IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2017-409-000454
[2021] NZHC 705

BETWEEN	CECILE GRACE First Plaintiff (See Schedule A for Complete List of Plaintiffs)
AND	ORION NEW ZEALAND LIMITED First Defendant LEISURE INVESTMENTS NZ LIMITED PARTNERSHIP Second Defendant

Hearing:	3-7, 10-12, 18-21, 31 August 2020, 1-2, 9-11, 21-24, 28-29 September 2020 and 9, 12-13 October 2020
Hearing Telephone Conferences:	14 and 17 August 2020 and 7 and 25 September 2020
Appearances:	C M Stevens, B R D Cuff, S K Battersby and C S M Henley for Plaintiffs T C Weston QC, M Dennett, R J H Scott and S M Crosbie for First Defendant G N Gallaway, W J Hamilton and L A Merrick for Second Defendant
Judgment:	31 March 2021
Reissued:	12 April 2021

JUDGMENT OF GENDALL J

This judgment was delivered by me on 31 March 2021 at 3 p.m. pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date:

Table of Contents

Introduction

[1] Two major fires occurred in the Port Hills area of Christchurch in February 2017. The plaintiffs were owners and in most cases residents of property, or business owners, in the area at the time. They and their properties were significantly affected by the fires. In this proceeding, the plaintiffs sue the two defendants for the consequences of the fires.

[2] The first defendant Orion New Zealand Limited (Orion) operates an electricity network infrastructure business and had electricity conductors and equipment in the general area where the first of the fires was said to begin. This was alongside a roadway in the lower Port Hills area known as Early Valley Road. The outbreak of

this first fire (the EVR Fire) is said to have begun around 5:40 p.m. on 13 February 2017. Orion was sued by a number of the plaintiffs for loss resulting from the EVR Fire.

[3] About an hour and a half later, a second fire commenced about 4 km away. This was higher up on the Port Hills in an area known as Marleys Hill off Summit Road (the Summit Road Fire). Over the next day and a half the Summit Road Fire steadily progressed into adjoining properties including one owned and operated by the second defendant, Leisure Investments NZ Limited Partnership (the Adventure Park). The Adventure Park was and remains the operator of a mountain bike, zipline, hiking and sightseeing park situated on this adjoining Port Hills property (which property I will call hereafter the Park). From early afternoon on 15 February 2017 the Summit Road Fire which had advanced into the Park ignited plastic seating on the chairlift chairs which Adventure Park staff were continuing to run. The ignited chairs, it is alleged, dripped molten plastic onto dry pine slash under and around the lift-line causing spot fires which developed immediately into a large fire outbreak (the Chairlift Fire) which outbreak advanced out of the Park causing significant damage to adjacent properties. The Adventure Park has been sued by those other affected plaintiffs for damage and loss said to be caused to their properties by the Chairlift Fire.

[4] In total there are 80 plaintiffs in this proceeding. They are listed in Schedules 1, 2 and 3 to this judgment. They are divided in Schedule 1 into those plaintiffs who were suing Orion with respect to the EVR Fire, in Schedule 2 into those other plaintiffs who were suing the Adventure Park with respect to the Chairlift Fire and, lastly, in Schedule 3 naming the 47th plaintiffs Warren Flanagan and Vilma Flanagan as the only plaintiffs who sue both Orion and the Adventure Park in respect of both the EVR Fire on the one hand, and the Chairlift Fire on the other hand, as a merged fire, (the Merged Fire).

[5] For present purposes this judgment will refer to those plaintiffs in Schedule 1 who made claims with respect to the EVR Fire as the EVR Fire Plaintiffs, it will refer to those plaintiffs in Schedule 2 who made claims with respect to the Chairlift Fire as the Remaining Plaintiffs and Mr and Mrs Flanagan as the sole plaintiffs who made a claim with respect to the Merged Fire as the Flanagans.

[6] Hearing of all the plaintiffs' claims began in this Court on 3 August 2020.

[7] Midway through that hearing the EVR Fire plaintiffs advised that their claims against Orion had been settled. A Notice of Discontinuance of these claims was filed. All parties consented to this discontinuance.

[8] At that time, related cross-claims between Orion and the Adventure Park were also settled. A similar Notice of Discontinuance of these cross-claims was filed.

[9] The Remaining Plaintiffs' claims and the Flanagans' Merged Fire claims all against the Adventure Park (together the remaining claims) continued, however. The hearing of these claims concluded on 13 October 2020.

[10] This judgment, therefore, relates only to the remaining claims.

[11] The Remaining Plaintiffs and the Flanagans claim that the fire which spread from the Adventure Park's property caused over $11 million of damage to their properties for which the Adventure Park is liable. Those claims are brought, first, under s 43 of the Forest and Rural Fires Act 1977 (the FRF Act), secondly, in negligence and, thirdly, in nuisance.

[12] It is acknowledged by the Remaining Plaintiffs and the Flanagans that the Adventure Park did not *cause* the Summit Road Fire. This fire started just outside the Park boundary, it seems to be agreed, by an arsonist at just after 7 p.m. on 13 February 2017. But the contention here is the Adventure Park did cause the spread or outbreak of a growing fire from its property by creating the Chairlift Fire which then joined with the EVR to create the additional Merged Fire.

Background

The Christchurch Adventure Park

[13] The Adventure Park effectively owns and operates the Park. It is a 365 ha mountain bike, zipline, hiking, sightseeing and Adventure Park development. It opened only in December 2016, some two months before the fires. The

Adventure Park says at present it is the only development of its kind in New Zealand. It cost in the region of $25 million to develop. The infrastructure at the Park includes a cafe/bar/function centre, several ancillary buildings, a four-seater detachable chairlift with top and bottom chairlift stations, mountain bike and walking trails, and four ziplines.

[14] The chairlift is an important asset at the Park. It is a medium-sized lift by international standards, manufactured by the Austrian lift company, Doppelmayr. The chairlift is just under 1.8 km long. It is used to ferry mountain bikers, zipliners and sightseers from the bottom of the Park to the top. The haul rope of the chairlift is 3.586 km long in total and weighs just under 24 tonnes.

[15] Attached to the haul rope are 84 "carriers". These represent 42 four-seater chairs and 42 specially designed quad mountain bike carriers.

[16] The average dead weight of each carrier is approximately 280 kg, which means the total weight placed on the haul rope from all carriers is nearly 24 tonnes.

[17] The chairlift is known as a "detachable" lift. This is as opposed to a "fixed grip" one. Despite this terminology, it does seem the carriers generally are not easily or quickly removed. Some lifts do have what is known as a parking rail which means the chairs can be transferred and stored reasonably easily which, I understand, is usually to prevent icing overnight. The Adventure Park's lift, however, did not have a parking rail. Instead, it simply had what is described as a "maintenance rail" at the bottom chairlift station where approximately five carriers could be diverted at a time for maintenance purposes.

[18] Another point of significance relating to the design of this chairlift is that at each of the chairlift stations there is a conveyor. As the chairs and bike carriers arrive into each station they are automatically transferred from the haul rope by this conveyor mechanism to a much slower separate rail. The purpose of this is to slow down the carriers for easier embarkation and disembarkation of people and bikes. The separate rail is then controlled by an electromagnetic clutch. This releases in a managed and

orderly fashion the chairs and bike carriers, once they have circuited around the rail, back again onto the speedier haul rope.

Summit Road Fire and the Chairlift Fire

[19] The Summit Road Fire, as I have noted, began on 13 February 2017. This fire commenced about 500 m from the top chairlift station at the Park. It was first noticed at around 7:10 p.m. that evening. It seems to be accepted by all parties that the Summit Road Fire was lit by an unidentified arsonist in an area of bush adjacent to the Summit Road and outside the boundary of the Park. By around 9:30 p.m. that night the Summit Road Fire had developed and was at that point only about 300 m away from the top chairlift station.

[20] Over the next 36 hours this fire slowly progressed into the Park, and part of it became the Chairlift Fire. The Chairlift Fire outbreak then spread fire rapidly beyond the Park to the southwest. It is useful here to set out a timeline for both the Summit Road Fire and the Chairlift Fire. In doing so, I will touch on the EVR Fire, although that will only briefly provide some background to the overall fire events. It is the Chairlift Fire and its outbreak and development on the Park which is critical to the events the subject of this judgment.

[21] But, first, it is helpful to note that the Port Hills region in Christchurch has had many fires over the years. Since records began, the evidence before me is that previously there had been nearly 700 fires in total recorded in the Port Hills.

[22] It is also of some importance that, at the time of these fires in February 2017, there was an elevated fire risk in Canterbury generally and in the Port Hills area of Christchurch in particular. February 2017 had been exceptionally dry. On Saturday 11 February 2017 the Christchurch City Council had imposed a total city fire ban as Christchurch had received only half its average February rainfall at that time. The seasonal conditions in the area were otherwise typical for this peak summer month, being hot, dry and windy. Of significant concern too was the fact that under and around the Chairlift at the time were considerable amounts of flammable pine slash and adjacent dry coconut matting, the latter being installed by the Adventure Park, I understand, for erosion-prevention purposes.

Timeline

[23] I now turn to set out the timeline. In doing so I will add more detail for the fires generally, and in particular with respect to the fires that affected the Adventure Park.

Monday, 13 February 2017

[24] As I have noted, around 5:40 p.m. that Monday the EVR Fire began and was noticed about 4 km away from the Park. At the Park the chairlift had been stopped at around 5:40 p.m. due to high winds. The Adventure Park's operation log recorded the wind at the Park at 5:41 p.m. that day as being 68 km per hour. This same log showed the chairlift was closed at 5:43 p.m.

[25] The EVR Fire developed in the windy conditions and quickly spread up the hill from Early Valley Road to endanger the properties of a number of the EVR plaintiffs.

[26] At 7:45 p.m. on the Monday, Darron Charity, a senior Adventure Park employee, received a call from Anne Newman who was the Adventure Park Public Relations Officer at the time, advising him of some smoke being seen rising from the Summit Road area adjacent to the Park. Mr Charity went to investigate and discovered the Summit Road Fire in its early stages of development.

[27] Following this discovery, Adventure Park employees almost immediately established a fire watch to monitor the threat of the fire. This was arranged by Mike Johnstone who was the General Manager of Park Operations at the time.

[28] By 9:26 p.m. that night, Ms Newman had notified Adventure Park Board Members that, "Darron Charity is onsite and believes [the Summit Road Fire] is currently about 300 m from the top station."

[29] By 1:30 a.m. that night the Summit Road Fire had breached the boundary of the Park below a car park area on Summit Road towards the general area of the top chairlift station. In places the boundary of the Park is only about 100 m away from

the top station and so, under all the circumstances, the threat from the advancing fire was obviously a matter of concern.

[30] Although it was not normal to keep the chairlift running through the night, a decision was taken that Monday night to restart the chairlift. Mr Johnstone, stated this was just a precaution as there was a need to keep the haul rope of the chairlift running to avoid it being subject to localised fire damage and potentially breaking.

[31] Mr Johnstone at that time also removed emergency lift evacuation equipment from the top chairlift station. He said this was done for two reasons. The first reason was to save it from the possibility of being consumed by fire. The second, and alternative reason was to ensure, in case access was lost to the station, that the equipment, therefore, would be elsewhere and available.

[32] Also, on that Monday night the Police requested Mr Johnstone to visit a neighbour of the Park near the top station to request that he evacuate his property. This was done and Mr Johnstone then returned to the bottom station. He and other emergency Adventure Park staff then remained at the bottom station all night to ensure the chairlift kept running.

[33] During that night, Mr Johnstone said he started to receive error messages on the bottom station computer indicating that there had been power issues at the top station.

[34] After discovery of the Summit Road Fire that evening, it seems Mr Charity set himself up near where the fire originated, inside the cordon, to keep an eye on it.

[35] It appears too that it was sometime after midnight on the Monday evening that Mr Johnstone drove up to the cordon on Summit Road and observed that the fire had backed into the Park boundary. Mr Johnstone gave his opinion on the threat the fire posed to the Park at that stage and said in his brief of evidence at paragraph 67:

> The thin line of fire had only made its way a very small distance towards the Park. It was a long way from any infrastructure, and the Park had been evacuated. The fire was small, and from my training and experience, small fires will not spread significantly at night time. The fire was moving downhill,

> which I knew meant it would move much more slowly than a fire that would burn uphill.

[36] Mr Johnstone also confirmed that at that stage there was no advice from the Police or rural fire officers to whom he spoke about any risk of the Summit Road Fire moving towards the chairlift and/or towards the bottom station where Adventure Park staff were located. That seemed to be the position around 1 a.m. on the Tuesday morning, 14 February 2017.

Tuesday, 14 February 2017

[37] In evidence before me, it was apparent that several things happened on the Tuesday morning. At 6:46 a.m. that morning Ms Newman notified the Board of the Adventure Park that "The fire has come into our boundary." The Adventure Park's insurer was also notified of the fire risk on the Tuesday morning.

[38] John McVicar, a member of the Board of the Adventure Park and owner of the land on which the Park sat and the surrounding forestry, gave evidence that he visited the overall Port Hills Fire Control Centre at Rolleston at around 9 a.m. that Tuesday morning. He said this was specifically to provide information about access points and water supplies within the Park. At 9:37 a.m. Mr McVicar, confirmed in an email to members of the Board that:

> As you know, the fire has crept into the top part of the Adventure Park by the Sign of the Kiwi overnight … I have requested some action to further protect the chairlift top station and pylons and forest in general. They have organised some retardant from the airport to put around key assets such as top station if required.

[39] So far as dropping the fire retardant was concerned, in cross-examination, Mr McVicar explained:[1]

> There was retardant going in the area right next to it (the top chairlift) and it's a … – it's just a precautionary measure, you've got a fire close by. There is fire retardant available. They're wanting to put it on, you know, high value key bits of property and asset and from the south tower area to the top chairlift, you now, probably less than 50 m so it was just that made sense to ask about it. The fire retardant came up in conversation. I didn't actually go out to Rolleston and say "I want fire retardant." … They made it very clear that they

[1] Notes of Evidence, page 1217, lines 20-40

> were only going to put the retardant on – protect key sort of assets and the top station just appeared to be one, so I suggested that at the time.
>
> … It was just an opportunity and made sense to utilise that retardant because they were wanting to use it and use it sensibly.

[40] That same Tuesday morning, Mr Charity in an email said, "It's actually a lot worse for us today". In re-examination, Mr Charity confirmed with respect to that email that, "The feeling for me onsite was about actually, I think it's amplifying rather than getting under control".

[41] At 8:56 a.m. that morning the Adventure Park had emailed its insurance broker (Aeon) and, at 9:36 a.m., its Bank (ASB) with messages which respectively stated:

> The fires are now significantly into our property on the east side.

And:

> We are doing all we can to protect our assets.

[42] At around 9:45 a.m., a fault message was received by the computer at the bottom station. The most likely cause of this message was a power failure at the top station as the power supply had come from above the station and, presumably was fire-affected. At this time, it does seem from the evidence before me, that there was a possible risk of the fire advancing to the chairlift in this top station area particularly.

[43] Also on the Tuesday morning, Mr Johnstone, as General Operations Manager, "put out an order" to Adventure Park staff on site that "There was a strict instruction that nobody should be going to the top of the Park because of the fire danger and the safety of staff was paramount."[2]

[44] That morning, however, Mr Johnstone and an electrician for the Adventure Park did drive in a vehicle from the bottom station up to the top station and confirmed that the power had failed there. At that stage the chairlift was running on its limited battery power.

---

[2] Notes of Evidence, Mr Johnstone, p 1114, line 4 and p 1121, line 18.

[45] It seems from the evidence of Mr McVicar and Mr Johnstone that their impressions at this time on the Tuesday morning, following discussions with various Fire Service personnel and other people, were consistent with findings outlined in an AFAC Report which, at page 22, included the comment:[3]

> From the morning of Tuesday, 14 February 2017, the only NZFS (New Zealand Fire Service) resources on the incident ground were water tankers. The IC felt that the fires were contained and although there would be a few more days involved in firefighting and mop-up that the resources available could manage. Therefore, Urban Fire Services were not requested for Tuesday.

[46] Ms Newman, in her evidence, confirmed too that, on the Tuesday morning, she had spoken to representatives of the Fire Service as she wanted to make sure they knew exactly where the ziplines were. She said she informed them that the chairlift was continuing to run at this time and no concerns were expressed to her by the Fire Service as to this. Overall, it seems to be the contention of the Adventure Park that there was little significant cause for concern over the Summit Road Fire advancing into the Park on that Tuesday morning. This, however, is despite other evidence before me including the clear concerns on the ground of Mr Charity noted at [40] above.

[47] After returning from the visit he made to the top station late on the Tuesday morning, Mr Johnstone stopped the chairlift which had still been running at that point. Later, he returned to the top station to observe the Summit Road Fire. At that point he says he saw aerial retardant aircraft around the cell phone towers adjacent to the Park before they began dropping retardant on the top station. Mr Johnstone gave evidence, that the Summit Road Fire then was quite visible. He estimated it was about 200 m away from the top station. No doubt with some concern as to this development, he directed that the chairlift be re-started. This, he said, was a decision made in accordance with the standard operating procedures for the chairlift in the Doppelmayr Manual and after talking to Doppelmayr representatives.

[48] By later in the afternoon on the Tuesday, a number of chairlift chairs and bike carriers, however, were clustering and bunching, particularly at the top station, but also some at the bottom station. At that point, Mr Johnstone says, he asked

---

[3] A post-fire report dated July 2017 of the Australasian Fire and Emergency Services Authorities Council Limited on the Port Hills Fires (The AFAC Report).

Mr Goodwin, from Doppelmayr, "whether there was any way to get the chairs quickly off the lift line to stop them bunching". His evidence was that Mr Goodwin was unable to assist. Bunching was a potential problem as the extra weight of several carriers jammed together created a load problem for the sagging haul rope.

[49] At that point the Adventure Park staff decided they needed to untangle the bunched chairs at the bottom station area. The decision was taken to remove the wheel rails for the bike carriers rather than removing the carriers generally off the haul rope and then the maintenance rail. Mr Johnstone, Mr Charity, Mr Goodwin and others, helped with the manual task of physically untangling, unbolting and removing some of the bike rails at the bottom station. This occurred from late afternoon on the Tuesday until sometime later that night. Later in the evening this work was undertaken using head torches. During this time Adventure Park staff had been successful in removing between 15 and 18 rails off the bike racks.

[50] At about 8 p.m. on the Tuesday night, it seems at Mr Goodwin's suggestion, staff of the Adventure Park made the decision to run the chairlift backwards and forwards in equal 20 minute intervals. This, they said, was to avoid the chair clusters from entering the top station and getting jammed while still maintaining movement of the haul rope which Adventure Park witnesses confirmed was the paramount and golden rule in the event of a fire.

[51] The clusters of carriers were the consequences of the failed clutch mechanism in the top station. It seems this failure had been known since the Tuesday morning but, notwithstanding this, carriers were not removed from the haul rope or maintenance rail at that time.

[52] Earlier that day, shortly before 1 p.m., Gareth Hayman, the General Manager of Doppelmayr New Zealand who was overseas at the time, had sent an email message to Adventure Park personnel which read:

> You guys may be already, if it's [the fire] getting close to the chair, it's best to keep the lift running for long as possible to protect the haul rope and the plastic core. Even if the power is cut to the top station, run the emergency drive for as long as its safe to do so.

[53] There was no mention, however, from Mr Hayman of any instruction to remove chairs or bike carriers from the haul rope.

[54] Also, on that Tuesday afternoon, it seems the view of the Fire Service and other relevant authorities was not one of great concern for the Park at this time. Mr McVicar in his evidence described this as follows:

> At no stage was I told that there was any heightened concern about the Summit Road Fire, and the consistent message I received was that it was under control and did not pose a threat to the Park property.

[55] Indeed, in an email Mr McVicar forwarded to his fellow Board members at 3 p.m. on the Tuesday afternoon, he advised:

> Update; have just spoken with Tim Shepherd at the Fire Control Centre. Have felt that they had our Marleys Hill fire largely under control at this time. Retardant has been put in certain areas and they are keeping on top of it – will need continual monitoring for some time. The other Early Valley Road fire is still burning on and there was/is fear that it could connect with the Marleys fire. They have heavy gear there now creating a fire break to prevent that happening.
>
> Wind – appears that it will stay WNW for rest of day and drop away this evening. Tomorrow and evening look like nice days with NE winds.

[56] Shortly after this message, at 3:04 p.m., Civil Defence released a statement which, amongst other things, stated:

> The Marley Hill fire appears to be largely contained on the city side of the Summit Road. Parts of the Early Valley Road fire have crossed the Summit Road towards Governors Bay. Current activity across both fires is focused on efforts to protect structures and prevent the fire from spreading.
>
> The fires are being fought with two aircraft, 12 helicopters and around 100 – 120 firefighters.
>
> Firefighters are making good progress in bringing the fires under control but expect to be working on the fires for another 48 – 72 hours.

[57] This statement, according to comments from Adventure Park staff, was seen as a "message of comfort".

[58] Adventure Park staff, including Mr Johnstone, remained in the bottom station of the Park for the remainder of that Tuesday night. This was to ensure the lift was

able to be run forwards and backwards. It required manual instructions from the bottom station for this to occur. It was said, if the haul rope had been left running simply in one direction with no attention given by staff to running and reversing the lift, then the carriers attached to the haul rope would hit the top station and have the potential to jam again and damage the haul rope.

Wednesday, 15 February 2017

[59] The chairlift had been run in this fashion all through Tuesday night until the Wednesday morning. At about 6:30 a.m. on the Wednesday it was clear that the Summit Road Fire had entered further into the Park. Flames were evident around chairlift Tower 10 and in the area of a downhill trail.

[60] Early that morning, Mr Charity walked up the east valley of the Park, looking towards chairlift Towers 8A and 10. At 7:13 a.m. he took a photo showing the fire in the Park near the chairlift.

[61] Mr Charity then arrived at the top station prior to 10 a.m. that morning. The fire at that stage had not reached the top station. It seems from evidence before me that early on the Wednesday morning the fire was tracking around the bottom of the cliff face below Tower 10. Then it climbed the cliff face and emerged in the area of the merged point of ziplines 2 and 3. At that point Adventure Park staff began the process of removing chairs and carriers from the haul rope. This started around 9:30 a.m. on the Wednesday morning.

[62] Mr Hamish Murrell, a contractor who had initially helped with construction of the Park, was contacted. He supplied a truck with a Hiab crane which was then used to remove chairs and bike carriers from the haul rope and maintenance rail at the bottom station. As I have noted, this only began around 9:30 a.m. on the Wednesday morning and continued until about 1:30 p.m. that afternoon. A small group of Adventure Park staff, with Mr Murrell, were able to remove somewhere between 30 and 35 of the 84 carriers from the haul rope over about that four hour period from 9:30 a.m. This occurred using the Hiab on Mr Murrell's truck. After initially trying to transport removed carriers to the Park car park, because this was taking too long, those carriers were simply placed in the open space alongside the bottom station.

[63] Interestingly, Mr Murrell, in his evidence, explained that the reason the chairs and carriers were removed was because "the fire was coming".[4]

[64] By around the middle of the day on the Wednesday, the Summit Road Fire had tracked in a north-westerly direction in the Park to a position between Towers 10 and 12 on the eastern side of the chairlift. The position of the Remaining Plaintiffs is it was in this location that the chairlift chairs, which were in close proximity to the adjacent forest, ignited and melted, dropping molten plastic to the ground, thus starting the Chairlift Fire outbreak. It seems this was the case and that, in about the four or so hours from 10 a.m. on the Wednesday morning to around 2:30 p.m. that day, the Summit Road Fire had spread through the forest to the western side of the chairlift to became a major crowning forest fire and to reach this area.

[65] From around 1:30 p.m. that Wednesday, Adventure Park staff at the bottom chairlift noticed that one of the chairs on the haul rope had caught fire. Mr Johnstone instructed that the lift was to be immediately reversed and the Park evacuated. That happened.

[66] The Remaining Plaintiffs say, and the evidence I refer to shortly seems to support the view that, from that time on the Wednesday, molten plastic dropping from the moving burning chairlift chairs had caused new spot fires down the length of part of the Park's chairlift line below the escarpment. These chairs had caught alight as they passed the burning forest towards the top of the lift line.

[67] The spot fires which were created ignited significant pine slash under and around the Chairlift and then merged to create what were described as the "gondola line ignitions" of 1 km shown in the Fire and Emergency New Zealand Marley Hill, Port Hills Fire Investigation Report at Maps 4 and 5.[5] This outbreak, before me, has been referred to variously as a "new head fire" and the Chairlift Fire. It is said that it created a new fire front outbreak which, with a change in the direction and the rapid strengthening of the wind at the time, meant the fire progressed rapidly from the Park

4 Notes of Evidence, p 1165, line 19.
5 See 320.12556 and 320.125788 and 89.

across the intervening valley and up to the Worsleys Road homes and surrounding properties.

[68] At this point it is useful to refer to a generally uncontested time lapse video taken by Drew Norris which was placed in evidence before me. This time lapse video showed graphically that at this time some of the Park's chairs had caught alight and with molten material from the chairs dripping onto pine slash on the ground below, this had this caused the outbreak and spread of the Chairlift Fire.

[69] The Drew Norris video depicted clearly that following the first chair being on fire, there was a second chair that caught fire followed by a cluster of chairs together which were on fire, all around Towers 8 and 8A of the lift. The first chair seen emerging on fire occurred, with corrected time, at about 1:30 p.m.

[70] The Drew Norris video then shows spot fires breaking out in the cutover below the escarpment and the bottom forest. Within a few minutes of the first spot fire in the cutover, smoke becomes visible in the forest below the cutover and, at 1:36 p.m., this fire begins to develop rapidly. By 1:37 p.m. the first visible flames are seen in the video within this forestry block and the fire in the cutover continues to develop.

[71] What also appears clear is that initially the burning chairs appear to be travelling downslope, above substantial areas of highly flammable dry pine slash under and around the lift, in the middle reaches of the chairlift. Then it seems, no doubt following Mr Johnstone's instruction to reverse the lift, the chairs reversed direction and travelled upslope, again across the pine slash before entering the forest at the top of the escarpment. From the video, the chairs then seemed to change direction again and were observed to be travelling downslope. Smoke plumes are seen to develop in the pine slash immediately after chairs passed the area in question and flames then quickly developed as spot fires occurred at each location.

[72] Those spot fires developed rapidly down the slope along the line of the chairlift.

[73] A further time lapse video at this point, the "YouTube fire video", was provided in evidence. Again, this gave uncontradicted evidence and confirmed observations from the Drew Norris video.

[74] From all this evidence it is plain that by about 1:21 p.m. on the Wednesday afternoon the Summit Road Fire and its flames were visible in the Park. From the evidence of Ms McKinley and others, flames were at that stage well above (being some 30 – 40 metres over) the height of the pine trees being consumed. Clearly this had become what is known as a "crowning fire".

[75] From a 2:30 p.m. Air Ops helicopter flight video also in evidence, the growing intensity of the chairlift fire was evident from the size of the overall fire plume in the area.

[76] Between 1 p.m. and 2 p.m. on the Wednesday afternoon there had been a significant wind change in the Port Hills area. The wind shifted from a west-north-west direction to an east-south-east direction. This coincided with the burning chairs being transported from the top forestry block to the bottom forestry block along the lift line. Based on these wind directions, in his evidence the fire investigator, Mr Cox, concluded that the relevant Worsleys Road properties owned by the Remaining Plaintiffs impacted by the outbreak of the Chairlift Fire, were consumed by this fire. Mr Cox, in his evidence, provides his opinion that, without the Chairlift Fire, the first and second fire runs from the Summit Road Fire would have passed well south of the Worsleys Road properties, and those properties would not have been affected.

[77] Mr Cox's evidence too conformed that the YouTube fire video demonstrated the effect of the increasing windspeed in the area on the spread of the spot fires under the chairlift as they combined and accelerated in a westerly direction.

[78] What the presence of the major crowning forest fire in the immediate area meant was this. The chairlift was operating in a 12 metre wide corridor of cleared pine trees. Dry slash from the cleared corridor remained under and around the chairlift line. At the point of the crowning fire the chairlift line was well below, perhaps 30 – 40

metres below, the top of the trees on fire. The flames from the fire were raging many metres above that. The chairlift at this time was being kept running between the trees on either side of the corridor which were burning intensely.

[79] Turning now to the Merged Fire, by approximately 3 p.m. that Wednesday, the Summit Road Fire, which it is said had morphed into the Chairlift Fire as a new "head fire", had spread through pine slash and forestry on the Park property passing onto the north-western side of the chairlift and merged with the EVR Fire on the eastern side of what is known as Kennedy's Track. The Merged Fire then advanced in a north-westerly direction on the western side of Worsleys Road, destroying property as it went. The unchallenged evidence of fire investigation experts employed by the Remaining Plaintiffs confirms this.

[80] And, from evidence generally uncontested before me, the Merged Fire entered the Flanagan's property at 165 Early Valley Road. Mr Joseph, a fire investigator for the Flanagans, gave evidence which I accept on this aspect.

[81] At trial, it was generally agreed too that if there is found to be a liability on the part of the Adventure Park to the Remaining plaintiffs for their loss then, first, it is accepted that a similar liability for the Flanagan's loss will arise from the Merged Fire, and, secondly, this liability is to be split evenly between the Adventure Park and Orion. As I understand it, this had been agreed as between the Adventure Park and Orion. No formal ruling as to this is required from the Court.

Adventure Park's Fire Safety Management Plan (FSM Plan)

[82] The Adventure Park was required to have a Fire Safety Management Plan (FSM Plan) prior to beginning its operation. The version of the FSM Plant in place at that point comprised Revision 4 of the Plan. This was dated 13 December 2016, only a few days before the time of the Park's commencement.

[83] Significant evidence from a range of witnesses before me all agreed that one of the greatest risks to the Park, given its location in the Port Hills within a hillside area of forestry, was the outbreak of fire. Accordingly, the FSM Plan was an important document and addressed aspects of this. As part of its resource consent for operation

of the Park too, the Adventure Park needed the Fire Plan and this had to be approved by the Christchurch City Council before the Park opened.

[84] In the FSM Plan adopted at the time, provisions of some relevance were:

> **1. INTRODUCTION**
>
> … The FSMP will thus be in three parts.
>
> - Village Design and Construction, plus Fire suppression and service response
> - Forest and Grass Fire – preventative, and fire fighting response.
> - Fire Evacuation of CAP and public safety
>
> Preparation for and management of Fire is of significant interest to CCC, NZFS, CCCRFA, DOC and ECAN for ensuring public safety in the Christchurch Adventure Park…
>
> The consequences of fire include the threat to the lives or health or safety of relevant persons (including emergency response personnel), damage to or loss of property and severe interruption to business activities or opportunities.
>
> Managing the risk of fire demands fire safety precautions based on a combination of appropriate prevention and protection measures (reduction and readiness), depending upon building use and occupancy and in the context of CAP, the land use. There are inherent fire risks and legal obligations on Christchurch Adventure Park (CAP) as the employer/occupier/owner and PCBU. On site, the Fire Safety Management Plan (FSMP) applies to all premises and leased area under the control of CAP as the employer, owner or principal occupier.
>
> …
>
> **5. Forest Fire – Prevention and Response**
>
> Forest fire presents the biggest risk to human safety in the park, the largest risk to the CAP assets and an Emergency and Evacuation scenario with a high probability, particularly during periods of high fire risk. Canterbury is a dry, east coast province, the CAP is heavily forested and CAP will have an anticipated high public use and access during those periods of increased fire risk. It is also not possible to completely close the site.
>
> …

Chairlift Fire Suppression

Electrical failure/electrical fire is a significant risk to the forest and to operations. There is an additional risk. A Base Station Fire and electrical fire in particular is a greater risk to CAP operations and Forest Fire than a fire in the café.

…

- Potential future sprinkling of the stations, and the lift line (cigarettes).

…

- Continuous running – protocol regarding running the lift during a forest fire to prevent heat concentration on the haul rope.

…

5.2 Forest Fire – Reduction

- Fuel reduction – slash removal, removal of dead wood/lower branches.

…

5.4 Response

…

- Use of safe zones – refer appendix B. The lift line, forest tracks, MTB trails provide corridors for egress and act as fire breaks. The lift line is a 12 metre – 20 metre strip which will be stabilised/covered with evergreen shrubs, vegetated and clear of pine trees.

…

6.1 Village Fire – Reduction

Removal of fuel sources from the village – branches and cones from the trees, dead or at risk trees, rubbish and recycling – will be removed weekly, and more frequently if required on review of the FWI.

(Emphasis added)

[85] So far as completion of the final FSM Plan generally was concerned, before the Court is an email dated 8 November 2016 (a month or so before the Park opened) to employees of the Adventure Park, the Christchurch City Council and Fire and

Emergency New Zealand, from George Ritchie, the author of the Plan, which in part stated:

> John McVicar (the owner of the forest) is keen to integrate the CAP Fire Safety Planning with the Cashmere Forest Fire Safety Planning to have an overall Plan and Fire Response.
>
> The Adventure Park presents additional risk to the Cashmere Forest and vice versa.
>
> We currently don't have an integrated plan, and in the Adventure Park, fire presents the highest risk to:
>
> - The safety of people in and around the park.
> - The protection of the forest/timber asset.
> - The protection and business continuity of Christchurch Adventure Park as an asset and as an Operation.
>
> It is a priority for Christchurch Adventure Park that the Fire Safety Management Plan (FSMP) is best practice and highly professional.
>
> To achieve that and add to the overall management of the risk in the Port Hills, we need to work together.

[86] It is interesting to note that a previous revision of the draft for the FSM Plan provided on one aspect for a much greater minimum lift line corridor of 60 metres between cleared pine trees. This was reduced, however, to 12 metres in the final Version 4 Plan noted at [84].[6]

Doppelmayr manual

[87] The Adventure Park's position here is that throughout the fires it followed the manual on its chairlift operation issued by the manufacturer, Doppelmayr, in all respects. It says it did so by keeping the haul rope running, which was the golden rule. It is clear the manual does provide for the haul rope to be kept running in the event of a fire. This is to avoid the danger of localised heat on the rope and it fracturing. The Adventure Park contends that otherwise, there was nothing specific in the Doppelmayr

[6] Subsequent to the February 2016 fires, the Adventure Park again revised its FSM Plan. A Version 5, dated 1 December 2017, interestingly did again provide for the minimum chairlift corridor between the forest trees to be 60 metres. Of course, this Version 5 was not in place at the time of the fires, the operative FSM Plan then being Version 4, and thus it is of little direct relevance here.

manual addressing the situation which it was facing, being a building forest fire under and around its chairlift and the haul rope.

[88] Whilst that may be the case, and given that more often than not Doppelmayr chairlifts are designed for operation over snow-covered ski fields, the plaintiffs say that the Doppelmayr manual was, of course, not contemplating a chairlift being run through a crowning forest fire, which was the case here.

Damage caused by the fires

[89] In addition to the many hectares of forest and parkland destroyed by the Summit Road Fire, the Chairlift Fire and the Merged Fire, these fires destroyed significant property of both the Remaining Plaintiffs and the Flanagans. The total amount those plaintiffs claim here, against the Adventure Park, is $11,006,138.50 plus interest and costs. These amounts represent losses claimed resulting from the destroyed or damaged properties, contents, vehicles, personal items, fencing, landscaping, forestry and other damaged items and associated losses of these plaintiffs.

[90] Interest on this sum at the rate of 5 per cent per annum is sought, calculated from the time of the loss on 15 February 2017 to 13 October 2020, the final hearing date for this matter. It is said too that interest will continue to accrue thereafter at that rate.

[91] The Remaining Plaintiffs say, therefore, that the total figure they claim, before inclusion of costs, is $13,025,764.91 with interest thereon up to 13 October 2020.

[92] It is true to say part of this claimed loss is insured and a significant part is uninsured. The Remaining Plaintiffs say, however, there is no difference between the two for the purposes of this proceeding and on the basis that I may find those losses to be properly claimed here, I agree.

[93] The total claim, therefore, is made up of:

(a) $9,823,373.94 in respect of the losses caused by the Chairlift Fire alone; and

(b) $1,182,764.56 in respect of the loss suffered by the Flanagans and caused by the Merged Fire.

[94] These amounts are broken down in his evidence by the plaintiffs' expert loss adjuster, Grant Bird as follows:

(a) Insured losses for the Chairlift Fire of $5,219,112.80;

(b) Uninsured losses for the Chairlift Fire of $4,624,719.20;

(c) Insured losses for the Merged Fire affecting the Flanagan property of $1,182,264.56; and

(d) Uninsured losses for the Merged Fire to the Flanagan property of $500.

[95] With respect to those losses, they include four properties that were deemed a total loss. These are, first, the property of the first plaintiff Cecile Grace (Mrs Grace), secondly the property of the second plaintiff Alexander Doug Pflaum and the 73rd plaintiff, Vikki Pflaum (the Pflaums), thirdly, the property of the 5th and 18th plaintiffs Bae Keun Kwon and Jung Kwon Jang (the Kwons), and lastly, the property of the Flanagans.

Plaintiffs' pleadings

[96] In the plaintiffs' final and sixth amended statement of claim against the Adventure Park, relevantly to the remaining claims, they plead:

> 80. At approximately 7:09 p.m. on 13 February 2017 a second fire commenced at a location on Marleys Hill near Summit Road (**Summit Road fire**).
>
> Particulars
>
> 80.1 The Summit Road Fire originated at GPS co-ordinates … between the Flying Nun track and a pine planation.
>
> 81. By approximately 1 p.m. on 15 February 2017, the Summit Road fire had spread into the area of the Port Hills occupied by the Adventure Park and, in particular, into the area in which the Adventure Park operated a chairlift.

Particulars

81.1 The Summit Road Fire entered the Adventure Park from the south-east;

81.2 The fire entered the Adventure Park on the evening of 13 February 2017 but had not yet reached the top station of the chairlift;

81.3 The fire travelled from the McVicars Forestry to the top station of the chairlift;

81.4 The fire crossed the area where the chairlift operated and entered the pine plantation at about midday on 15 February 2017.

82. During the course of the afternoon of 15 February 2017, the Summit Road Fire developed significantly in the area of the upper reaches of the chairlift and the top station.

83. On the afternoon of 15 February 2017:

83.1 The Summit Road fire had significantly developed in the upper reaches of the chairlift;

83.2 The upper reaches of the chairlift and the top station was in an area consumed by fire;

83.3 The EVR Fire was burning out of control.

84. Despite the above and requests from fire authorities to cease its use, Leisure Investments continued to operate its chairlift including from 1 p.m. on 15 February 2017:

84.1 First, in a direction moving the chairs down the hill towards the bottom station and the café and bar area;

84.2 Secondly, reversing the chairlift moving the chairs towards the upper station and crossing the pine slash and the McVicar forest; and

84.3 Thirdly, reversing the chairlift to again move chairs towards the bottom station (**the chairlift operation**).

85. The chairlift operation caused the chairs and bike racks to catch fire and combust.

Particulars

85.1 Leisure Investments knew the Summit Road Fire had spread into the upper reaches of the Adventure Park from at least 1:30 a.m. on Tuesday, 14 February;

85.2 Despite knowing this and continuing to run the chairlift Leisure Investments failed to detach the chairs and bike racks from the haul rope despite them having the time to do so.

85.3 The chairs and bike racks contained flammable components.

85.4 Leisure Investments' continued operation of the chairlift on the afternoon of 15 February 2017 caused chairs and bike racks to travel through an area of fire burning adjacent to the upper reaches of the chairlift and in doing so to catch alight.

86. Immediately after the flaming chairs and bike racks passed over the escarpment and the middle reaches of the chairlift, spot fires commenced along the line of the chairlift in the highly flammable dry pine slash and vegetation below the chairlift.

87. This outbreak of fire was caused by the flaming debris of the burning chairs and bike racks dropping from them as they passed over the escarpment and the middle and lower reaches of the chairlift.

88. This outbreak of fire caused by the chairlift operation by the second defendant (the Adventure Park) took the Summit Road Fire out of the containment area to the east of the chairlift and above the escarpment set up by the Rural Fire Authority undertaking the fire suppression activities.

89. The outbreak of fire caused by Leisure Investments led to the Summit Road Fire forming a new head fire which developed in intensity and destroyed the plaintiff's property as set out in Schedule 2 and combined with the EVR Fire, Schedule 3.

Particulars

89.1 The new head fire emerged in the afternoon of 15 February 2017 from the merger of spot fires created by flaming debris from the chairs and bike racks beneath the middle and lower reaches of the chairlift;

89.2 From there the Summit Road Fire gained intensity and spread in a west-south-west direction under a strengthening east-north-east wind towards Worsleys Road. The properties on Worsleys Road and surrounding area were threatened by the new head and northern flank fires.

90. The EVR Fire and the Summit Road Fire and the Merged Fire destroyed and/or damaged the plaintiffs' property, including buildings, contents and motor vehicles, causing the plaintiffs to suffer loss…

Particulars

…

90.2 The Summit Road Fire destroyed and/damaged the relevant plaintiffs' property, including buildings, contents and motor vehicles, causing those plaintiffs to suffer loss…

90.3 The EVR Fire merged with the Summit Road Fire and the Merged Fire destroyed and/damaged the [Flanagan's]

> property, including buildings, contents and motor vehicles, causing the [Flanagans] to suffer loss…

[97] In this statement of claim, essentially three remaining causes of action are pleaded against the Adventure Park:

(a) liability under s 43 of the now repealed Forest and Rural Fires Act 1977 (FRF Act);

(b) negligence; and

(c) nuisance.

[98] Effectively here the Remaining Plaintiffs and the Flanagans claim damages against the Adventure Park under the three heads noted at [97] above as follows:

(a) The Adventure Park is responsible under s 43 of the FRF Act for what they say is the "outbreak" of the Chairlift Fire. This followed the entry of the Summit Road Fire into the Park, the Chairlift Fire then having spread and destroyed the properties on and around Worsleys Spur. Also, it is claimed this fire merged with the EVR Fire to form the Merged Fire that destroyed the Flanagan's home.

(b) As to the negligence claim, principally, it is claimed that the Adventure Park was negligent in not commencing the removal of the flammable chairs from its chairlift haul rope earlier than 9:30 a.m. on Wednesday 15 February 2017, the plastic seats of which ignited and caused the Chairlift Fire as I have noted above.

(c) As to the nuisance claim, it is said the Adventure Park, by running the chairlift and its chairs through the Summit Road Fire, created a nuisance in the form of what became the Chairlift Fire that broke out of the Park and unreasonably interfered with the use and enjoyment of the properties owned/occupied by the Remaining Plaintiffs and the Flanagans.

[99] At the outset, I repeat that the Remaining Plaintiffs and the Flanagans do acknowledge the Adventure Park did not start the Summit Road Fire and its staff were put in a challenging but manageable position when that fire started on the night of Monday 13 February 2017.

Section 43 of the Forest and Rural Fires Act 1997 (FRF Act)

Liability under s 43

[100] Section 43 of the FRF Act provides a statutory right of recovery from persons responsible for fire in circumstances:

> Where any property has wholly or partially been destroyed or damaged by (or safeguarded from) an outbreak or threat of outbreak of fire, and responsibility for the outbreak is acknowledged by or (the outbreak) is established by action or otherwise as caused by any person.

[101] It is interesting to note that *Todd on Torts* at 11.6.02 addresses liability under s 43 (although it is now repealed) generally and states:[7]

> Section 43(1) of the Forest and Rural Fires Act 1977 held a person responsible for causing a fire in a forest or rural area strictly liable for costs incurred in fighting the fire, *as well as for damage done to property. Section 43(3) preserved a claimant's right to sue at common law for damages*. The 1977 Act was repealed by the Fire and Emergency New Zealand Act 2017, which largely came into force on 1 July 2017. It replaced civil liability with a new offence and penalty regime that includes serious criminal offences punishable by up to two years' imprisonment. One commentator has said:
>
> > "It remains to be seen whether this public policy shift away from civil cost recovery and towards criminalising risky fire behaviour will achieve the stated objectives [of improving fire safety]. In the meantime, the liability landscape has changed significantly for those who cause rural fires that get out of control and those who suffer loss as a result of them."
>
> While statutory liability to pay compensation has been abolished, *liability at common law remains, but it is not as easy to establish as under the 1977 Act*.
>
> (emphasis added)
>
> [citations excluded]

[7] Stephen Todd & Others (Eds) *Todd on Torts* (8th Ed) Thomson Reuters at 11.6.02.

[102] The FRF Act was repealed on 1 July 2017 by the Fire and Emergency New Zealand Act 2017. However, at the time of the fires in this case, s 43 of the FRF Act remained in force.[8] Relevantly, it provided in full:

> **43 Recovery from person responsible for fire**
>
> (1) Where any property has wholly or partially been destroyed or damaged by or safeguarded from an outbreak or threat of outbreak of fire, and responsibility for the outbreak is acknowledged by, or is established by action or otherwise as caused by, any person—
>
> (a) the costs of control, restriction, suppression or extinction of the fire may be recovered from that person by the Fire Authority or the New Zealand Fire Service Commission or the eligible landholder or eligible landholders of the forest area affected, as the case may be, incurring those costs pursuant to fire control measures under this Act; and
>
> (b) any loss in, or diminution of, value of that property, and any consequential loss or damage not too remote in law, may be recovered from that person by the owner of the property.
>
> (2) The amount of the costs so recoverable may be wholly or partially established by agreement, or by a Rural Fire Mediator, or by proceedings under section 48(4).
>
> (3) This section shall be deemed to be supplementary to and not in substitution for any other rights of recovery that may exist in law or by enactment or otherwise howsoever.
>
> …

[103] Section 43 is a strict liability provision as the Court of Appeal has twice confirmed.[9] In *AMI Insurance Ltd v Legg* the Court of Appeal restated the legal position that liability under s 43 is strict, citing *Tucker v New Zealand Fire Service Commission*.[10] This had also been found to be the case by that Court earlier in *Garnett*

---

8 It appears that the Fire and Emergency New Zealand Act 2017 does not have a counterpart provision to s 43 and instead it utilises an offence-based regime.

9 Under strict liability there are some limited defences which must be contrasted with "absolute liability offences" which impose legal responsibility in every circumstances regardless of whether there is an absence of fault. Section 43 of the FRF Act refers to the concept of responsibility for the outbreak of the fire as being caused by any person. Further discussion on this aspect will follow.

10 *AMI Insurance Ltd v Legg* [2017] NZCA 321, [2017] 3 NZLR 629 at [13]; and *Tucker v New Zealand Fire Service Commission* [2003] NZAR 270 (HC) at [42]–[43].

v Tower Insurance Ltd.[11] In *New Zealand Fire Service v Attfield* and in *Marlborough Lines Ltd v New Zealand Fire Service Commission* the High Court accepted that liability under s 43 is independent of any liability on the basis of negligence, nuisance or any other civil fault.[12]

[104] The judgment of William Young J in *Tucker* addressed s 43 in some depth, and it has been cited on a number of occasions in subsequent cases. In his judgment, William Young J noted the enactment of s 43 as part of the 1977 Act came only three years after the decision in *New Zealand Forest Products Ltd v O'Sullivan* where Mahon J found liability for rural fires under the rule in *Rylands v Fletcher*[13] turned on whether the fire in question that started on the defendant's land was a natural or non-natural use of that land.[14] William Young J found it was:[15]

> …no coincidence that s 43 was enacted only three years after that case was decided. In other words, I think that s 43(1)(a) was primarily intended to cover cases which would otherwise be subject to the rule in *Rylands v Fletcher* save for the facts that the fire either did not escape or was a natural use of the land on which it was started. I have already referred to the *New Zealand Forest Products* decision.

and he said:

> I have in the end reached the view that s 43 is intended to apply so as to impose liability on a person who causes the outbreak of a fire irrespective of whether that person is otherwise civilly responsible for the fire and its consequences.

His Honour also said of s 43's element of causation:[16]

> [T]he combination of words still suggests that the legislature was looking at causation in fact rather than responsibility in law. As Mr Scott argued the phrase "responsibility for" can carry the meaning "being the cause of". I think that is pretty much what the Legislature intended here. One is, after all, not normally legally accountable for an outbreak of fire: legal accountability is usually applicable only to consequences of a fire. Further, there is a real sense in which the section carries the connotation that someone who causes a fire is thereby responsible for it.

---

11 *Garnett v Tower Insurance Ltd* [2011] NZCA 576, (2012) 17 ANZ Insurance Cases 61-918 at [38].

12 *New Zealand Fire Service v Attfield* HC Dunedin CP58/01, 16 June 2003 at [11(ii)]; and *Marlborough Lines Ltd v New Zealand Fire Service Commission* [2017] NZHC 2127 at [60].

13 *Rylands v Fletcher* (1868) 3 LR HL 330.

14 *New Zealand Forest Products Ltd v O'Sullivan* [1974] 2 NZLR 80 (SC) at 87, citing *Hazelwood v Webber* (1934) 52 CLR 268 at 277–278 per Gavan Duffy CJ, and Rich, Dixon and McTiernan JJ, and at 281 per Starke J.

15 At [42(4)].

16 At [42(2)] (emphasis original).

[105] In his judgment, William Young J determined liability may be established under s 43 irrespective of whether a defendant is otherwise civilly liable at common law. He upheld the District Court's decision against Mr Tucker on this point. However, William Young J ultimately found, in the rather unusual facts which prevailed in *Tucker*,[17] that, as to causation, the defendant, Mr Tucker, could not be considered to have "caused" the outbreak of fire.

[106] The *Tucker* case involved a claim by the New Zealand Fire Service Commission against Mr Tucker, a truck driver. Mr Tucker was driving a fully maintained and compliant 36 wheel truck and trailer unit when two of the tyres burst and two-wheel rims came into contact with the roadway. The sparks that were produced caused a roadside fire and resulted in firefighting costs being incurred. The New Zealand Fire Service succeeded in its claim in the District Court but Mr Tucker successfully appealed this decision to the High Court resulting in William Young J's decision. His Honour found that Mr Tucker had not "caused" the outbreak of the fire in the circumstances prevailing in that case.

[107] Before explaining in his *Tucker* decision the proper approach to causation under s 43, his Honour outlined that in his view the section:[18]

> …was aimed at a farmer who deliberately lights a fire (possibly for the purposes of a controlled burn-off). Such a farmer might be thought to be fairly placed under an absolute obligation to ensure that the fire does not get out of control. I believe that the legislation was intended to render unnecessary any need to prove an escape (if the fire fighting expenses were incurred because it went out of control) or that such a fire was a non-natural use of the land involved. The fact that this was the sort of case which the Legislature no doubt had in mind when s 43 was adopted does not mean that its effect is confined to such cases.

[108] In outlining a "principled approach" to causation,[19] he endorsed Lord Hoffman's approach to causation in his Lordship's speech in *Environment Agency v Empress Car Co (Abertillery) Ltd*.[20] There, Lord Hoffman found causation ought to be assessed by classifying the events leading up to the harmful event as either:[21]

---

17 *Tucker v New Zealand Fire Service Commission*, above n 10.
18 At [57].
19 At [45].
20 At [47], citing *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL).
21 At 36.

(a) "a normal fact of life" or "in the general run of things a matter of ordinary occurrence"; or

(b) "extraordinary".

[109] Only if the event falls into the first category is the defendant said to have "caused" the fire.[22] In *Empress Car*, the appellant maintained a diesel tank in a yard which was drained directly into the River Ebbw Fach in Wales by a person unknown. The appellant was prosecuted, charged with "causing poisonous, noxious or polluting matter or solid waste to enter controlled waters", and convicted on that basis in the Crown Court. On appeal to the House of Lords, their Lordships found the appellant's accumulation of a noxious liquid (diesel) and its maintenance of it in a tank on its property *caused* the pollution, even though a third party had opened the tank's tap which discharged the diesel into the river.

[110] In his speech, Lord Clyde distinguished the test for negligence with its reasonable foreseeability requirement from causation as a matter of fact:[23]

> In deciding whether some particular factor has played so important a part that any activity by the defendant should be seen as entirely superseded as a causative element it is not a consideration of the foreseeability, or reasonable foreseeability, of the extraneous factor which seems to me to be appropriate, but rather its unnatural, extraordinary or unusual character.

[111] Lord Hoffman elaborated on the ordinary/extraordinary categorisation in this way: "The distinction between ordinary and extraordinary is one of fact and degree to which the [trial court] may apply [its] common sense and knowledge of what happens in the area."[24]

[112] To illustrate this approach in practice in New Zealand, in *Nelson Forests Ltd v Three Tuis Ltd*, Miller J held a couple and their company running a bed and breakfast liable under s 43 when one partner disposed of ashes from a cabin wood-burner over

---

22 *Tucker*, above n 10, at [61].
23 *Empress Car*, above n 20, at 37.
24 At 36.

a bank, having not seen the fire burning for some hours, starting a fire that destroyed a large forest owned by a neighbour.[25]

[113] Miller J affirmed that s 43 imposed strict liability.[26] He said, applying the test laid down by William Young J in *Tucker*, that the defendant having dumped the hot ashes outside the cabin over a bank in this way, "cannot possibly [say] that the fire was an extraordinary consequence, such that he should not be taken to have caused it at all."[27] His Honour found, unlike in *Tucker*, that the dumping of hot ashes was an action that had an "immediate" connection to the outbreak of the fire. There was no "succession of events of which only one, an action not in itself intrinsically likely to cause fire, was directly attributable [to the defendant]".[28] This placed the events leading up to the fire firmly in the "normal fact of life" category and not as an "extraordinary consequence". Thus, causation of the outbreak of the fire and therefore liability under s 43 were established in the *Nelson Forests* case.

[114] Finally, in *New Zealand Fire Service v Attfield* Master Christiansen dismissed an application to strike out a proceeding involving a claim under s 43 where a branch from a poplar tree in strong winds fell onto power lines, causing the lines to break which resulted in an outbreak of fire from the point of contact with the ground.[29] The Master summarised relevant conditions and circumstances which included: tall trees in close proximity to the lines, in very old and poor condition; the prevalence of strong (prevailing) north-west winds; previous occurrences of wind-blown branches bringing down lines in the area; the well-known propensity of trees to damage power lines giving rise to public safety issues; and finally, the fact the lines company had an explicit written policy and practises in place to try and reduce this risk, but did not take any steps in relation to these particular lines.[30] He found these events *could* be described as "'ordinary' in the sense contemplated by *Tucker* and *Empress Car*.".[31] The proceeding was not struck out.

---

25 *Nelson Forests Ltd v Three Tuis Ltd* [2013] NZHC 856, [2013] NZAR 1151 at [24].
26 At [24], citing *Tucker*, above n 10; and *Empress Car*, above n 20.
27 At [25].
28 At [25].
29 *New Zealand Fire Service v Attfield*, above n 12.
30 At [19].
31 At [20].

Causation under s 43

[115] As the authorities noted above have made clear, responsibility for the outbreak of fire for the purposes of s 43, focuses on causation in fact rather than responsibility in law.[32] This focus on causation in fact has the result that a person who causes a fire is thereby responsible for it. Section 43(1) makes this clear.

[116] William Young J in *Tucker* noted that this analysis of causation, particularly in relation to strict liability offences, has caused "exquisite difficulty for the courts" and "in the end Judges are often driven to take refuge in unarticulated considerations of common sense".[33]

[117] In endeavouring to identify this "common sense" approach to causation in the context of liability under s 43, William Young J explained this further in *Tucker*:[34]

> [54] Where causation is in issue, the question comes down to "common sense". More than that, it also comes down to what is a question of fact and degree and therefore, inevitably a question upon which different people will have different views. That said, there is much which is of assistance and relevance in the *Empress Car* case to the issues which arise in the present litigation.
>
> [55] One cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. Does the rule impose a duty which requires one to guard against, or makes one responsible for, the deliberate acts of third persons? If so, it will be correct to say, when loss is caused by the act of such a third person, that it was caused by the breach of duty.
>
> …Before answering questions about causation, it is therefore first necessary to identify the scope of the relevant rule. This is not a common sense fact; it is a question of law.
>
> …The issue of causation which I must address is not to be assessed on an abstract or philosophical basis.

[118] Also, in relation to this "common sense" approach, the Court of Appeal said in *AMI Insurance v Legg*:[35]

---

32 *Tucker*, above n 10 at [42](2).
33 *Tucker*, above n 10 at [44] – and cited in *Marlborough Lines Limited* case (see n 10) at [76].
34 *Tucker*, above n 10 at [54] – [55].
35 *AMI Insurance Ltd* at [41] and [42], above n 10.

> …That causation involves inductive reasoning, in which conclusions are derived as a matter of probability and may rest on common sense. It does not necessitate a "minute" or "microscopic" analysis.
>
> …AMI, the plaintiff, need not prove that the specific embers that reignited on 10 January came from ELL's [the defendant] business.
>
> …
>
> AMI, therefore, has proved, on the balance of probabilities, that the introduction of the pine stumps or other vegetation from [ELL] caused the reignition of the fire on 10 January 2013 or the *Leggs*' liability for which they otherwise had cover under the policy.

[119] In the present case, the uncontested evidence before me of Mr Cox and Mr Joseph that the outbreak of the Chairlift Fire was caused by the Adventure Park running its flammable chairlift chairs through the Summit Road Fire is difficult to escape. Mr Cowan in his evidence also confirmed this, as did the conclusion which is reached in the FENZ Marleys Hill Report. The post-fire "AFAC Independent Operational Review" Report of July 2016[36] before the Court also commented at [23]:

> From the bottom station [Adventure Park staff] were able to remove a number of chairs but the task was too big to be completed in a timely manner. When it was noticed that the chairs on the chairlift were on fire the Operations Manager instructed the chairlift to be put in reverse and sent the chairs back up into the fire area/top station. Chairs that had caught fire appeared to be dropping hot embers off the chairlift and starting spot fires below the main fires. This line ignition brought the fire lower in the valley into the heavier fuels."

And:

> Another issue was that there was a lot of logging slash from tree felling and pruning operations lying on the ground significantly increasing the potential fuel loading.

Without question this was also graphically shown in evidence, first, in the father and son video of the logging slash taken soon after the Park opened, and then in both the Drew Norris fire video and the YouTube fire video.

[120] I am satisfied that it was the inaction of the Adventure Park in leaving the chairs on the chairlift haul rope until it was too late, and at the same time making the decision

---

[36] This report by the Australasian Fire and Emergency Services Authorities Council Limited described itself as "A review of the management of the Port Hills fires in February 2017.

to continue running the chairlift through the major crowning forest fire that had developed, which caused the initial outbreak of the Chairlift Fire. The chairs and the haul rope were run backwards and forwards through the crowning forest fire towards the top of the chairlift. The lift and its chairs and carriers were passing through the narrow 12 metre corridor between trees engulfed in fire, the resulting extreme fire temperatures igniting the flammable plastic components on the chairs. Running the lift both downhill and uphill with plastic chairs on fire, as I have noted, resulted inevitably in high temperature molten plastic through gravity and the motion of the lift dropping to the ground. There, uncleared and highly flammable pine slash left lying under the lift line, in breach of the Adventure Park's accepted obligations under the FSM Plan, together with adjacent coconut matting resulted in immediate spot fires, which quickly developed through the fuel available into the major Chairlift Fire outbreak. The inevitable starting point here is inescapable, that the Adventure Park caused the resultant outbreak of fire under the terms of the FRF Act. The only basis upon which, in my view, the Adventure Park could be said to not be responsible for the outbreak of the Chairlift Fire would be if that fire resulting from the burning chairs and the events that followed could be seen as an extraordinary event.

Was this an extraordinary event?

[121] Lord Hoffman in the House of Lords decision in *Empress*,[37] in an attempt to apply the concept of "common sense" in a principled way, articulated the distinction between what he described as the "ordinary" and the "extraordinary".[38]

[122] It is true that technically the existence of an "extraordinary event" does not, as I see it, present the Adventure Park with a defence under s 43 of the FRF Act. Instead, it simply describes circumstances where the defendant's actions or inactions did not *cause* the outbreak of fire here. Essentially this is because the extraordinary event has superseded the relevant actions/inactions of the Adventure Park here which are said to have caused the loss.

---

37 *Empress*, above n 20.
38 *Empress*, above n 20 at [36]B.

[123] This concept was explained by William Young J in *Tucker*,[39] relating to the unusual factual circumstances in that case, in the following terms:

> The concatenation of events which flowed from that and produced the fire would appear to me to have been unusual in the sense that a person who drives a properly maintained and inspected truck and trailer unit would not normally expect thereby to start a roadside fire. This concatenation of events must be categorised (given the speech of Lord Hoffman) as being either:
>
> (a) a "normal fact of life" or "in the general run of things a matter of ordinary occurrence" on the one hand; or
>
> (b) "extraordinary" on the other.
>
> On the exiguous evidence before the Court, I place it in the latter category, i.e. as being extraordinary. In that context, I find it difficult to see how Mr Tucker could be regarded fairly as being "responsible for" the outbreak of fire in issue.

[124] In the *Empress* case in the House of Lords, Lord Clyde used a slightly different formulation of words in addressing the same question at para [36](g):

> In deciding whether some particular factor has played so important a part that any activity by the defendant should be seen as entirely superseded as a causative element, it is not a consideration of the foreseeability, or reasonable foreseeability, of the extraneous factor which seems to me to be appropriate, but rather its unnatural, extraordinary or unusual character.

[125] In Lord Clyde's statement that I have noted above, the use of the word "superseded", and also the words "flowed from" in the judgment of William Young J in *Tucker* noted above, in my view, must mean that, when considering the issue of causation, in order for any causative link to the actions of a defendant such as those of the Adventure Park here to be defeated, the alleged extraordinary event must be something that occurred subsequent to the activity of that defendant that caused the fire. It also then needs to be something which is regarded as so unusual as to be able to be properly characterised as extraordinary in character.

[126] As to this, William Young J in *Tucker* also held effectively that:

> Liability for costs from fires should only be escaped in circumstances where it can be shown that the cause was beyond a person's control. The onus shifts to the person who was involved in causing the fire to show that they were not the immediate cause of that fire. This needs to be proved on the civil balance of probabilities standard, that is that the mischief under s 43 was not in fact

[39] *Tucker*, above n 6 at [61].

> caused by the actions leading to the incurring of costs and was ultimately beyond that person's control.

On this, concepts such as foreseeability, according to William Young J, play no part in deciding whether a person caused some potential effect.

[127] The upshot of all this is the assessment of causation under s 43, therefore, requires a real enquiry into the relationship between the action taken and its effect. If it could be said that the action was proximate and within the control of a defendant as the causer of that action, then that defendant would be liable for the effect. However, if the causer could show that an action was not the immediate cause of the effect, such as the fire, or was beyond their control, then they should escape liability.

[128] In the present case, in my view, it is uncontested in any real sense that the actions of the Adventure Park here caused the Chairlift Fire. As I see it there is simply no "extraordinary event" that followed the actions/inactions which were taken by the Adventure Park. The decision to run the chairlift, with flammable plastic chairs still attached, in the advancing Summit Road Fire and in all the circumstances I have outlined above, was clearly within the control of the Adventure Park and its personnel. That they chose not to remove the chairs and to continue running the chairlift backwards and forwards through the crowning forest fire, resulting in the outbreak of the Chairlift Fire, and its immediate growth through the substantial and highly flammable pine slash under and around the chairlift, in my view, constitutes the various actions and inactions that caused this fire outbreak. And it was this outbreak that damaged/destroyed the properties of the Remaining Plaintiffs.

[129] It is difficult to escape the conclusion that flammable plastic chairs igniting when passed through and close to a crowning forest fire in a relatively narrow chairlift corridor does not constitute an extraordinary event. Nor is the inevitable dripping of high temperature molten plastic from those chairs as the chairlift continued to move over exposed and highly flammable pine slash and adjacent coconut matting under and around the lift, causing the immediate outbreak and growth of numerous spot fires which developed into a major and fuel-charged inferno. In fact, as I see it, all this is the ordinary outcome that a reasonable person in these circumstances would expect. To adopt Lord Hoffman's words, it was a normal fact of life, an ordinary occurrence

in the general run of things, that the events I have described above would unfold in the way they did.

[130] In response, Mr Gallaway, for the Adventure Park, urged on me that in a case such as this where the original Summit Road Fire was lit by an arsonist and, therefore, the fire which came onto the Park was not deliberately lit by the Adventure Park itself, something close to negligence on its part is required for s 43 of the FRF Act to apply. For the reasons I have outlined above, I do not accept this argument other than to say that the causation issue I have discussed and my decision on causation, does have relevance. Nevertheless, if I may be wrong on this aspect, in any event, as will appear later in this judgment, I am satisfied that the Adventure Park in its actions here was negligent. A negligence threshold having been met in this case, I am satisfied, in any event, that the Adventure Park would clearly be liable to the plaintiffs in terms of s 43. Mr Gallaway also urged upon me that the concatenation of events which occurred with the Chairlift Fire should properly be seen as extraordinary. This was so, he said, given particularly that the Summit Road Fire was started by an unknown arsonist and it was this fire, he claimed, which simply came onto the Park and caused the Remaining Plaintiffs' loss. Again, I reject this argument. The matters I have outlined above clearly, in my view, illustrate a number of things. First, there was a clear failure on the part of the Adventure Park to comply with aspects of its own FSM Plan, as I have outlined. Secondly, over the period of time from the Monday evening at which time the Summit Road Fire was advancing towards the chairlift, ample opportunity was available for the Adventure Park to take steps to prevent the Chairlift Fire outbreak. But, they simply neglected to do so. It is acknowledged that the difficulties they faced at the time were not easy. But the events which occurred from early Wednesday afternoon on, although horrific, were the logical and ordinary outcome of the Adventure Park's unfortunate actions.

Was this an "outbreak" of fire or simply a "spread" of fire?

[131] Section 43 of the FRF Act applies where any property has been wholly or partially destroyed or damaged by an *outbreak* of fire. A consideration of the intended meaning of this word "outbreak" is, therefore appropriate here.

[132] As I see the position, outbreak of fire is not synonymous with an ignition of fire. Also there is a distinction between an outbreak and a spread of fire for the purposes of the FRF Act. On a number of occasions the Act uses the term "outbreak" often preceding the words "or spreadable fire" used in other sections of the Act to indicate difference.

[133] Neither the words "spread", nor "outbreak", are defined in the FRF Act.

[134] Turning to the natural and ordinary meaning of these terms, the *Oxford English Dictionary* define these terms in this way:[40]

(a) "Outbreak is a sudden or violent occurrence of war, disease etc."

(b) "Spread is to "open something out so as to increase its surface area, width"

or

"To extend or distribute over a large or increasing area".

[135] In addition, the words "spread" of fire in the past have achieved a technical meaning which generally involves the spread of fire by either a conduction or convection process or by radiation.

[136] Generally, the spread of fire in terms of these ordinary definitions refers to the increasing surface area of an existing fire, generally occurring during a single burning period from a single point, source or origin. A fire spread is generally regarded as a spread from or beyond its point of origin, being the ignition point.

[137] In my view, a fire which is ignited beyond the head of a spreading fire which is not caused by the action of the spreading itself, therefore, cannot be seen to have been caused by the spread of fire. Rather it is a new outbreak of fire with a new point of origin. As I see it, the Chairlift Fire here is just such an outbreak for the purposes of the FRF Act as I have noted above. This is confirmed by the expert evidence of Mr Joseph and the Marleys Hill fire investigation report.

---

[40] *Oxford University Press Compact English Dictionary* (2005) (3rd ed) at pp 718 and 1003.

[138] The decision in *New Zealand Fire Service Commission v Legg* supports this conclusion.[41] In that case this Court upheld a claim under s 43 of the FRF Act in circumstances where the actions of the defendants had caused the reignition of a fire. There, a waste burn-off on a rural lifestyle block lit earlier reignited, almost a month later, when the heap reignited because of deep remaining heat in the fire pile, and spread to neighbouring properties. Thus, the original heat source there reignited over a month after the original flames had dissipated, and the Court accepted this as falling within the meaning of the word "outbreak" under s 43. It found further that this was not considered to be an "extraordinary" event.

[139] On appeal, the Court of Appeal in that case confirmed that:[42]

(a) s 43 would apply in such circumstances of a reignition.

(b) the reignition of fire constituted an outbreak of fire for the purposes of s 43; and

(c) liability under s 43 extended beyond the timeline of events from when the fire had first ignited. The defendants will be responsible for causing the reignition of a fire even in circumstances where the original fire was apparently dormant, extinguished or in a different location.

[140] The Adventure Park endeavoured to counter all this with the suggestion that there was no fire outbreak here for which it was responsible. It made the claim the fire was not deliberately set by the Adventure Park and, at worst, this fire might be seen as merely being spread inadvertently by a range of circumstances which included certain actions taken by Adventure Park staff in a genuine attempt to limit the hazard. Mr Gallaway submitted that good policy reasons exist here why a property occupier like the Adventure Park, faced with a growing rural fire that it did not start and which did not ignite initially on its property, should not be held liable under s 43 for, at the very worst, inadvertently passing the fire onto its neighbour.

---

41 *New Zealand Fire Service Commission v Legg* [2016] NZHC 1492.
42 *AMI Insurance Ltd v Legg* [2017] NZCA 321 at [42].

[141] To a significant extent I reject these contentions. In doing so I turn to consider again what is the event under the FRF Act that triggers liability here.

[142] I have found that the Adventure Park and its staff, as a result of both failure to act and/or deliberate inaction on its part, first, in leaving the chairs on the chairlift haul rope and, secondly, running the chairlift backwards and forwards through the crowning forest fire over exposed and highly flammable pine slash and adjacent coconut matting fuel under the lift (in breach of its obligation to remove it) causing ignition of the fuel below from the dripping molten chair plastic and in all the other circumstances here, caused the Chairlift Fire. It was this newly created outbreak of fire which caused the damage to the properties of the Worsley Road owners, the other Remaining Plaintiffs and (via the Merged Fire) the Flanagans. This damage otherwise would not have occurred from the Summit Road Fire, a fire which on all the evidence was being largely contained.

[143] On this question as to the specific event on the part of the Adventure Park that triggered liability under the FRF Act, whether this is viewed as a decision on the part of the Adventure Park not to remove the chairs, or a deferral of that decision, or subsequently a choice being made only to remove some of the chairs, and throughout continuing the running of the chairlift line through the crowning forest fire, in my view, it was decisions taken by the Adventure Park that caused the outbreak of the Chairlift Fire and the damage resulting from this outbreak. As to removal of the pine slash under the lift line, the Adventure Park had a clear duty to do so under its FSM Plan. On these aspects, either by way of action or inaction, the Adventure Park made a decision to leave that highly flammable pine slash under the lift line. No actions were taken for its removal nor for removal of the coconut matting fuel, whilst at the same time the Adventure Park and its staff decided on the continuing action to keep the chairlift running. It did so, even after burning chairs were sighted, chairs which inevitably dropped the hot molten plastic onto the exposed fuel below.

[144] As I see it, this was the same type of situation which might occur if the Adventure Park had kept and ignited a flammable rubbish heap on its property which caused a fire outbreak that spread and damaged neighbouring properties. In many

ways this is not dissimilar to the situation which occurred in the *New Zealand Fire Service Commission v Legg* case noted above.[43]

[145] By way of an aside, I note here that I have referred to actions and inactions on the part of the Adventure Park and its staff and identified a duty at times that reflected this. In this case, as I see it, any one action or inaction on the part of the Adventure Park and its staff was potentially sufficient to create the fire outbreak danger which occurred. And, together I have found that it was these actions and inactions on the part of the Adventure Park that were the cause of the relevant fire outbreak.

[146] Usefully at this point I repeat my overall findings that the Adventure Park caused the outbreak of the Chairlift Fire here by:

(a) not removing its flammable plastic chairs from the chairlift and running the lift through the crowning forest fire backwards and forwards, inevitably leading to the ignition of those chairs; and

(b) ignoring the absolute likelihood that, once ignited, the molten plastic of the chairs would drip onto exposed fuel below the lift line causing a fire outbreak and contributing further to this by causing the chairlift to run backwards and forward through the forest fire; and

(c) permitting the highly flammable fuel (pine slash) to remain present under and around the lift line (along with the adjacent coconut matting) and to create this fire outbreak risk in breach of its clear obligation under the FSM Plan to remove it.

Conclusion on s 43 FRF Act

[147] I conclude, therefore, that:

(a) The Chairlift Fire was an outbreak of fire in terms of s 43 of the FRF Act.

---

[43] *New Zealand Fire Service Commission v Legg*, above n 41.

(b) The Chairlift Fire outbreak was caused by the Adventure Park on the basis I have outlined above.

(c) No subsequent extraordinary event occurred here.

[148] The Adventure Park, therefore, is responsible for the loss suffered by the Remaining Plaintiffs and the Flanagans under s 43, and is liable to reimburse them for that loss and damage. (The Adventure Park's liability to the Flanagans, however, is to represent only 50 per cent of the amount due to them, given that the balance of the Flanagan's claim has been met by Orion).

Negligence

[149] The second claim by the Remaining Plaintiffs and the Flanagans against the Adventure Park is one brought in negligence. To succeed in a claim of negligence, the claimant parties must establish a duty of care was owed to them, that the duty of care was breached, that the breach caused the loss, and that the loss was not too remote.[44]

[150] In advancing this issue of negligence, the Remaining Plaintiffs and the Flanagans, contend that the Adventure Park operated its chairlift in circumstances where it was reasonably foreseeable that to do so would result in the Chairlift Fire starting and immediately developing as an outbreak of fire which caused the damage in the neighbourhood which it did. An essential allegation, amongst others, is that all the chairs should have been removed from the haul rope as some of the fires developed, there was ample time to do so, but this did not happen.

[151] For the Adventure Park, Mr Gallaway complains that this final pleading included in the sixth amended statement of claim, follows a range of previous versions which had different primary allegations advanced against the Adventure Park. According to Mr Gallaway, in the first four versions of the plaintiffs' pleadings the primary allegation against the Adventure Park was that the chairlift should have been stopped, and its case centred on an allegation that the staff of the Adventure Park ignored requests from fire authorities to shut down the chairlift. Properly,

[44] *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [34].

Mr Gallaway noted before me that this was simply untrue, although it does seem the allegation regarding requests from fire authorities to shut down the chairlift being ignored was repeated in the sixth amended statement of claim. This was an error it seems acknowledged as such by Mr Stevens. No evidence to support this repeated claim was offered at any time.

[152] It is, however, the amended version of the statement of claim filed in 2019 where the allegation is made that the Adventure Park, in all the circumstances affecting the Park at the time, should have kept the lift running but removed the carriers from the lift line, which is the principal assertion before the Court now.

[153] In response to this fundamental allegation, the Adventure Park's essential response is a simple one. This is its contention that it was not under a duty to remove the chairs and bike carriers from the haul rope because it was not reasonably foreseeable that those carriers would catch fire and the fire would spread as a result.

Duty of care and the scope of that duty?

[154] An essential pre-condition to the action in negligence here, as I have noted, requires the Remaining Plaintiffs and the Flanagans to establish that the Adventure Park owed them a duty of care. Essentially the nature of that duty of care embodies an imposed requirement that one party not behave in a certain way in relation to a specific person or group of persons.

[155] In the present case, the standard of care required of the Adventure Park is that of a reasonable and prudent operator of a bike, adventure park and chairlift business, running that business in the circumstances it found itself in on 13 – 15 February 2017.

[156] As to this aspect, the Court has considerable scope at the breach stage to set the standard of care required of the Adventure Park at a level which is fair and realistic. This needs to be informed by a realistic assessment of the Adventure Park's true role in causing what the Remaining Plaintiffs and the Flanagans contend is the Chairlift Fire outbreak.

[157] The general principles to be considered with respect to the imposition of a duty of care were examined by the Supreme Court in *Couch v Attorney-General*.[45] There, Elias CJ and Anderson J said:

> … Whether the defendant is under a duty of care to the plaintiff is a matter of judgment arrived at principally by analogy with existing cases and with no better organising tools than the broad levels of "neighbourhood", foresight, proximity, remoteness and such other considerations of policy as may be prompted by the circumstances. Proximity, "neighbourhood" and remoteness are general concepts which, as Professor Jane Stapleton has pointed out in relation to remoteness, may in fact be misleading if they are taken to suggest purely temporal or spatial concerns. Nor does the connection between plaintiff and defendant which gives rise to a duty of care in law depend on an existing relationship. Cardozo CJ described negligence as itself "a term of relation":
>
> > The risk reasonably to be perceived defines the duty to be obeyed, and risks imports relation; it is risk to another or to others within the range of apprehension.

[158] In Couch, the majority (Blanchard, Tipping and McGrath JJ) on the facts of that case put the test as follows:[46]

> … To establish a duty of care, Ms Couch must demonstrate that, either as an individual or as a member of an identifiable and sufficiently delineated class, she was or should have been known by the defendants to be the subject of a distinct and special risk of suffering harm of the kind she sustained at the hands of Bell. The necessary risk must be distinct in the sense of being clearly apparent, and special in the sense that the plaintiff's individual circumstances or her membership of the necessary class rendered her particularly vulnerable to suffering harm of the relevant kind from Bell.

[159] Applying these considerations, in the present case I am satisfied that as a general proposition it must be established that the Adventure Park ought reasonably to have perceived that in the circumstances as they existed there was:

(a) a risk of the chairlift chairs and/or bike carriers catching fire; and

(b) a risk of them creating a catastrophic outbreak of fire as a result.

---

45 *Couch v Attorney*-General, above n 48 pp 748 – 749 and citing Cardozo CJ delivering the judgment of the majority of the Court of Appeal of New York in *Palsgraf v Long Island Railroad Company* at p 344.

46 Above n 48, at [112].

[160] In determining whether a duty of care exists in a novel case, the Supreme Court in *North Shore City Council v Attorney General (The Grange)*[47] said the Court is to approach the determination of duty in two stages: first, foreseeability and proximity; and secondly, policy matters.

[161] So far as foreseeability is concerned, the question is whether the loss claimed by these plaintiffs was a reasonably foreseeable consequence of the Adventure Park's act or omission. This is essentially a screening mechanism which excludes claims which must obviously fail because no reasonable person in the shoes of the Adventure Park would have foreseen the loss which has occurred.

[162] Assuming that foreseeability is established, the Court is then to consider whether the foreseeable loss occurred within a relationship that was sufficiently proximate. That concept of proximity is focused on the closeness of the connection between the parties. It enables the balancing of the moral claims of the parties, the parties' claim for compensation for avoidable loss, and a defendant's claim to be protected from an undue burden of legal responsibility.

[163] It seems that under this first head, the Courts are really concerned with whether there is "a relationship of such a nature that a defendant may be said to be under an obligation to be mindful of a plaintiff's legitimate interests in conducting his or her affairs" or "a means of identifying whether the defendant was someone most appropriately placed to take care in the avoidance of damage to the plaintiff".

[164] Essentially, the question is to be asked whether, in all the circumstances of the case, it is "fair, just and reasonable" that a duty of care be recognised.[48]

[165] In the present case, I am satisfied there was sufficient proximity in the sense required between the Adventure Park and its proximate neighbours, which group included the Remaining Plaintiffs and the Flanagans, which gave rise to a duty of care. I find therefore, the first element of the stage one consideration is satisfied. These Plaintiffs have passed the initial "screening test".

---

47 *North Shore City Council v Attorney General (The Grange)* [2012] NZSC 49 and [2012] 3 NZLR 341.

48 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [52].

[166] I now turn to the second element which is the question of policy matters. This involves an assessment of the possible effects of a decision to impose such a duty on society and on the law generally. In this case the issues, as I see it, are not just the loss of property to these vulnerable Plaintiffs. They also involve questions directly relating to the inherent danger of forest fires for both responders, the public and for people living in the general area.

[167] Fire is a potentially significant danger. A duty of care may be less likely too in cases where the plaintiffs concerned may not be vulnerable. The Court is also to look at whether self-protective measures could reasonably have been expected or bargained for. But, given an outbreak of a crowning forest fire, as occurred here, there was effectively nothing the Remaining Plaintiffs and the Flanagans could have done to protect themselves from the outbreak of the Chairlift Fire they allege was caused by the Adventure Park. I conclude it is fair, just and reasonable in this case to impose an appropriate duty on the Adventure Park.

[168] I will discuss further this aspect shortly, when I come to address the nuisance ground of action advanced against the Adventure Park. Suffice to say that, for the reasons I have outlined above, I am satisfied that the Remaining Plaintiffs and the Flanagans have done enough to establish that the Adventure Park owed them a relevant duty of care here.

[169] But next, a determination needs to be made as to whether the Adventure Park breached the duty of care that I have found is established by falling below the scope or standard required by that duty.

Breach of the duty of care?

[170] To recap, the scope of the duty of care and the standard of care required of the Adventure Park here, is that of a reasonable and prudent chairlift and Adventure Park operator running its business and operation in the circumstances in which it found itself in February 2017. Turning now to consider a possible breach of this duty, it is necessary to consider the operation of the chairlift which included what were flammable but removable plastic chairs.

Flammability of the chairs?

[171] The chairs on the Adventure Park chairlift were coated in flexible polyurethane foam which had a pilot ignition temperature of between 300 and 360 degrees Celsius and an auto ignition temperature of 330 to 380 degrees Celsius. There can be little doubt, as I see it, that it was clearly foreseeable that the chairs could catch fire if they were run through and closely adjacent to a well-developed crowning forest fire, as occurred here.

[172] When ignited, the polyurethane foam on the chairs, from all the evidence before me, decomposes into a liquid form which tended to burn intensely as a pool fire.

[173] The evidence of Mr Cox and others was that, for the polyurethane foam to have ignited in this case, it would have been necessary for the chairs to pass through a fire of sufficient intensity to raise the temperature of that material to its pilot ignition temperature (if there was the presence of an ignition source such as flames or embers) or to its auto ignition temperature in the absence of direct flame. There seems little question here from all the expert evidence provided that, given the close proximity of the chairs to the forest (amounting in some cases to a little over a metre on each side given a 12 metre chairlift corridor), and with the trees reaching a far greater height than the chairs, pilot ignition circumstances would have arisen. It seems, too, from the evidence relating to the steel haul rope relating to its melting point, that any fire which was likely to damage the haul rope in a significant way, would first damage the plastic chairs attached to it.[49]

[174] Evidence before me confirmed also that once the polyurethane foam on the chairs began burning, this would have resulted in droplets of flaming liquid polyol falling onto the ground below and igniting the pine slash there.[50]

---

[49] Mr Johnstone, General Operations Manager for the Adventure Park, in his evidence agreed that if there was a risk of the steel haul rope breaking from heat, so too was there a risk of the polyurethane foam on the chairs catching fire: Notes of Evidence, p 1079, line 32.

[50] In the evidence of Mr Cox, at para 138 of his brief, this is confirmed. It appears also that before me it is not questioned in any real sense by any of the other expert evidence.

Requirements for a competent chairlift operator?

[175] Expert evidence was called in this trial as to the requirements for a competent chairlift operator from Mr Hamish McCrostie, a chairlift expert called by the plaintiffs and Mr Maunch, and Mr Hayman, experts called for the Adventure Park. The Adventure Park experts referred specifically to instructions in the Doppelmayr manual to keep the haul rope running in the event of fire to avoid catastrophic damage to the rope. In making reference to this requirement, comments were made that this constituted a "golden rule" for chairlift operations.

[176] The Adventure Park's own Version 4 FMS Plan in place at the time of the fire also referred to a continuous running protocol for the chairlift in the event of a forest fire "to prevent heat concentration on the haul rope".

[177] Mr McCrostie also accepted in his evidence that the haul rope should be kept running in a fire for its protection if it is safe to do so. He queried, however, whether this is a "golden rule". Like the other experts, he noted too that the Adventure Park's lift was designed as one to run "bare cable" if required.[51]

[178] The FSM Plan Version 4 did not appear to consider specifically what was a potential risk of leaving chairs on the haul rope which could ignite while the chairlift was running through a dangerous forest fire, as occurred here. The Doppelmayr manual, is a generic manual for a four-seater detachable chairlift. This manual did refer at one point to "burning carriers", but this was generally relating only to removal of passengers in that event and avoiding such fires in a chairlift station. The manual also envisaged removal of chairs and bike carriers from the haul rope on a reasonably regular basis for maintenance, safety checking and other purposes.

[179] Evidence was provided before me that, well before 2017, forest fires in Australia, Europe and the United States of America had destroyed or damaged chairlift operations and these also, at times, involved the burning of chairlift chairs.[52]

---

51 Mr Hayman, for the Adventure Park also confirmed this in his written evidence at para 51.

52 These fires included chairs on chairlifts being burnt at Marble Mountain, Sunrise Peak Arizona, Gatlinburg, Tennessee and Pagarito, New Mexico.

[180] As to these aspects, several matters became clear as expert evidence from both sides was provided at trial:

(a) Fire in the Adventure Park was identified as its greatest risk and this was confirmed in the FSM Plan.

(b) The Adventure Park's chairlift, like other Doppelmayr lifts, was designed to run "bare cable", even in a situation where the haul rope was to be kept running in a fire (if safe to do so) to avoid localised heat on the cable.

(c) In any event, the Adventure Park lift was designed for chairs to be regularly removed periodically for maintenance purposes. That removal of chairs, it seems, was not an especially difficult process and the procedures for it were contained in the Doppelmayr manual.

(d) Here, it seems 39 chairlift and bike carriers were removed from the haul rope in something over four hours on the Wednesday morning, 15 February 2017. The Adventure Park says however, this was done because of a bunching problem, and not because of potential chair ignition issues. It says it was not reasonably foreseeable that in this case the carriers would catch fire as this was something that "may never have happened before", although as I have noted above, fires around chairlifts involving the burning of chairs had occurred prior to February 2017.

(e) Mr McCrostie confirmed in his evidence that it would have been reasonable and achievable to remove the chairs from the chairlift in the face of the advancing fire on the Tuesday and to have kept the chairlift running to protect the haul rope. His evidence was to the effect that it was a major failing of the Adventure Park not to do so. Mr Maunch and Mr Hayman in their evidence, however, did not go this far.

(f) There appeared to be no major pre-planning by the Adventure Park when developing its FSM Plan for the possibility of a forest fire and all aspects that might arise. Before me, however, all parties accepted this was the Park's greatest danger and the worst-case scenario here. Given the conditions the Adventure Park was operating in at the time, it seems there was a lack of planning and foresight on its behalf with its major focus preoccupied with possible danger to the haul rope.

(g) Given that staff had been able to remove 39 chairlift chairs and carriers over a period of about four hours on the Wednesday morning, and at that time, as I understand it, only about 20 or so chairs and carriers may have remained on the haul rope outside the top and bottom stations, the additional at risk chairs could have been removed in a reasonably short period of time had the removal work commenced earlier.

(h) All this, was in a situation where the chairlift line, in direct breach of the Adventure Park's FSM Plan, was littered with highly flammable pine slash and, as Mr McVicar confirmed in his evidence, dangerous and flammable coconut matting put down in and around this area soon after the Park opened. All this constituted a significant fire hazard which helped create and spread the major fire outbreak.

[181] In summary I find as I have noted above:

(a) The standard of care required of the Adventure Park here was that of a reasonable chairlift operator in all the circumstances. It is an objective one.

(b) A reasonable chairlift operator would have been aware that a major forest fire, such as the one which was developing and could endanger the haul rope, in all the circumstances at the Park, was likely also to ignite the plastic components of the chairs. This would cause a significant fire risk as the overheated plastic material dropping from the chairs onto significant uncleared and flammable pine slash under the

lift line and adjacent coconut matting would have resulted in dangerous outbreaks of fire.

(c) A reasonable operator in the circumstances of the Adventure Park, following the scrub and forest fires which had been in and around the Park in significant fire conditions, would have commenced removing the flammable chairs off the haul rope before 9:30 a.m. on Wednesday 15 February 2017.

(d) In failing to do so and continuing to run the chairlift backwards and forwards with flaming chairs in all the circumstances prevailing at the time, the Adventure Park breached its duty of care owed to the Remaining Plaintiffs and the Flanagans.

(e) The Adventure Park also breached its duty of care by failing to remove the significant and highly flammable pine slash under and around the chairlift line as required by its FSM Plan and to remove also the highly flammable coconut matting which was adjacent.

Causation of loss by the breach and remoteness?

[182] An adequate causal nexus between the breaches of their duty of care by the Adventure Park and the losses claimed by the Remaining Plaintiffs and the Flanagans, must also be established here.

[183] As I understand it, before trial the Adventure Park abandoned an affirmative defence it had raised regarding causation issues. Also before me, it did not call any expert evidence from a fire investigator relating to this.

[184] I find, therefore, there is a sufficient causal nexus between the acts and omissions which are alleged against the Adventure Park and the destruction of the homes and property of the Remaining Plaintiffs and the Flanagans.

[185] I have found that the flammable chairs left on the haul rope by the Adventure Park and its staff and then run backwards and forwards in a narrow corridor through

the crowning forest fire resulting in them catching alight and dropping heated molten plastic onto the uncleared pine slash under the chairlift, caused the outbreak of the chairlift fire.

[186] The failure too on the part of the Adventure Park to comply with its own FSM Plan with respect to the removal of pine slash from under the lift line (along with its decision to install flammable coconut matting in the adjacent area) provided the heavy fuel load the molten plastic needed to create the chairlift fire outbreak.

[187] The outbreak of that Chairlift Fire fed by the uncleared pine slash and its adjacent coconut matting quickly spread towards the Worsleys Road spur and the properties of residents there. No expert evidence was provided at trial to suggest that some earlier or intervening event occurred. Indeed, I am satisfied the effectively unchallenged evidence of fire investigators Mr Joseph and Mr Cox to the effect that the Summit Road Fire would not have reached the properties of the Remaining Plaintiffs and the Flanagans, makes this clear.

[188] The outbreak of the Chairlift Fire created and caused by the Adventure Park caused the damage to those Plaintiffs' properties.

Conclusion on negligence

[189] In conclusion, I find that the Remaining Plaintiffs and the Flanagans have proven on the balance of probabilities that the Adventure Park breached its duty of care to them on the basis I have outlined above and that this has caused damage and loss to their respective properties. Liability in negligence on the part of the Adventure Park is established here.

Nuisance

[190] Given my findings noted above that the Adventure Park is liable to the Remaining Plaintiffs both under s 43 of the FRF Act and in negligence, strictly speaking it is not necessary here for me to address the third cause of action advanced against the Adventure Park claiming liability in nuisance. But, for completeness, I will address this nuisance claim, albeit briefly. As to this, the Remaining Plaintiffs

and the Flanagans contend that the outbreak of the Chairlift Fire caused by the actions of the Adventure Park I have outlined above, created and continued a nuisance for which it is liable. This claim in private nuisance as the authors of *Todd on Torts* note:[53]

> …is an unreasonable interference with a person's right to the use or enjoyment of an interest in land.

[191] Private nuisance provides a remedy in respect of unreasonable indirect or consequential interference by a defendant with a plaintiff's use or enjoyment of an interest connected with land.[54] The interference in this case is said to be the Chairlift Fire itself, a fire created by the Adventure Park.

[192] It is accepted that those with a right to exclusive possession of land may sue in nuisance but any lesser right will not suffice.[55] In this case I am satisfied the Remaining Plaintiffs and the Flanagans are all either owners of, or people with the right to exclusive possession of, the individual land which they occupy. This requirement is satisfied here.

[193] In this general area, it is accepted there is some overlap between negligence and nuisance in cases related to hazards. The authors of *Todd on Torts* state:[56]

> …Where the basis of the plaintiff's complaint is that the defendant has "adopted" or "continued" or failed to abate a dangerous condition which the defendant did not create or authorise, or sues in public nuisance to recover damages for physical harm resulting from an isolated accidental occurrence on the highway or a navigable waterway, "fault" in the sense of failure to take reasonable precautions against a foreseeable risk of harm is an essential element of liability and the actions of nuisance and negligence overlap.

[194] Mr Gallaway referred me specifically to this statement from *Todd on Torts*. Omitted from the quote, however, was the preceding sentence in *Todd on Torts* which stated:

> However, the label "nuisance" has also been applied to situations which lie outside the traditional boundaries of the tort.

---

53 *Todd on Torts*, above n 7 at 10.2.01.
54 *Hunter v Canary Wharf Ltd* [1967] AC655 (HL).
55 Above n 54.
56 *Todd on Torts*, above n 7 at 10.2.07 at p 570.

[195] Those traditional boundaries were addressed earlier in that para 10.2.07 where the authors of *Todd on Torts* state:

> In the classic case of nuisance where the defendant creates a continuing interference with the use or enjoyment of neighbouring land, liability is strict and it is no defence that the defendant took all possible care and precautions to avoid a nuisance. The nuisance standard of unreasonable interference is not the same as the negligence standard of unreasonable conduct in the face of a foreseeable risk of harm. While the reasonableness of the defendant's conduct is taken into account, particularly through the locality factor, in deciding whether a non-physical interference with amenity is actionable, it is not decisive of liability. In nuisance the Court is not concerned with determining what is an adequate level of precaution. Instead, its role is to fix to the threshold level of unreasonable interference beyond which an actionable nuisance exists, and require the defendant to reduce the level of interference generated by the activity to a point beyond that threshold. Ultimately, if the activity cannot be continued at that location without causing an unreasonable level of interference with the use and enjoyment of neighbouring property, the defendant must cease the activity.

[196] In the present case, in my view, a question may arise as to whether the Adventure Park, by allowing the Chairlift Fire to become established and develop, has created a continuing interference with the use or enjoyment of land occupied by the neighbours. But I am satisfied here, in any event, as my conclusion on the negligence cause of action makes clear, that the Adventure Park has failed to either anticipate or to abate the dangerous conditions created by the Chairlift Fire. In that sense it has been at fault in that it has failed to take reasonable precautions against what was a foreseeable risk of harm.

[197] More specifically, there are three elements to the tort of nuisance which I turn shortly to address. These three elements are:

(a) first, the defendant must have created or continued the nuisance;

(b) secondly, the defendant's land must have been used in a way that was unreasonable; and

(c) thirdly, the damage suffered must have been foreseeable.

I will address each of these elements in turn.

Adventure Park created or participated in the creation of a nuisance?

[198] This element is made out if:

(a) the Adventure Park here created the nuisance; or

(b) the Adventure Park inherited the nuisance and did not take reasonable care in reducing the risk of harm; or

(c) the Adventure Park participated in the creation of a nuisance by continuing the nuisance; or

(d) the Adventure Park has directly interfered with the nuisance; or

(e) if the Adventure Park knows or should have known of the possible cause of a nuisance by a hazard on their property.

[199] It is also the case that if an occupier personally engages in an activity or creates a state of affairs that causes a nuisance then that occupier is strictly liable in a sense that it is no excuse to show that all reasonable precautions and due skill and care have been taken to prevent the activity from causing an unreasonable level of interference to a neighbour.

[200] For liability in nuisance to be established, a party need not be found to have acted negligently. This was the case in the High Court decision in *Hill v Waimea County Council* where a fire spread from a Council rubbish tip to an adjoining property.[57] The Council was found not to be liable in negligence as its use and management of the rubbish tip was reasonable but it was, however, held liable in nuisance. It is clear too that an occupier like the Adventure Park here who continues in nuisance will be strictly liable. Continuing the nuisance may occur if an occupier knew or ought to have known of its existence on the land and then failed to take reasonably prompt and effective steps to remove or abate it.[58]

---

57 *Hill v Waimea County Council* (HC) Nelson A8/84, 12 March 1987.

58 *J L Tindall v Far North District Council* (HC) Auckland CIV-2003-488-135, 20 October 2006 at [5] – [7].

[201] As I have noted above, I am satisfied the Adventure Park here engaged in activities and created the state of affairs that caused the outbreak on its property of the Chairlift Fire. That fire that caused the outbreak of the Chairlift Fire which was a nuisance. That fire then escaped from the Adventure Park's property, as could be expected in all the circumstances, and travelled to and destroyed or damaged the property of the Remaining Plaintiffs.

Adventure Park's land was used in a way that was unreasonable?

[202] To constitute an actionable nuisance, the interference here with the Remaining Plaintiffs' use and enjoyment of their land must be substantial and unreasonable. The focus of enquiry is directed to the severity of the *effect* of the Adventure Park's activity here on the Remaining Plaintiffs' use and enjoyment of their land. The reasonableness or otherwise of the Adventure Park's conduct is merely one factor that may be relevant in determining whether this interference with comfort and convenience exceeds the level that a normal occupier in that particular locality could be expected to put up with.

[203] As the key point of difference in nuisance compared to a negligence claim, the focus of nuisance is the unreasonable effect of a defendant's conduct on the plaintiff's land. The focus of negligence, however, is the unreasonable *quality* of a defendant's conduct in the face of a foreseeable risk of harm to a plaintiff.

[204] In *Bank of New Zealand v Greenwood*, Hardie Boys J set out the approach to be taken with respect to determining whether land was used in a way that was unreasonable to cause a nuisance.[59] He noted in his judgment that while the conflicting interests of the parties are to be balanced by reference to the standard of "reasonableness" the basic test to be applied was: "Simply whether a reasonable person, living or working a particular area, would regard the interference as unacceptable."

[205] A critical question, therefore, is whether the interference complained of is unreasonable in the sense that it exceeds the level that a reasonable occupier, tolerant of a neighbour's reasonable activities, would regard as acceptable. This is a question

---

[59] *Bank of New Zealand v Greenwood*, 1984 1 NZLR 525 (HC) at 531.

of fact to be determined by reference to a number of factors including locality, the damage and severity of the nuisance, whether the damage was easily avoidable and whether the avoidance of the damage could be reasonably expected of the party.

[206] If physical damage is caused to a neighbouring property, there must have been an unreasonable use of land by the defendant.[60] In the present case the Remaining Plaintiffs were effectively direct neighbours of the Adventure Park. The nuisance caused by the Chairlift Fire destroyed some of their homes and in other cases it damaged their real and personal property. Factors here included the location of the Adventure Park on the Port Hills in mid-February with an extreme and acknowledged fire danger. The raging fires had been approaching and reached the Adventure Park property over the preceding days. The damage caused by the nuisance to the Remaining Plaintiffs was substantial. The situation of the Adventure Park at the time included the establishment of its chairlift in a reasonably narrow corridor of a large and maturing forest with substantial, highly flammable pine slash under and around the chairlift line in contravention of the Adventure Park's own requirements.

[207] The nuisance here, in my view, was avoidable by the Adventure Park simply removing its flammable chairs from the haul rope which would have prevented the Chairlift Fire. This was, in my view, a reasonable and simple precaution which the Adventure Park should have taken in the face of an advancing forest fire, this also being something that the Remaining Plaintiffs here were entitled to expect the Adventure Park to do.

[208] The use by the Adventure Park of its chairlift in this manner in all the circumstances prevailing on its property at the time was unreasonable.

Damage suffered was foreseeable?

[209] In order to recover damages in an action for nuisance, plaintiffs must establish that a reasonable person in the position of the Adventure Park here could have foreseen

[60] *St Helen's Smelting Co v Tipping* (1865) 11 HLC 642.

the possibility of harm of the kind complained of at the time of performing the acts which caused the harm.[61]

[210] Here, the damage caused by the Adventure Park's nuisance must have been foreseeable.

[211] In my view, it was reasonably foreseeable that the Adventure Park's continued operation of the chairlift with its flammable chairs attached through an area engulfed by a crowning forest fire in all the circumstances here would cause the outbreak of the Chairlift Fire. And it was also reasonably foreseeable, in my view, that once the outbreak of the Chairlift Fire was created, the plaintiffs neighbouring properties would suffer damage.

Conclusion on nuisance

[212] For all these reasons, insofar as it may be necessary to make a decision on this aspect here, I am satisfied that the Adventure Park is also liable to the Remaining Plaintiffs here in nuisance.

Damages

[213] As to the overall losses caused by both the Chairlift Fire and the Merged Fire, in most cases the Remaining Plaintiffs and the Flanagans held some insurance cover. In certain cases, however, this was insufficient, the properties concerned and their contents being underinsured or not insured at all. The losses claimed here against the Adventure Park, therefore, include subrogated claims for losses incurred by the insurers of various Remaining Plaintiffs and the Flanagans, as well as other uninsured losses incurred by those plaintiffs.

[214] The total amounts claimed by all the Remaining Plaintiffs and the Flanagans, Mr Stevens says, is something over $11 million plus interest and costs. Interest is calculated on this sum at five per cent per annum from the time of the loss on 15 February 2017. Up to 13 October 2020, Mr Stevens calculates the interest amount for this period at a figure a little over $2 million.

---

61 *Cambridge Water Co Ltd v Eastern Counties Leather PLC* (1994) 2 AC264 (HL) at 301.

[215] The amounts claimed as at 13 October 2020 by all the Remaining Plaintiffs and the Flanagans (before inclusion of any costs) appears to be, $13,025,764.91.

[216] Mr Stevens says the substantive claim against the Adventure Park (which I round up) is made up of:

(a) $9,823,373.00 with respect to losses caused by the Chairlift Fire; and

(b) $1,182,764.00 being 50 per cent of the losses suffered by the Flanagans as a result of the Merged Fire.[62]

[217] The plaintiffs' expert loss adjuster, Grant Bird, has set out the breakdown of insured losses for the Chairlift Fire at $5,219,112.00 and the uninsured losses relating to this fire at around $4,624,719.00.

[218] So far as the Merged Fire affecting the Flanagans' property is concerned, the insured losses claimed here are $1,182,264.00 and the uninsured losses $500.

Broadly "Non-contested" sums

[219] The Adventure Park has significant issues with the quantum of claims in particular of three of the Remaining Plaintiffs (Mrs Grace, the Pflaums and the Kwons) and also the Flanagans. At the outset however, as I understood the position, it generally did not appear to contest quantum for the majority of the following principally repair cost claims:

Claimants	Claim Amount
David Bailey and Sharon Bailey (the 25th plaintiffs)	$7,508.32
Alan Beuzenberg and Debbie Beuzenberg (the 33rd plaintiffs)	$2,813.76
Dara Bigwood (the 22nd plaintiff)	$4,923.88
Percy Bull (the 55th plaintiff)	$2,362.11
Tracey Cook and Claude Cook (the 49th plaintiffs)	$21,675.12
Cory Beynon (the 7th plaintiff)	$1,415.24

[62] Given that, as I understand it, the other 50 per cent has been met/agreed to be met by Orion as part of its overall settlement.

Rachel Cullens (the 79th plaintiff)	$1,760.00
Dorrance Family Trust (the 9th Plaintiff)	$926,064.76
Fabel Music Limited (the 10th plaintiff)	$5,319.43
Graeme McVicar and Joy McVicar (the 11th plaintiffs)	$24,955.55
Joanne Kinley and Wayne Gibbon (the 50th plaintiffs)	$2,364.01
Ian Houghton (the 15th plaintiff)	$20,521.39
Christopher Johnstone and Karen Johnstone (the 36th plaintiffs)	$2,389.57
The Trustees of the Tirohanga Family Trust (the 36th(a) plaintiffs)	$4,603.28
Suzanne Millar and Chris Millar (the 76th plaintiffs)	$2,764.77
Grant Poultney and Susan Poultney (the 37th plaintiffs)	$34,684.95
Glen Menzies and Tracey Menzies (the 38th plaintiffs)	$12,761.86
Jerry O'Neill and Jill O'Neill (the 39th plaintiffs)	$5,548.98
Paul Dorrance (the 43rd plaintiff)	$9,844.00
Peter Morgan and Mary Brennan (the 44th plaintiffs)	$8,430.98
Nick Thurley and Catherine Barendrecht (the 51st plaintiffs)	$12,748.31
Miranda Angelique and Craig Newbury as Trustees of the Newbury Family Trust (the 71st plaintiffs)	$88,503.38
Miranda Newbury and Craig Newbury (the 71st(a) plaintiffs)	$25,632.36
Norman Matthews (the 52nd plaintiff)	$1,753.28
Terrence Powers and Karen Powers (the 32nd plaintiffs)	$20,594.27
Peer Pritchard and Sonya Anne Brooks as Trustees of the Pritchard Brooks Family Trust (the 58th plaintiffs)	$6,477.69
Ross Bonnington (the 62nd plaintiff)	$11,562.25
Charles Moore and Shona Moore (the 63rd plaintiffs)	$2,294.03
Mark Sinclair and Karen Sinclair (the 80th plaintiffs)	$1,000
Steven Williams (the 65th plaintiff)	$57,301.85
Alan Beuzenberg and Debbie Beuzenberg as Trustees of the Beuzenberg Family Trust (the 69th plaintiffs)	$11,682.95
Monique Mentink and Landsborough Trustee Services (No 10 Limited) as Trustees of the Monique Mentink Family Trust (the 70th plaintiffs) and Ian Houghton as occupier (the 70th plaintiff)	$30,927.77

Timothy Fournier and Kate Bracefield (the 72nd plaintiffs)	$65,507.88
Richard Wilhelm and Susan Wilhelm (the 28th plaintiffs)	$62,082.07
Gregory Graham (the 13th plaintiff)	$3,586.60
Mark Balogh and HLS Trustees Limited as trustees of The Balogh Family Trust (the 6th plaintiff)	$3,539.36
James Frost (the 17th plaintiff)	$17,430.77
Philip Johnston (the 57th plaintiff)	$1,300.98

[220] As the trial proceeded however, this position seemed to change, at least so far as the larger of those repair cost claims were concerned. As to the rest of the repair cost claims for amounts under about $90,000, I understood the Adventure Park conceded that if the claims it faced succeeded as to liability (as I have found they have) then the quantum aspect of those under $90,000 repair cost amounts were not contested. I will address this aspect further below.

Contested sums

[221] In addition to those claims outlined in the table above, those three Remaining Plaintiffs I mention at [219] and the Flanagans have made substantial claims for their homes and other assets totally destroyed by the Chairlift Fire and, in the case of the Flanagans, the Merged Fire. These are:

Address	Plaintiff	Amount Claimed Including GST	Fire
343 Worsleys Road	Doug Pflaum and Vikki Pflaum	$3,952,583.81	Chairlift Fire
339 Worsleys Road	Jung Kwon Jang and Bae Keun Kwon	$2,400,782.24	Chairlift Fire
349 Worsleys Road	Cecile Grace	$1,963,828.21	Chairlift Fire
165 Early Valley Road	Warren Flanagan and Vilma Flanagan	$2,365,529.13 (less 50% settled with Orion = $1,182,764.56)	Merged Fire

[222] These four claims and the quantum of each are contested by the Adventure Park. The claims generally represent loss resulting from the parties' destroyed homes and contents, their vehicles, personal items, fencing, landscaping, forestry and other damaged items. Interest and costs are also sought. I will address that last aspect later.

Legal framework

[223] The starting point for all claims advanced by the Remaining Plaintiffs and the Flanagans is that they are to be assessed on the basis that those claimants bear the onus to prove the fact and the quantum of their loss in the usual way, irrespective of any part of their claim being a subrogated claim brought by an insurer of any particular plaintiff.

[224] In *Anscombe v Paul Christie Ltd*,[63] a claim which related to losses suffered by a podiatrist/shoe retailer following flooding at its premises, the Court of Appeal commented:

> …at times in the course of this case there has been some confusion as to the true issue. Although a claim such as this is often brought by an insurer under its right of subrogation, the damages recoverable are those to which the insured is entitled at law as against the defendant, rather than the amount paid or payable by the insurer under its contract of insurance. While the two may be the same they are not necessarily so; and indeed the latter is irrelevant to the former.

[225] On liability, given I have found the Remaining Plaintiffs and the Flanagans have succeeded in their claims against the Adventure Park both pursuant to s 43 of the FRF Act and also in tort, generally speaking they are entitled to be put back into the position they would have been in had their properties not been affected by the fires.[64]

[226] The claims made by the Pflaums, the Kwons, Mrs Grace, and the Flanagans here are advanced on the basis they are entitled to recover what their respective insurers paid to them to settle their claims under their policies, plus additional uninsured losses, on a "new for old" basis. Those are matters, however, disputed by the Adventure Park.

---

63 *Anscombe v Paul Christie Ltd* [1991] 2 NZLR 176 at [177].

64 This represents the long-established *restitio in integrum* principle which generally requires as far as possible putting the claimants into the position that they had been in before the fires.

[227] And, so far as the claim under s 43 of the FRF Act is concerned, it is useful to repeat s 43(b) which suggests that the same ordinary principles for damages should also apply relating to that claim. Section 43 here relevantly provides:

> (b) Any loss in, or diminution of, value of that property, and any consequential loss or damage not too remote in law, may be recovered from that person by the owner of the property.

[228] The critical question in this case is, what is the appropriate measure of damages to properly and fairly compensate those Remaining Plaintiffs and the Flanagans for their respective losses?

[229] Overall, in considering the fact specific enquiry relating to each of the remaining claims, the objective the Court faces must be one to do justice between the parties.

[230] On this aspect, in *Warren & Mahoney v Dynes*[65] the Court of Appeal stated:

> In each case the Court must select the measure of damages which is best calculated to compensate fairly the plaintiff for the harm done while at the same time being reasonable as between the plaintiffs and a defendant.

[231] In *Chase v De Groot*,[66] a claim also related to residential property, Tipping J said:

> The debate in this case related to whether the Chases should be compensated by an award on the basis of the cost of reinstatement or by an award on the basis of diminution in value. If diminution in value is the correct measure then a subsidiary issue arises, namely at what date such diminution should be assessed. In *Dynes v Warren & Mahoney* I undertook a detailed review of the authorities and principles in this field. My general approach was approved in the Court of Appeal … For present purposes it is sufficient to note the following points. The object of damages in tort is to put the plaintiff into the same position as would have prevailed if there had been no tort. Assessment of damages is essentially a question of fact. Any rules or principles constitute guidance only. The object is to be fair to both sides. Reinstatement will be adopted as the appropriate measure when to do so will be fair between the parties. There is no immutable or even prima facie rule against or in favour of reinstatement as the correct measure. There are, however, two necessary prerequisites to an award based on reinstatement. First, the plaintiff must be intending to reinstate and, second, it must be reasonable to do so.

---

65 *Warren & Mahoney v Dynes* Unreported CA49/88, 26 October 1988 at 10.
66 *Chase v De Groot* [1994] 1 NZLR 613 at 627, lines 25 – 41.

[232] Plainly, the plaintiffs in question have the fundamental onus of proving both actual loss and the quantum to rectify which will flow from the unexpected expenditure they must incur. In turn, the Adventure Park, if it believes this is the case, may bring an additional argument before the Court to show that betterment has occurred. It has the onus to establish this.

[233] As to that onus which is on plaintiffs to prove their loss in such a case, this has been confirmed in cases such as *Bonham-Carter v Hyde Park Hotel Ltd*, where the Court said:[67]

> Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the Court saying:
>
> > "This is what I have lost. I ask you to give me these damages"
>
> They have to prove it.

Reinstatement

[234] In *Chase v De Groot*[68] a question arose as to whether a plaintiff with a successful tortious claim like the affected plaintiffs here, should be compensated based on the cost of reinstatement or simply the diminution in value of their respective properties.

[235] The Court, as I have outlined above, noted the two necessary prerequisites to award damages in a situation like the present based on the cost of reinstatement. These were, first, that the plaintiff must be intending to reinstate and, secondly, that it must be reasonable to do so.

[236] Later, in the Supreme Court decision in *Marlborough District Council v Altimarloch Joint Venture Ltd*,[69] the Court said:

> There are no absolute rules in this area (measurement of damages), albeit the Courts have established prima facie approaches in certain types of cases to give general guidance and a measure of predictability…

---

67 *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177.
68 *Chase v De Groot,* above n 66 at 627.
69 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11 at 156.

[237] Recently, in *Isaac Construction Ltd v Nu-Way Energy (NZ) Ltd*,[70] this issue of measuring damages was considered. There, the plaintiff was awarded damages for the cost of replacement for a tank room that had burnt down by a fire caused by negligence. The Court accepted in the circumstances that the cost to replace was appropriate, as the plaintiff sought to rebuild the tank shed and it was reasonable to do so.

[238] In saying this, the Court noted that it did not matter that the plaintiff did not want to restore the tank shed to its exact pre-loss condition. The plaintiff had modified the replacement of the tank shed:

> It opted for the cheaper option that did not involve the actual construction of a replacement building but involved the construction of corrugated iron to achieve the same result.

[239] This Court in *Isaac Construction* concluded that the method of rebuild did not exclude a claim for the cost of replacement and there was no unfair prejudice to the defendant in the plaintiff doing this. In fact, rebuilding to this extent was a cheaper option than if the tank shed was rebuilt to its full pre-loss condition. On this basis an award for costs of replacement was held to be justified.

[240] Of course, all this must be subject to one rider. This is to the effect that, in considering the reasonable cost of reinstatement of an asset, a consideration will often arise as to whether there may be reasonable alternatives to reinstating.

[241] Sometimes, a plaintiff will provide an estimate of the cost of rebuilding a destroyed property (notionally to the same plans and specifications). This notional or theoretical approach is apposite particularly where there has been reinstatement, but the reinstated property is different from the original.

[242] This occurred in *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*.[71] In her findings in that case in relation to quantum (which were not disturbed on appeal) Dunningham J acknowledged:

---

70 *Isaac Construction Ltd v Nu-Way Energy (NZ) Ltd* [2018] NZHC 1775 at 233.

71 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2015] NZHC 1983 at 187.

> However, when it rebuilt the stadium, the Trust took the opportunity to expand and improve the stadium and not just replace what was lost. That meant a hypothetical exercise had to be undertaken to establish the cost of rebuilding the stadium to its pre-existing state.

[243] Notwithstanding that notional reinstatement was adopted as the appropriate measure, Dunningham J in that case still applied a deduction for betterment.[72]

[244] Plainly, in a case where a plaintiff might choose a more expensive replacement when an exact replacement for a damaged property is available, the damages that plaintiff might receive are to be limited to the cost of the exact replacement.

Process for quantifying loss

[245] I turn now to the process adopted by these Remaining Plaintiffs and the Flanagans for quantifying the losses they had suffered. As to this, all relied heavily on extensive evidence provided by Grant Bird, a loss adjuster from Godfreys Chartered Loss Adjusters. He was instructed on behalf of these plaintiffs and also their insurers with respect to these matters.

[246] In addition, some additional evidence relating to specific individual quantum claims from each of the three Remaining Plaintiffs with large claims was provided to the Court by Cecile Grace and her son Kieran Grace for their family, by Doug Pflaum for his family, and from Mrs Kwon relating to her family claim.

[247] The Adventure Park also chose to advance rebuttal evidence. Some of this was from Dave Robb, an expert loss adjuster it had engaged, and other evidence was from expert registered valuers it had instructed, Mark Dunbar and Mark Beatson from Telfer Young.

[248] At a basic level, Mr Bird, the Godfreys loss adjuster, undertook an analysis of the quantum of insured and uninsured losses suffered by each of the Remaining Plaintiffs and the Flanagans. This was calculated on a full replacement

---

[72] A notional measure was also adopted in *Gagner Pty Ltd v Canturi Corporation Pty Ltd* [2009] NSWCA 413.

basis. Mr Bird then prepared a schedule for each plaintiff setting out his analysis and opinion on the quantum of those losses.

[249] Between March 2019 and September 2020, it appears that, in conducting his investigations relating to the quantum of those insured and uninsured losses, Mr Bird:

(a) conducted face to face interviews with many of the respective plaintiffs to understand the extent of their insured and, in particular, their uninsured losses;

(b) reviewed details respectively of their properties, contents, vehicles, personal items, fencing, vegetation, forestry and other damaged/destroyed items; and

(c) reviewed documentation relating to the damaged properties and items, both insured and uninsured, as provided to Godfreys.

[250] Mr Bird then collated the information and material collected into a master spreadsheet he says after confirming the legitimacy of the claims from fire location evidence.

[251] In his evidence, Mr Bird confirmed his extensive loss adjusting experience. On this basis he considered all the claims were reasonable (expect for a bicycle damage claim which he considered too remote and this was excluded). With what is said to be his experienced eye being run over each of the claims, Mr Bird testified as to his conclusion that, on the balance of probabilities, all the claims made "appear to be reasonable". He said that through Godfreys he had then prepared "Plaintiff Claim Summaries" for each of the significant plaintiffs' claims with appended adjustment spread sheets. These were before the Court. The reports and spreadsheets set out an analysis of insured and uninsured losses suffered by each plaintiff, generally on a full replacement basis, and listed what was said to be supporting documentation for the respective losses.

[252] These claim summaries provided:

(a) Details of the location and date of the claimed losses and, as I have noted, a summary of the insured and uninsured losses for the particular plaintiff.

(b) An overview of the property in question, including its location, the age of the dwelling, other buildings and any improvements, and a description of the damage claimed. Where appropriate this included details relating to destruction or damage of the home, associated property, vehicles, contents, trees including shelter belts, any forestry stand and the like.

(c) A section validating the claim. This was Godfreys confirmation, first, that it had reviewed the information for the insured losses that was submitted by IAG and its agents and, secondly, that Godfreys was satisfied the items presented were ones that generally would be covered by an insurance policy and, in any event, were items damaged in the fire event that had been described.

(d) Those insured losses listed the principle heads of claim presented to Godfreys by IAG in its documentation with appropriate references.

(e) As to the uninsured losses, these were summarised by Mr Bird based generally on what he had been told by the Remaining Plaintiffs and the documents provided by them respectively, on a similar basis to the insured losses material noted above.

[253] Aspects of Mr Bird's evidence at times raised hearsay issues. These issues, however, were not pursued before me to any degree on behalf of the Adventure Park. Generally, they seemed to be overtaken by the parties' approaches to all the evidence, including close scrutiny and cross-examination of Mr Bird as an expert loss adjuster.

[254] I will now consider in turn each of the four claims from the Remaining Plaintiffs and the Flanagans.

Flanagans' quantum claim – 165 Early Valley Road

[255] As I have noted at the outset, all plaintiffs in this proceeding reached a settlement with the first defendant, Orion, midway through the course of this trial and that proceeding was discontinued. The Adventure Park's consent to this discontinuance, together with its agreement to discontinue its cross-claim against Orion, was given on the basis of its understanding that the agreement reached between the plaintiffs (and in particular the Flanagans) and Orion settled 50 per cent of the Flanagan's claim for damage to their property at 165 Early Valley Road.

[256] Accordingly, the Adventure Park acknowledges here that if, as I have found, it is deemed to be liable under any of the pleaded causes of action, so far as the Flanagans claim is concerned, it is to be responsible for only 50 per cent of any proper sum this Court elects to award for the damage that occurred to 165 Early Valley Road.

[257] With these comments in mind I turn to consider the quantum of the Flanagan damages claim.

[258] The Flanagans' claim is a total loss claim for their home and related assets as a result of the Merged Fire. Mr Stevens also confirmed at the outset that the amount they seek from the Adventure Park in respect of this loss being reduced to 50 per cent of their total loss (a total loss outlined in the statement of claim at $2,365,529.13), as a result of their settlement with Orion, is now $1,182,764.56.

[259] The situation faced by the Flanagans was unquestionably a heartbreaking one. In February 2017, their substantial home at 165 Early Valley Road had only just been entirely rebuilt following significant earthquake damage suffered in the 2010/2011 Christchurch earthquake sequence. The Flanagans had only moved back into their recently rebuilt home a little over a week before the fires in February 2017. Their brand new home was entirely destroyed by the Merged Fire along with a substantial amount of its contents including artwork and furniture and many improvements on the property. As I understand the position, the stress of the fire event, and this second relatively recent loss of their substantial family home, simply became too much for Mr and Mrs Flanagan to bear. The home was located on a sizeable farmlet which it

seemed had been farmed actively by Mr Flannagan, who now, post-fire, had become quite unwell.

Insured loss claim

[260] Mr Bird and his firm, Godfreys, undertook the loss adjusting for the Flanagan IAG insurance claim. From his evidence, Mr Bird confirmed he personally met with the Flanagans in about April or May 2019. In arriving at what was a cash insurance settlement sum for the Flanagans' home, Godfreys did several things. First, their representative spoke directly to the principal building contractor who had just finished the house build prior to the fires to obtain details of rebuild cost. Secondly, Godfreys requested Joseph & Associates, quantity surveyors, to update the cost of rebuilding the home based on the plans they were able to obtain for the new dwelling structure. Thirdly, this costing was then provided to the insurers, IAG. A cash settlement was reached with the Flanagans who, understandably, it is said had "had enough" in all the circumstances they were facing, and did not intend to reinstate their home or the destroyed outbuildings.

[261] The square metre rebuild rate reached for the Flanagans' home was in the order of $4,000 per square metre. As to the evidence before me to confirm this figure, even the Telfer Young expert valuer, Mr Beatson, called by the Adventure Park to give quantum evidence before me, accepted that this rate would be in the appropriate range. On this, specifically he confirmed that:[73]

> … I'd be comfortable to say that, for a high-quality home on the Port Hills, that a rate between $4,000 and $5,000 (per square metre) would not be out of the normal scope.

Mr Beatson in his evidence also went on to accept that the lesser pre-fire market valuation of the Flanagan home, which he had been instructed to provide an assessment of without more, would not replace what was there before the fire.

[262] The Flanagans' position here is a simple one. They say that overall, the payments made to them by IAG represent almost exclusively insured losses, and the claim against the Adventure Park for these is an entirely reasonable one. The payments

[73] Notes of Evidence, page 1243, lines 3 – 9.

were made in accordance with IAG's policy obligations, the Flanagans say they have been properly adjusted and objectively scrutinised by an experienced expert loss adjuster, Mr Bird, and they were appropriately paid in all respects. Given IAG in making these payments has acted appropriately to settle their basic loss here, the Flanagans say IAG is entitled through subrogation to recover that loss from the party who caused it.

[263] Mr Gallaway, for the Adventure Park, in response raises a number of issues which I address in turn.

[264] First, he notes that IAG elected to cash settle the Flanagans claims for the house and the farm buildings and in each case the settlement has been either for the sum insured or for a sum that he says was very close to the assessed replacement cost of the item. This was agreed by IAG from the outset, Mr Gallaway says, in the knowledge, however, that the Flanagans were unlikely to reinstate their home on the site. Given this, Mr Gallaway argues the Flanagans, therefore, are only entitled to diminution in value and not replacement cost damages. These, he said, need to be based on the undisputed market value measure as assessed in the evidence of Mr Beatson.

[265] According to Mr Gallaway, that would mean the total award (of which the Adventure Park might pay only 50 per cent) to which the Flanagans might be entitled here, including GST, would be $1,526,800 calculated as follows:

a. Dwelling	$1,366,800
b. Farm buildings	$50,000
c. Chattels	$20,000
d. Other improvements	$90,000
	$1,526,800

[266] On this aspect, however, Mr Stevens suggested in his cross-examination of Mr Beatson that a replacement valuation methodology might be more appropriate in this case for the Flanagan property, given that it was newly constructed and only occupied by the Flanagans one week before the fire struck. Little useful comment on this followed, however. But, as I have noted above, Mr Beatson also accepted that his

market valuation of the home clearly would not replace what was there before the fire. In my view, this is relevant here.

[267] It is useful at this point to note the usual position accepted in situations where damage to land, houses or other improvements occurs. Todd on Torts addresses this.[74]

> It was often said that the basic measure of damages for physical injury to land and improvements was the amount by which the value was diminished rather than the (usually) higher cost of reinstating the property to its former state.[68] However, the courts now take a more flexible, pragmatic approach and will award the cost of reinstatement where the plaintiff intends to restore and occupy the property and it is reasonable to do so.[69]

---

68 For example, Jones v Gooday (1841) 8 M & W 146, 151 ER 985 (Exch); Moss v Christchurch Rural District Council [1925] 2 KB 750 (KB); Cousins v Wilson [1994] 1 NZLR 463 (HC) at 467.

69 Taylor v Auto Trade Supply Ltd [1972] NZLR 102 (SC); Bevan Investments Ltd v Blackhall & Struthers (No 2) [1978] 2 NZLR 97 (CA) at 113-114 and 118-119; Warren & Mahoney v Dynes CA49/88, 26 October 1988; Chase v de Groot [1994] 1 NZLR 613 (HC) at 627; Roberts v Rodney District Council [2001] 2 NZLR 402 (HC).

[268] In my view, flexibility is required here, given the particular and tragic situation which the Flanagans faced following the fires. They are an aging couple and Mr Flanagan has suffered a significant turn in his health as a result of these events. Any decision they have taken not to themselves reinstate (for a second time) their lost home is understandable. That others may do so in time is always a possibility. A pragmatic approach here, as I see it, requires that the Flanagans are properly compensated for the loss of their new home by a full payment to replace it.

[269] Given these matters, and the fact that what was being addressed here was a brand new high quality home which all parties, including the Adventure Park's valuer expert, accepted would be costed at a rebuild rate of at least $4,000 per square metre, I am of the view, in all the particular circumstances of the Flanagans here, that the amount cash settled by IAG for their home of some $1,673,676 (given an assessed replacement cost at a higher figure of $1,768,010) represents an appropriate figure for the Flanagans' house loss claim here.

---

74 *Todd on Torts*, above n 7 at 25.2.(3)(a).

[270] And as to quantum issues generally, the Flanagans' claim here is almost exclusively an insured loss claim paid out to them by IAG. IAG, like other insurance companies, would have scrutinised the Flanagans' claim and the loss adjuster's recommendation carefully before making the insurance payout to them in the usual way. Payment would have been made only after that loss adjuster's conclusions were taken into account, even if just as evidence of either loss or the contractual liability of IAG as insurer under the policy in each particular case. I am satisfied notice can be taken of this here. And, so far as the Flanagans' house loss claim is concerned, in my view, it is not appropriate to try to second guess in a minute way the professional loss adjustment assessment for their home made by Mr Bird and Godfreys as experts and IAG's decision on their claim. This was largely an assessment of the cost to replace the lost home based upon a loss adjustment completed with input from the builder. This builder, pre-fire, had only just completed construction of the precise replacement home for the Flanagans. He confirmed quantities and costings as did the independent quantity surveyor's estimate.

[271] For all these reasons I accept the amount cash IAG settled for this house at $1,673,676 represents a proper assessment of that loss incurred by the Flanagans.

[272] Next, so far as the Flanagan's contents claim is concerned, the Adventure Park accepts the amount paid by IAG under the policy of $329,130 was appropriate as a recoverable amount in this case. That amount, as I understand it, represented largely a replacement cost figure for most of the contents lost.[75] Other than this, I need say nothing further on this aspect of the claim.

[273] Issue is taken on behalf of the Adventure Park, however, over the plaintiff's claim for $34,500 for their 2005 Range Rover Sport 2.7TDX motor vehicle. This is despite two pre-loss valuations to support this figure that were, as I understand it, obtained for insurance purposes. Mr Robb, the Adventure Park's expert loss adjuster, following what he says was his research on autotrader.co.nz, suggested that a similar

[75] It does seem from material before the Court that the total replacement value of the Flanagans' contents was $377,010. Deductions from this figure have been made for depreciated values of linen, clothing and a computer, bringing the claim down to $366,620. IAG then paid $329,130 which was the sum insured under the policy.

vehicle with identical mileage was being offered for sale at just under $22,000, and this amount, therefore, might better reflect the vehicle's pre-fire value.

[274] The insurance payment of $34,500 for the vehicle, Mr Gallaway complains, was based purely on an agreed replacement value. The Adventure Park does not accept this figure. Mr Gallaway says it would consent to an award based on the $22,000 value noted by Mr Robb.

[275] I reject this argument from the Adventure Park, however. On the balance of probabilities, I find the loss-adjusted insurance amount paid for the vehicle at $34,500 (being the mid-price of the two specific pre-loss valuations) meets the onus on the Flanagans to establish their loss amount relating to the written-off vehicle.

[276] Demolition costs claimed by Flanagans for their fire-destroyed home are also confirmed as accepted by Mr Gallaway. The Adventure Park, however, queries the Flanagans claimed alternative accommodation costs under their insurance policy of $30,000. This is on the basis that it is said no evidence has been provided to the Court to prove these costs were actually incurred. An additional "stress benefit" under the policy of $2,000 is also claimed. The Adventure Park argues too that, for similar reasons, this should not be awarded, as it is in the nature of a claim for general damages without evidence.

[277] I disagree. Again, as I see it, a pragmatic approach is required here. There can be no doubt that alternative accommodation costs would have been incurred by the Flanagans post-fire. Their new home was entirely gutted by the fires along with contents, vehicles and major farm buildings. It is true that no hotel, motel or house rental receipt evidence was before the Court. Nor did Mr or Mrs Flanagan make the choice, understandably no doubt for health and other reasons, to give evidence before me. Alternative accommodation, however, would have been needed immediately following the tragic fire events that occurred, even if it may have involved "imposing" on friends or relatives. Dislocation alone would have been a major factor. And, the minor $2,000 "stress benefit" payment, as I see it, in reality would have gone nowhere to address the real stress caused to the Flanagans by the circumstances of these harrowing events. I am satisfied these amounts are properly claimed here.

Uninsured loss claim

[278] In addition to their insured loss claims, the Flanagans include an uninsured loss claim of $500 which I understand represents one half of a $1,000 insurance excess they were required to meet. No other uninsured losses are claimed. Nothing was placed before me on behalf of the Adventure Park to question this claim. In any event, it represents a minor claim for uninsured losses, given the magnitude of the events which the Flanagans faced over the Merged Fire. This $500 claim is also recoverable here.

[279] In summary, I am satisfied the quantum claimed by the Flanagans as their total losses from the Merged Fire outlined in their statement of claim at $2,365,529.13 is appropriately claimed. Fifty per cent of this amount, being $1,182,764.56, is to be paid to them by the Adventure Park. They are entitled to judgment for this sum against the Adventure Park. An order to this effect will follow.

Cecile Grace's quantum claim – 349 Worsleys Road

[280] Mrs Grace's claim against the Adventure Park outlined in the statement of claim totals $1,963,828.21.

Insured loss claim

[281] In evidence before the Court was a detailed claim summary for Mrs Grace together with an annexed spreadsheet prepared by Mr Bird of Godfreys and confirmed in his evidence before me. This summary assessed Mrs Grace's insured losses at $1,308,440.00 and her uninsured losses as claimed at $655,388.21.

[282] Before me, evidence was given in support of the quantum of this claim by Mr Bird, Mrs Grace and her son Kieran Grace. Both Mrs Grace and her son, amongst other things, testified as to the pre-fire condition of their home. This included the provision of photographs and confirmation that pre-fire their destroyed home totalled 436 square metres in area. They also confirmed that the replacement house and garage, which Mrs Grace had rebuilt through Fowler Homes, covered an area of only 284 square metres. Their evidence was that Mrs Grace could not afford to fully replace

the home which she had as her insurance did not cover the cost of rebuilding the substantial original house. Nor was she able to recover the full amount for losses which she had incurred to infrastructure on her property. A specification and quotation from Fowler Homes for rebuilding the 284 square metre home was before the Court. It was priced at $869,000.

[283] In her evidence, when Mrs Grace was asked whether the $869,000 was the total cost incurred on the rebuild which has now taken place of the basic house, she advised there were some overruns. She said she had actually spent around $895,000 in total on the Fowler Homes rebuild.

[284] Despite this, it seems the cost Mrs Grace is claiming for the house rebuild is the $1,120,905 total amount paid by her insurer, IAG, for her house, pursuant to the sum insured under the policy. This sum represents a further $225,000 approximately more than Mrs Grace spent with Fowler Homes under the adjusted pricing for rebuilding the home at its smaller 284 square metres coverage area.

[285] A major claim item included in Mrs Grace's uninsured losses schedule is an additional sum which represents what is described as "rebuild costs based on Fowler Homes' rate of $3,061.25/m^2 – 436m^2". As best I can tell, this is Mrs Grace's claim for what she did not receive from her IAG house settlement payment but which otherwise she would have needed to complete a notional rebuild of her home at 436m^2 based on the Fowler Homes' square metreage rate for the 284 square metres actually rebuilt.

[286] All the expert valuation and related evidence before me (including that of the Adventure Park's own valuer Mr Beatson) accepted this square metreage rate of about $3,000 per square metre as reasonable and, importantly, even perhaps on the low side, for rebuilding homes to the general standard of Mrs Grace's pre-fire dwelling in the Port Hills area. I accept, too, that following the fires, and this major rebuild and re-establishment of Mrs Grace and her family at the property, numerous unexpected and other costs would have arisen. From s 43(1)(b) of the FRF Act, Mrs Grace is entitled to claim from the Adventure Park "any loss in, or diminution of, value of that property, and any consequential loss or damage not too remote in law". The property which

Mrs Grace had immediately prior to the fire was, all parties accept, a good quality 436 square metre house and garage. As a result of the fires she has lost that house and garage. There is no question, as I see it, that they were wholly destroyed by this outbreak of fire, an outbreak which I have found was caused by the Adventure Park. Her loss in the value of that property is of the 436 square metre house and garage. That she chose for reasons clearly explained in her evidence to rebuild, as quickly as she could, a reduced size dwelling was entirely a matter for Mrs Grace. Despite this decision, in terms of that s 43(1)(b) of the FRF Act, and otherwise her loss, however, has been the value of the larger home and she is entitled to be compensated for that. It follows that this claim for the additional approximately $3,000 per metre rebuild cost to bring what she has received from her insurer up to the 436 square metre figure is, therefore, appropriately claimed and is to be allowed.

[287] In response to questions relating generally to amounts Mrs Grace is claiming regarding the house rebuild, she did not agree she had been overcompensated. Her evidence was that she had in fact had to reduce the size of her home, despite the fact she dearly would have loved to have rebuilt her previous house. To rebuild at the size of her previous home, Mrs Grace indicated in her evidence she would have needed at least another $200,000 for basic costs over and above the settlement payout she had received from IAG and she would have needed to use her retirement savings to complete the rebuild.

[288] As to the contention that the rebuild cost of approximately $890,000 paid by Mrs Grace to Fowler Homes is approximately $420,000 less than the $1.32 million claimed from the Adventure Park with respect to her home, Mrs Grace also went on to confirm in her evidence that she had incurred significant ongoing repair costs and bills for her house, the surrounds and the overall hillside property on which it stood. Any notion she was overcompensated, she emphasised was entirely "out of touch with reality" of the true building and other costs she had incurred.

[289] I note here too that the IAG insurance payout for the "home" under Mrs Grace's policy would have covered a considerable number of additional elements beyond the simple structure of the dwelling which formed the Fowler Homes quote.

[290] Overall, in all the circumstances here, I am satisfied the $1,320,000 claimed from the Adventure Park with respect to the loss of Mrs Grace's home and some contents is a properly established and reasonable figure.

[291] This figure it seems also includes by way of insured loss a contents policy settlement of approximately $188,000 itemised in the Godfreys claim summary for Mrs Grace. Again, I note this summary was prepared specifically by Mr Bird. His evidence, too, was to the effect that this IAG payout properly refers to the insured losses Mrs Grace has suffered here. I am satisfied this verified contents claim settled by the insurer under Mrs Grace's policy as a result is properly established and recoverable here. I refer also to my comments at [270] above relating to insurers' processes generally on insured loss claims. These were in relation to the Flanagans' claim, but they apply equally, as I see it, to Mrs Grace's claim here.

Uninsured loss claim

[292] I now turn to Mrs Grace's claim for the other uninsured losses she has listed.

[293] At the outset I note that Mr Gallaway in his final submissions has confirmed the Adventure Park's agreement to several items in this uninsured loss claim. These are, first, $20,430 for the Holden Ute V8 car and the Honda ATV quad bike, $52,986 for demolition and tree removal, and what seems to be $34,287 by way of fees associated with the new house.

[294] So far as other aspects of this uninsured loss claim are concerned, in their evidence Mrs Grace and her son indicated that over a number of weeks after the fire they had together listed all the items that had been lost in the fire, from memory. Kieran Grace, it seems, focused specifically on items outside the house and Mrs Grace on items inside. This clearly was a difficult exercise. It resulted in the detailed claim summary prepared by Mr Bird and Godfreys.

[295] On all these matters I found both Mrs Grace and her son, Kieran Grace, to be straightforward and reliable witnesses although understandably affected by the raw emotional impact of the fire and the devastating events which had occurred involving destruction and loss of their home and surrounding property.

[296] In her uninsured loss claim, Mrs Grace includes a significant number of chattels and other contents which were destroyed in the Chairlift Fire. No real challenge to the items on this list, a list methodically prepared by Mrs Grace and her family, was made before me, except as I outline below. Instead, however, the measure of damages adopted is the subject of some challenge.

[297] On this aspect, *Todd on Torts*[76] states:

> Where the plaintiffs' goods are totally destroyed as a result of the defendant's tort, the basic measure of damages is the market value of the goods at the time and place of destruction. Normally this will entitle the plaintiff to the cost of purchasing a suitable replacement in the market at the date of destruction, or as soon thereafter as is reasonable. But if the cost of a substitute greatly exceeds the resale value of the property prior to its destruction, and the plaintiff does not intend to purchase a replacement, recovery may be limited to the lower sum.
>
> (Footnotes omitted)

[298] Here, as I understand it, Mrs Grace's assessment of the market value of these destroyed chattels has been based in part on second-hand replacement value assessed through Trade Me and the like and, in part, where no real substitute market is available, by new replacement cost. In considering the many items for which claims are made, I am satisfied that Mrs Grace has endeavoured to make a genuine and proper attempt to arrive at fair market values for these items at the time they were destroyed in the fire. Plainly Mrs Grace has been careful and, as I see it, even reasonably conservative in her approach to valuation of all the assets she has lost in the fire and particularly her house contents, chattels and personal effects. Some overs and unders will occur in a valuation exercise like this, of course, but overall I find on the balance of probabilities that the major part of this uninsured contents and chattels loss quantum is fairly and properly established.

[299] An adjustment is to be made, however, for some degree of depreciation cost in the clothing and linen claim here along with a small adjustment overall for similar contents. This is not a major item overall and is to amount to a reduction in the claim for these items of $15,000.

---

[76] *Todd on Torts*, above n 7 at 25.2(3)(b).

[300] On the uninsured contents claim, the Adventure Park does raise a further complaint that a number of the items were owned by Mrs Grace's sons who are not plaintiffs in this proceeding. These, it says, should not be linked to her present claim. With respect, I disagree. From the claim summary, the items concerned, as I see it, are not major, generally involve sporting, hunting and motor racing items. Generally, they might fairly be considered as family assets belonging in some cases originally to the boys' deceased father and therefore seen broadly as parental assets. Alternatively, Mrs Grace might have been notionally a bailee of these items. Had they been part of the insured loss claim, the items would likely have been covered by the policy from an insurance perspective. This, as I understand it, is because, even if the items were owned by Mrs Grace's sons, as members of the insured's family living at home, they were insured. The policy normally would respond to their loss, just the same as it would to Mrs Grace's loss of her personal property. An alternative might have been for Mrs Grace to allocate some of the IAG insurance monies she received to her sons' losses, which would only have increased her unrecovered losses here. In my view, under all the circumstances here, it is proper to include these in Mrs Grace's overall claim.

[301] I turn next to alternative accommodation costs outside the policy allowance (which allowance I have considered as properly claimed here). These relate to periods up to the completion of Mrs Grace's replacement home on 24 April 2020. They amount to a total uninsured loss claim of $33,348. For similar reasons to those I outline above relating to the Flanagans' alternative accommodation aspect of their claim, I am satisfied these costs, although reasonably significant, are to be allowed. This is to meet the required housing needs for Mrs Grace and her family for the many months until her new home was finished. It is true this part of the Flanagan claim related only to an insured loss and payment under their policy. But that makes no difference, as I see it, to Mrs Grace's entitlement to this claim for her actual loss caused from the Chairlift Fire outbreak. For these reasons, this is an appropriate claim, and is to be awarded.

[302] Other major items in Godfreys uninsured loss claim summary for Mrs Grace include $5,477.45 for 1.9 hectares of lost pine trees in their forestry block[77] approximately $32,000 for Canterbury Demolition charges, $36,845 for replacement of a concrete block shed, $14,800 for removal of damaged trees, replacement of farm and other fencing totalling approximately $41,000, reinstatement of a Newfield drainage system totalling $38,605, replacing an asphalt driveway at $20,900.10, replacing retaining walls totalling about $34,400, lost jewellery totalling about $16,000 and other minor items. The majority of these items are supported by independent quotations from suppliers and contractors, and I am satisfied they are properly claimed.[78]

[303] The evidence of Mrs Grace and her son also addressed these together with other aspects of their uninsured losses. Mr Bird in his evidence confirmed that he had a number of discussions with Mrs Grace and her son over these and other items as well. Although on the uninsured loss claims he described his position as one largely to provide a presentation of those claims, Mr Bird did say he was generally comfortable with the detailed summary list he had prepared.

[304] The ultimate test here is what is reasonable as between the parties. In all the circumstances I find that Mrs Grace's claim both as to insured and uninsured losses is a reasonable one and that, with the relatively small adjustment I have noted above, she has done sufficient to satisfy the onus on her to establish on the balance of probabilities the quantum of the various claims she makes. An award for the adjusted amount claimed (which is now $1,948,828.21) is to follow.

Kwon's quantum claim – 339 Worsleys Road

[305] Mrs Kwon gave evidence before the Court that her family home at 339 Worsleys Road was completely destroyed in the fire along with outbuildings, landscaping and trees, a forestry block, and the family's contents and personal

---

[77] A formal forest loss valuation from Forest Management Limited dated February 2020 is before the Court to support this figure and indeed, relative to forestry loss claims from others, the $5,477.45 figure might be seen as conservative.

[78] These also included, by way of example, written quotations before the Court from N & H Scott Fencing Contractors for farm and paling fences, a hay store, sheep pens and a water system and troughs and from South Island Vegetation Control for tree felling and gorse control.

belongings. This was confirmed in the Godfreys claim summary completed by Mr Bird. The Kwons' claim against the Adventure Park is quantified at $1,091,105 for insured losses and an additional $1,309,677.24 for uninsured losses.

[306] At trial Mrs Kwon confirmed she and her husband are in the process of rebuilding their new house on the property. She said in her evidence that the new house is "very different" to the old house and it will be significantly more expensive. In evidence she indicated that the build costs for the new house might be "three and half a million more" than the $1 million approximately received from their IAG insurance claim, indicating a total rebuild cost of around $4.5 million.

[307] Mrs Kwon in evidence acknowledged that rebuilding their new house would obviously include a number of additional costs which were not covered by the earlier IAG insurance policy claim. Some of these additional building costs make up the majority of the Kwons' uninsured loss claim. These appear to include building and resource consent fees, geotechnical investigation costs, architect fees, structural engineering fees and demolition costs.

[308] The evidence before me supporting the quantum of the Kwon's damages claims came in part from Mrs Kwon, also through various written quotations from suppliers and contractors and Mr Bird again provided evidence. This included provision of another detailed Godfrey's claim summary for the Kwons from Mr Bird. And he confirmed too that he had met with Mrs Kwon and reviewed all documentation provided by her and particularly that provided in support of the uninsured loss claim.

Insured loss claim

[309] On the Kwons' insured loss claim, essentially this represented a house settlement of $895,957, certain other small amounts in the policy including an alternative accommodation allowance of $20,000 and a contents policy payment from the insurer of approximately $171,000.

[310] So far as the insured loss payments are concerned, Mr Bird summarised these in his Godfreys claim summary and concluded:

> We have reviewed the information submitted by IAG NZ Ltd and its agents and are satisfied that the losses claimed could be expected at the property given its proximity to the fire.

[311] He confirmed, too, that settlement of the Kwons' claim with IAG was made in accordance with the terms and conditions of their relevant policy. And again, I note on this my comments at [270] above relating specifically to IAG's insurance processes generally on an insured's claims.

[312] On this basis and in all the circumstances prevailing for the Kwons, given their evidence that they will be replacing their house, I am satisfied the total $1,109,105,00 insured loss aspect of this claim is made out.

Uninsured loss claim

[313] I now turn to the uninsured losses claimed by the Kwons. These are substantial, totalling $1,309.677.24. The largest portion of this uninsured loss claim relates to the rebuild budget for the Kwons' house. Their overall claim for rebuild is in the region of $1.64 million plus a significant amount for additional professional and consultancy fees incurred in rebuilding the house totalling around $186,000.

[314] So far as the theoretical cost of rebuilding the house is concerned, supporting documentation has been provided from Suckling Stringer Quantity Surveyors referred to in Mr Bird's report. This provides a "cost indication" of $1,427,600 (excluding GST) to construct the house and complete surrounding external works. That cost is said to be exclusive of design and consent fees.

[315] Although the Adventure Park here does accept that the Kwons' house was totally destroyed by the advancing fire, it maintains they have not discharged the burden on them of establishing that reinstatement at the cost suggested is reasonable. Instead, the Adventure Park contends the appropriate measure of damages that should be awarded for the Kwons' loss here should be diminution in the value of the house and not reinstatement. On this they say the pre-fire value of the house, according to their valuation evidence provided, is only $625,000. I do not accept, however, that this is the proper basis for determining loss here. The Kwons clearly intend to rebuild

their house, albeit with a new dwelling which Mrs Kwon has acknowledged is "very different" and significantly more expensive.

[316] What is clear from all the evidence before me, however, is that the assessed rebuild figure for the Kwons' house at a rate of $4,897 per square metre, including GST, was not at all surprising. Mr Bird in his evidence confirmed that, as the Kwons' house pre-fire was a superior executive home, this figure was clearly not an out of the way price today to build in the Port Hills of Christchurch post-quake. One of the registered valuer experts specifically called by the Adventure Park, Mr Dunbar, in his evidence also accepted this square metre rebuild rate was reasonable for the Kwons' property. Mr Beatson, the other registered valuer called by the Adventure Park to give evidence, also confirmed that a rebuild rate of $4,000 to $5,000 for a superior home in the Port Hills was appropriate and reasonable. From the photos provided and the evidence before the Court, all parties regarded the Kwon home as being an executive home of superior finish, justifying these rebuild figures.

[317] That said, I am satisfied this first item of uninsured loss claimed by the Kwons amounting to $769,581.07, being the additional rebuild cost per square metre (at the rate of $4,897.67) over and above the insurance settlement received for the house by the Kwons, is appropriate and reasonable here. An allowance for this amount is to follow.

[318] I turn now to the balance of the Kwons' uninsured loss claim. I address, first, their claim for design, engineering, project management, geotechnical, surveying and consent costs associated with the new build. From Mr Bird's claim summary report, these appear to total something over $186,000. Before me, Mr Stevens endeavoured to argue that, despite the substantially increased new house price, these costs would remain the same given the nature of the terrain on the Kwons' site which required specialist engineering advice. In my view, however, the Kwons have been unable to show that, given the total house cost they say is now in the region of $4.5 million, there is not an excess professional fees element incurred here for a total build that would have been in the region of only about $1.64 million.

[319] I am satisfied that in all the circumstances here, this $186,000 claim for professional fees is excessive and should be reduced to $90,000. The Kwons' uninsured loss claim in this regard is to be reduced by $96,000.

[320] Next, I address that part of the Kwons' uninsured loss claim relating to their house contents and chattels. On this aspect, again no evidence was provided or suggestion advanced by the Adventure Park that any items in the Kwons' total contents list were wrongly claimed on the basis they had not been destroyed or damaged in the fires or otherwise. On this house contents issue, the Kwons have claimed just over $307,000. Of this, $172,000 approximately was paid by IAG as part of the insured claim. This left an uninsured contents claim at around $135,000.

[321] As to this aspect, the Adventure Park complains that the Kwons have not discharged the burden on them of establishing, first, whether they intend to reinstate the contents they have lost (and it is suggested it is reasonable for them to do so here), secondly, what was the age and condition of the individual contents items, and thirdly, what is a reasonable value or price for each. Accordingly, the Adventure Park, although accepting the Kwons are entitled to some award for contents lost in the fire, have confirmed for present purposes they would consent to judgment being entered but only based on 50 per cent of the total contents sum claimed. This represents what the Adventure Park says is a reasonable deduction to take into account second-hand or depreciated replacement cost valuation of the contents.

[322] At trial it became apparent that the only reasonably detailed evidence concerning the Kwons uninsured loss claim was provided by Mr Bird. Generally, in this evidence he confirmed that, although he did speak with Mrs Kwon relating to their claim:

> We were not briefed to adjust the claim because there is no policy in relation to the uninsured claim. What I would say, however, is that we have run, as I said this morning, our experienced ruler, shall we say, over the items presented.

And, in answer to a further cross-examination question do you certify the validity of those uninsured claims he answered:

> I would very definitely say no…I would say that on the balance of probabilities the claims appear to be reasonable but I could not vouch for…the absolute detail.

[323] On this aspect of their contents claim, Mrs Kwon's evidence was limited. She said that she did try her best to quantify items using her memory and based on the price generally she purchased the item for. Sometimes, Mrs Kwon said, the price she allocated for an item might be lower than the amount she purchased it for, but she always tried her best to piece everything together in a proper fashion.

[324] Although not an easy exercise, as I see it, a reduction from the total $307,000 contents claim made by the Kwons is appropriate here to account for a depreciation element on the Kwons' large claim for lost clothing, footwear, linen and bedding particularly.[79] Mr Gallaway for the Adventure Park suggests 50 per cent of the total sum claimed should be deducted. I am satisfied this is excessive. I reduce the Kwons' overall $307,000 contents claim by 10 per cent which I regard as a reasonable reduction in all the circumstances here. This amounts to an approximately $30,700 reduction. This $30,700 is to be deducted from the Kwons' uninsured contents claim.

[325] Next, the Adventure Park takes issue with a site improvements claim under the Kwons' uninsured losses category. This seems to total just over $170,000. It includes nearly $125,000 for landscaping which it is suggested is unreasonable. Further, a claim for lost forestry at $51,865, it is said is also unreasonable. On this latter aspect, it is suggested the Kwons have provided no details of the species of trees said to have been lost. A broad one-page costing by Laurie Forestry Ltd in evidence before me is also said to lack detail and be quite inadequate. This Laurie Forestry one-page letter headed "Small-forest-indicative value review", estimated the likely value of the Kwons' 2.2 hectare forest at between $19,000 and $22,000 per hectare plus GST. A midpoint figure for that lost forestry of $51,865 is claimed. In my view, this is not fully supported by evidence here and is excessive. It certainly appears to be well above other forestry loss evidence (for Mrs Grace) that was before the Court from Forest Management Limited.

---

[79] From the Godfreys Claim Summary prepared for the Kwons, it seems their claim for lost clothing, footwear, linen and bedding is for new replacement items totalling something over $40,000.

[326] Clearly some forestry has been lost here. This is not disputed. Although the Kwons have provided little to show the nature of the trees pre-fire and what their true loss is here, I will allow 60 per cent of this claim as a reasonable estimate of this loss. This means that the $51,865 uninsured loss claim for trees will be reduced by $20,746.00

[327] So far as landscaping is concerned, however, the amounts claimed appear to have been actually incurred. Given there is no question they relate to damage caused to the immediate surrounds of the Kwons' home, I am satisfied they are properly claimed here.

[328] Lastly, the Adventure Park endeavours to raise an issue as to the claimed alternative accommodation costs under the Kwons' policy. These amount to $20,000. This argument is advanced on the basis that no evidence has been provided to the Court to prove these costs were actually incurred. Similarly, the "stress benefit" payment of $1,000 under the policy is also queried.

[329] In my view, and for similar reasons to those I have outlined above for other claimants, I am satisfied there is nothing in these complaints. Given the total destruction of the Kwon house following the fires, alternative accommodation would obviously have been needed. A discrete payment for this, and the "stress benefit" allowed for, are reasonable and properly claimed.

[330] Of the $2,400,782.24 the Kwons claim (being $1,091,105 paid by the insurer IAG and $1,309,677.24 uninsured losses claimed) I am satisfied the Kwons are entitled here to the following:

a. Insured losses paid by IAG		$1,091,105.00	$1,091,105.00
b. Claimed uninsured losses		$1,309,677.24	
LESS			
Professional Fees Deduction	$96,000.00		
Contents adjustment	$30,700.00		
Forestry trees adjustment	$20,746.00		
		$147,446.00	
Balance uninsured loss claim			$1,162,231.24
TOTAL			**$2,253,336.24**

[331] Judgment is to follow for the Kwons for this sum of $2,253,336.24

Pflaums' quantum claim – 343 Worsleys Road

[332] The quantum of the Pflaum claim is the largest of the Remaining Plaintiffs totalling $3,952,583. Of this, $1,310,570 represents insured losses which have been paid by IAG. The balance of $2,642,013 represents the Pflaums' claim for uninsured losses. The evidence before me mixed the Pflaums' insured and uninsured loss claims significantly. I, therefore, deal with both claims together.

[333] At trial, Mr Pflaum gave evidence that the family home owned by he and his wife was completely destroyed in the fires and together they also lost the house contents, vehicles, personal belongings, trees, outbuildings, retaining walls and fencing.

[334] In his evidence, Mr Pflaum confirmed the home was initially constructed in the late 1970s as a one-bedroom property. Immediately before the fire, however, it measured 600 square metres in area over three levels, having been extensively added to over the years. The property, however, was insured based on a floor area of only 380 square metres. The policy too provided for a sum insured of only $1,046,375 including GST. In his evidence, Mr Pflaum explained that the reason the insurance

policy provided cover for only 380 square metres, and not the 600 square metres which the house in fact measured, was that he had arranged the insurance at an earlier stage when the house area was only 380 square metres before significant alterations were completed. He accepted it was a mistake on his part that he had not increased the insurance cover area which he regretted but:[80]

> …when a bill comes in you sort of look at the amount that you have to pay and pay it. It was pretty careless.

[335] Like the claims from the other Remaining Plaintiffs and the Flanagans, quantum evidence for the Pflaums was also provided by Mr Bird, the loss adjuster from Godfreys and by way of a number of written quotations or estimates from suppliers and contractors. Mr Bird's evidence included a Claim Summary Report prepared for the Pflaums' insured loss claim and also their uninsured loss claim.

[336] As to evidence generally, Mr Pflaum worked with Mr Bird and Godfreys in preparation of this Claim Summary Report, including the detailed spreadsheets it contained. This included meetings with Godfreys in May 2019 and the provision of both photos, receipts, reports and summaries that detailed the condition of the Pflaum house pre-fire, and also written quotations and estimates from suppliers and contractors relating to reinstatement costs.

[337] In addition, Mr Pflaum had prepared a montage of photos to show the initial photographs of the house and the various alterations which were undertaken over the years.

[338] Showing some degree of prescience, Mr Pflaum on the Wednesday afternoon when he saw the fire advancing took a series of photos of the home, its contents and surrounds to ensure that he had proof of the condition of the house and belongings should the worst happen. These were provided to Godfreys. In his evidence, Mr Pflaum confirmed that he had gone through Mr Bird's Claim Summary Report and spreadsheet and confirmed the accuracy of all the items claimed.

---

[80] Notes of evidence, page 969, lines 7 – 10.

[339] In detailing the list of property they had lost, Mr Pflaum gave evidence that he had carefully considered all the photos he had taken, both inside the house on a room by room basis and outside the house, and listed all the contents that were shown before having family members add missing items.[81] He confirmed that any items that he could remember the cost of, he specified. Sadly, he noted, however, that all original receipts he had were burnt in the fire. Of other items, Mr Pflaum stated in evidence that:

> …Where I wasn't so sure I looked up the internet and kept on looking until I found something that looked reasonably the same and put that down as a value for those other items.[82]

[340] With respect to the figures which Mr Pflaum provided for each item/chattel or other specific line item in the uninsured loss list, Mr Pflaum said that, depending on what the item was, the value figures he gave represented a combination of replacement with new and old. For example, he testified that for his motorbike, he did not allocate the new cost there but put what it might cost if he was trying to find another similar motorbike.[83] For items such as clothes, however, Mr Pflaum said he did not want to be searching all the opportunity shops forever relating to all these items. So where he could he said he put a new replacement price on each item. In his overall evidence Mr Pflaum stated that in reaching these quantum figures he did whatever he thought was fair.[84]

[341] Mr Pflaum confirmed that this was not an easy process:[85]

> It was the time it took, hours and hours and hours doing it and it was a lot of time constraints as well because you're trying to set up house and also apply for a new, to rebuild your house. So it would've been nicer to spend a lot more time at it but there's limits to what I could do.

[342] The Pflaums' overall claim, given particularly the information provided by Mr Pflaum in his evidence, was put before the Court in Mr Bird and Godfreys' Claim Summary Report and annexed spreadsheet, itemising in detail both the insured loss claims and the uninsured loss claims.

---

81 Notes of Evidence, page 966, lines 7 – 10.
82 Notes of Evidence, page 966, lines 13 – 15.
83 Notes of Evidence, page 973, line 8.
84 Notes of Evidence, page 973, line 8.
85 Notes of Evidence, page 973, lines 9 – 13.

[343] Mr Gallaway confirms the Adventure Park takes particular issue with the magnitude of the Pflaum claim. So far as the house itself is concerned, Mr Gallaway notes the unchallenged market valuation evidence of Mr Dunbar of Telfer Young which assesses the pre-fire value of this house at $830,000 and chattels at $45,000. The sum received by the Pflaums from IAG for the home, he notes, totals just over $170,000 more than that market value. Mr Gallaway contrasts that with the total rebuild cost claim made by the Pflaums which seems to be well in excess of $3.1 million, This comprises $2,564,300 for the cost of rebuilding the dwelling with the remaining costs, to include expert design fees, fencing, trees, retaining walls, a shed, driveway, paths and other miscellaneous items. The $3.1 million figure is nearly three times the sum insured here and roughly three and a half times the market value of the improvements as assessed by Mr Dunbar. Mr Gallaway also complains that the claimed cost of rebuilding this house is based only on a one-page letter, dated 24 May 2019, Mr Pflaum has received from Benchmark Homes. The letter refers to a sum of $2,714,000 including GST for a rebuild cost (being $2,564,000 for the dwelling plus $150,000 for outbuildings and services). These amounts seem to include a $119,700 shed which Mr Gallaway says is not to be rebuilt, according to Mr Pflaum's evidence, but is to be generally incorporated into the new dwelling.

[344] A further issue is taken with this Benchmark Homes single page assessment in that it is not a detailed quantity surveyor's report. It is also expressed to be valid only until 24 August 2019. The letter, too, states it is based on the plans, photos and specifications provided by Mr Pflaum.

[345] The letter does set out an estimated cost of building the three storied home of 602 square metres plus a balcony of 20 square metres, a total of 622 square metres. This appears to be a slightly larger home than the Pflaums had pre-fire, given Mr Pflaum's evidence that the house then occupied an area of 600 square metres.

[346] Mr Pflaum's evidence before the Court was detailed. He presented as a careful, thoughtful and reliable witness and I found him candid throughout in his answers to questions posed. I am satisfied from his evidence, and photos and other information provided to the Court, that he was able to establish that immediately before the fires the Pflaum residence, through a number of additions over the years, was a substantial

three-storey structure with a floor area measuring in total 600 square metres. That Mr Pflaum had insured the property based only on a floor area of 380 square metres he explained, and I accept, was a careless mistake and oversight on his part.

[347] So far as the house itself is concerned, there is no doubt it was completely destroyed in the fires. From his evidence I accept too that Mr Pflaum and his family intend to reinstate the house and, given that it and the property were a home for the Pflaum family for some time prior to the fires, it is reasonable for them to reinstate here.

[348] That said, I accept too that, although it is brief, the evidence before me of the Benchmark Homes rebuild estimate for the Pflaum's replacement new home and outbuildings provides some (if not the best) evidence to determine the quantum of the Pflaum's loss from the destruction of the house and the stated outbuildings alone.

[349] This Benchmark Homes replacement home estimate, as I have noted, outlines a figure of $2,564,300 for replacement of the house (said to be at 602 square metres plus a balcony of 20 square metres). This figure works out at something over $4,000 per square metre which all the experts before me accepted was a reasonable build cost rate for a superior type home like the Pflaums' on the Port Hills. Adjusting the Benchmark figure down to the 600 square metres which Mr Pflaum confirms was in fact the pre-fire footprint for the house, brings this amount down to $2,473,311. I accept this represents a proper reinstatement estimate for the Pflaum house alone.

[350] Included in the Benchmark Homes estimate is an additional figure of $119,700 for 171 square metres of outbuildings to which the Adventure Park objects. As I understand it, this relates to a replacement for a shed destroyed in the fire which Mr Pflaum has confirmed in his evidence is not to be rebuilt. It seems the shed area concerned is planned to be generally incorporated into the new dwelling proposed. The $119,700 claim by the Pflaums is therefore disallowed, given that the shed is not to be rebuilt and has been accommodated elsewhere.

[351] The Benchmark estimate also provides an additional figure of $30,000 for what is described as "services". As I understand it, this services figure is picked up in

various amounts included in the Pflaum's claim summary report under uninsured losses.

[352] The upshot of the matters I have referred to above is that, the Pflaum claim to a rebuild cost of their home that they assess at $2,564,300 needs to be slightly adjusted for the reduced 600m^2 area and, therefore, is to be reduced by some $90,989 to a new approved figure of $2,473,311. But otherwise I am satisfied this is in line with all the relevant expert house build evidence before me.

[353] On these aspects, I also reject the contention advanced for the Adventure Park that, as Mr Dunbar's market value of the house pre-fire was only some $875,000, this should be preferred over the reinstatement rebuild figures I have outlined above. I repeat that, in my view, it is reasonable in this case to have the Pflaum home reinstated, they intend to do so, and the cost of this is to guide their effective loss here both in terms of s 43 of the FRF Act and otherwise.

[354] Next, it seems from Mr Pflaum's evidence that they have included a claim for actual experts' and consultants' fees largely incurred to date in relation to the new dwelling totalling around $117,000. The Adventure Park objects to this figure and suggests it is unsubstantiated. I disagree. It refers to usual and expected design, consent and expert fees and is to be allowed.

[355] The next claim relates to contents and chattels. The claim by the Pflaums is a large one for a total amount of approximately $659,000 for replacement of these. Mr Gallaway complains that this amount is more than three times the sum insured by the Pflaums for their contents which was paid out by their insurer, IAG, amounting to $213,336. He says, too, this quantum claim for contents is out of all proportion to the other large total loss claims for contents made by each of the Flanagans, Mrs Grace and the Kwons. It is more than double the next largest contents claim which is that of the Flanagans.

[356] This contents claim is for the Pflaums' entire house full of chattels. It is based on an extensive list of chattels prepared by Mr Pflaum with the costs assessed largely on a "new for old" replacement cost basis. At the outset, I need to say I have the

utmost sympathy for the situation in which the Pflaums found themselves immediately following the fires which completely destroyed their home, its contents, their vehicles and virtually their entire life-time accumulation of personal effects. That Mr Pflaum had the foresight to hurriedly photograph all aspects of their house and its contents as the fires approached was admirable. There is no suggestion that the personal effects and contents items listed are in any way inaccurate. A question remains, however, regarding what is a proper assessment of the value for these items.

[357] What is clear from the evidence before the Court is that Mr Pflaum's explanation was that over the very many hours it took, he carefully endeavoured to derive values for each of the items claimed from the internet, Trademe records, new pricing catalogues and the like. Mr Pflaum commented that he was not able to spend the weeks he said would be required going around op shops to try to price all the used items he needed to replace. As a result, little supporting or independent information as to the contents or chattels values was provided.

[358] Mr Gallaway for the Adventure Park suggests here and with some justification that, where Mr Pflaum has claimed "new for old" replacement for contents items where there was a readily available second-hand market, that was inappropriate in this case. Further, Mr Gallaway before me contended that, given what he suggested was a dearth of better evidence, a figure of 50 per cent of the total contents sum claimed (which would leave a total contents payout of $329,500) was all that was appropriate.

[359] Whilst I accept there is validity in Mr Gallaway's criticisms of Mr Pflaum's contents quantification attempts, his suggestion of an award to the Pflaums of only 50 per cent of the total $659,000 contents claim, in my view, represents a slightly excessive reduction.

[360] I need to say at this point that I do not in any significant way criticise Mr Pflaum for the approach he has adopted to these chattels valuation issues. The task he undertook was a massive one. No doubt he took he view that where they might not be readily available, it was not reasonable to adopt notional second-hand values for chattels which would not replace what the Pflaums had pre-fire. In a sense then, Mr Pflaum in presenting their claim for chattels quantum particularly seemed to opt

largely for new values. Evidence before me illustrated that no-one else was prepared to undertake any other form of valuation exercise on these items. That said, I do accept that the onus to prove loss and quantum here rests throughout on the Pflaums and this proof is to be to the required civil standard. With that in mind, a fair and reasonable approach to the Pflaums' contents and chattels valuation here requires, in my view, an overall downward adjustment to be made in the amounts claimed.

[361] I turn now to the ultimate test here. This is what is reasonable as between the parties. Given my general comments on this contents valuation issue noted above, a 40 per cent reduction in my mind is reasonable here and will do justice to both parties. This is to take into account true depreciation allowances on many of the chattels items and particularly the large volume of clothing, footwear and linen items, together with general unders and overs on other items in what is a very extensive contents list before me. That has the result that the approved claim for the Pflaums' contents, with the 40 per cent reduction, totals $394,400 and not $659,000. It is this lower figure which is to be adopted here.

[362] Next, the Pflaums claimed a little over $539,000 for certain significant items outside the dwelling associated with their property. Included in this figure were some items for which estimates or quotations were provided. Several of these related to the following:

(a) 6 retaining and driveway walls – for which a pricing of $129,185 (plus GST) is before the Court from Retain.Co;

(b) nearly 2 km of sheep fencing – for which a quotation of around $55,000 is before the Court from Heasley Fencing & Earthworks;

(c) 3.1 ha of forestry trees, details of which I address below; and

(d) 300 m of shelter belt reinstatement for which $61,962 is claimed.

[363] As to the forestry claim, the Pflaums include a claim for $89,125 specified as the cost to replace 3.1 hectares of forestry trees (along with a general sum described

as removal of trees and replanting totalling $20,654). Before the Court is a letter from Laurie Forestry Ltd dated 13 May 2019 giving an estimate of the likely pre-fire value of their trees at the $89,125 figure. This is based on a value for the trees said to be at the rate of $21,000 to $25,000 per hectare (plus GST). Laurie Forestry Ltd, however, also gave an assessment for a similar forestry loss for the Kwons in an almost identical letter dated 24 May 2019. This assessment gave a tree value estimate in the order of $19,000 to $22,000 per hectare plus GST, somewhat less than its 13 May 2019 letter to Mr Pflaum. Also, as I note at [325] above, these Laurie Forestry figures are significantly above the other forestry loss evidence for Mrs Grace that was before me from Forest Management Limited.

[364] For similar reasons to those I have outlined with respect to the Kwon claim, in all the circumstances here, I find that a figure of 60 per cent of the Pflaums' claimed amount for their forestry loss would be an appropriate claim and all that could reasonably be justified on the basis of material before the Court. Sixty per cent of the $89,125 is $53,475. It is this amount which is to be allowed in place of the Pflaums' $89,125 claim for the lost 3.1 hectares of forestry.

[365] Turning to the Pflaums' $539,000 site improvements claim, the Adventure Park complains that the value for this exceeds their valuer Mr Dunbar's estimate of the total market value of the land. Therefore, Mr Gallaway says the site imprisonments claims simply cannot be sustained. In addition, the Adventure Park position is that there has been no detailed evidence provided to confirm the pre-loss condition or extent of those items or whether in fact it is reasonable for them to be reinstated here.

[366] Mr Gallaway, in light of this, suggested an amount equivalent to 20 per cent of the assessed land value here amounting only to $95,000 would represent a fair sum for site improvements as between the parties. I disagree. On the evidence before me I accept however that the totals for the Pflaums' actual site improvements loss, claimed by the Pflaums at $539,000, is an excessive figure. In my view, at best a fair allowance for these site improvement claims would be 60 per cent of the total claim, a claim with the $89,125 forestry claim now excluded that would total $449,875. Sixty per cent of this sum amounts to $269,925. This amount is to be allowed here.

[367] Issue is then taken by the Adventure Park with a claim of $30,400 made by the Pflaums for a 1986 Saab motor vehicle. The Adventure Park complains that no proof of this loss or the market value of the vehicle has been provided. Instead, the $30,400 merely seems to represent an agreed replacement value paid to the Pflaums as part of their insured loss by IAG. It is submitted for the Adventure Park that a nominal sum of $5,000 for this 34-year-old vehicle would be appropriate here, given the absence of any evidence as to its actual market value. To an extent I agree that the Adventure Park here should not be bound by any decision on this vehicle's value, IAG has made by way of a contractual policy obligation to pay an agreed value. I say this bearing in mind that the true replacement cost of this vehicle might be significantly less. I adopt a nominal sum here of $15,000 for this vehicle in place of the $30,400 claimed.

[368] Lastly, additional policy benefits of $20,000 for alternative accommodation costs and $1,000 for additional stress benefit claimed by the Pflaums here, as with similar claims from the other remaining plaintiffs, are disputed. For reasons I have outlined above relating to those others which also apply here to the Pflaums (who as I understand it still remain unhoused in any real sense in their Worsleys Road property) these amounts are properly claimable from the Adventure Park.

[369] In conclusion the quantum amounts to which the Pflaums are entitled here are as follows:

Dwelling	$2,473,311	
Contents	$394,400	
Site improvements	$269,925	
Forestry loss	$53,475	
Fees	$117,114	
Car	$15,000	
Additional policy benefits	$21,000	
Demolition	$40,250	
TOTAL		**$3,384,475**

Repair cost claims

[370] The remaining claims against the Adventure Park are what Mr Gallaway describes as "repair claims" given that the properties in question were all deemed to be capable of economic repair.

[371] At para [219] of this judgment I indicated that as this trial commenced it seemed that the Adventure Park may have conceded (like Orion with the smaller claims from other plaintiffs it was facing) that the individual quantum amounts for these repair claims largely was not disputed.

[372] In his closing submissions before me, however, Mr Gallaway seemed to suggest that neither the plaintiffs nor IAG had discharged the burden on them of establishing the presence or quantum of these individual losses claimed. He complained that none of these Remaining Plaintiffs had elected to give any evidence personally or to call evidence from loss adjusters who had been involved in a number of the claims other than Mr Bird. As I saw it, this was somewhat of a new approach from Mr Gallaway but, nevertheless, I turn to address this issue now.

[373] So far as these repair-claim Plaintiffs are concerned, there are approximately 38 plaintiffs involved. Of these, 25 have made claims which are each less than $15,000. There are a further six whose claims are over that figure but under $35,000. There is one claim from the Dorrance Family Trust which is for $925,564 by way of an insured claim and $500 by way of an uninsured claim. Then there is one other claim from the Trustees of the Newbury Family Trust totalling about $88,500, a further claim from Mr Steven Williams totalling $57,301.85 and claims from Timothy Fournier and Kate Bracefield of about $65,500, and Richard and Susan Wilhelm totalling between $62,000 and $65,500.

[374] As to Mr Gallaway's complaint that no evidence was called with respect to these claims, it does seem that for some at least, reports from the loss adjuster Mr Bird are before the Court and these have not been the subject of specific cross-examination of him. General complaints about Mr Bird's evidence were noted, as I have outlined above, but specific evidentiary challenges, in particular relating to the larger repair cost claims, were generally not advanced to any degree before me.

[375] Indeed, with these 38 additional repair cost claims before the Court, if the individual plaintiffs were specifically required to give and call evidence of say an (averaging say two hours in each case) then this trial would have been extended by some 76 hours amounting to almost three further weeks. My understanding at the time was that this played a large part in what seemed to be a decision made on behalf of defendants not to challenge repair cost aspects of the Remaining Plaintiffs' claims, but it seems this now is not the case.

[376] Here the major challenge to the repair cost claim from the Adventure Park mounted by Mr Gallaway in his submissions was almost exclusively directed to the Dorrance Family Trust claim. The loss adjuster for this claim was Mr Bird. The majority of this $925,564 claim represented insured loss. The thrust of the Adventure Park complaint with respect to this claim is that it is said Mr Bird's evidence and loss summary is of little relevance because Mr Gallaway says IAG as insurer elected to cash settle the Dorrance claim.

[377] Although I accept Mr Gallaway's assurance that IAG did cash settle that claim, I am satisfied that any such settlement of this repair claim undoubtedly would have been based upon the loss adjuster's assessment of loss and repair cost.

[378] I accept too that it is correct to say that the manner in which an insurer like IAG does elect to settle its contractual policy obligation, strictly speaking, is to some extent irrelevant to whether the plaintiff concerned has proved the necessary loss.

[379] On this, Mr Gallaway points to the evidence of the loss adjuster called by the Adventure Park here, Mr Robb. He says that Mr Robb's view is by and large that from a loss adjusting perspective the information presented here does not support the Dorrance Family Trust claim made. On this basis, the Adventure Park submits I should not accept this claim put forward by the Dorrance Family Trust.

[380] I disagree, however. As I have noted, the loss adjuster for the Dorrance claim was Mr Bird. He provided in his evidence a detailed Claim Summary Report. It was no doubt on the basis of this report that IAG chose to make the insurance payout to the Dorrance Family Trust for the loss IAG accepted. On this aspect, I note my earlier

comment on insurance company practices when considering and meeting claims generally. I do not accept too that the suggestions advanced in evidence by Mr Robb in which he attempts to attack this conclusion are of sufficient substance to override the position taken by Mr Bird and IAG generally. I accept their position and find here that the Dorrance Family Trust has done sufficient to establish its loss and the quantum as claimed in the statement of claim. Judgment for this amount is to follow.

[381] I turn now to the remaining 37 repair claims. To repeat, the Adventure Park advances a general contention that these plaintiffs, and IAG through subrogation, have not discharged the burden of establishing the presence or quantum of the individual losses claimed in each case. The complaint is made that neither the Remaining Plaintiffs nor IAG have provided sufficient loss adjuster files or material with respect to the specific claims. Nor, it is claimed, did other loss adjusters provide to Mr Bird their full loss adjusting files for claims they were involved in when he prepared his various Claim Summary Reports before the Court. It is suggested that Mr Bird in his evidence did express some concerns about this approach. At times it appears he had needed to request additional documents, which he did. As I have noted above, some 25 of these 38 claims, however, are for amounts less than $15,000. I had always understood throughout that, especially with regard to what were seen as minor claims such as these, no additional evidence was required. Similar principles, too, for consistency would seem to apply for the approximately six claims under about $35,000 here.

[382] The major complaint from the Adventure Park relating to these matters seems to be that the remaining plaintiffs, and IAG in particular, should not be entitled to recovery of these insured loss claim costs because IAG cannot substitute what it paid (in some cases it is said voluntarily by way of cash settlement) for an award of damages which needs to be determined on ordinary principles.

[383] Even accepting this proposition, which from a technical point of view I do, I am satisfied here that Mr Bird's evidence and his substantial plaintiff Claim Summary Reports for the Remaining Plaintiffs can properly be relied upon. I reach this position, notwithstanding what might be seen as attempts to challenge it by Mr Robb.

[384] I conclude that the Remaining Plaintiffs, including the Dorrance Family Trust, have done sufficient to meet the burden on them to establish their individual losses and to verify that the quantum claimed in each individual case is properly due. Judgment to this effect is to follow.

Betterment

[385] Before me, the parties appeared to accept the position that, before any discussion of betterment was to take place here, the Remaining Plaintiffs and the Flanagans must have properly established their right to reinstatement damages. As to this aspect, as I have noted, the Adventure Park's initial position was that reinstatement was not reasonable and in fact in the case of the Flanagans, for the reasons they outlined, they did not even intend to reinstate.

[386] In addressing these issues earlier, however, I have reached a decision on this reinstatement question in favour of the Remaining Plaintiffs and the Flanagans.

[387] That said, it is appropriate now that I turn to address the issue of betterment.

[388] On this betterment question, Mr Gallaway submitted before me that, in any event here, a discount for betterment in relation to the increased value of a replacement property is relevant even in the present case where plaintiffs have no realistic choice but to reinstate. This was confirmed by the Court of Appeal in *Southland Indoor Leisure Centre Charitable Trust* where the Court held "betterment is a tool used [where] the defendant's negligence forces the plaintiff to replace property with something of greater value."[86]

[389] In that *Southland Indoor Leisure Centre* case an allowance for betterment was made and an appropriate reduction imposed.

[390] Here, the Adventure Park must prove the existence of and quantum of any betterment it alleges against the Remaining Plaintiffs and the Flanagans. Once this has occurred, those plaintiffs are then in a position where they can point towards

---

[86] *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68 at [151].

factors that count against making any significant deduction for betterment. Ultimately, the question, as to what is an appropriate assessment of damages, is a question of fact.

[391] On betterment issues, it is useful to look first to s 43 of the FRF Act. This provision does not appear to contemplate any deduction for betterment. Section 43(1)(b) states:

> (b) Any loss in, or diminution of, value of that property, and any consequential loss or damage not too remote in law, may be recovered from that person (the offender) by the owner of the property.

[392] Loss that is recoverable under s 43 is prescribed as "any loss" and "any consequential loss or damage" that is not too remote in law. The loss claimed in the present case is a loss said to have resulted directly from the Chairlift Fire requiring replacement of the homes and items that were destroyed or substantially damaged.

[393] And, so far as the second and third causes of action in negligence and nuisance advanced by the Remaining Plaintiffs and the Flanagans are concerned, as I see it, the authorities generally do not seem to support the allowance of betterment in circumstances such as the present.

[394] A leading case on betterment is *J and B Caldwell Ltd v Logan House Retirement Home Ltd*[87] which was endorsed in the Court of Appeal in the *Southland Indoor Leisure* case.

[395] It noted the object of damages in tort is to restore plaintiffs to the position they would have occupied but for the defendant's wrongdoing. Betterment is used as a tool to achieve that objective where a defendant's negligence forces a plaintiff to replace property with something of greater value. General principles applying to the assessment of betterment are:

(a) each case has to be dealt with on its own facts;

(b) justice has to be done between the plaintiff and the defendant;

---

[87] *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1992] 2 NZLR 99

(c) the plaintiff should not over-recover; and

(d) the defendant must pay to compensate the plaintiff for the inconvenience of incurring a cost earlier than the plaintiff would have anticipated.

[396] Deductions for betterment are to be net of any allowance for any disadvantage associated with the untimely and unavoidable nature of a plaintiff's investment. Betterment, however, can take the form of savings resulting from deferred spending on replacement or maintenance. It has been recognised by the courts that where there is no second-hand equivalent readily available, plaintiffs are forced to substitute what was lost with something new and, therefore, any deduction for betterment may need to be reduced to take account of any economic cost to the plaintiff of investing in a new for old at a point in time when it would not otherwise have done so. Ultimately, and particularly where it is not possible to quantify betterment precisely, the task of the Court is to use its best endeavours to place a monetary value that is fair.

[397] There are other exceptions to the general approach to betterment which include a situation where the plaintiffs have a need to reinstate or replace items that they would otherwise never had had to replace or where there is a need for plaintiffs to carry out reinstatement in a particular way without any choice or options. A further exception is a plaintiff's unilateral need to comply with the law, including Local Authority requirements.

[398] It is my view that in the current circumstances these exceptions to betterment apply in large measure.

[399] A first exception is where there is a need for the plaintiffs unilaterally to comply with the law. For example, this is to include the situation prevailing when a common clause in property insurance policies is activated. This type of clause provides that the cover is to include the "extra costs necessary for the restoration to meet with the lawful requirements of government or local bodies".

[400] There is an accepted exception not to account for betterment where a plaintiff, as a matter of necessity, is obliged to reinstate a house or some other asset in a particular manner in order to comply with imposed requirements or in order to obtain *restitution in integrum* relating to the use and enjoyment of that plaintiff's property.

[401] In the present case, I am satisfied this exception applies to those Remaining Plaintiffs and the Flanagans who, as a result of what I have found to be the actions of the Adventure Park, have been required when they or others rebuild their homes, outbuildings, fences and other structures to comply with the requirements of the law such as council compliance and building code requirements.

[402] Further, I am satisfied in this case that generally, reinstatement of the parties' destroyed and damaged house and property assets in particular is the only way to return these plaintiffs to the same position they enjoyed with regard to the use and enjoyment of their particular properties before the fire.

[403] A further betterment exception applies where plaintiffs have a need to reinstate or replace their property or items that they would not otherwise have had to replace, but for a defendant's default. This is a further exception which, in my view, applies to a number of the situations before me. It applies to some extent, as I see it, with respect to a number of possessions and house contents, held by the Remaining Plaintiffs and the Flanagans prior to the fires, which they would not reasonably be expected to replace but for that event. As I have noted, issues do arise regarding amounts claimed for some items, but I am satisfied overall that with the awards made in this judgment, no plaintiffs will be receiving what could be described as an inappropriate windfall.

[404] Lastly, a betterment exception exists where plaintiffs need to carry out reinstatement in a particular way without any choice or options on their part. This exception, in my view, will apply here with regard to a number of structure rebuilds for which there is really no option or choice existing for that particular plaintiff. For example:

(a) Houses located on a hillside which, prior to the fire, included retaining walls and other major structural elements were required to be reinstated

on the same building platform and in accordance with what are the now current building compliance regulations;

(b) A destroyed or substantially damaged fence needed to be reinstated along a property boundary;

(c) Driveways and pathways needed to be properly resurfaced;

(d) A possible exception example in this case also included the situation of a significantly underinsured plaintiff, such as Mrs Grace, who had no option to even reinstate what she had before the fire, but instead had no choice but to rebuild a significantly smaller home.

[405] As I have noted earlier, it is for the Adventure Park to prove that betterment has occurred in situations like the present. In support of its betterment argument, the Adventure Park called expert evidence from the valuers Mr Dunbar and Mr Beatson of Telfer Young who were instructed to prepare market valuation reports. It seems, therefore, they understandably adopted a market approach for each valuation they undertook based on a sales comparison approach. The valuers confirmed in evidence that their instructions were simply to undertake that market value assessment and hence they did not use a replacement method of valuation in any case. Mr Dunbar, in particular, confirmed that as his instructions were to prepare a market value this meant that an alternative replacement cost valuation, in his assessment, would not be useful. Both valuers and Mr Dunbar in particular did confirm, however, that neither of them were suggesting that the "improvement value" they had listed for the various homes and outbuildings would be sufficient to rebuild those buildings on the respective properties.

[406] Indeed, it seems that Mr Beatson, who was instructed to prepare a market valuation report for the Flanagan property, in his evidence did accept that a valuation to reinstate those buildings would require a replacement cost approach as the appropriate method but he confirmed this was not his instruction from the Adventure Park. Mr Beatson did, however, agree that the Flanagans' home was

"effectively a rebuild".[88] He agreed too that to put the Flanagans back into the same position would be a costly exercise, with his assessed market valuation not replacing what was there before. Notwithstanding this, Mr Beatson also accepted in his evidence the rebuild rate for the Flanagan property as claimed as a reasonable one.[89]

[407] Finally, the Adventure Park called evidence from the loss adjuster, Mr Robb, but he said he was unable to give an opinion on whether the Remaining Plaintiffs' claims and the Flanagans' claim were reasonable here.

[408] To summarise Mr Robb's evidence, as I see it, this included the following:

(a) He accepted that Mr Bird, who he considered to be an experienced and competent loss adjuster, was in a better position than himself to analysis the other loss adjuster's work on the various insured loss claims.

(b) Generally, Mr Robb was of the view that he had some difficulty in determining whether or not the insured and uninsured losses were reasonable because of what he said was a lack of supporting documents provided to him.

(c) As to accommodation costs, he did not suggest that where these were claimed the expense was not incurred. So far as the evidence relating to Mrs Grace's $40,000 accommodation allowance is concerned, he concluded that this amount was reasonable. He accepted the evidence too that the amount had been completely used up by the Grace family and that they had to front up with more accommodation costs themselves.

(d) He accepted that so far as re-carpeting the destroyed homes were concerned, a claim for 100 per cent cost of the new carpets was acceptable as purchasing and reinstating second-hand carpets was not appropriate.

---

88 Notes of Evidence, p 1237, line 15.
89 Notes of Evidence, p 1243, lines 11 – 14.

(e) He acknowledged he had in fact been shown photos of the Grace, Kwons' and Pflaum' properties and, having viewed these, he had no argument as to the use of the expression "executive" homes for the Kwon and Pflaum properties.

(f) He accepted the evidence of the valuer Mr Dunbar that the Kwons originally had a 343 square metre home, the Pflaums a 600 square metre home and Mrs Grace a 436 square metre home. He confirmed too he was aware that the Kwons are rebuilding their house, the Pflaums intend to rebuild and Mrs Grace has rebuilt a smaller home.

(g) He confirmed he took no issue with the square metreage rates put to him and accepted by Mr Dunbar as reasonable, and even went so far as to comment that the square metreage rate for Mrs Grace's rebuild of $3,000 per square metre was "at the lower end".[90]

(h) Finally, it seems from his evidence that Mr Robb may have taken no steps himself to undertake an independent check of the building costs claimed here such as using the Cordell Calculator.[91]

[409] In conclusion on this betterment issue, considering the factual position in this case and the particular exceptions to the betterment principle I have noted above, I accept that in doing justice here between the parties no deduction for betterment should be made. I am satisfied the Adventure Park has been unable to meet the onus upon it to prove betterment against the remaining plaintiffs and the Flanagans. It fails with respect to the betterment argument. No betterment adjustment is to be made here.

Interest

[410] The remaining plaintiffs and the Flanagans seek interest in this proceeding as outlined in their statement of claim. The Interest on Money Claims Act 2016 relates to claims commenced only after 1 January 2018. Here, the initial statement of claim issued by all plaintiffs in this proceeding, including the Remaining Plaintiffs and the

90 Notes of Evidence, page 1264, line 16; page 1265, lines 27 and 28 – 33.
91 Notes of Evidence, page 1269, lines 6 – 9.

Flanagans, it seems was filed on 30 June 2017. The Interest on Money Claims Act 2016, therefore, does not apply to the interest claim here.

[411] Clause 1 of Schedule 1 of the Interest on Money Claims Act 2016, however, provides that the previous regime under s 87 of the Judicature Act 1908 is to apply.

[412] That s 87(1) provided:

> In any proceedings…for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate, not exceeding the prescribed rate, as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

[413] At all relevant times here the "prescribed rate" was five per cent per annum.

[414] I need to note here too that the power to award interest under s 87 is discretionary and is to be exercised as the justice of the case requires. The general purpose of the power to award interest is to enable the Court properly to compensate successful plaintiffs for their loss. This involves issues of principle including factors such as the need for a defendant which has had the use of money which should have been available to the plaintiff to compensate the plaintiff accordingly. Awards of interest generally are not dependent on proof of either the plaintiff's loss or the defendant's gain as it is assumed this has occurred.

[415] In the present case and bearing in mind the principles I have noted above, I am satisfied the Remaining Plaintiffs and the Flanagans are entitled to an award of interest against the Adventure Park with respect to their claims from the date when the events in question occurred. That date, as I see it, was 15 February 2017.

[416] At that date, pre-fire, the Remaining Plaintiffs and the Flanagans were generally living in their undamaged homes and having the benefit of occupying and using their properties and all related assets.

[417] As I see the position, it is a matter of fairness and principle here that this Court should exercise the discretion it has under s 87 and otherwise in favour of making

awards of interest here to the Remaining Plaintiffs and the Flanagans. This is to be at the rate of five per cent per annum from 15 February 2017 to the date of payment of each judgment sum, to compensate them for the delayed payment of their loss. It is my view that without such an interest award plaintiffs here are not properly compensated.

[418] For these reasons an order is now made that the Remaining Plaintiffs and the Flanagans are entitled to a payment of interest on the respective judgment sums awarded to them at the prescribed rate of five per cent per annum with respect to those awards here from 15 February 2017 to the date of final payment respectively of each judgment sum. An order requiring the Adventure Park to make this interest payment is now made.

Judgment

[419] The Remaining Plaintiffs and the Flanagans have largely succeeded in their claim here against the Adventure Park.

[420] Accordingly, I enter judgment against the Adventure Park in favour of:

(a) The Flanagans in the sum of $1,182,764.56 plus interest thereon at 5 per cent per annum from 15 February 2017 to the date these amounts are paid.

(b) Mrs Grace, the sum of $1,948,828.21 plus interest thereon at 5 per cent per annum from 15 February 2017 to the date these amounts are paid.

(c) The Kwons in the sum of $2,253,336.24 together with interest thereon at 5 per cent per annum from 15 February 2017 to the date these amounts are paid.

(d) The Pflaums in the sum of $3,384,475.00 together with interest thereon at 5 per cent per annum from 15 February 2017 to the date these amounts are paid.

(e) Each of the repair costs plaintiff claimants respectively as outlined at para [219] herein as "Claimants" for the amounts specified for each of those plaintiffs as outlined under "Claim Amount" in the paragraph, together with interest thereon at 5 per cent per annum from 15 February 2017 to the date respectively each of these amounts is paid.

(For the avoidance of doubt and by way of example a payment under para (e) above is to include the 9th plaintiffs' the Dorrance Family Trust claim at $926,064.76 plus interest).

Costs

[421] The Remaining Plaintiffs and the Flanagans have largely succeeded in their claim here against the Adventure Park. In terms of r 14.1 of the High Court Rules I see no reason why they should not be entitled to an award of costs against the Adventure Park in the usual way. Notwithstanding that, at trial I received no detailed submissions on this particular issue of costs.

[422] In light of this, therefore, costs here are reserved.

[423] I encourage counsel for the parties to liaise with a view to endeavouring to resolve the issue of costs between themselves. If counsel and the parties are unable to settle the question of costs then counsel are to file memoranda sequentially which are to be referred to me and in the absence of either party indicating they wish to be heard on the matter I will decide the question of costs based upon the memoranda filed and all the other material before the Court.

.....
Gendall J

Solicitors:
DLA Piper New Zealand, Auckland
Kennedys, Auckland
Chapman Tripp, Christchurch

Copy to
Craig Stevens Barrister, Wellington
Thomas Weston QC, Barrister, Tai Tapu

SCHEDULE A

Complete List of Plaintiffs

CECILE GRACE
First Plaintiff

ALEXANDER DOUG PFLAUM
Second Plaintiff

AMRUT GOVIND
Third Plaintiff

BRENT CAMERON AND ANNIE CAMERON
Fourth Plaintiffs

B KWON
Fifth Plaintiff

MARK BALOGH AND HLS TRUSTEES LIMITED AS TRUSTEES OF THE BALOGH FAMILY TRUST
Sixth Plaintiffs

CORY BEYNON
Seventh Plaintiff

DIVINE CAKES & DESSERTS CHRISTCHURCH LIMITED
Eighth Plaintiff

PAUL JOSEPH DORRANCE AND DAVID PAUL AMODEO AS TRUSTEES OF THE DORRANCE FAMILY TRUST
Ninth Plaintiffs

FABEL MUSIC LIMITED
Tenth Plaintiff

GRAEME MCVICAR AND JOY MCVICAR
Eleventh Plaintiffs

GAVIN BRINDLEY
Twelfth Plaintiff

GREGORY GRAHAM
Thirteenth Plaintiff

HELEN WARD
Fourteenth Plaintiff

IAN HOUGHTON
Fifteenth Plaintiff

JAMES FROST
Seventeenth Plaintiff

JUNG KWON JANG
Eighteenth Plaintiff

KATHARINE EVERTON
Nineteenth Plaintiff

KERRY FRANCIS BRIGGS
Twentieth Plaintiff

DARA BIGWOOD
Twenty-Second Plaintiff

DAVID BAILEY AND SHARON BAILEY
Twenty-Fifth Plaintiffs

GRANT SISSON AND
STEPHANIE SISSON
Twenty-Sixth Plaintiffs

THE TRUSTEES OF THE SISSON
FAMILY TRUST
Twenty-Sixth (a) Plaintiff

KENNETH MCKENZIE AND
DENISE MCKENZIE
Twenty-Seventh Plaintiffs

RICHARD WILHELM AND
SUSAN WILHELM
Twenty-Eighth Plaintiffs

ROBIN OAKLEY AND
SHIRLEEN OAKLEY
Thirtieth Plaintiffs

SIMON JERARD AND
SAMANTHA JERARD
Thirty-First Plaintiffs

TERRENCE POWERS AND
KAREN POWERS
Thirty-Second Plaintiffs

ALAN BEUZENBERG AND
DEBBIE BEUZENBERG
Thirty-Third Plaintiffs

BARRY PREBBLE
Thirty-Fourth Plaintiff

CHRISTOPHER BAYLEY AND
JANINE BAYLEY
Thirty-Fifth Plaintiffs

CHRISTOPHER JOHNSTONE AND
KAREN JOHNSTONE
Thirty-Sixth Plaintiffs

THE TRUSTEES OF THE TIROHANGA
FAMILY TRUST
Thirty-Sixth (a) Plaintiffs

GRANT POULTNEY AND
SUSAN POULTNEY
Thirty-Seventh Plaintiffs

GLEN MENZIES AND
TRACEY MENZIES
Thirty-Eighth Plaintiffs

JERRY O'NEILL AND JILL O'NEILL
Thirty-Ninth Plaintiffs

JOSHUA SCOTT AND LINDA JONES
Fortieth Plaintiffs

MICHAEL MILNE AND SACHA MILNE
Forty-First Plaintiffs

PHILLIP CLAUDE AND
KATHRYN WARD
Forty-Second Plaintiffs

PAUL DORRANCE
Forty-Third Plaintiff

PETER MORGAN AND
MARY BRENNAN
Forty-Fourth Plaintiffs

WARREN FLANAGAN AND
VILMA FLANAGAN
Forty-Seventh Plaintiffs

LORRAINE ELDER AND DAVID ELDER
Forty-Eighth Plaintiffs

TRACEY COOK AND CLAUDE COOK
Forty-Ninth Plaintiffs

JOANNE KINLEY AND WAYNE GIBBON
Fiftieth Plaintiffs

NICK THURLEY AND
CATHERINE BARENDRECHT
Fifty-First Plaintiffs

NORMAN MATTHEWS
Fifty-Second Plaintiff

REBECCA PARISH, GERRARD DOUBLE AND ANDERSON LLOYD TRUSTEE COMPANY 2013 LIMITED AS TRUSTEES OF THE PARISH AND DOUBLE FAMILY TRUST
Fifty-Fourth Plaintiffs

PERCY BULL
Fifty-Fifth Plaintiff

PETER COUGHLAN
Fifty-Sixth Plaintiff

PHILIP JOHNSTON
Fifty-Seventh Plaintiff

PEER PRITCHARD AND
SONYA ANNE BROOKS AS TRUSTEES OF THE PRITCHARD BROOKS FAMILY TRUST
Fifty-Eighth Plaintiffs

ROBIN OAKLEY AND
SHIRLEEN OAKLEY
Fifty-Ninth Plaintiffs

REBECCA PARISH
Sixtieth Plaintiff

ROB VAN WEERD CONSTRUCTION LIMITED
Sixty-First Plaintiff

ROSS BONNINGTON
Sixty-Second Plaintiff

SHONA MOORE
Sixty-Third Plaintiff

STEVEN WILLIAMS
Sixty-Fifth Plaintiff

CHRISTOPHER BAYLEY, JANINE BAYLEY AND DAVID SHACKLETON AS TRUSTEES OF TE WAIHORA TRUST
Sixty-Seventh Plaintiffs

ANNIE CAMERON AND BRENT CAMERON AS TRUSTEES OF THE ALBAN FAMILY TRUST
Sixty-Eighth Plaintiffs

ALAN BEUZENBERG AND DEBBIE BEUZENBERG AS TRUSTEES OF THE BEUZENBERG FAMILY TRUST
Sixty-Ninth Plaintiffs

MONIQUE MENTINK AND LANDSBOROUGH TRUSTEE SERVICES NO. 10 LIMITED AS TRUSTEES OF THE MONIQUE MENTINK FAMILY TRUST
Seventieth Plaintiffs

MIRANDA ANGELIQUE AND CRAIG NEWBURY AS TRUSTEES OF THE NEWBURY FAMILY TRUST
Seventy-First Plaintiffs

MIRANDA ANGELIQUE AND CRAIG NEWBURY
Seventy-First (a) Plaintiffs

TIMOTHY FOURNIER AND KATE BRACEFIELD
Seventy-Second Plaintiffs

TRUDY ANDERSON
Seventy-Third Plaintiff

VIKKI PFLAUM
Seventy-Fourth Plaintiff

KERRY BRIGGS AND LISA BRIGGS
Seventy-Fifth Plaintiffs

SUZANNE MILLAR AND
CHRIS MILLAR
Seventy-Sixth Plaintiffs

SAMANTHA JERARD, SIMON JERARD
AND MARK ABOTT AS TRUSTEES OF
THE FEDERAL TRUST
Seventy-Seventh Plaintiffs

PAUL STANTON AND CATHERINE
STANTON
Seventy-Eighth Plaintiffs

RACHEL CULLENS
Seventy-Ninth Plaintiff

MARK AND KAREN SINCLAIR
Eightieth Plaintiffs

SCHEDULE 1

AMRUT GOVIND
Third Plaintiff

BRENT CAMERON AND ANNIE CAMERON
Fourth Plaintiffs

DIVINE CAKES & DESSERTS CHRISTCHURCH LIMITED
Eighth Plaintiff

GAVIN BRINDLEY
Twelfth Plaintiff

HELEN WARD
Fourteenth Plaintiff

KATHARINE EVERTON
Nineteenth Plaintiff

KERRY FRANCIS BRIGGS
Twentieth Plaintiff

GRANT SISSON AND STEPHANIE SISSON
Twenty-Sixth Plaintiffs

THE TRUSTEES OF THE SISSON FAMILY TRUST
Twenty-Sixth (a) Plaintiff

KENNETH MCKENZIE AND DENISE MCKENZIE
Twenty-Seventh Plaintiffs

ROBIN OAKLEY AND SHIRLEEN OAKLEY
Thirtieth Plaintiffs

SIMON JERARD AND SAMANTHA JERARD
Thirty-First Plaintiffs

BARRY PREBBLE
Thirty-Fourth Plaintiff

CHRISTOPHER BAYLEY AND JANINE BAYLEY
Thirty-Fifth Plaintiffs

JOSHUA SCOTT AND LINDA JONES
Fortieth Plaintiffs

MICHAEL MILNE AND SACHA MILNE
Forty-First Plaintiffs

PHILLIP CLAUDE AND KATHRYN WARD
Forty-Second Plaintiffs

LORRAINE ELDER AND DAVID ELDER
Forty-Eighth Plaintiffs

REBECCA PARISH, GERRARD DOUBLE AND ANDERSON LLOYD TRUSTEE COMPANY 2013 LIMITED AS TRUSTEES OF THE PARISH AND DOUBLE FAMILY TRUST
Fifty-Fourth Plaintiffs

PETER COUGHLAN
Fifty-Sixth Plaintiff

ROBIN OAKLEY AND SHIRLEEN OAKLEY
Fifty-Ninth Plaintiffs

REBECCA PARISH
Sixtieth Plaintiff

ROB VAN WEERD CONSTRUCTION LIMITED
Sixty-First Plaintiff

CHRISTOPHER BAYLEY, JANINE BAYLEY AND DAVID SHACKLETON AS TRUSTEES OF TE WAIHORA TRUST
Sixty-Seventh Plaintiffs

ANNIE CAMERON AND BRENT CAMERON AS TRUSTEES OF THE ALBAN FAMILY TRUST
Sixty-Eighth Plaintiffs

TRUDY ANDERSON
Seventy-Third Plaintiff

KERRY BRIGGS AND LISA BRIGGS
Seventy-Fifth Plaintiffs

SAMANTHA JERARD, SIMON JERARD AND MARK ABOTT AS TRUSTEES OF THE FEDERAL TRUST
Seventy-Seventh Plaintiffs

PAUL STANTON AND CATHERINE STANTON
Seventy-Eighth Plaintiffs

SCHEDULE 2

Alexander Doug Pflaum (the 2nd Plaintiff)
Vikki Pflaum (the 74th Plaintiff)
B Kwon (the 5th Plaintiff)
Jung Kwon Jang (the 18th Plaintiff)
Cecile Grace (the 1st Plaintiff)
David Bailey and Sharon Bailey (the 25th plaintiffs)
Alan Beuzenberg and Debbie Beuzenberg (the 33rd plaintiffs)
Dara Bigwood (the 22nd plaintiff)
Percy Bull (the 55th plaintiff)
Tracey Cook and Claude Cook (the 49th plaintiffs)
Cory Beynon (the 7th plaintiff)
Rachel Cullens (the 79th plaintiff)
Dorrance Family Trust (the 9th Plaintiff)
Fabel Music Limited (the 10th plaintiff)
Graeme McVicar and Joy McVicar (the 11th plaintiffs)
Joanne Kinley and Wayne Gibbon (the 50th plaintiffs)
Ian Houghton (the 15th plaintiff)
Christopher Johnstone and Karen Johnstone (the 36th plaintiffs)
The Trustees of the Tirohanga Family Trust (the 36th(a) plaintiffs)
Suzanne Millar and Chris Millar (the 76th plaintiffs)
Grant Poultney and Susan Poultney (the 37th plaintiffs)
Glen Menzies and Tracey Menzies (the 38th plaintiffs)
Jerry O'Neill and Jill O'Neill (the 39th plaintiffs)
Paul Dorrance (the 43rd plaintiff)
Peter Morgan and Mary Brennan (the 44th plaintiffs)
Nick Thurley and Catherine Barendrecht (the 51st plaintiffs)
Miranda Angelique and Craig Newbury as Trustees of the Newbury Family Trust (the 71st plaintiffs)
Miranda Newbury and Craig Newbury (the 71st(a) plaintiffs)
Norman Matthews (the 52nd plaintiff)

Terrence Powers and Karen Powers (the 32nd plaintiffs)
Peer Pritchard and Sonya Anne Brooks as Trustees of the Pritchard Brooks Family Trust (the 58th plaintiffs)
Ross Bonnington (the 62nd plaintiff)
Charles Moore and Shona Moore (the 63rd plaintiffs)
Mark Sinclair and Karen Sinclair (the 80th plaintiffs)
Steven Williams (the 65th plaintiff)
Alan Beuzenberg and Debbie Beuzenberg as Trustees of the Beuzenberg Family Trust (the 69th plaintiffs)
Monique Mentink and Landsborough Trustee Services (No 10 Limited) as Trustees of the Monique Mentink Family Trust (the 70th plaintiffs) and Ian Houghton as occupier (the 70th plaintiff)
Timothy Fournier and Kate Bracefield (the 72nd plaintiffs)
Richard Wilhelm and Susan Wilhelm (the 28th plaintiffs)
Gregory Graham (the 13th plaintiff)
Mark Balogh and HLS Trustees Limited as trustees of The Balogh Family Trust (the 6th plaintiff)
James Frost (the 17th plaintiff)
Philip Johnston (the 57th plaintiff)

SCHEDULE 3

Warren Flanagan and Vilma Flanagan (the 47th Plaintiffs)