reviewer awarded the cost of lodging the review application, and noted that costs relating to participation in the case conference, research and preparation and disbursements had already been awarded in relation to an accompanying review.

Conclusion

[64] In light of the above considerations, the Court finds that:

(a) The Corporation, in its decision of 15 June 2020, correctly calculated the appellant's weekly compensation, and so the decision of the Reviewer dated 28 September 2021, in relation to the Corporation's decision and as to costs, is upheld.

(b) The Corporation, in its decision of 19 July 2021, correctly assessed the appellant's entitlement to interest under section 114 of the Act, and so the Reviewer's decision dated 19 January 2022 is upheld.

[65] The appeals are dismissed. I make no order as to costs.

Suppression

[66] The Court considers it is necessary and appropriate to protect the privacy of the appellant. This order, made under s 160(1) of the Accident Compensation Act 2001,

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8 *Beauchamp*, above note 3, at [26]-[27].
9 *Kacem v Bashir*, above note 4, at [32].

forbids publication of the name, address, occupation, or particulars likely to lead to the identification of the appellant. As a result, this decision shall henceforth be known as *AD v Accident Compensation Corporation*.

P R Spiller
District Court Judge

Solicitors for the Respondent: Izard Weston Lawyers.