IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-1094
[2019] NZHC 1637

BETWEEN	MAINZEAL PROPERTY AND CONSTRUCTION LIMITED (IN LIQ) First Plaintiff
AND	KING FAÇADE LTD (PREVIOUSLY KNOWN AS RICHINA LAND LTD) (IN LIQ) Second Plaintiff
AND	MAINZEAL GROUP LIMITED (IN LIQ) Third Plaintiff
AND	ANDREW JAMES BETHELL AND BRIAN MAYO-SMITH Fourth Plaintiffs
AND	RICHARD CILIANG YAN First Defendant
AND	PETER GOMM Second Defendant
AND	RT HON JENNIFER MARY SHIPLEY Third Defendant
AND	CLIVE WILLIAM CHARLES TILBY Fourth Defendant
AND	PAUL DAVID COLLINS Fifth Defendant
AND	RICHINA GLOBAL REAL ESTATE LIMITED (IN LIQ) Seventh Defendant
AND	ISOLA VINEYARDS LIMITED (PREVIOUSLY KNOWN AS WAIHEKE VINEYARDS LIMITED) (IN LIQ) Eighth Defendant

Hearing: 8 May 2019

Counsel: M D O'Brien QC and M D Pascariu for the Plaintiffs
D J Chisholm QC and T P Mullins for the First Defendant
J E Hodder QC and J Marcetic for the Second to Fifth Defendants

Judgment: 12 July 2019

JUDGMENT (NO 2) OF COOKE J
(Applications to alter quantum, and costs)

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[1] There are two matters arising out of the judgment in these proceedings to be addressed:[1]

(a) the plaintiffs and the liable defendants have each applied for orders altering the amount of compensation awarded; and

(b) the plaintiffs and the fifth defendant have applied for costs.

[2] As a consequence of these matters I scheduled a further hearing of the parties on 8 May 2019. Following that hearing the parties filed a number of supplementary memoranda addressing issues that emerged.

ALTERATIONS TO QUANTUM

[3] In the judgment I reserved leave to the parties to apply to alter the judgment sum.[2] The plaintiffs and the liable defendants have both made application to alter the amount awarded by the Court. Broadly speaking, the plaintiffs contend that the Court did not address their claim for interest on the second cause of action which would increase the sum awarded. The first to fourth defendants contend that the Court's assessment of the losses to the companies' creditors caused by the breach were exaggerated because the Court used the gross amount owing to the creditors without taking into account expected recoveries from the assets of the companies in liquidation. For reasons explained in greater detail below I accept that both applications raise legitimate points.

[4] There is an initial jurisdictional point that has been raised by each side, particularly in response to the other's application. It is argued that the leave reserved by the Court did not extend beyond the slip or recall rules (rr 11.9 and 11.10) and that the applications do not meet the requirements of those rules.

[5] I do not accept this. The leave reserved was in prescribed terms. In so reserving leave I was particularly concerned about the complexity involved in the compensation assessment, and resulting calculations. That concern arose in relation to the basis upon which the plaintiffs had advanced their claim (ie. under the *Mason v*

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1 *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255.
2 At [540]–[542] and [550(c)].

Lewis approach), and also the basis ultimately adopted. The purpose of the leave was to ensure that the calculations leading to the compensation awards were correct in light of the findings the Court had made. I did not, however, want there to be a further hearing of the Court at which further evidence would be called on the question of compensation. The Court needed to make a decision on the evidence that had been received.

[6] For that reason, the leave reserved was broader than the slip and recall powers normally available to the Court. I went further than that to achieve what I considered to be the right result if any error was identified, and to avoid any technical impediment to alteration of the judgment award in those circumstances. That is apparent not only from the way that the leave is described, but also from the example given of the potential application of that leave at [541], which goes beyond the slip and recall concepts.

[7] Strictly speaking the judgment issued was accordingly an interim judgment in the manner contemplated by r 11.2(a) of the High Court Rules 2016 (the Rules). That is because there were potentially further matters to be decided by the Court before the judgment was finalised. That is so notwithstanding the indication that I was seeking to avoid issuing an interim judgment (at [542]). The matters left to be determined were of a residual character and were circumscribed by the findings made, the logic of the judgment, and the evidence already received, however. So it was an interim judgment of a limited kind. What was being avoided was any continuation of the trial with further evidence.

[8] For that reason I address each of the applications on their merits under the leave reserved.

Application by liable defendants

[9] Whilst the plaintiffs' application was made first in time, I deal first with the application by the first to fourth defendants.

[10] In assessing the amount of compensation to be awarded under s 301, the first step is to identify the loss caused by the breach. That is then subject to the exercise of the discretion. In assessing the loss caused here I relied on the figures that had been

extensively referred to in the evidence and submissions on the amounts owed to the creditors by the companies in liquidation. What was not referred to in any of the parties' submissions, and which was only mentioned once in the evidence in passing, was that the amount owed to creditors did not represent the creditors' likely loss. That was because the companies in liquidation had assets which could be realised to partially offset the loss to those creditors. The focus of the submissions and evidence from the parties had been on the amounts owed to creditors. The offsetting assets of the companies had been treated as a neutral factor in assessing loss on the *Mason v Lewis* approach, including in the expert evidence of the accountants. The parties did not address the offsetting assets even in closing submissions after the Court had asked the parties to address the possibility that the compensation awarded might begin with the full loss on liquidation.[3] The submissions in closing addressed to that possibility focused on causation issues — that is, whether the full loss on liquidation would have arisen but for the defendants' breach, rather than raising what the loss on liquidation actually was.[4]

[11] There was nevertheless material before the Court suggesting that the loss suffered by the creditors was not represented by the full amount of the admitted creditors' claims, as it was partially offset by assets held by the companies in liquidation. Mr Apps gave the following evidence in his brief:

> 45. Given the minimal expected level of actual and expected asset recoveries of $23.843 million (from Tables 1A and 1B) and admitted claims of $115.298 million (from Table 2 above), significant loss of at least $91.455 million is likely to accrue to proven and admitted creditors.

[12] No Tables 1A or 1B were actually provided by him in evidence. But this uncontradicted evidence nevertheless means what it says. His evidence was that the loss to the creditors was not the gross amount of $115.298 million, but it was anticipated to be lower in the amount of $91.455 million. In making their application the liable defendants also refer to a schedule to the third amended statement of claim which stated that the company had assets to recover in the amount of approximately $21.2 million as at the date of liquidation.

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3 At [403]; *Mainzeal Property and Construction Ltd (in liq) v Yan* HC Wellington CIV-2015-404-1094, 25 October 2018 (Minute No 5); and *Mainzeal Property and Construction Ltd (in liq) v Yan* HC Wellington CIV-2015-404-1094, 2 November 2018 (Minute No 6).

4 The first defendant did not address this question at all in its closing submissions, and the second to fifth defendants only did so in oral submissions.

[13] The Court has found that the figure of $115.298 million referred to by Mr Apps overestimated the creditors' claims and that the figure of $110,646,126 should be used. Removing the figure of $23.843 million referred to by Mr Apps leaves a figure for the deficiency in liquidation of $86,803,126. On this basis that starting point for assessing the defendants' contribution should accordingly have been approximately $87 million rather than approximately $110 million. Assuming the Court retained the one-third approach to assessing the defendants' contribution in the exercise of the discretion, the judgment amount would be approximately $29 million rather than $36 million.

[14] It is axiomatic that the defendants cannot be liable for more than the loss they caused. The loss that they caused is the starting point for their liability, subject to the exercise of the Court's discretion. So this is an important point in the assessment of the defendants' contribution. But by itself it does not demonstrate that the amount awarded under s 301 was wrong. This depends on the impact that the figure has on the discretionary exercise.

[15] In responding to this point, the plaintiffs contend that the liable defendants are misinterpreting the references in the schedule to the third amended statement of claim and [45] of Mr Apps' evidence. They say that the level of expected recoveries is not accurately identified at $21.2 or $23.8 million. They contend that the assets being referred to were subject to the security interest of the secured creditor (BNZ), and that the receivers who were appointed by BNZ prior to the appointment of the liquidators had realised those assets, and then made payment to preferential and secured creditors. Counsel supplied a report of the receivers showing that the liquidators had only received approximately $8 million from the receivers.

[16] I do not see how the references in the third amended statement of claim and Mr Apps' evidence can be reconciled with this argument. Both were referring to the liabilities to the remaining unsecured creditors, and offsetting assets. If these assets had already been realised and taken by the preferred and secured creditors except for $8 million then these references would simply be wrong. But this is the evidence that the plaintiffs themselves led at trial, and what they said in their own statement of claim.

[17] The plaintiffs also contend that these can only be regarded as estimates of the net liabilities, and that there are a series of other matters that have not been taken into account when assessing the true liability. I accept that what Mr Apps said, and what

was set out in the third amended statement of claim, could only have been a broad estimate. But that will always be the case when the Court assesses issues of quantum during the course of a continuing liquidation. There may well have been other matters not taken into account. Assessing the value of the assets held by the companies is a difficult forensic exercise. The costs of the liquidation may well be relevant. The cost of the litigation, including the cost of the litigation funding arrangements, will also affect what creditors ultimately get.[5] It is unclear the extent to which factors of this kind were part of Mr Apps' overall assessment. But the best evidence of the relevant net amount, and accordingly the creditors' loss, remains the assessment Mr Apps provided. If the plaintiffs wanted to suggest otherwise, including after my minutes, they needed to make application to call further evidence.

[18] I accordingly accept that starting with approximately $110 million was wrong, and that the correct starting point was approximately $87 million.

[19] In the liable defendants' application they seek two further reductions to this figure. I do not accept this, however. In particular:

(a) The liable defendants argue I should deduct a further $2,282,880.12, being debts owed by Mainzeal related companies other than Mainzeal itself. To the extent that those companies have not been pooled in the liquidation under s 271 of the Companies Act 1993 this point might be arguable. But the liabilities to creditors were explored in detail at trial, and at no point was it suggested that this amount should not be included. It also seems to me unrealistic to say that the loss to the creditors overall should be diminished because particular losses fell on the related legal entities, rather than Mainzeal itself. These are still losses caused by the trading in breach of s 135, and the evidence demonstrated that these entities were treated as part of the overall operation. I am not persuaded there has been any error relevant to the exercise of the discretion in these circumstances.

(b) The liable defendants also suggest I should deduct $1,324,474.09 being the suggested recovery from the eighth defendant, Isola, to the second

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5 Although such costs would not be included in any damages award as a matter of principle.

> plaintiff in light of expected recoveries by Isola and the Court's judgment against Isola. This is the matter I referred to at [541] when reserving leave. I accept the plaintiffs' point in response that the expected recoveries by and from Isola cannot be calculated in this way. They are necessarily speculative, and may also be influenced by claims in Isola's liquidation from parties associated with the first defendant. I accept that this was a matter on which Mr Graham gave evidence, but I do not accept his assessment at face value. I conclude that this factor does not warrant adjustment in the exercise of the discretion.

[20] Nevertheless for the reasons outlined the correct starting point was $87 million given the assets of the companies in liquidation. The consequential question is the effect that this may have on the amount awarded under the judgment following the exercise of the discretion under s 301.

[21] In assessing the applications under the leave reserved by the Court, my objective is to ensure that the amount awarded is as accurate as possible given the findings of the Court. There is one other factor relevant to the net loss to creditors that I accept was not taken into account by Mr Apps or the schedule to the amended statement of claim, however. That is that the figures assessed amounts owed to creditors as at the date of liquidation. Those amounts take no account of the effective loss to the creditors arising out of them being out of pocket from the date of liquidation in 2013 to the date of the Court's judgment in 2019. At the date of the Court's judgment, interest is payable on the judgment sum. But the creditors have also been deprived of their money between 2013 and 2019. That has not been taken into account in the figures referred to by Mr Apps, or the third amended statement of claim.

[22] This gives rise to the consideration of the application made by the plaintiffs. I accordingly address the plaintiffs' application before assessing whether any alteration to the judgment is appropriate in light of the matters addressed above.

The plaintiffs' application

[23] The plaintiffs say the Court erred by failing to address their claims for interest under the second cause of action.

[24] I accept that the plaintiffs did make a claim for interest. It is referred to in the second cause of action in the third amended statement of claim, being a claim for "Interest under the Judicature Act 1908 from 28 February 2013 until the date of payment". In addition, in the plaintiffs' opening submissions there was a single sentence that advanced a claim for interest on this claim (paragraph 244 — "Interest and costs are also sought"). This matter was not mentioned again over the following eight weeks of trial, including in plaintiffs' closing submissions. Nevertheless it was there. I accordingly address this claim on its merits as well.

[25] There is some uncertainty in the authorities on whether pre-judgment interest should be awarded on the amount of compensation under s 301 for breach of duties under s 135. In the Supreme Court's decision denying leave to appeal in *Lewis v Mason* the Court said that the Court of Appeal had been entirely right to include interest as part of the assessment of loss suffered by creditors — but that was in the particular context of one secured creditor being entitled to contractual interest.[6] So that authority is not directly applicable, although it does recognise that interest claims of creditors can be relevant.

[26] In *Goatlands Ltd (in liquidation) v Borrell* the Court was dealing with a very similar situation to what now arises here. A claim for interest in relation to liability under s 301(1)(b)(ii) had not been addressed by the Court.[7] After reviewing the different approaches that have been applied by the Courts in relation to claims under s 301 on the question of interest Lang J said:

> [10] The only reason that the issue of interest did not form part of my substantive judgment was that neither counsel mentioned the issue during closing submissions. Had it been drawn to my attention at that time, I would have taken it into account when assessing the figure to be paid by way of compensation. I consider that that is the simplest and most appropriate way to deal with a claim for interest in the context of a claim for compensation under s 301(1)(b)(ii).
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> [11] Had it been necessary to do so, I would therefore have recalled my judgment under the so-called "slip" rule. I would then have re-issued the judgment, having included within it a new section dealing with the claim for interest.

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6 *Lewis v Mason* [2009] NZSC 103 at [2]; and *Mason v Lewis* [2006] 3 NZLR 225 (CA).

7 *Goatlands Ltd (in liquidation) v Borrell* HC Hamilton CIV-2005-419-1643, 14 March 2007.

[27] The Court then decided it need not take that step as it could award interest under s 87(1) of the Judicature Act 1908 to deal with the situation. The approach adopted by Lang J is essentially what the plaintiffs seek here.

[28] I agree with Lang J that the most appropriate approach to assessing this factor is to include it as a relevant matter to be considered in the overall discretion exercised under s 301. It may well be that s 301(1)(b)(ii) does not contemplate that interest will be awarded on compensation given there is no express reference to interest as there is in s 301(1)(b)(i) and s 301(1)(c).

[29] In exercising the discretion under s 301 the Court can take into account that the plaintiffs have been deprived of their funds for a period of time. Awarding interest is a way of granting compensation for parties that have been so deprived. But the preferable approach is to take this into account as a factor when determining the amount to be awarded under s 301.

[30] In exercising the discretion under s 301 I did not take into account the loss to creditors arising out of being held out of their funds between liquidation and the date of the Court's judgment. I accept it is appropriate that I do so, as this is a meaningful loss to those creditors even though they have not been given the interest in the liquidation when the proof of debts have been accepted. That is the same general approach adopted by Lang J in *Goatlands*, although the path he chose to remedy the situation in that case was to include an award of interest rather than re-open the award of compensation. Here the appropriate course is to address the factor in light of the s 301 discretion given the leave I reserved, which existed to cover precisely this kind of issue. In any event regardless of which path is chosen the result should be the same.

Conclusion on applications to alter quantum

[31] It seems to me that the two applications ultimately become interrelated. As at the date of liquidation, the correct amount to use as the starting point on the basis of Mr Apps' evidence was $87 million. The difference between the figure of the actual net loss to creditors as at liquidation in 2013 ($87 million) and the figure used in the judgment ($110 million) is $23 million. The period between the date of liquidation (February 2013) and the date of judgment (February 2019) is almost exactly six years. Adjusting the $87 million starting point upwards by $23 million is equivalent to

compensating the creditors for the time value of money at a simple rate of around 4.4 per cent for the six years. That is close to the prescribed rate under s 87(1) of the Judicature Act 1908, which provides a general guide for an amount that can be attributed to this factor under the Court's discretion under s 301. In other words, if both adjustments were made, the starting point would have been the same overall, meaning $36 million would still have been the appropriate compensation to award.

[32] Even under s 87(1), the award of interest is discretionary — the amount on which it is awarded, the period over which it is awarded and the rate used are all matters for judicial evaluation. When taking into consideration the time value of money in the exercise of the discretion under s 301, additional considerations become material. For example, in the present case a key consideration is whether an award representing approximately one-third of the total loss would remain appropriate if the starting point were not $110 million.

[33] It is relevant that the outcome of the exercise of the discretion in the present case was influenced by the ultimate size of the $36 million figure the defendants were held liable for. At [445]–[450], I compared the figure of $36 million with a series of other figures relevant to the case, including the amounts that the Richina Pacific entities owed the companies in the liquidation. I concluded that $36 million was a fair amount for the total liability in light of those figures. The ultimate question here is whether this assessment remains appropriate given the subject matter of the applications by both sides.

[34] The compensation ultimately awarded under s 301 is limited by the loss caused by the defendants, but then subject to an overall evaluation. It is not an exact exercise. As the Court of Appeal said in *Mason v Lewis*:[8]

> [118] Finally, claims of this character necessarily have to be approached in a relatively broad-brush way. The jurisdiction to order recompense is of an "equitable" character.

[35] The two applications before the Court have similar economic effect. Making alterations to the assessment as a consequence of recognising the validity of both applications makes little ultimate difference to the actual sum awarded, and any differences are within the margins of assessment involved in the exercise of the

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8 *Mason v Lewis*, above n 6.

discretion. In light of the above factors, I have concluded that both applications are appropriately considered on their merits, that both applications are valid, but that they cancel one another out. The liable defendants have persuaded me that I have overestimated the starting point for assessing loss because of a particular factor, and the plaintiffs have persuaded me that I have underestimated the loss because of another factor. The end result still accords with the Court's findings. If I had re-opened the issues addressed by the applications, and granted both of them, I would have reached the same result. To make any adjustment would suggest that there was a level of precision in the figures and the assessments that they simply do not have. I am satisfied that both the starting point, and the ultimate conclusions as to the amounts the defendants should be liable for, remain sound. No adjustment is necessary to remedy error. Accordingly I decline both applications.

COSTS

[36] A significant number of issues were raised by the parties in relation to costs. Following the hearing on 8 May 2019 the parties were able to further discuss the plaintiffs' costs claim, and by memorandum dated 28 June 2019 they reached agreement that the plaintiffs' entitlement to scale costs (not including steps for which the plaintiffs seek increased time) was $380,025.

[37] There are nevertheless a number of matters still in dispute, namely:

(a) The plaintiffs' claim for additional allowances for:

(i) listing and inspection of documents;

(ii) preparation of the common bundles;

(iii) preparing briefs of evidence; and

(iv) preparation for trial.

(b) The plaintiff's claim for increased costs as a consequence of offers made without prejudice except as to costs, or because the case was one of public importance.

(c) The fifth defendant's claim for costs as a successful party, and the plaintiffs claim for Sanderson or Bullock orders against the liable defendants in relation to the fifth defendant's costs.

(d) The liable defendants' claim for a reduction in costs arising from the plaintiffs' unsuccessful claims and arguments.

(e) Arguments on the recoverability of certain disbursements claimed by the plaintiffs, including the costs of certain witnesses, and litigation services disbursements.

[38] It will be necessary to address each of those issues in turn. I will endeavour to do so as concisely as possible as is appropriate for the determination of costs.

[39] As a general observation in relation to the issues that have been raised, it seems to me to be desirable that the approach to costs not involve an over-elaborate exercise, particularly given that the Rules provide that "so far as possible the determination of costs should be predictable and expeditious".[9] The general approach to be followed was set out by the Court of Appeal in *Holdfast NZ Ltd v Selleys Pty Ltd*.[10] In addressing the issues below it also seems to me that the appropriate answer to each of the disputes is to be found in the key principles that should be applied to the determination of costs.

Time band uplifts

[40] The plaintiffs have sought a series of time band uplifts in relation to particular steps in Schedule 3. There is no dispute that the band C allowances are not appropriate for the steps involved in this case given its significance and complexity.

[41] In putting forward the arguments on what should be allowed, the plaintiffs provided evidence of their actual time spent on the steps involved. In response the liable defendants raised, amongst other things, arguments that the plaintiffs' time records were unreliable for the purpose of making this assessment.

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9 High Court Rules 2016, r 14.2(1)(g).

10 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [43]–[44].

[42] It seems to me that there are two important points of principle that are relevant to determining these issues. The first is that the costs regime is not intended to be based around the actual time and cost of the claiming party. Given that the schedule allowance is obviously inappropriate, however, it is understandable that information on actual time has been provided to the Court. But it seems to me that the allowance should not be calculated on the basis of actual time spent. It should only be taken into account as a general guide on what a reasonable amount of time might be. The ultimate question is a matter for the Court's judgment. The second point is that the general idea of the costs award representing two-thirds of actual reasonable expenditure is built into the daily recovery rates prescribed (see r 14.2(1)(d)). It is not built in to the time allowances. The actual time allowances should be based on "the time considered reasonable for each step" (see r 14.2(1)(c)). Whilst this is a difficult assessment when the schedule does not provide any real guide, it is nevertheless a matter of evaluating the time considered reasonable for the steps in the case before the Court.

Discovery (items 20 and 21)

[43] Under items 20 and 21 of Schedule 3 only 13 days are provided for listing and inspection on a band C basis. There is no dispute that this is well below the reasonable time that would actually be involved in this case. The issue is to assess what the reasonable amount of time should be.

[44] The plaintiffs seek 56.9 days, and say the actual time involved was 162.7 days. The defendants say that 41 days should be allowed. As indicated, the plaintiffs provided evidence of the actual amount of time taken on the exercise from its time recording systems, and the liable defendants took issue with this information, including on the basis that the time records were unreliable. The plaintiffs also referred to *Trustpower Ltd v Commissioner of Inland Revenue* where the Court allowed 70 days, which was said to represent 35 per cent of actual days spent on the exercise.[11]

[45] I accept that the amount of time for listing and inspection in this case would have been extensive. The case dealt with the activities of a significant company over

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[11] *Trustpower Ltd v Commissioner of Inland Revenue* [2014] NZHC 3072 at [29].

a number of years. The plaintiffs' claim for what is effectively 67 days does not seem to be unreasonable in that context. I also take into account that this claim is made on the basis that the plaintiffs also seek the cost of the supplier of electronic document management as a disbursement, which I will address below. I note that the plaintiffs contend that they spent far more hours on the exercise than this, albeit the liable defendants dispute this. I nevertheless allow the amount claimed by the plaintiffs.

Preparation of common bundles (item 31)

[46] Under Schedule 3 an award under band C involves five days for this step. The plaintiffs claim 2.9 days, but also claim the full amount of an invoice from a litigation services agent in the amount of $63,018.72. The liable defendants say that only five days should be allowed, and that only part of the disbursement should be.

[47] I accept the liable defendants' approach, again as a matter of principle. Use of the actual time spent by a party or claims for third party disbursements should normally be avoided. Claims for disbursements as an alternative to what is regulated by the scale would only be allowed in special circumstances which the use of a third-party contractor is appropriate for particular reasons, such as the electronic document management service referred to above. If a party wishes to manage its litigation expenditure by contracting a third party it is free to do so, but their invoice claimed as a disbursement would not normally be the basis for the costs claim.

[48] The plaintiffs do not contend that the reasonable time for this step was greater than five days. In the circumstances I allow the claim for five days under band C. As I will explain below I do not allow the claim for the disbursement to the extent it is for matters covered by the allowance in the schedule.

Preparation of plaintiffs' briefs (step 30)

[49] Under Schedule 3, the band C allocation involves five days. Again, the allocation in the schedule is obviously inadequate. The plaintiffs claim 79.8 days (which they say is two-thirds of their actual time) and the liable defendants say this should be 50 days.

[50] In *Trustpower v Commissioner of Inland Revenue* the Court allowed seven days for three witnesses, and then five days and three days for two others.[12] In *Strathboss Kiwifruit Limited v Attorney-General* the Court considered the approach adopted in *Trustpower* and concluded an allowance of four days per brief to be reasonable leading to an allowance of 124 days.[13]

[51] As I indicated above, I do not think it appropriate to base the allowance on the basis of discounting from the actual time involved. The discounting is built into the recovery rate, not the time allocations. I agree that the actual time spent can be relevant to assessing what a reasonable amount might be, but the allocation should not be calculated on the basis of that figure, or be a discount from that figure.

[52] The plaintiffs approach amounts to approximately 5.3 days per brief. This can only be used as a general guide because some of the briefs were very lengthy (such as Mr Apps' briefs) and others less so (such as Mr Schubert's brief). In the circumstances I make an overall assessment of what I consider to be a reasonable amount of time for a case of this kind. It was a complex case. The plaintiffs' witnesses were largely reconstructing events from documentation, and then providing expert/opinion evidence. I ultimately accept that the plaintiffs' assessment of what is effectively 80 days is reasonable, and I allow that amount.

Preparation for hearing (step 33)

[53] Once again the schedule is not adequate for a trial of this kind, with band C only allowing five days. The plaintiffs initially claimed 231 days, and the defendants contended that only 70 days should be permitted. The plaintiffs then reduced their claim to 173.3 days.

[54] An earlier version of Schedule 2 had an allowance for trial preparation at twice the amount of time occupied for the trial.[14] The current version of Schedule 3 has the much reduced prescribed allowances. In my view the actual time spent at the trial gives some indication of what would reasonably be expected in preparing for it in this kind of case. The trial took 41 days. The plaintiffs claim amounts to 4.2 days

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12 *Trustpower Ltd v Commissioner of Inland Revenue*, above n 11, at [42].
13 *Strathboss Kiwifruit Limited v Attorney-General* [2019] NZHC 62 at [26]–[30].
14 Until February 2009, s 8(1) Judicature (High Court Rules) Amendment Act 2008.

preparation for each day of the trial, and the defendants' alternative proposal involves 1.7 preparation days. The plaintiffs suggest they actually spent 346.68 eight hour days preparing for trial.

[55] Some assistance is provided by the authorities. In *Sovereign Assurance Co Ltd v CIR* the Court allowed 50 days for a 21 day (2.3 days per trial day) when it was suggested 100 days had been spent on preparation.[15] In *Trustpower Ltd v Commissioner of Inland Revenue* the Court allowed 30 days for a 16 day trial.[16] In *Kidd v van Heeren (No 5)* the Court allowed 50 days for a five day hearing.[17] In *Strathboss Kiwifruit Ltd v Attorney-General* the Court allowed 90 days for a trial lasting 57 days (representing 1.6 days for each day of trial).[18]

[56] I accept that this was a complex case, and a significant amount of time is appropriately allowed. In my view 70 days is too low. But an allowance of 173.3 days is significantly more than the previous authorities for a lengthy trial, and involves a significantly higher ratio than normal at 4.2 days. In the circumstances of this case I allow 100 days for this step, which is nearly 2.5 days preparation for each day of trial.

Plaintiffs' claim for increased costs

[57] The plaintiffs make an application for a percentage increase in the costs award under r 14.6. First they seek a 50 per cent increase of costs as a consequence of offers made without prejudice except as to costs that were not accepted. They then seek an increase of an unspecified amount on the basis that the case was one involving a matter of public importance.

Settlement offers — r 14.6(3)(b)(v)

[58] This rule provides that there can be an award of increased or indemnity costs if:

> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
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> …

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15 *Sovereign Assurance Co Ltd v CIR* [2012] NZHC 3573 at [12].
16 *Trustpower Ltd v Commissioner of Inland Revenue*, above n 11, at [50].
17 *Kidd v van Heeren (No 5)* [2015] NZHC 3191 at [102].
18 *Strathboss Kiwifruit Ltd v Attorney-General*, above n 13, at [34].

> (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under r 14.10 or some other offer to settle or dispose of the proceeding; or

[59] Offers made by successful plaintiffs are in a different category from offers made by unsuccessful defendants that exceed what the plaintiff is entitled to. The latter category is subject to separate rules in rr 14.10 and 14.11 which contemplate that a defendant offering more than the plaintiff is entitled to get costs from the point of the offer. That rationale does not arise in the rejection of offers made by the plaintiffs. A defendant who defends a proceeding is putting the plaintiff to the cost of it, and normally no increased costs are caused because the defendant does not accept an offer to settle for less than is claimed.

[60] The principle in r 14.6(3)(b)(v) recognises, however, there will be situations where the refusal to settle can demonstrate that the party is acting without reasonable justification, and causing unnecessary expense to the claiming party. It has a similar rationale to the other uplift grounds in r 14.6. A plaintiff may offer to accept less than it is entitled to try and convince an obdurate defendant not to put the parties to the cost of a trial, and the failure to accept such an offer may justify an uplift. Without seeking to circumscribe r 14.6(3)(b)(v) that seems to me what the rule is generally directed to.

[61] The plaintiffs have been awarded $36 million against the liable defendants. In June 2016 they offered to settle for less — $32 million. In October 2018 during the course of the trial the plaintiffs offered to settle for less again — $25.5 million. Then on 15 November 2018 they offered to settle for $37.5 million.

[62] The liable defendants say, including in relation to the first of these offers, that the offers were not capable of acceptance as it required agreement from other defendants on other causes of action. They also raise other issues.

[63] I do not need to address those arguments, however. It seems to me that the key point is the circumstances are well short of justifying an uplift under r 14.6(3)(b)(v). There were genuine issues to be addressed in this proceeding, and it has ultimately involved the Court assessing compensation on a basis other than the *Mason v Lewis* approach. I do not see that it can realistically be contended that the liable defendants have caused the plaintiffs unnecessary expenditure by refusing to accept the plaintiffs' offer without reasonable justification. The defendants did not admit liability, and put

the plaintiffs to the cost of proving the claims, but I see no reason why the plaintiffs should not get more than a conventional costs award as a consequence. The settlement offers made by the plaintiffs did not materially change the character, or cost of the litigation in this respect.

Uplift on rule 14.6(3)(c)

[64] This rule provides the Court may award increased or indemnity costs if:

> (c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

[65] The plaintiffs here justify the increase on the basis the proceedings were brought in the interests of the creditors adversely affected by the reckless trading of the liable defendants.

[66] The liquidator effectively acts on behalf of the creditors of the company. In my view that is not the kind of situation that the rule is contemplating. A liquidator of a company does not automatically get an uplift because he or she acts on behalf of the creditors. The rule is directed to questions of some importance to the public, or sections of it. I accept the liable defendants' submission that the rule equivalent to the provision in the old rules which contemplated a level of wider importance.[19] On that basis I see no justification for increasing the plaintiffs award in the present case on this ground.

Fifth defendant's costs

[67] Sir Paul Collins was successful at trial. He is accordingly entitled to costs. A number of reasonably complex arguments have been advanced in relation to the appropriate orders the Court should make given these circumstances.

The basis of the award

[68] It is first appropriate to assess what general approach should be followed in assessing the award. There is then the complication that the plaintiffs initially included Sir Paul in its claims for breach of ss 135 and 136 of the Companies Act 1993, but

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[19] See *New Zealand Maori Council v Attorney-General (No 3)* HC Wellington, CP942/88, 28 April 1995; and *Whangamata Marina Society Inc v Attorney-General* (2006) 18 PRNZ 565 (HC) at [16].

discontinued against him on those claims in December 2017, leaving the residual claims against him which were unsuccessful at trial. In advancing his claim for costs, Sir Paul claimed a full costs award under the scale until December 2017 under r 15.23. From December 2017 he sought 25 per cent of scale costs.

[69] In assessing what the appropriate award of costs should be it is significant that the fifth defendant joined the defence of the claim with the second to fourth defendant. The Rules provide:

> **14.15 Defendants defending separately**
>
> The court must not allow more than 1 set of costs, unless it appears to the court that there is good reason to do so, if—
>
> (a) several defendants defended a proceeding separately; and
>
> (b) it appears to the court that all or some of them could have joined in their defence.

[70] Had the defendants all succeeded they would have been entitled to one award of costs against the plaintiffs between them. The second to fifth defendants shared their actual legal expenditure. The object of the Rules is broadly to award a successful party two thirds of the reasonable legal expenditure (see r 14.2(1)(d) in particular). The first defendant would only have been entitled to a further cost award under r 14.15 if there was good reason.

[71] In light of these principles, it seems to me that the appropriate way of assessing the fifth defendant's costs is to assess what an award to all defendants had they succeeded would have been, and then to award the fifth defendant the appropriate percentage share of that amount. That would represent the appropriate contribution to actual legal expenditure. This is consistent with the apportionment approach that has been applied in England and Wales.[20]

[72] I conclude the relevant amount should be one-quarter rather than one-fifth of the costs that would have been awarded on a successful defence. The first defendant did defend separately, and I accept that there was a valid reason for him to do so as the issues concerning his potential liability were materially different, and ultimately led

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[20] See *Korner v H Korner & Co Ltd* [1951] Ch 10 (CA); and *New Zealand Forest Products Ltd v New Zealand Insurance Co Ltd* [1996] 2 NZLR 20 (CA).

the Court to make awards effectively requiring him to be responsible for a greater share of the defendants' liability. Sir Paul only shared his defence with three others. The reliance on the principle that an award represents approximately two-thirds of reasonable legal expenditure under r 14.2(1)(d) provides the appropriate guiding principle.[21]

[73] In addressing the claims on this basis I accept the plaintiffs' submission that this approach should apply to the costs prior to discontinuance under r 15.23. The rationale behind rr 14.2(1)(d) and 14.15 remain applicable at this point. The costs the fifth defendant is entitled to at that point are limited accordingly.

[74] The plaintiffs argue that awarding the fifth defendant a proportionate square of the costs after December 2017 is unjust as he will be recovering costs which are more substantively attributable to the reckless trading claims. That is because the claims pursued against him after December 2017 were not the main claims, but only residual claims. They argue that the claims against Sir Paul pursued by them after December 2017 amounted to only 14.3 per cent of the defence claims overall, and they argue that only one-fifth of that amount should be awarded.

[75] I do not accept these arguments. The fifth defendant was included in the group of director defendants who were sued. Arrangements for the defence of that action would then have been put in place with the second to fifth defendants being represented by the same solicitors and counsel. Whilst the plaintiffs discontinued against the fifth defendant on the main claims in December 2017, claims were still pursued against him. It would be wrong to suggest that he should have been able to reduce his share of the actual legal expenditure from that point, with the other three taking a greater share. If it were in fact true that such arrangements were reached to so minimise his actual legal expenditure the position might be different. But that is not suggested.

[76] For these reasons I conclude that the fifth defendant is entitled to one-fourth of the costs award applicable to all steps. Having regard to assessments made by counsel for the fifth defendant in the memorandum dated 21 June 2019 (at [20]), and counsel

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[21] I do not take any account of the insurance arrangements, on which I received memoranda following the hearing.

for the plaintiff in the memorandum of 3 July 2019 (at [7]) I calculate the appropriate award excluding disbursements is accordingly $191,400. I understand that there are elements of increase over the scale involved in this calculation, but that they have not been disputed by the plaintiffs.

[77] In terms of disbursements I accept counsel for the plaintiffs' submission that the evidence of four of the experts (Messrs Millard, Westlake, van Zijl and Cao) was directed to the reckless trading claims only. Their fees could not reasonably be expected to have been contributed to by Sir Paul, and accordingly the plaintiffs can not be expected to pay the one-fifth share of these fees. That is not so of the other disbursements. Here, however, the recovery should be based on a one-fifth rather than one-quarter share as the first defendant joined in the instruction of Mr Graham. I calculate the entitlement for disbursements is accordingly $151,253.98.

Sanderson and Bullock orders

[78] The plaintiffs next contend that the Court should make an order requiring liable defendants to pay the fifth defendant's costs (a Sanderson order), or that the plaintiffs' costs against the liable defendants should include the amount that the plaintiff is liable to the fifth defendant (a Bullock order). I accept that under the Rules there is jurisdiction to do so under rr 14.1 and 14.14, notwithstanding this is not something that is contemplated by specific rules. In *Lane Group Ltd v D I & L Paterson Ltd* the Court of Appeal endorsed the following statement as capturing the position under the former rules:[22]

> Whether or not a special order [either a *Bullock* or a *Sanderson* order] should be made is a matter of discretion for the judge, and the fact that, when the action was started, it was a reasonable course for the plaintiff to join the successful defendant does not entitle the plaintiff to an order that the costs of the successful defendant be paid by the unsuccessful defendant if, in the opinion of the judge, it is not reasonable that the unsuccessful defendant should be penalised.

[79] I do not accept that orders of this kind are appropriate in the present case. It cannot be said that Sir Paul was included as a defendant because of the defendants' breaches for which they have been held liable. Sir Paul was in a materially different position from the other defendants as he came onto the Board at a later point, and after

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22 *Lane Group Ltd v D I & L Paterson Ltd* [2001] 1 NZLR 129 (CA) at [82] per Tipping J.

the stage where the defendants were held to have breached their duties. The decision to include him as a defendant was the plaintiffs' responsibility. Equally it cannot be contended that the decision to continue a claim against him from December 2017 is the responsibility of the liable defendants. The claim pursued against him from that point failed, as it did against the other defendants.

[80] More generally I do not see this as a case where the fifth defendant was joined as a proper party as a consequence of the matters for which the other defendants are liable. Rather he was joined as a consequence of a decision made by the plaintiffs on whether they would bring claims against him, and to continue with them once bought.

Reduction in costs

[81] The liable defendants have sought a reduction in the plaintiffs' cost award under r 14.7(d). This rule provides the Court may refuse or reduce a costs award if:

> (d) although the party claiming costs has succeeded overall, that party has failed in relation to a cause of action or issue which significantly increased the costs of the party opposing costs.

[82] The plaintiffs succeeded with the principal claim for breach of directors' duties under s 135 of the Companies Act 1993 but failed on the other claims, or issues in the following way:

(a) the claim under s 136 failed in its entirety;

(b) the claims against the liable directors in relation to the KFL restructuring, and the December 2012 restructuring also failed; and

(c) the plaintiffs effectively failed on the arguments concerning the outcome of the *Mason v Lewis* approach, albeit the Court awarded significant compensation on a different basis.

[83] The liable defendants contend that the plaintiffs' award should be reduced by 50 per cent. The plaintiffs say that only a reduction of 10 per cent is appropriate.

[84] In *Packing In Ltd (in liq) (formerly known as Bond Cargo Ltd) v Chilcott* the Court of Appeal held:[23]

> Success or failure in this context is better assessed by a realistic appraisal of the end result rather than by focussing who initiated what step, and the extent to which that step succeeded or failed.

[85] In endorsing that general approach the Court of Appeal in *Weaver v Auckland Council* said:[24]

> [24] While understandable in its own context, we do not consider that *Packing In* is authority for the proposition that in a damages claim it should be routine for the Judge dealing with costs to be required to unpick what happened in quite the detail undertaken in that case.

[86] The submissions for the parties involved a significant degree of unpicking, including analysis of how many pages of briefs were attributable to particular causes of action or argument. In my view a more holistic approach is appropriate.

[87] First it is plain the plaintiffs succeeded in this proceeding. The amount that the Court has awarded by way of compensation is significant, and close to the amounts sought by the plaintiffs. For that reason it seems to me that the suggestion that the plaintiffs' claim should be reduced to 50 per cent is unrealistic.

[88] Rule 14.7(d) only applies when the failed claim significantly increased the cost of the opposing party. I accept that there should be some reduction in the award to reflect the failure on the other claims. But they were the more residual claims. The failure on the s 136 claim seems to me to be immaterial given the success under s 135. Whilst the KFL restructuring, and December 2012 restructuring claims failed against the defendants, I take into account that it is likely that there would have needed to be some evidence on these restructurings in order for the Court to understand their implications for the claims that succeeded. It is also relevant that the plaintiffs' costs entitlement has effectively been reduced by their liability to the fifth defendant for the failure of these claims against him, and that the fifth defendant shared the cost of the litigation with the second to fourth defendants.

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23 *Packing In Ltd (in liq) formerly known as Bond Cargo Ltd) v Chilcott* (2003) 16 PRNZ 869 (CA) at [6].

24 *Weaver v Auckland Council* [2017] NZCA 330.

[89] I do not put great significance on the plaintiffs' substantive failure on the forensic exercise involved in the attempted *Mason v Lewis* approach to compensation. The plaintiffs succeeded on this cause of action, and were awarded a significant sum. Moreover much of the forensic complexity on this issue was largely introduced by the defendants' analysis. When it comes to the claimed disbursements, as I will address below, a more specific approach is warranted to deal with particular disbursements.

[90] Standing back and making an assessment overall, in my view a reduction of 10 per cent is appropriate. Figures greater than that would assign a significance to the unsuccessful claims that they did not really have. For the avoidance of doubt, the percentage reduction applies to the plaintiffs' costs claim, and not the disbursements.

Disputed disbursements

[91] A number of the plaintiffs' disbursements are disputed. Under r 14.12(2) the Court must assess whether the class of disbursement is to be approved, that it is reasonably necessary for the conduct of the proceedings, and reasonable in amount. As indicated above, my approach to particular disbursements is specific in light of the findings already made.

Mr Apps

[92] Mr Apps gave expert accounting evidence for the plaintiffs. He was the most significant of the plaintiffs' witnesses, with his briefs of evidence being very long, including a number of technical schedules. Of all the witnesses called at the trial, his evidence most fully corresponded to the entire scope of the plaintiffs' case.

[93] The liable defendants seek a reduction to only 50 per cent of his costs. This largely reflects the level of reduction sought by the defendants under r 14.7(d).

[94] I see no reason to depart from the overall assessment I made in relation to a global reduction of costs under r 14.7(d). The fees for Mr Apps are high, but that is not surprising given the nature of this case, and the significant role he had for the plaintiffs in the presentation of it. Accordingly I conclude that there should be a 10 per cent reduction on his fees representing those parts of his fees that are attributable to the unsuccessful claims.

Mr Jones

[95] Although Mr Jones initially provided a brief of evidence addressing a particular matter, his evidence was ultimately in response to the quantity surveying evidence of Mr Millard called by the defendants.

[96] I ultimately concluded that neither the approach of Mr Millard or Mr Jones provided me with a reliable basis to assess quantum. I also concluded that the *Mason v Lewis* approach was not relevant to the present case. If I had applied that approach the plaintiffs would have been unsuccessful.

[97] In those circumstances I accept the liable defendants' argument that the plaintiff should not be entitled to recover disbursements associated with Mr Jones. His fees were attributable solely to an issue which the plaintiffs effectively lost, and where I found his evidence ultimately not helpful.

Mr Schubert

[98] Mr Schubert had formerly been involved as an auditor of Mainzeal, and apart from providing evidence of fact in relation to this period he also gave expert evidence in relation to auditing issues. The amount he claims is said by the defendants to be disproportionate to his contribution to the case, and they compare his charges to the less significant charges of Professor van Zijl.

[99] I do not propose to make any adjustment to the claimed amount. Mr Schubert's evidence was attributable to the causes of action on which the plaintiffs succeeded, and his evidence was valuable, particularly given that the defendants did not call evidence from any other auditors. Whilst it is a high amount, there is no justification for reduction.

Litigation disbursements

[100] The plaintiffs have claimed three litigation related disbursements, including from a discovery agent who created an electronic platform for the document management (Streamlined Litigation Services), a further agent who created a folder structure for the electronic casebook (Yallop & Co), and a particular cost for storage recall of particular documents (Iron Mountain). The liable defendants say that only

50 per cent of the first disbursement should be allowed, that only a particular part of the Yallop & Co fees should be allowed, and only a small portion of the Iron Mountain fees should be allowed.

[101] As indicated above, care needs to be exercised when a party seeks to claim a third party cost as a disbursement when the tasks that that third party undertakes are covered by the time allowances set out in the schedule. Allowing the disbursement in full would allow a party to get 100 per cent of their costs for this activity, rather than approximately two thirds of reasonable legal expenditure the Rules contemplate.

[102] On the other hand, in cases of this size and complexity, efficiency in the management of litigation is to be encouraged. As Dobson J held in *Todd Pohokura Ltd v Shell Exploration Ltd*:[25]

> [64] … The cost of complying with discovery obligations in complex commercial cases, and then efficiently keeping track of discovered and inspected documents through subsequent stages of the litigation, is a formidable challenge. Disproportionate costs for this aspect of litigation have been identified as discouraging formal, principled resolution of genuine disputes that involve burdensome volumes of documentary records.
>
> [65] Rules on the scope and manner of completing discovery need to keep pace with the form in which records are kept. Innovation in that regard ought to be encouraged, and can justify reimbursement of disbursements reasonably incurred in such attempts. In other contexts, it may be necessary for a claimant to establish that the extent of such contractual costs represented an efficient solution in terms of cost, and caution is required in not giving credit twice, under both the costs allowance and recognition of such outsourcing costs. …
>
> [66] Claiming for such a disbursement that reflects outsourcing parts of a very substantial discovery task, and streamlining inspection and subsequent document management through the litigation, should reasonably be offset against what might otherwise be a claim in the fees component of a costs claim, for increased allowance for an unusually large discovery and inspection task. …

[103] In that case the Court allowed the full amount of the disbursement. In *Trustpower v Commissioner of Inland Revenue* the Court allowed 50 per cent of an electronic discovery support service.[26]

[104] I accept that the full amount of the Streamlined Litigation Services disbursement should be awarded here. Given that the time allowance in the schedule

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25 *Todd Pohokura Ltd v Shell Exploration Ltd* HC Wellington CIV-2006-485-1600, 1 July 2011.

26 *Trustpower Ltd v Commissioner of Inland Revenue*, above n 11.

does not assess the true amount of time that would be involved, the approval of the disbursement and the assessment of the time allowance are inextricably interlinked, as Dobson J indicated. In allowing the recovery of the disbursement, and the amount I have allowed under the schedule, I am satisfied that the plaintiffs are being awarded an appropriate amount overall for this category of cost.

[105] I do not allow the full amount of the Yallop & Co fees. As I have already found, these seem to me to be partly directed to mechanical bundle creation steps that are covered by the time allowance in the schedule. The plaintiffs are free to make those arrangements, but under the cost rules they should not be allowed to claim it as a disbursement recoverable against the opposing party. I accept, however, that the printing and binding cost that are part of the Yallop & Co fees is recoverable. The liable defendants accept this. This is a normal disbursement that is permissibly recovered in the amount of $16,031.72.

[106] The Iron Mountain fees are in a different category again. As I understand it these were the costs to recover Mainzeal's hard copy records stored in Porirua which, following review, turned out not to be relevant. I accept some amounts should be allowed for recovery of the documents for examination, but the amount of $27,212.73 seems to me to be excessive. I allow $5,000 for this disbursement.

[107] Finally on the question of costs, I have not sought to calculate the actual award to the plaintiffs as a consequence of my findings on the basis that the parties should be able to work this out for themselves. But I reserve leave to apply to resolve my outstanding issues.

Costs against Isola

[108] The plaintiffs also sought a costs award against the eighth defendant. The eighth defendant has indicated it would abide by the decision of the Court on any judgment. The plaintiffs claim 10 per cent of total costs of disbursements as related to the KFL claims, and indicate that the eighth defendant should pay 50 per cent of this. These seem to be excessive amounts. In the circumstances I simply award a fixed amount to the plaintiffs against the eighth defendant in the amount of $50,000.

Slip rule corrections

[109] The parties identified two errors in the judgment that should be corrected under the slip rule. Paragraph 550(b) should refer to the fourth plaintiffs rather than the second defendants. In the second to last sentence in paragraph 347 KFL should be substituted for Isola.

ORDERS

[110] Accordingly for these reasons I make the following orders:

(a) The applications made by the plaintiffs and the liable defendants to alter the amount awarded in the principal judgment are dismissed.

(b) The plaintiffs are to be awarded costs in light of the findings of this judgment, with leave reserved at [107] in relation to any issues concerning the fixing of those costs.

(c) The fifth defendant is to be awarded costs in accordance with [76] and [77].

(d) The other orders at [108] and [109] are made.

Cooke J

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