**IN THE HIGH COURT OF NEW ZEALAND**
**GISBORNE REGISTRY**

**CIV-2015-416-25**
**[2017] NZHC 1284**

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| BETWEEN | | DOUBLE J SMALLWOODS LIMITED<br>First Plaintiff |
| | | G & P ENTERPRISES LIMITED<br>Second Plaintiff |
| | | JON KENNETH GARDNER AND<br>MARGARET ANNE GARDNER<br>Third Plaintiffs |
| AND | | GISBORNE DISTRICT COUNCIL<br>Defendant |

Hearing: 3–7 April 2017

Counsel: T J Rainey and N D Smith for Plaintiffs
F P Divich and A C Harpur for Defendant

Judgment: 13 June 2017

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**JUDGMENT OF THOMAS J**

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## Introduction

[1] The first plaintiff, Double J Smallwoods Limited (Smallwoods), carries on business as a sawmilling remanufacturing company on land it leases and on land owned by the second plaintiff, G & P Enterprises Limited (G & P), at 127 Awapuni Road, Gisborne (together referred to as the Property). The third plaintiffs, Jon and Margaret Gardner, are directors and shareholders of Smallwoods and G & P.

[2] The defendant, Gisborne District Council (the Council), owns two parcels of reserve land which are bisected by the Waikanae Creek (the Creek). Lot 3 DP9506

(Lot 3) adjoins the northern bank of the Creek and Lot 2 DP9506 (Lot 2) is between the southern bank of the Creek and the north-western boundary of the Property.

[3] The plaintiffs' claim concerns a fire which occurred on 7 January 2010 (the Fire), which the plaintiffs say began in vegetation (likely pampas and scrub) around the western end of Lot 3. The Fire spread southeast towards the Creek. Windblown embers blew across the Creek and ignited vegetation on Lot 2 and then the Fire and windblown embers spread southeast into the Property, causing widespread damage, including the total loss of a storage shed (called an air shed), partial loss of a mill building and damage to plant, stock and other items.

[4] The Council says the Fire began in the rail corridor on land not owned by the Council. The Council had joined as third parties KiwiRail Holdings Limited and New Zealand Railways Corporation (together referred to as KiwiRail which term includes its predecessors, Tranzrail and Ontrack). The Council discontinued its claim against them.

[5] The plaintiffs claim in nuisance, negligence and strict liability. They say they suffered an unreasonable interference with their right to use and enjoy the Property because the pampas, scrub and weeds growing on Lots 2 and 3 (together the Council Land) posed a fire hazard and increased risk of fire spreading to the Property. The Council had control of the Council Land and its use of it created an unreasonable interference to the Property and as a result the plaintiffs suffered damages and loss.

[6] As far as the negligence claim is concerned, the plaintiffs say the Council owed them a duty of care, being aware of the fire hazard posed by the pampas, scrub and weeds on the Council Land and failed to take reasonable steps to reduce, remove or abate that hazard.

[7] The plaintiffs claim damages and losses including business losses, consequential losses and general damages for anxiety, stress and inconvenience suffered by Mr and Mrs Gardner.

[8] The Council denies the claim, saying that the vegetation on the Council Land was a reasonable and natural use of the Council Land. Furthermore, that the Fire was deliberately or accidentally lit by an unknown person, it started on land not owned by the Council and the Council had no reasonable opportunity to extinguish it before it spread. As far as negligence is concerned, that in the conditions prevailing at the time, any vegetation could pose a fire hazard, it was not foreseeable that there would be an unlawful lighting of a fire and the Council cannot reasonably be required to remove all vegetation which might in certain conditions pose a fire hazard in the event of an unlawful or accidental fire.

[9] The Council says Mr and Mrs Gardner have no standing and cannot claim general damages in their capacity as directors of Smallwoods and G & P.

[10] The Council raises affirmative defences: it had no direct control of persons who started the Fire; if the Council were negligent, then the plaintiffs consented to the risk of damage by the spread of fire (volenti non fit injuria); contributory negligence by the plaintiffs failing to take reasonable steps to safeguard their own interests; and business loss is an expectation loss and not recoverable in tort. At the trial, Ms Divich, appearing for the Council, withdrew the defence based on volenti non fit injuria.

**Issues**

[11] The issues which require determination are:

(a) Did the Council's use of the Council Land create, continue or adopt an unreasonable interference (nuisance) to the plaintiffs' right to use and enjoy the Property?

(b) Did the vegetation growing on the Council Land pose an unreasonable fire hazard and an increased risk of fire spreading to the Property?

(c) Did the Council know the Property was at risk of damage or injury by fire in the vegetation, including pampas grass, on the Council Land?

(d) What, if any, duty did the Council owe to the plaintiffs to prevent or minimise the known risk of damage or injury to the Property arising from the vegetation including pampas grass on the Council Land?

(e) Did the Council breach that duty by failing to do what was reasonable in all the circumstances to prevent or minimise the known risk?

(f) Was the Council's breach of this duty causative of the loss suffered by the plaintiffs?

(g) To what extent would removal or reduction of vegetation on the Council Land have reduced or prevented the Fire from spreading, if at all?

(h) What is the quantum of the loss suffered by the plaintiffs?

(i) Did the plaintiffs fail to exercise the skill and care which would be expected of a reasonable prudent person in their position to avoid a foreseeable risk of harm? If so, what reduction (if any) should be made to the damages which would otherwise be payable?

(j) Can Mr and Mrs Gardner claim general damages?

## PART I - FACTUAL ASSESSMENT

### Background

[12] The Property is on the south side of the Palmerston North/Gisborne railway line. The rail corridor occupies land either side of the railway line and is owned by the Crown/KiwiRail. The Council Land is on the south side of the rail corridor. Lot 2, on the southern side of the Creek, is about 20 metres wide and 90 metres long. Lot 3, on the northern side of the Creek, is about 70 metres long (running along the railway line) and about 15 metres wide. The Council Land is bounded by a primary school on the southern and western boundaries and an industrial/commercial

business on the western boundary. Residential neighbourhoods are to the north and south.

[13] The Property adjoins the southern boundary of the Council Land on its north western side and the rail corridor on its north eastern side. At the time of the Fire there was a wire fence along the boundary.

[14] The Smallwoods timber processing business is operated on land owned by G & P and land to the south which is owned by Red Sea Investments Limited (Red Sea) and leased to Smallwoods. There are eight buildings located on the leased land including the mill building where much of Smallwoods' plant was located. Sawdust, which is a by-product of the timber processing plant, stock and waste timber produced by the timber processing business was stored on the Property.

[15] In addition to the leased land, Smallwoods used another building known as the air shed located on additional land owned by Red Sea. Smallwoods had exclusive use of the air shed without charge from Red Sea. The air shed was used for storage of stock which had been processed by Smallwoods before being sold/shipped to customers.

*The background to the Fire*

[16] In January 2001, the Council's Bylaws and Fire Inspector at the time, Stewart Wohnsiedler, wrote to KiwiRail's property managers about what he considered to be KiwiRail's land at the back of the Property, recording that the "long grass, weeds and toe toe bushes" were a hazard, particularly given their proximity to the timber yard. In his letter he required the "overgrowth" to be cut and cleared "to lessen the fire risk" and said, if not carried out within 14 days, the Council would do so at KiwiRail's cost.

[17] Mr Gardner gave evidence that for about six years prior to 2010 there had been problems with fires starting on land behind the Property. He considered they had the potential to spread south onto the Property and cause major damage. He described them as mostly minor fires, but they had been attended by the Police, the Fire Service and Council. As a result, he had complained to the Council and held

discussions with Mr Wohnsiedler. He said that in about 2006 or 2007, after one of the fires spread onto the Property, Mr Wohnsiedler agreed with him that scrub and vegetation adjoining the Property needed to be cleaned up. Mr Gardner cut the north eastern boundary fence and used a front end loader to begin clearing the scrub. Two railways officers arrived and instructed him to leave immediately, despite his protestations that he was carrying out the work as discussed with the Council and in order to reduce the fire hazard.

[18] Although Mr Gardner had been prevented from continuing with that work, he decided to clear a fire track in from the boundary fence to create a fire break. Other preparations in the case of fire included acquiring six hose reels and putting fire extinguishers on all the forklifts. The engineers' workshop had two or three extinguishers and mains water was piped to the fire hydrants. There was a 3,000 litre water tank at the Property which could assist as another water source in the case of fire. Mr Gardner arranged cleanups of the Property every two years around the buildings in order to meet insurance audits for fire prevention. There was an onsite incinerator to dispose of flammable material and larger items were taken offsite to be burned.

[19] Mr Gardner said, however, there was an ongoing problem with the scrub, weeds and pampas on the other side of the boundary fence which continued to seed and spread across into the Property in the prevailing wind.

[20] In October 2009, Mr Gardner again organised a clearing of the fence line using a small excavator purchased for the purpose of removing scrub and pampas. Mr Gardner also tried to reduce the fire risks within the Property by cutting up fillet timbers and storing them away from the buildings on the far side of the sawdust heap. It was then sold as firewood and given away. At the time of the Fire, he had arranged to reduce his stock of firewood and organised for remaining bundles to be removed from the Property. Sawdust was being removed for use on dairy farms and had previously been provided to the Council for use as ground cover.

[21] Donald Scott is currently the Principal Rural Fire Officer, Wairoa District Council. He was the Principal Rural Fire Officer, Gisborne District Council from

1995 to 2009. He gave evidence of previous fires, observing that most of them were less than 20 square metres in area and varied from grass to scrub fires.

[22] Although he had stated that no fires had occurred on the Council Land where the Fire began, Mr Scott accepted there was evidence of fires which had taken place around the Council Land in the area at the back of the commercial property known as Dukes. He observed there were no recorded fires in the area between November 2008 and the date of the Fire although he conceded there may have been smaller fires in or by the Council Land of which he might not have been aware. He acknowledged the small fires were deliberately started by unknown persons in the vegetation along the railway corridor and was aware of the 2006 fire in the corridor which burned into the Property. In his recollection, there was a fire prior to 2006 when the sawdust heap in the northwest corner of the Property was ignited and difficult to bring under control. Mr Gardner disputed that.

[23] Mr Scott recalled working with KiwiRail for two to three years from about 2006 to clean up the railway corridor, including the reduction or removal of vegetation. He confirmed his concern was the fire risk from the vegetation. Toe toe was a particular concern because it was very easy to ignite and caused problems when burning. Because there had been fires in the location previously, there were requests to clear it. The area around the Property was of the greatest concern because the Property was a commercial premises.

[24] Mr Scott had no concerns about the Council Land because there had been no fires there, it was not immediately adjacent to the railway track, public access was limited and the Creek would act as a natural fire break. He acknowledged he did not have a good understanding of the exact areas of land ownership at the relevant time, that is, which land was owned by KiwiRail and which land was owned by the Council. He also acknowledged that, had he understood the Council owned the Council Land, he might have done things a little differently, saying it was difficult to ask someone to do something if you do not do it yourself.

[25] There were 743 vegetation fires throughout the Tairawhiti area in the past 10 years, according to the records of the New Zealand Fire Service. This area covers the Gisborne Regional Council boundaries.

**The Fire**

[26] Thursday, 7 January 2010 was a typically fine, hot and dry summer's day in Gisborne. There was a north-westerly wind which strengthened during the Fire. Based on data obtained from the Gisborne ERO Fire Weather Station located about two kilometres from the Property, the risk of fire on the day was extreme.

[27] The Fire started in an area on the boundary between the railway corridor and Lot 3. It spread rapidly through the dried pampas grass and other scrub on the Council Land on the south side of the railway corridor in the prevailing wind and spread across the Creek to Lot 2 on the southern side of the Creek. Pampas grass and other scrub on Lot 2 fuelled the Fire, which spread out of control to the Property.

[28] Just after 6.00 pm the Gisborne Fire Brigade was called to respond to the Fire at the Property. They used seven pumping appliances, two water tankers, a command unit and hose layer. A contingent of Gisborne District Council rural fire fighters also attended. At one stage five helicopters equipped with monsoon buckets were used to bring the Fire under control.

[29] Although it threatened a number of neighbouring houses, the Fire was able to be contained. Some surrounding houses sustained damage through radiated heat. Two buildings used by Smallwoods for its timber processing business were substantially damaged in the Fire. The air shed and its contents were completely destroyed. The mill shed was significantly damaged, as was key timber processing equipment located in it.

[30] Mr Gardner described receiving two telephone calls about the Fire and immediately returning to the Property. At that time the Fire was confined to the railway corridor and Council Land, he said. He described seeing the pampas flaming and the railway land and Council Land being well ablaze. He can remember seeing burning vegetation being lifted into the air and blown by the north westerly wind

across the Property. Mr Gardner said he followed a fire appliance when it arrived and by that stage the northern end of the air shed was alight. As he remembered it, the Fire had not crossed into the Property by the ground at that time but was spreading from the airborne vegetation including pampas leaves and heads blown into the air and falling down, starting spot fires on the Property.

[31] The New Zealand Fire Service (Eastern Region) carried out an investigation into the Fire which resulted in a report dated 7 August 2010. The report writer, Derek Goodwin, identified the origin of the Fire in what he called a toe toe bush on the boundary between the railway corridor and the Council Land. The toe toe bush was subsequently identified as pampas grass.

[32] Mr Goodwin noted this was not the first time a fire had started within the Council Land. The New Zealand Fire Service had attended approximately 10 events in the area of the railway corridor behind the Property between 2006 and 2010. The fence on the boundary between the Property and the Council Land was damaged on at least one occasion. Mr Goodwin noted that the plaintiffs had complained to the Council about these fires and endeavoured to have the Council take action to remove or reduce the fire risk presented by the overgrown pampas grass and scrub located in this area. Mr Goodwin was called by the plaintiffs as an expert and his evidence is discussed in more detail below.

[33] Mr Wohnsiedler, summarised the extent of the Council involvement in an internal report he prepared for the Council dated 2 February 2010. He said:

> Over the last 10 years or so Council has had an ongoing battle with Tranz Rail then (now Ontrack) to keep their corridor clear of overgrowth and other combustible materials/vegetation. It has even gotten to a stage of threatening with the S. 183 Local Government Act "removal of overgrowth that was a fire hazard".
>
> They would only clear 2 meters either side of the centreline track, the rest was said to be government lands and they believed Council to be responsible.

[34] The report confirmed the Council's recognition of the risk of fire starting in the overgrown vegetation and in particular the pampas grass bushes:

> ... because of the children smoking dope under the cover of them and lighting the bushes causing fires along the railway corridor ...

[35] The report also recognised the risk of such fires causing damage to the Property:

> After the last two fires (prior to the recent one) ending up in [Smallwoods'] yard, Don Scott and I went and talked with John Gardner and we decided to pull all the toe toe bushes on his property/land to reduce the fire risk along his boundary.
>
> John Gardner organised a digger and pulled all the bushes and lay them on the sides to stop them growing. Council and John Gardner worked together to get a site to get rid of the bushes.
>
> Network and Ontrack were not happy with John Gardner pulling toe toes under the lines or on Ontrack's land so he only went as far as the arm would reach.
>
> John Gardner and Council have worked together on several occasions to try to alleviate fire risks along the railway line boundary for the safety of his yard.
>
> All fires in the past have been started by either children in the bushes or electric shorts (power running down poles - power running down day wires) earthing out and resulting in fires along the railway line and into [Smallwoods'] yard by overgrowth and toe toe bushes.
>
> John Gardner also reduced the fire risk within the yard by cutting up a large percentage of his fillet timber and giving/selling it off for firewood and also looking after some of the local residents and also reducing the size of the sawdust heap with trucks coming in on a regular basis tracking it away.
>
> I have had an excellent working relationship with John Gardner no matter what the issue and he has always tried to go that extra mile to better his industry and protect the people and their environment.

[36] The Council's report is particularly relevant in two ways:

(a) it recognised the steps taken by Mr Gardner to reduce the risk of fire spreading from what the report refers to as "the railway land" at the rear of the Property; and

(b) it highlighted the fact that the Council believed maintenance of the land and removal of the fire hazard represented by the combustible materials/vegetation was the responsibility of KiwiRail.

[37] However, KiwiRail's responsibility in fact ended at the boundary of the railway corridor. The area in issue included the Council Land for which the Council was responsible.

[38] The plaintiffs' insurer requested Grant Weavers, a Specialist Fire Investigator, to prepare a report. In his report dated 8 February 2010, Mr Weavers advised:

> This property [Smallwoods' yard] has a railway line on its rear boundary. Vegetation alongside the railway line has been either deliberately or accidentally lit, causing the embers from this vegetation to spread onto [Smallwoods'] property, igniting the timber in the yard and then spreading onto the sheds causing extensive damage.
>
> Prior to the fire, the vegetation alongside the railway lines had been sprayed and left to die off as a control mechanism. This dry vegetation has increased the fire risk in this area. This area of the railway line is regularly used as an access for pedestrians. From discussions had with businesses around the scene, it is understood that they have had trouble from time to time with deliberately lit, or misadventure fires by youth in the area and [have] brought this matter to the attention of the authorities to address the problem.
>
> ...
>
> The cause of the fire is deemed to be a vegetation fire on railway land (accidentally or deliberately lit) – spreading into [Smallwoods' yard] causing extensive damage to property.

[39] Mr Weavers was also called by the plaintiffs to give expert evidence.

*Pampas and fire risk*

[40] Donald McLean, a Senior Ranger, Biodiversity at the Department of Conservation, reviewed photographs of the bushes growing along the rail corridor and on the Council Land, including photographs of burnt stumps taken after the Fire. He confirmed the bushes were all pampas (cortaderia selloana) except for three existing small native toe toe bushes (austroderia species) planted along the boundary fence.

[41] Phillip Karaitina, Team Leader, Biosecurity at the Council, reviewed photographs of the burnt vegetation and was unable to ascertain whether the bush identified as the source of the Fire and those on Lot 2, which ignited when the Fire jumped the Creek, were pampas or toe toe. He accepted he did not have the requisite

expertise. I am satisfied, given the evidence and expertise of Mr McLean, who was sure that the bushes were pampas, that they were indeed pampas grass.

[42] A United States Department of Agriculture report records that:

> [Pampas] produces large amounts of highly flammable material, seriously increasing the fire risk (Parsons & Cuthbertson, 2001). It presents a fire hazard due to the build-up of dried leaves, flowering stalks, and leaf bases (Bossard et al., 2000).

[43] The New Zealand Ministry for Primary Industries' March 2009 guidance records that pampas "creates a fire hazard". Council brochures record pampas is an unwanted weed as it harbours pest species "as well as creating a fire risk".

[44] The various fire experts, whose evidence is discussed in detail below, generally agreed toe toe is also extremely flammable in the right conditions.

[45] The Council sought to justify its maintenance of the Council Land by evidence that vegetation along waterways is generally to be encouraged because plants help water quality and reduce erosion. Mr Karaitina referred to document entitled "Streamside Planting Guide" issued by the Council in 2013 (it not being available in 2009–2010), which includes toe toe in a list of preferred plants for streamside planting. The Guide does state that pampas creates a fire risk.[1]

[46] The Council also referred to the Regional Pest Management Strategy. Pampas is not included in the list of plants subject to eradication which requires any land owner to destroy them before they produce hard seed. Pampas is, however, on the list of plants to be contained, the second highest category.

[47] Mr Karaitina gave evidence about the prevalence of pampas in the Gisborne region, saying that large scale eradication would be difficult and expensive. He accepted that pampas is a non-native species and generally not desirable, it being classified as a weed under the Regional Pest Management Strategy.

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1 At 1152.

[48] Andrew White, Community and Recreation Manager of the Council, gave evidence about the Council's ownership and management of approximately 900 hectares of reserve land, which he said is managed in different ways, prioritised based on its purpose and use. He believed the Council Land would not have been part of the reserves management contract at the time and speculated it was unlikely anything was done with the Council Land because it had no or little public use or visual importance.

[49] Mr White discussed how the Council allocates funding to maintenance, saying the level of funding does not automatically change because a scrub fire has occurred. He did, however, say where high risk to life or property is identified as a result of a potential fire hazard, actions including the removal of long grass may be taken.

[50] Since the Fire, the plaintiffs have replaced the destroyed wire fence with a high steel fence. Mr Gardner agreed that was a real benefit given pampas remained on the boundary of the Property and still constituted a fire hazard. The fence was a protection in the September 2016 and March 2017 fires on the north eastern boundary on the rail corridor. He said the other benefit was the slowing of spread of pampas seed.

*Sawdust heap*

[51] The Council identified the sawdust heap at the Property relatively near to the boundary as a fire hazard which contributed to the spread of the Fire.

[52] Mr Gardner described the sawdust heap as part of the business operation. Because of the previous fires, it had been repositioned away from the railway boundary fence and neighbouring houses, sheltered by the workshop and air sheds. The sawdust was trucked out on a semi-regular basis. It was kept in the open so in winter it would become wet to saturation. In summer it dried to a depth of about 300 millimetres, said Mr Gardner.

[53] Mr Gardner pointed out that the Council fire officer, Mr Wohnsiedler, recorded he was satisfied with how the sawdust heap was dealt with, as, he claimed,

was Smallwoods' insurance assessor, who did not identify the sawdust heap as a problem. The most recent assessment was in November 2007 when the assessor recorded that housekeeping management was at an average level and adequacy of private fire protection was average or above average.

[54] Mr Gardner said, when he attended the Fire, he got onto his loader and went to the northern end of the Property by the sawdust heap. He described timber being on fire and he pushed it away from the sheds. He was asked by one of the fire officers to go up onto the sawdust heap and quell any hotspots there, and he did so. He described the fires as being mostly in the firewood bundles on the northern side of the sawdust heap and he said he used the sawdust to quell those fires because, below the surface, the sawdust was damp from being stored outside. He recalled the sawdust heap itself as generally not flaming or burning that much, other than perhaps on the north side by the firewood.

[55] Patrick Hogan is a Senior Fire Station Officer based in Gisborne and one of the fire officers who attended the Fire. He described the Fire spreading by the severe north northwest winds over sawdust heap and to structures on the Property. Mr Hogan said there were spot fires on top of the sawdust heap and the aim was to stop those fires to protect the buildings. He said the spot fires in the sawdust were spread by the wind to start other spot fires.

[56] Sarwin Kumar is the Regulatory Services Manager at the Council. He gave evidence of complaints received by the Council from about 2000 in respect of noise and dust and steps taken in relation to management of sawdust at the Property. Abatement notices were issued in 2000 and 2001 requiring Smallwoods to control the spread of sawdust and to cover or remove stock piles. A further abatement notice relating to offensive and objectionable dust was issued in September 2008. Mr Kumar attended the Property several times following complaints. He described dust moving across the Property in the prevailing northwest wind. The only real relevance of this evidence was to demonstrate the prevalence of the northwesterly wind and how dust and sawdust moved across the Property.

**Expert analysis of the Fire**

[57] The plaintiffs called three experts to address the origin and spread of the Fire. Grant Weavers is a specialist fire investigator with 40 years' experience as a fire officer and fire investigator, since 2008, working in a commercial practice. Brian Joseph is an experienced fire investigator and managing director of a commercial practice, with over 22 years' experience in the area of fire investigation. Derek Goodwin is a specialist fire investigator for the New Zealand Fire Service, having served with the Fire Service for 25 years and for the last 10 years being responsible for determining the cause and origin of fires.

[58] The Council called two experts to address the same issue. Peter Hughes is a risk management consultant with 45 years' experience in fire safety and risk management in New Zealand and overseas, having served for 21 years in the British Fire Service. Marnix Kelderman is a forensic scientist and fire investigator with a Masters qualification in Botany. His background includes having worked for the Department of Scientific and Industrial Research and being employed as a forensic scientist and fire investigator specialising in origin and cause determination. In 2001 he established a forensic and fire investigation company.

[59] There is no doubt that all the experts have considerable expertise in the areas covered by their evidence.

[60] Mr Hughes' evidence was confined to the Fire on the Property and a risk analysis, so did not offer an opinion in respect of the origin and initial spread of the Fire. Mr Goodwin did not offer any opinion on fire protection measures at the Property and likewise Mr Kelderman's opinion in this area was limited.

*Point of origin of the Fire*

[61] The experts all agreed that the Fire was likely ignited on the northern side of the Creek. The plaintiffs' experts were more certain it began in the pampas bushes on the boundary of Lot 3 and the railway. Mr Kelderman was of the opinion that there was a larger potential point of origin, although conceded, given the history of

fires in the general area, it was more likely than not the Fire began in the pampas in that area.

[62] The experts agreed it was most likely the Fire was deliberately lit, although an accidental cause could not be ruled out.

*Spread of the Fire on the north bank of the Creek*

[63] The experts were asked for their opinion on the spread of the Fire on the north side of the Creek (Lot 3) assuming the Fire originated in the pampas. They all agreed that the surrounding vegetation on Lot 3, being pampas/toe toe, weeds and scrub, contributed to the development and spread of the Fire over the northern banks of the Creek due to the amount, type and height of the vegetation (fuel load). Mr Goodwin and Mr Kelderman emphasised the role played by the strength and direction of the high winds on the day. Mr Kelderman's opinion was that, if the Fire started in any vegetation, it would have spread under the prevailing conditions, which included dry vegetation and warm temperatures, as well as very high winds.

[64] The experts were also asked to consider whether the Fire would likely have spread down to the edge of the northern bank of the Creek had Lot 3 been cleared and maintained as mown or line trimmed grass. Mr Goodwin considered the likelihood low, Messrs Weavers and Joseph considered the Fire would have spread but more slowly. Mr Kelderman could not exclude the Fire spreading, pointing out that maintenance of the mown and line trimmed areas would be variable and, in his opinion, there would still have been taller vegetation in the Creek marginal areas. While all agreed that the spread of the Fire would have been slower, Mr Goodwin added that the lower intensity would mean that ember transportation may not have occurred.

*Cause of the Fire crossing to Lot 2 on the southern bank of the Creek*

[65] The experts agreed that the pampas/toe toe, weeds and scrub vegetation on Lot 3 caused or contributed to the Fire crossing the Creek to Lot 2. The plaintiffs' experts referred to the high fuel load and dry vegetation on both sides of the Creek, Mr Weavers noting that the tall pampas/toe toe was approximately two metres high

on both sides. The convected and radiant heat from the Fire and wind strength resulted in firebrands and hot embers becoming airborne and transported across the Creek, igniting similar vegetation on Lot 2. Mr Weavers said the high fuel load and height of the vegetation created "a ferocious fire", Mr Goodwin added the contribution of the high winds. Mr Kelderman said it was not possible to say what fire source travelled across the Creek and that it could have been the vegetation or rubbish.

[66] The plaintiffs' experts agreed that the type of vegetation had a bearing on the spread of the Fire. Mr Weavers explained that the denseness and height of the pampas/toe toe, along with the fact that most of the bush structure was off the ground and therefore in a very dry state and highly flammable, would have allowed a high density fire to occur, creating high heat energy in the form of radiant and convected heat. This then created a column of hot gas above the Fire in the form of a plume, drawing cool air into the base of the Fire from all directions, moving a mass of hot air. This entrainment of cool air into the plume resulted in decreased temperatures with increased height of the plume.

[67] Mr Kelderman said that differing types of vegetation provide different fire regimes in different environmental conditions. In his opinion, it was the rapid wind speed which was the major factor and, when vegetation catches fire and is sufficiently buoyant, it can be transported.

[68] Messrs Weavers, Joseph and Goodwin agreed that, if the pampas/toe toe, weeds and scrub vegetation on both sides of the Creek had been cleared and maintained as mown or line trimmed grass, the Fire would likely not have crossed the Creek and re-established on Lot 2. Mr Kelderman did not entirely agree, given the conditions on the day. In his opinion, given the nature of the area alongside a waterway, there would still be other plants and therefore hypothetically the marginal vegetation, such as toe toe and pampas, would have been maintained.

[69] All the experts recognised that the Creek was a natural fire break but noted it was not sufficient to prevent the spread of the Fire in the circumstances.

[70] In any event, all agreed that if both Lots 3 and 2 had been cleared and maintained as mown or line trimmed grass and the Fire had still crossed the Creek and re-established itself, it would have taken longer to do so because the fire load would have been lower given different types of vegetation. Again Mr Kelderman was more ambivalent, saying it would be relatively slower depending upon how the plants, which he said would still have been there, had been maintained.

*Spreading to the Property*

[71] The plaintiffs' experts agreed that the pampas/toe toe, weeds and scrub vegetation on Lots 2 and 3 contributed to the Fire spreading to the Property, Mr Kelderman saying *any* vegetation would have contributed to the spread of the Fire.

[72] All the experts essentially agreed that once the Fire was on Lot 2 to the south of the Creek, then most types of vegetation in the right conditions would have the potential to spread in the circumstances of the high wind on the day.

[73] The plaintiffs' experts had a slightly different view from Mr Kelderman, again focusing on the type and height of the vegetation, meaning it spread more quickly whereas, if the fuel load was low, then the spread would have been different.

[74] The plaintiffs' experts considered that ember transfer spread the Fire from Lot 2 into the Property, although Mr Goodwin also referred to radiated heat heating fuels in front of the initial fire. Mr Kelderman said embers/rubbish/seeds/vegetation which was smouldering or burning could spread across in high winds.

[75] In the opinion of Mr Weavers and Mr Joseph, had the Council Land been cleared and maintained as mown or line trimmed grass, the Fire would not have spread to the Property, Mr Weavers saying it would not have spread any further than the edge of the Creek on the northern side. Mr Goodwin said it was not likely to have spread with the fuel load present in that scenario. Mr Kelderman again qualified his opinion by saying that, as the Council Land was not a general public area, the taller marginal plants would still have been present and the Fire could have still spread under the conditions on the day. All the experts agreed that it would have

likely taken longer to spread to the Property although Mr Kelderman was of the opinion that, by the time the Fire Service had been notified and responded, it would have been in the scrubland on the Property.

[76] The plaintiffs' experts then all agreed that, if the Fire had still spread to the edge of the Property, it would likely have been extinguished by the Fire Service before causing significant damage to the plaintiffs' stock and buildings, although Mr Goodwin referred to the variable of how quickly the Fire Service would have responded. Mr Kelderman disagreed on the basis of what he described as the significant amount of vegetation on the Property.

*Contribution of weather, wind and ground*

[77] All the experts agreed that the conditions played a big part in the speed and spread of the Fire, Mr Kelderman saying the weather was the major contributor to the spread of the Fire. Mr Weavers explained that the wind strength first blew heat forward of the Fire, pre-heating the fuel load and increasing the speed of the Fire. The windborne firebrands picked up by the wind were then blown and transported into unburned fuel some distance from the point of origin of the Fire. Mr Joseph described the strong winds and high fuel load meaning fine fuels broke away from the pampas and toe toe and were carried in the wind, meaning spot fires were likely to have occurred. Mr Goodwin agreed that the speed and direction of the wind contributed to ember transportation and radiated heat of the available fuels.

*Spread of fire in the Property*

[78] Mr Weavers' opinion was that hot embers and firebrands carried to the Property were hot and dense enough and contained enough energy to ignite when they landed on combustible fuel loads on the Property. Mr Goodwin and Mr Kelderman both referred to radiated heat heating fuels in front of the initial fire and through ember transportation due to high winds. Mr Kelderman added the contribution of hot smouldering sawdust on the Property blown in the high winds.

[79] Mr Goodwin's opinion was that the loose embers which were blowing would have caused sawdust to catch fire to a degree, saying that sawdust will start to burn and then fall in on itself and self-extinguish.

[80] The plaintiffs' exerts all agreed the fuel load on the Property contributed to the spread of the Fire. Mr Hughes and Mr Kelderman considered it was a/the major contributor to the spread of the Fire within the Property.

**Risk management**

[81] The experts then addressed what, in their opinion, risk prevention measures should or could have been taken by the plaintiffs. In Mr Joseph's opinion, given the vegetation present in the Fire, no practical measures would have prevented its spread into the Property. Mr Hughes considered a clear space of 30 metres of closely mown grass or metalled finish should have been constructed on the Property and that the amount of combustible materials close to the boundary should have been minimised. Mr Kelderman's opinion was that vegetation should have been cleared and the sawdust heap controlled.

[82] It was accepted that the plaintiffs had not adopted best risk management practice on the Property. Mr Joseph was of the opinion the steps taken by the plaintiffs to address vegetation re-growth were reasonable; Messrs Hughes and Kelderman did not consider reasonable steps had been taken.

[83] The issue was the storage of various items on the Property and the vegetation. Mr Joseph considered the presence of physical items onsite were reasonable. Mr Hughes considered it reasonable for Smallwoods to store waste timber, have timber clad buildings, order additional stacks of timber cores prior to Christmas, and store large quantities of sawdust and firewood bundles, provided separation distances were achieved or, if not, then additional protection measures should have been taken. In Mr Hughes' opinion the storage distances between stacks, and between the stacks and the buildings, should have been recognised as increasing the fuel load within the Property.

[84] Mr Hughes considered there was no control of the sawdust storage, noting that, since the Fire, barriers have been installed by way of stacks of steel containers, two containers high, on three sides of the sawdust pile. He also referred to the firewood bundles/waste timber loosely stacked within areas of the yard where there was strong growth of vegetation.

[85] Mr Kelderman's opinion can be summarised by reference to the following paragraphs of his evidence.

> 17. The large amounts of combustible material stored by the plaintiffs and the large area of uncontrolled scrublands on the plaintiffs' property caused the fire to spread to the buildings; and their contents, that were lost or damaged.
>
> 18. Had the large amounts of combustible material not been present on the plaintiffs' land, or over the boundary on to the council reserve land, then the fire would have been easily brought under control without reaching the buildings and causing extensive damage.

[86] Mr Kelderman noted that, since the Fire, Smallwoods has cleared the Property of vegetation and created the enclosed area for the sawdust. In his opinion these measures should have been in place before the Fire and would have prevented the damage which occurred. He referred to the fact that sawdust is known spontaneously to ignite in an open environment and that the fine particles would have become buoyant and easily blown while smouldering/burning in the high wind. This would have been further exacerbated by the extremely large fuel load of the stacked timber sitting beside and within the pile of sawdust, which would have created a significant amount of heat and fire.

**Observations on the experts' evidence**

[87] Mr Goodwin was the only expert who attended the Fire and he was the first asked to provide a report on it. He attended the Property and general location in days following the Fire, inspected the whole site, spoke to witnesses and took photographs. He identified the point of origin as clearly being the toe toe [pampas] bushes along the railway lines. The clump of pampas/toe toe he believed to be the point of origin covered, he said, an area approximately eight metres long and four metres wide.

[88] In support of his conclusion that the situation would have been different had the Council Land been grassed, Mr Goodwin pointed to photographs taken at the time showing areas of grass which were clearly not affected by the Fire, one being the area (Lot 5) adjacent to Lot 2, which is also owned by the Council. Mr Goodwin said he has not seen green grass catch fire and spread.

[89] In Mr Goodwin's opinion, the most significant contributing factor to the development of the Fire was the nature of pampas and the state it was in. He said live pampas would have been in a very dry state at the time of the Fire given its life cycle, thereby creating a greater fuel load. This was the case whether or not the pampas was alive in his opinion.

[90] Mr Weavers was the only other fire expert who attended the Property at the time, conducting a scene examination on 14 January 2010. His report is referred to in paragraph [38] above. Mr Weavers said:

> Based upon my inspection of the remains of the burnt scrub and pampas on the reserve and railway land on the northern side of the Waikanae Stream I consider that prior to the fire the scrub and vegetation on this land posed a fire hazard.
>
> I also inspected the reserve land on the southern side of the Waikanae Stream and observed that there were a number of large burnt pampas stumps, particularly on the eastern side of this land. I consider it is likely that these pampas were ignited by airborne embers spreading from the northern side of the stream and that they allowed the fire to jump across the river and then spread/jump into Double J Smallwoods' yard.

[91] In Mr Weavers' opinion the scrub, pampas and weeds on Lot 2 "undoubtedly" caused or contributed to the spread of the Fire to the Property. In Mr Weavers' opinion, the distance of travel of the likely line of the Fire across Lot 2 was approximately 20 metres and it contained a significant volume of vegetation. There was approximately 30 metres' distance from that apex point to the stacks of timber and firewood bundles on the Property. He therefore considered the pampas/toe toe and other scrub on Lot 2 meant the Fire would have had enough fuel to ignite, develop and produce firebrands and hot embers to be transported by wind to the stacks of wood and bundles of firewood on the Property and possibly directly to the buildings. He said:

> Once those stacks of wood were on fire then the fire became rapidly uncontrollable and very difficult to prevent from spreading throughout the yard and buildings as the stacks of wood were a high fuel load and heat energy source.

[92] In Mr Weavers' opinion the Fire did not spread solely by burning across the ground, but it also jumped/spread to isolated buildings and stock throughout the Property. He explained that whatever an ember lands on must have sufficient energy to enable it to be set on fire. An ember landing on a pile of wood would not necessarily ignite a fire, as it depended upon the thickness and density of the wood, not how dry it was. He said embers generally land on another fuel in order to ignite a fire. Therefore, in his opinion, it was more likely that an ember would have landed on a fuel outside a building which then ignited.

[93] Given that Mr Goodwin and Mr Weavers attended the Property and location of the Fire at the time and have remained consistent in their observations and conclusions, I attach significant weight to their evidence.

**Factual findings**

[94] I am satisfied on the balance of probabilities that:

- The Fire ignited on Lot 3 on the northern side of the Creek in the pampas bushes on the boundary of Lot 3 and the railway land.
- The Fire was deliberately lit.
- The fuel load of the pampas/toe toe, weeds and scrub on Lot 3 contributed to the development and spread of the Fire over Lot 3.
- The strength and direction of the high winds on the day contributed significantly to the spread of the Fire.
- Had Lot 3 been cleared and maintained as mown or line trimmed grass the Fire would have spread more slowly because the fuel load would have been smaller.

- The pampas/toe toe, weeds and scrub on Lot 3 were a major contributor to the Fire crossing the Creek to Lot 2, again aided by the high winds. The presence of similar vegetation on Lot 2 meant the Fire quickly ignited and spread on Lot 2.

- Had Lot 3 been cleared and maintained as mown or line trimmed grass, the Fire would likely not have crossed the Creek.

- Once the Fire reached Lot 2, the pampas/toe toe, weeds and scrub contributed to the Fire spreading to the Property. However, given the conditions, most types of vegetation would have had the potential to spread the Fire to the Property, given the relatively short distance between the edge of the Creek on Lot 2 and the boundary of the Property. The height and type of vegetation on Lot 2 meant it spread more quickly to the Property.

- Once at the Property, the Fire spread by land and by windborne embers landing on combustible material in the Property.

- Flying embers landed in the Property and ignited material such as vegetation and stacks of timber, which in turn spread the Fire to the air shed and mill.

- The fuel load on the Property, including its location, contributed to the spread of the Fire.

- The Fire was on the Property before the air shed was set alight.

- Embers landed on a fuel outside the air shed, causing the air shed to ignite.

[95] I am satisfied that in the circumstances the vegetation on the Council Land posed a fire hazard.

**PART II - LEGAL ANALYSIS AND LIABILITY FINDING**

[96] Given those factual findings, I now turn to consider the three causes of action against the Council. I will briefly consider strict liability and nuisance before

addressing in more detail what was agreed to be the cause of action most relevant to this case, negligence.

[97] The authors of *The Law of Torts in New Zealand* summarise the overall position as follows:[2]

> (a) In the classic case of nuisance where the defendant, or someone for whose acts the defendant is responsible, performs an activity or creates a state of affairs on the land that causes or threatens continuing or recurring interference with the use or enjoyment of neighbouring land, liability turns on whether the interference is unreasonable and lack of negligence is no defence. Damages are recoverable only if harm of the kind suffered was a foreseeable consequence of the acts that gave rise to the interference.
>
> (b) Where the plaintiff claims damages for loss caused by a single accidental escape of something harmful from the defendant's land, and the event is unlikely to be repeated, the action lies either in negligence or under the special strict liability rule in *Rylands v Fletcher*.
>
> (c) The principle derived from *Sedleigh-Denfield v O'Callaghan* and *Goldman v Hargrave*, which requires occupiers to take reasonable steps to remove dangerous conditions on their land which they were not responsible for creating, is based on negligence but remains actionable in private nuisance in cases of continuing interference with the use or enjoyment of land.
>
> (d) Where activities conducted in a public place (for example on the highway or in a reserve) interfere with the use or enjoyment of neighbouring land, an action in private nuisance may lie against the body in occupation or control of the area if it condones, and therefore, impliedly authorises the activity. Otherwise the occupier may be liable under the *Goldman v Hargrave* principle for failing to take reasonable steps to put a stop to the activity …

[98] The plaintiffs' position is that this case falls squarely within (c) and/or (d) above.

*Strict liability - Rylands v Fletcher*

[99] The rule in *Rylands v Fletcher*[3] has been the subject of extensive analysis in many common law jurisdictions. Whether strict liability as set out in *Rylands v*

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2 Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, 2016) at [10.2.07] (citations omitted).

3 *Fletcher v Rylands* (1865) 3 H&C 774 (Exch); *Fletcher v Rylands* (1866) LR 1 Ex 265 (Exch Ch); and *Rylands v Fletcher* (1868) LR 3 HL 330 (HL).

*Fletcher* ought to be retained is subject to diverging judicial and academic opinion. The Australian High Court has held that the rule has been absorbed by the principles of ordinary negligence.[4]

[100] The courts in England and New Zealand have not been persuaded to abandon the rule, but the England and Wales Court of Appeal has limited its potential scope in respect of fire.[5] In *Hamilton v Papakura District Council*, the New Zealand Court of Appeal held that an action based on *Rylands v Fletcher* is a special form or "subset" of private nuisance action which extends strict liability to certain cases where damage results from an isolated escape of something harmful from the defendant's land.[6]

[101] In the present case, the growing of pampas and other vegetation on the Council Land was a natural use of the land. Although pampas is recognised as flammable, it is doubtful it would be considered "exceptionally dangerous or mischievous". Certainly, the use of the Council Land for growing pampas and other vegetation could not, in all the circumstances, be considered extraordinary and unusual. In any event, it was the Fire which escaped from the Council Land or which caused vegetation embers to escape. Moreover, I am satisfied that, on the balance of probabilities, the Fire was deliberately lit and therefore the defence of act of a stranger applies.

[102] For these reasons, the claim based on strict liability pursuant to the principles of *Rylands v Fletcher* fails.

*Nuisance*

[103] Where a nuisance proceeds from a state of affairs created on a person's land by the unauthorised act of a stranger over whom the owner (or occupier) has no control, or arises from natural causes without human intervention, the owner is not strictly liable. However, an owner who "adopts" or "continues" a nuisance will be liable. An owner adopts a nuisance by making use of the state of affairs for his or

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4 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 (HCA).

5 *Stannard v Gore* [2012] EWCA Civ 1248, [2012] 3 EGLR 129 (CA). See also Stephen Todd [2014] NZ L Rev 513 at 525.

6 *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA).

her own purposes. An owner continues a nuisance if the owner knows or ought to know of its existence on the land and fails to take reasonably prompt and effective steps to remove or abate it.[7]

[104] In this case, the plaintiffs say that, while the pampas/toe toe was naturally occurring on the Council Land, the Council adopted the nuisance because the Council had the ability to remove it and failed to do so in circumstances where it was aware of the fire hazard posed by the pampas/toe toe.

[105] In *Leakey v The National Trust*, a naturally occurring hazard (land instability) arose on the defendant's land.[8] The hazard was not caused or aggravated by any human activities on the defendant's land. The trial Judge found that at least six years before the incident, the defendant knew the unstable land was a threat to the plaintiff's property. Despite requests from the plaintiff, the defendant had not taken any action to prevent any slips or subsidence. The Court of Appeal found the defendant liable in nuisance. The defendant was under an affirmative duty to take reasonable care to remove or mitigate such hazards as occurred on its land and which could cause a foreseeable risk of harm to neighbouring property.

[106] In *French v Auckland City Corporation*, thistle seeds spread from the defendant's land to a neighbouring property.[9] The High Court found the landowner liable for the losses caused to his neighbour's property as a consequence of his failure to take reasonable steps to prevent the spread of seeds from weeds growing on his land. The action was brought in nuisance and negligence. The Court observed that, if a claim is based on nuisance, a claimant would have to show he suffered substantial annoyance or damage and, in any case, the Court would be concerned to strike a tolerable balance between the conflicting claims of landowners to enjoy their properties and the interests of surrounding occupiers.[10] The present case can be distinguished in that the damage was not caused by the spread of pampas grass but by the Fire started by a third party outside the defendant's control.

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7 *JL Tindall v Far North District Council* HC Auckland CIV-2003-488-135, 20 October 2006 at [65]–[70].
8 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (CA).
9 *French v Auckland City Corporation* [1974] 1 NZLR 340 (SC).
10 At 351.

[107] In *Hill v Waimea County Council*, fire spread from a council rubbish tip to an adjoining property.[11] The council was found not liable in negligence as its use and management of the rubbish tip was reasonable. The council was held liable in nuisance. However, in *Hill* there was no evidence of a third party starting the fire. Furthermore, the defendant had actively brought rubbish onto the land, rather than omitting to remove something naturally occurring.

[108] In the present case, the Council's position is it was the Fire rather than the pampas/toe toe which was the nuisance. The Council had no opportunity to intervene and stop the Fire once it started, nor did the Council adopt the Fire.

[109] The Council also contends that, in the context of the Council Land being a small piece of the 900 hectares of reserve land held by the Council, less should be expected of the Council.[12] Against that, however, the Council can be considered to be relatively well-resourced and it has the ability to raise finance through rates and other measures. In those circumstances, and particularly where the Council was aware of the fire hazard, I do not accept that less ought to be expected of it.

[110] In any event, the issue of liability in the case of spread of fire where the fire was started by a third party is best considered in the context of negligence.[13]

*Negligence*

[111] As recognised by the Privy Council in *Goldman v Hargrave*, a land owner (or occupier) owes a duty of care to his or her neighbours to ensure no hazards occurring on the land (whether natural or man-made) cause foreseeable loss or harm.[14] That duty obliges an owner of land to take reasonable steps to remove or reduce such hazards as are recognised by the owner. The duty depends on knowledge of the hazard and ability to foresee the consequence of not dealing with it. In the words of Lord Wilberforce:[15]

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11 *Hill v Waimea County Council* HC Nelson A8/84, 12 March 1987.
12 *Goldman v Hargrave* [1967] 1 AC 645 (PC) at 663.
13 Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, 2016) at [10.2.06(3)].
14 *Goldman v Hargrave* [1967] 1 AC 645 (PC).
15 At 663.

> In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able bodied: the owner of small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more.

[112] In that case, a tree which had been hit by lightning and was still smouldering was cut down into sections by the defendant, who did not, however, try to extinguish the smouldering fire, simply leaving it to burn itself out. The fire reignited and spread to the neighbour's property.

[113] In the present case, the plaintiffs argue the Council was aware of the significant fire risk posed by the pampas grass on the Council Land at the rear of the Property. Being alive to the existence of that hazard,[16] the Council was subject to a duty to take reasonable care. The scope of the duty was to do what was reasonable in all of the circumstances, which was to remove the pampas grass on the Council Land so as to remove or reduce the fire risk.

[114] There is no authority to support the proposition that the status of the landowner as a territorial authority is somehow relevant to the existence of that duty. Both *Goldman v Hargrave* and *Leakey v National Trust* suggest that the determining factor in the existence of the duty is control over the land where the hazard arises, rather than the identity of the landowner.[17] The Council conceded the point.

[115] It is clear from the evidence that, for some years prior to the Fire, the Council was aware of fires being illegally lit in the rail corridor adjoining the Property and the Council Land. The Council was not only aware of the fire hazard the pampas/toe toe posed, but was sufficiently concerned to require those responsible for the railway corridor to clear the vegetation. Indeed the Council was so concerned it threatened to use what statutory powers it had to ensure that action took place. The Council

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16 The fact certain Council officers may not have appreciated at the time that the reserve was in fact Council Land is irrelevant. The Council clearly knew it owned the land.

17 See Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, 2016) at [5.6.05].

cannot sustain the position that it was unaware of the fire hazard. There may not have been a fire for a number of years and there may not have been fires on the Council Land itself previously. Yet this is irrelevant in the circumstances of the proximity of the railway corridor and Council Land, the confusion as to the ownership boundaries and responsibilities, and the common state of both the railway corridor and Council Land with the presence of pampas/toe toe.

[116] The issue is whether the Council as landowner acted reasonably in all the circumstances by not taking active steps to remove the pampas grass on the Council Land.

[117] The plaintiffs must establish that a reasonable person in the Council's position could have foreseen this involved a risk of injury to the plaintiffs. If so, they must establish what a reasonable landowner would do by way of response to the risk. Relevant considerations include the magnitude of the risk, the probability of its occurrence, as well as the expense, difficulty and inconvenience of taking alleviating action.[18]

[118] The Council's position, apparently with the benefit of hindsight as there does not appear to be documentary support for the position, is that it was reasonable to allow vegetation to remain on the Council Land to mitigate the risk of erosion of the bank to the Creek and to improve water quality, toe toe being a desirable plant for such purposes. Again, however, the context needs to be considered. Given the known fire risk of pampas/toe toe and the history of fires in the general area with close proximity to a timber yard, plant selection would have required careful consideration. Furthermore, the Council's position in this regard is undermined by the fact that land adjoining Lot 2 owned by the Council appears clear of vegetation, as does the park owned by the Council adjacent to Lot 3.

[119] In Ms Divich's submission, to expect the Council to keep the Creek bank in mown grass and devoid of any scrub or bush, which might be set alight by a third person, to protect neighbours from the potential spread of fire is unreasonable and would amount to an interference with the Council's right to use its land. The

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[18] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (HCA) at 47–48.

Council was comfortable the Creek was a natural fire break which would, in normal conditions, contain any fire to the railway side of the Creek. The fire experts all agreed that the Creek constituted a natural fire break, and that its width exceeded the recommended fire breaks in vegetated land. Ms Divich referred to Mr Kelderman's evidence that under the prevailing weather conditions a fire would have spread on to the Property even if there were simply grass about 300mm high on the Council Land. Ms Divich then conceded in closing it would have been reasonable for the Council to remove the fire risk presented by the pampas/toe toe.

[120] The potential benefit of the Creek providing a fire break does not appear to have been considered previously by the Council. The context of previous fires and the known fire hazard of pampas/toe toe, as well as the frequency of hot dry summers and potential for high winds, together created a risk the Council reasonably should have considered and addressed. Had the Council Land been grassed, any fire would have spread more slowly, increasing the prospect of it being controlled or contained before it reached the Property. This does not mean the Council has a duty to clear its reserves of all vegetation. The duty is to do that which is reasonable in the circumstances.[19]

[121] I am satisfied the Council breached its duty by failing to take steps which were reasonable for it to take in the circumstances to prevent or minimise the known risk of damage or injury to the Property by fire. This failure was a material cause of the Fire and the loss suffered by the plaintiffs.

[122] The Council was itself aware of the duties of a landowner to its neighbours in this situation and the measures which were reasonable for the landowner to take. In 2001 the Council wrote to KiwiRail's property manager following a fire in toe toe, noting that "this type of overgrowth is dangerous, particularly when next to a timber yard". Relevant too is the Council's own report on the Fire and the fact that the Council Land is bordered to the west by Dukes Yard (affected by previous fires), with residential land to the north and a school and Smallwoods' commercial premises to the south. Bearing those factors in mind, and given the known fire risk

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[19] *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (CA).

of pampas, it is clear that the Council should have taken action to remove the pampas.

[123] The Council should, as acknowledged by Mr Scott, have done that which it was insisting KiwiRail do – clear the pampas grass from the Council Land. Had it done so, it would have established the area in mown grass. The Council's own correspondence with KiwiRail establishes a reasonable baseline of what the Council expected.

[124] Further illustrating a reasonable baseline, Principal Rural Fire Officer Ray Dever is quoted in the *Gisborne Herald* 2 February 2017 edition as saying:

> We have a heap of overgrown sections around the district. If you own one of them, we suggest you give some consideration to your neighbours.
>
> Cut the grass to reduce the fire risk.
>
> If a fire starts on a property with long grass and spreads to affect the neighbours then the property owner is liable for any damage caused to the neighbour's place.

[125] I am satisfied it was more likely than not that, had the pampas/toe toe been removed, the plaintiffs' losses would have been avoided. It is unlikely the Fire would have started on Lot 3 or, if it had, that it would have spread to Lot 2 and the Property. The Council's negligence was a cause in fact of the plaintiffs' loss.

[126] The Council's negligence was also a cause of the losses at law given the material and substantial causal link between the Council's negligence and the plaintiffs' loss. The Council's negligence was a material cause of the chain of events leading to the loss and there was no break in the chain sufficient to sever the Council's liability.

[127] Neither was the loss too remote. A defendant who is guilty of negligence will be liable for the foreseeable consequences of that negligence, provided the loss caused is not too remote to bar recovery.[20] A foreseeable risk is a "real risk", being

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[20] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co* [1961] AC 388 (PC) [*The Wagon Mound (No 1)*].

"one which would occur to the mind" of a reasonable person in the position of the defendant and which it "would not brush aside as far-fetched".[21]

[128] In the present case, the loss which occurred must have been of a type foreseeable to the Council. There is no requirement that the defendant foresee the full amount or extent of that damage.[22] Fire damage to the Property was clearly a foreseeable consequence of the Council's negligence. The Council had previously recognised the risk of fire spreading to the Property from land adjacent to it. The Council is liable for the loss, even if the extent may have been greater than anticipated.

*Contributory negligence*

[129] Section 3(1) of the Contributory Negligence Act 1947 provides:

> **3 Apportionment of liability in case of contributory negligence**
>
> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

[130] This creates an affirmative defence which must be pleaded. The burden of proof is on the defendant.[23]

[131] Where the Court is satisfied a plaintiff has suffered damage which has been caused by the fault of both the defendant and the plaintiff, the Court may in its discretion apportion damages as between them. The issue is whether a plaintiff negligently failed to take reasonable care to protect its interests where it is proven

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21 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 (PC) [*The Wagon Mound (No 2)*] at 643.

22 *Taupo Borough Council v Birnie* [1978] 2 NZLR 397 (CA); and *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA).

23 *Kenny v Dunedin City Corp* [1920] NZLR 513 (CA).

that its failure has been a cause of the loss for which it sues.[24] The second issue is relative blameworthiness.[25] The test to be applied is the degree of departure from the standard of a reasonable person with the characteristics of the claimant.[26]

[132] I have concluded Smallwoods did not adopt reasonable risk management practice on the Property in the circumstances as it knew them to be, given the fire hazard on the Council Land and the railway land. Pampas/toe toe, scrub, grass and overgrowth grew along the length of the border with the railway corridor. Although some clearing had been done down the boundary, this had not reached the north western corner by the time of the Fire. A cleanup every two years was insufficient. The boundary was fenced by a wire fence and it is notable this has now been replaced by a metal fence.

[133] I take note of the efforts by the plaintiffs to clear vegetation on the other side of the boundary.

[134] It was reasonable for the various items to be stored on the Property. The problem was the location and method of storage, particularly given the hazards within the Property of vegetation, the sawdust heap and combustible items stored on the Property near the boundary separated by a wire fence.

[135] The expert evidence about the development and spread of the Fire once it reached the boundary with the Property satisfies me that the presence and location of vegetation and combustible material on the Property played a material part in the spread of the Fire and ignition of the buildings.

[136] In these circumstances, I am satisfied there was a departure from a reasonable standard of risk management. In all the circumstances a reasonable manager of a timber yard would have implemented measures to protect the yard from the spread of fire, in particular by ensuring the site was clear of vegetation, there was no

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24 See *Johnson v Auckland Council* [2013] NZCA 662 as a recent example but also see *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445 [*Byron Avenue*] and the obiter comments of Tipping J in the Supreme Court in *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289.

25 *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA).

26 *Byron Avenue*, above n 24 .

vegetation growing against any buildings, combustible material was stored well away from the boundary, and there was a solid boundary fence.

[137] In Ms Divich's submission, the plaintiffs' failure should be set at around 50 to 75 per cent. Mr Rainey for the plaintiffs said any liability should be no more than 20 per cent.

[138] In all the circumstances, I assess it as just and equitable to reduce the damages to the plaintiffs by 50 per cent.

## PART III - DAMAGES

[139] The losses from the Fire were extensive. The level of insurance cover was insufficient and the business was under-insured. The claimed losses therefore include a subrogated claim for losses incurred by the insurance company as well as the uninsured losses incurred by the plaintiffs.

### Non-contested sums

[140] The Council does not contest the following costs:

| | | |
|---|---|---|
| • Site cleanup and demolition | | $120,635.54 |
| • Rebuilding of mill building | | $70,170.00 |
| • Bin base costs | | $11,983.57 |
| • Bin costs | | $31,900.00 |
| • Repair to retaining wall | | $40,936.52 |
| • Stock: | general pine losses | $149,255.00 |
| | kauri losses | $69,000.00 |
| | rimu losses | $67,200.00 |
| • Replacing plant | | $227,156.00 |

[141] The claim of $136,354.08 for the boundary fence was initially contested on the basis the replacement fence is substantially better than that lost in the Fire and represents a betterment. At the end of the trial, the Council conceded that, as the

adjoining landowner, it would be responsible for half the cost of an appropriate fence and agreed this sum.[27]

**Contested sums**

*Replacing air shed*

[142] Smallwoods needed to replace the air shed with a building of similar size to store its raw materials and stock. It seeks to recover the reasonable cost of a replacement building. The $299,407.21 cost is not disputed per se. The Council contests liability on the basis the plaintiffs did not have an interest in the building.

[143] The open-sided air shed was smaller than its replacement, which is enclosed and demonstrably superior in construction. Furthermore, having been built on G & P's property rather than in its original location on the property leased from Red Sea, it is now a capital asset to the plaintiffs.

[144] Smallwoods had been negotiating with Red Sea for a more formal arrangement in relation to its use of the air shed but a deal had not been concluded. It occupied the air shed under an unwritten agreement and paid no rent. At best, therefore, the arrangement was a tenancy at will or monthly tenancy, determinable by a maximum of one months' notice. The cost of hiring temporary facilities has already been included in the calculation of business losses as an additional operational cost.

[145] For these reasons, there is no award to the plaintiffs in respect of the replacement air shed.

*GST*

[146] The position as to GST in respect of the claimed amounts has now been clarified. Apart from the kauri, which was owned by Mr and Mrs Gardner, all sums claimed are exclusive of GST because Smallwoods and G & P are GST registered.

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[27] The defendant is therefore liable for 50 per cent of the cost of the boundary fence and no further reduction in respect of contributory negligence is required.

The plaintiffs accept that claimed preparation costs should be included in any claim for experts' fees and disbursements.

*Business losses*

[147] The claimed business losses which are contested are:

| | |
|---|---|
| 2010 | $260,977.00 |
| 2011 | $183, 226.00 |
| 2012 | $226,955.00 |
| 2013 | $280,905.00 |
| 2014 | $289,258.26 |

*(i) Business losses 2010*

[148] The mill building was severely damaged and for about two months there was very little production from the business, with limited production for about six months following. Mr Gardner said there were ongoing quality issues after that, with fine tuning of the replacement machinery. Mr Gardner said, given the production problems, the business lost customers and the ongoing effects continued into subsequent years.

[149] The plaintiffs called Leon Briggs to give evidence in respect of the plaintiffs' claimed business losses for 2010. He is a loss adjuster with a Bachelor in Commerce and Administration, a Fellow of the Chartered Institute of Loss Adjusters in the United Kingdom and the corresponding Australasian body, and a Fellow of the Australian and New Zealand Institute of Insurance and Finance.

[150] Mr Briggs was initially appointed by the plaintiffs' insurers to investigate the claimed losses immediately after the Fire. He attended the Property, inspected the damage and spoke to a number of witnesses during his investigation of the claim. He continued to investigate, observe and verify the damage and losses, and provided regular reports to the insurer. The losses exceeded the insured policy in several categories.

[151] The Council called William Apps, Chartered Accountant, and Executive Director in the Corporate Advisory Services Division of a Chartered Accounting firm. He has a Bachelor of Commerce, is a member of the College of Chartered Accountants Australia and New Zealand, and has a Graduate Diploma in Business (Finance).

[152] The two experts conferred. They agreed that the plaintiffs suffered loss, but disagreed as to the quantum. It was agreed the appropriate approach to determining quantum was to determine:

(a) lost revenues caused by the Fire (Lost Revenues);

(b) an amount that represents the Lost Revenue less the saved direct costs of sale (Lost Gross Margin);

(c) an amount representing other operating costs (other than direct costs of sale) which gave rise to savings as a result of lost revenues (Saved Costs) which should be deducted from Lost Gross Margin when assessing loss;

(d) an amount, if any, of additional or increased costs of operation incurred by the plaintiffs in attempts to restore turnover and/or maintain gross margin as a result of the Fire (Increased Costs of Working).

[153] The experts agreed expected sales of product in the 2010 calendar year were $375,711. The experts disagreed in respect of further claimed Lost Revenues totalling $152,964. They also disagreed on:

(a) the gross margin percentage to be applied to lost turnover when assessing Lost Gross Margin;

(b) the appropriate allowance to apply to Lost Revenues when assessing saved costs;

(c) the quantum of Increased Costs of Working;

(d) whether or not any deduction should be allowed against the resulting assessment of loss for the contribution to loss (if any) arising from the faulty manufacture of replacement plant which may have extended the period of loss; and

(e) whether Lost Gross Margin on lost sales could be significantly less than the annual gross margin for all revenues.

[154] Mr Briggs assessed $257,276 of additional loss, whereas Mr Apps maintained the correct figure was $83,456.

[155] Mr Briggs referred to Mr Apps' assessment that customer churn is to be expected and that some of the losses claimed could be considered as normal churn. He pointed to the other side of that proposition being the possibility of customers who might have approached Smallwoods and generated new revenue but did not because of the Fire. They can never be identified and their omission would have the effect of understating the plaintiffs' claim. I accept that general proposition.

*Lost Revenues*

[156] Mr Briggs was satisfied lost trellis sales of $17,876 were properly claimable on the basis of contemporaneous information provided by Smallwoods' accountant. The accountants had assessed a loss of $24,000, but Mr Briggs adopted the lower figure which had been achieved in 2009. Mr Apps considered there was insufficient evidence of a link between the reduction in turnover and the Fire, given other possible causes such as changes in sales patterns, pointing to the history of fluctuating sales to this particular customer.

[157] Mr Briggs was satisfied with the information in a letter from Smallwoods' customer, Pan Pac Forest Products Limited (Pan Pac), considering it justified a loss of $87,206 in dry mill bearer sales. Mr Apps allowed $23,505 only, leaving a difference of $63,701. Again, Mr Apps was dissatisfied with the quality of supporting evidence.

[158] Pan Pac had advised Mr Gardner it could not accept the quality of a line of lathes as a result of the Fire. Mr Briggs allowed $22,773 in this regard. Mr Apps noted that, whereas sales of one product reduced by $22,773 between 2009 and 2010, overall sales of lathes to Pan Pac increased by $5,461 between those years and sales of lathe product to Pan Pac increased every year from 2008 to 2013.

[159] Mr Briggs calculated a loss of non-customer specific sales of bearers of $4,291 compared to the previous year, but Mr Apps rejected this head of loss on the basis the reduction could be from other sources.

[160] Mr Briggs calculated a loss based on historic achieved sales of two products to Prime Sawmills totalling $44,323. Mr Apps referred to a news article of 15 December 2010, which stated that Prime Sawmills closed down due to deteriorating market conditions. In those circumstances Mr Apps considered the likely deteriorating trading conditions would have resulted in a drop off of sales.

*Lost Gross Margin*

[161] Mr Briggs adopted 49.82 per cent as the Lost Gross Margin percentage on the basis the most recent performance of the business was most likely to be the best indicator of its immediate future performance. Mr Apps considered a weighted average of the prior three years' percentages was more appropriate. The difference is 4.15 per cent, which results in a value difference of $21,940 to $15,592.

[162] Mr Apps had suggested an alternative Lost Gross Margin figure of 22.93 per cent, but effectively did not pursue this point at the trial. His opinion was put forward on the basis that simply adopting annual gross margins for all product lines for loss measurement purposes could produce a misleading assessment of loss if the gross margin varied greatly across products.

*Applicable ratio of Saved Costs*

[163] Mr Briggs and Mr Apps adopted the same approach in principle for Saved Costs as for Lost Gross Margin, that is, the year prior or three years' prior weighted

average respectively. The difference represents 0.93 per cent on the respective calculations of lost revenues ($4,917 of Saved Costs as compared to $3,494).

*Allowance for Increased Costs of Working*

[164] Mr Briggs was provided with details of claimed increased costs, being costs incurred to maintain normal business operations. He had sighted the relevant invoices at the time but did not retain copies. He was satisfied the costs were reasonable and economic. Mr Apps considered there was insufficient information for him to conclude whether the costs were reasonable or not.

*Allowance for any contribution arising from faulty plant*

[165] The replacement multi-saw was manufactured overseas but before despatch was found to be cracked and had to be replaced, causing delay. This delay further contributed to the loss but not to any great degree, said Mr Gardner. He accepted the new saw was a great deal more efficient and "tidier", which resulted in increased production, but required the same number of personnel.

[166] Mr Apps asserted it was reasonable to deduct 28.57 per cent from the loss calculation for the issues around the replacement multi-saw. Mr Briggs disagreed.

*Analysis*

[167] I am satisfied the losses as calculated by Mr Briggs are appropriate, with the exception of the claims relating to Prime Sawmill. As that business closed in December 2010, it is reasonable to conclude their purchases would have reduced throughout the year in such a way as to reduce projected sales by 50 per cent.

[168] I accept the position taken by Mr Briggs on the replacement multi-saw. In ordering the new multi-saw, Smallwoods undertook reasonable steps to mitigate the level of losses stemming from the Fire. A reasonable delay in delivery by a supplier is not a negligent action attributable to Smallwoods, and a deduction is therefore not appropriate.

[169] Mr Briggs undertook his analysis immediately following the Fire and was satisfied on the basis of the information provided to him. I accept Mr Apps' concern, given the unavailability of invoices. However, in the circumstances, I am satisfied that the figure arrived at by Mr Briggs is a reasonable one and properly justified. For this reason the 2010 loss is assessed at $235,527, having deducted 50 per cent of Prime Sawmill sales ($11,041), and claim preparation costs ($10,708).

*(ii) Business losses 2011–2014*

[170] Paul Moriarty gave evidence for the plaintiffs in respect of the claimed losses over the 2011–2014 calendar years. Mr Moriarty is a Director and Principal of Moriarty Associates and a Specialist Forensic Accountant. He has a Bachelor of Science with Honours, is a qualified Chartered Accountant and is accredited as a Business Valuation Specialist.

[171] The difference between the two experts for these years is $937,348 claimed by the plaintiffs as against $84,682, the sum calculated by the defence. Mr Moriarty and Mr Apps conferred and agreed the same approach to determining the quantum of loss as set out under [152] above. They disagreed on a number of matters, including the use of monthly management accounts, the level of lost revenues, the period of adjustment, the lost gross profit, saved costs and whether there should be any deduction in respect of the faulty replacement plant.

[172] The main issues are: for how long the plaintiffs are entitled to business losses and how they are calculated.

*Pan Pac*

[173] Mr Gardner explained that Pan Pac was Smallwoods' number one customer, supplying everything which Pan Pac did not produce itself. The two businesses had a strong and longstanding relationship. Mr Gardner was confident that, had it not been for the Fire, Smallwoods would have continued to retain all of Pan Pac's business until at least 2014–2015. He said Smallwoods had the capacity to meet Pan Pac's increased requirements as advised to him.

[174] In a letter dated 12 September 2011, Rijan Veldsman, Pan Pac's Operations Manager – Lumber stated:

> Supply from Double J Smallwoods
>
> To Whom It May Concern:
>
> Following a fire in January 2010 at their plant in Gisborne, Double J Smallwoods have been unable to meet our demand for solid wood packaging and processing materials. Up until this time they supplied approximately 80% of all solid wood packaging and processing materials used in the Lumber Division at Pan Pac.
>
> *This included 100% of all bearers used in both operations departments. Since May 2011 the Sawmill has increased production by approximately 20% through the addition of a 3rd crew that took operation from running 80hrs to 120 hrs/week.* [emphasis added]
>
> Since this time Pan Pac has made arrangements with alternative suppliers. Pan Pac will maintain these supply arrangements in order to minimise the risk to the business.

[175] After the Fire, Pan Pac went to another supplier, Kiwi Lumber. This prompted Kiwi Lumber to begin producing the same products as Smallwoods. Even after Smallwoods was back to full production, Pan Pac continued to order through Kiwi Lumber.

[176] Mr Moriarty adopted the Lost Revenue calculations undertaken by Mr Briggs as a starting point for his calculations of loss in respect of Pan Pac in the 2011–2014 calendar years. Mr Apps raised the same issues, as noted above.

[177] Mr Moriarty referred to Pan Pac's 20 per cent uplift in production from May 2011 and assessed this loss as $125,351. Mr Apps continued to question the evidence about Pan Pac's 20 per cent uplift and considered there was insufficient information to support an assumption that any such uplift would continue to 2014. He further noted that, as actual sales of the product reduced progressively over 2011 and 2012, there was no evidence to support any uplift.

*Is it reasonable to assume that the Lost Revenues would have been experienced over the four year period 2011–2014?*

[178] Mr Moriarty considered a four year period to be a reasonable timeframe, whereas Mr Apps considered there was insufficient information to support any assumption as to whether Pan Pac would have continued their business relationship with Smallwoods for one, two or any more years after the Fire.

*Lost Gross Margin*

[179] Mr Moriarty remained confident that the Lost Gross Margin on Lost Revenue could reasonably be assumed to approximate to the average of the business as a whole, whereas Mr Apps concluded, given the absence of information, it was difficult for any expert to establish loss conclusively.

*Saved Costs*

[180] Mr Moriarty adopted Mr Briggs' position, noting the small difference between Mr Briggs and Mr Apps (13.65 per cent and 14.58 per cent respectively). Mr Moriarty considered it appropriate to adopt a Saved Costs percentage based on historic "business as usual" results. He considered Mr Apps' use of actual Saved Costs percentage from 2011–2014 to be unreasonable and not reflective of the financial conditions he considered would have existed had the Fire not occurred.

[181] Mr Moriarty adopted Mr Briggs' logic when identifying the costs which, by their nature, were variable and accepted some of them may have a mixed variable and fixed component. However, Mr Apps considered Mr Moriarty's approach was inappropriate, saying there was no way of establishing the figure to be used without a detailed analysis of the relationship between variable costs and revenues.

*Should any allowance be made for Saved Labour when assessing loss?*

[182] Mr Moriarty concluded that wage costs remained virtually unchanged each year despite changes in revenue, whereas Mr Apps referred to wages of $500,000 in 2007 with a turnover of $2.044m, whereas the wage bill in 2013 was $386,000 when revenues dropped to $822,000. From that he concluded that further allowance

should be made for saved labour costs. In his opinion a full analysis of Smallwoods' payroll was required.

*Faulty replacement plant*

[183] Mr Apps' position as referred to above in respect of the 2010 year applied to the later years. Mr Moriarty did not consider the issue.

**Analysis**

[184] From his analysis of the financial performance of Smallwoods, Mr Moriarty concluded Smallwoods suffered a marked decrease in revenue and gross profit because of the Fire at a time when its gross profit percentage showed a trend of improving margin. He conducted an industry overview which led him to conclude there was a stable/strong underlying level of industry activity through the years covered by the claim. This formed the backdrop for his consideration for uninsured losses.

[185] I note Smallwoods' reported revenue in the year ending 31 March 2007 represented the high point of the six years preceding the Fire. The underlying data shows:

(a) in the six years before the Fire, revenue was at or above $1,600,000 per annum;

(b) after the Fire (which occurred towards the end of the 2010 financial year), reported revenue was lower, falling to less than $1,000,000 in the year ending 31 March 2013; and

(c) revenue then recovered to circa $1,300,000 in the financial years ending 31 March 2014 and 31 March 2015 although this remained below all the levels reported prior to the Fire.

[186] As noted by Mr Apps, notwithstanding the Fire, the gross margin in 2010 (of $1,007,761) was greater than was achieved in any other financial year for the 2007

to 2015 period. Whereas average gross sales for the three financial years from 2007 to 2009 before the Fire were $1,871,888, average annual revenues for the 2011 to 2015 years following the Fire were $1,142,688 or, on average, some $729,200 less per annum. Mr Apps pointed out that, whereas average annual revenues declined after the Fire, average gross margin improved, or, notwithstanding a decline in revenues, the resulting revenues possibly comprised sales of more profitable products.

[187] Mr Apps referred to a trend of continuing decline in turnover from 2007–2009, a small increase in 2010, decreases in 2011–2013, followed by increases in 2014 and 2015. He then questioned whether the apparent reductions in turnover experienced in the 2011–2013 financial years[28] were caused solely by the Fire or whether they were a continuation of what he considered to be the decline in revenues in 2007–2010.

[188] In Mr Moriarty's opinion, given the long trading history and strength of the relationship between Smallwoods and Pan Pac as explained by Mr Gardner, it was very unlikely a change would have occurred. He considered the loss of revenue and gross profits arose largely due to Pan Pac redirecting orders to other suppliers and leaving a proportion of those orders with competitors so as to split their supply base and minimise the risk and impact of another supply interruption to their business.

[189] That there was no direct evidence from Pan Pac is a significant difficulty. There was no opportunity to question Pan Pac as to the period for which it increased production and whether it would have then sought to spread its risk in any event.

[190] It is fair to infer that Pan Pac, when increasing production, might at the same time have sought to spread its risk and find another supplier. That, in my assessment, would be a reasonable business approach. It is also reasonable to assess that once any new supplier, for example Kiwi, had its "foot in the door", it would then seek to supply more of Pan Pac's business. Conversely, Smallwoods would, as a result of the Fire and loss of Pan Pac, seek to diversify and/or find new customers, again a reasonable and sensible commercial approach.

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[28] Revenues increased again for the 2014 and 2015 years.

[191] Therefore, the five year loss period at the levels claimed is too long and the assumption Smallwoods would have obtained all of Pan Pac's increased production must be qualified.

[192] In my assessment, Smallwoods have not proven to the requisite standard that Pan Pac's increased production continued beyond 2010. Further, it is reasonable to discount the claim relating to Pan Pac by 10 percentage points each year to recognise the likelihood of Pan Pac deciding to spread its risk in any event. I have already allowed the full amount of the claim in respect of the 2010 year. The following years should be calculated using the remainder of the claim after the increased Pan Pac bearer sales have been deducted. The 2011 year should be calculated using 90 per cent of the remainder of the claim, the 2012 year 80 per cent, the 2013 year 70 per cent and the 2014 year 60 per cent.

[193] In the circumstances I consider it appropriate to apply the annual gross margin for sales of all products to all customers when calculating lost gross profit arising from lost revenues of particular product lines.[29]

[194] Given the small difference between Mr Briggs and Mr Apps in respect of saved costs, I adopt 14 per cent.

[195] Mr Apps' contention on saved labour has some force. However, Mr Moriarty's evidence was that wage costs remained largely fixed, noting an almost unchanged wage cost from 2007 to 2015 despite significant changes in revenue. He noted that Mr Gardner informed him he ceased to draw a salary in 2013. Mr Gardner's evidence was that the business required the same workforce after the Fire as it had before. On the figures provided, before the Fire, wages accounted for between 23.65 to 29.35 per cent of revenue. This figure jumped to 41.6 per cent in 2011, 40.79 in 2012 and 46.95 in 2013. It was not until 2014 when revenue substantially increased that the percentage ratio of wages to revenue reduced to pre-Fire levels, being 29.05 per cent. This analysis supports the plaintiffs' position that wages were a relatively fixed cost. If wages represented over 45 per cent of revenue, it would be reasonable to infer that, had the business been able to function

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[29] Based on each relevant year's gross profit percentage.

at a lower staffing level, it would have taken the step of reducing staff. For these reasons, I am satisfied that no allowance needs to be made for saved labour when assessing loss.

[196] As noted in respect of the 2010 year, it is not appropriate to make any reduction in the claim in respect of faulty replacement plant.

*General damages*

[197] Mr Gardner gave compelling evidence of the health implications for him and the stress caused to him and his wife as a result of the Fire.

[198] The difficulty with the Gardners' position is that their only interest in the damage resulting from the Fire was the loss of the kauri logs, which were owned by them in their personal capacity. Mr Gardner said in evidence he "would not lose sleep" over the loss.

[199] For this reason, no general damages are awarded.

**Result**

[200] The damages awarded to the plaintiff are $875,254.68.[30]

*Interest*

[201] Pursuant to the Judicature Act 1908, I award the plaintiffs interest at the prescribed rate of five per cent from the date of the losses awarded.

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[30] Based on the table provided in the joint memorandum of counsel dated 2 June 2017. The plaintiffs' losses of $1,614,155.27 are reduced by 50 per cent as a result of contributory negligence, leaving $807,077.64. Added to that is the Council's 50 per cent share of the boundary fence, $68,177.04.

**Costs**

[202] If the parties are unable to agree costs, the plaintiffs are to file a memorandum within 28 days of the date of this decision, with any response from the Council 14 days thereafter.

**Thomas J**

Solicitors:
Rainey Law, Auckland for Plaintiffs
Heaney and Partners, Auckland for Defendants