

Civil Procedure

JOHN TURNER*

I Introduction

This review of civil procedure primarily deals with the period from 2010 to the middle of 2014, with coverage of some earlier decisions where they are relevant to the matters being discussed. It covers the following topics: the new rules governing discovery in High Court civil proceedings which took effect on 1 February 2012 (with particular reference to the application of the concept of proportionality), recent developments in the law relating to further particulars and more explicit pleadings, and finally the issue of litigation costs awards against legal representatives personally.

II Recent Developments in Discovery

A Changes to the New Zealand discovery rules

As is well known, at least among litigation practitioners, new discovery rules in the High Court took effect on 1 February 2012 in terms of the High Court Amendment Rules (No 2) 2011.¹ Rule 4 of the amendment substituted a new pt 8 in the High Court Rules consisting of new rr 8.1–8.48 dealing with the topics of discovery, inspection and interrogatories. Of these, rr 8.1–8.33 contain the new regime for discovery.

The new rules embody a number of innovations. The parties are required to co-operate on discovery arrangements.² When litigation is in reasonable contemplation they must take reasonable steps to preserve discoverable documents.³ Initial disclosure of documents used to prepare, or referred to in, a pleading must generally be made when that pleading is served.⁴

*Barrister, Auckland

1 High Court Amendment Rules (No 2) 2011.

2 High Court Rules, r 8.2.

3 High Court Rules, r 8.3.

4 High Court Rules, r 8.4.

The case management conference assumes significance in the discovery process as this is when the discovery orders are to be made.⁵ The parties must confer on the discovery order which is sought and address the matters in the prescribed discovery checklist.⁶ The discovery order requested is to be addressed in a joint memorandum or in separate memoranda.⁷

The judge presiding at the case management conference may then make an order⁸ for standard⁹ or tailored¹⁰ discovery or may dispense with discovery. There is a presumption that tailored discovery will be appropriate in relation to certain classes of proceeding.¹¹ The new rules set out the test of relevance to be applied in relation to standard discovery.¹² Tailored discovery requires disclosure of documents either in categories or under another method of classification.¹³ In general, tailored discovery might be expected to be narrower than standard discovery¹⁴ though this may not necessarily be the case.¹⁵

The parties must conduct a reasonable search for documents in accordance with specified criteria, including a requirement that discovery be proportionate to the subject matter of the proceeding.¹⁶ A proportionate approach also applies where the costs of standard discovery are high compared to the matters at issue, in which case standard discovery will apply.¹⁷ A general requirement that the processes of discovery and inspection be proportionate in nature is also included in the new rules.¹⁸

5 High Court Rules, r 8.5.

6 High Court Rules, r 8.11(1); and pt 1 of sch 9.

7 High Court Rules, r 8.11(2).

8 High Court Rules, r 8.12(1).

9 High Court Rules, r 8.7.

10 High Court Rules, r 8.8.

11 High Court Rules, r 8.9.

12 See the four categories in r 8.7, being documents on which the party relies, documents that adversely affect that party's own case, documents that adversely affect another party's case, and documents that support another party's case.

13 High Court Rules, r 8.10.

14 For some discussion of this issue see *Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* [2013] NZHC 1054 at [15], in which Asher J noted that tailored discovery will "[m]ore often" be narrower in scope than standard discovery but could also be extended to documents which may lead to a train of enquiry in terms of the traditional test for discoverability. The traditional test will be discussed later in this review.

15 This author is aware from his own experience with large cases, and also anecdotally, that tailored discovery, especially in cases involving agreed keyword searches of electronic records, can generate very large numbers of discoverable documents, as was the case under the traditional test.

16 High Court Rules, r 8.14; and particularly r 8.14(2)(e).

17 High Court Rules, r 8.9(a).

18 High Court Rules, r 8.2(1)(a).

Documents to be discovered are to be listed and verified by affidavit.¹⁹ Inspection by electronic exchange then occurs unless otherwise ordered.²⁰

The new rules have been the subject of some existing comment in seminar and conference papers.²¹ However, as far as this author is aware, this review contains the first detailed analysis of relevant case law dealing with certain aspects of the new discovery rules since they took effect in February 2012, particularly the concept of proportionality.

B *Problems with traditional discovery requirements*

Before dealing with the provisions of the new rules, it is useful to set out in general terms some of the underlying legal issues and problem areas relating to discovery (or disclosure as it is termed in various countries) of documents in common law jurisdictions, such as England, Canada, Australia, the United States and New Zealand.

A convenient starting point is the classic and well-known statement of Lord Donaldson MR in the English Court of Appeal in *Davies v Eli Lilly & Co*:²²

This right [to discovery] is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted “cards face up on the table”. Some people from other lands regard this as incomprehensible. “Why,” they ask, “should I be expected to provide my opponent with the means of defeating me?” The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have *all* the relevant information, it cannot achieve this object.

19 High Court Rules, rr 8.15 and 8.16.

20 High Court Rules, r 8.27.

21 See, for example, David Friar, Andrew King and Laura O’Gorman “New Discovery Rules” (paper presented to the New Zealand Law Society, October 2011); and Raynor Asher and others “E-Discovery: From First Instructions to a Pain Free Electronic Exchange” (paper presented to the Auckland District Law Society, 28 August 2012).

22 *Davies v Eli Lilly & Co* [1987] 1 WLR 428 at 431 (emphasis in original). These sentiments were echoed by the Law Commission in its 2001 paper on discovery reform. See Law Commission *Reforming the Rules of General Discovery* (NZLC PP45, 2001) at 1, in which the Commission noted that discovery was an “approach alien to civil law jurisdictions” but was necessary by reason of the fact that common law courts lacked general inquisitorial powers to require production of documentary evidence. See also John Turner “Review of Civil Procedure” [2002] NZ L Rev 185 at 189–196.

The reference to the court having “*all* the relevant information” (emphasis as in the original reported passage) echoes the traditional formulation of the test for discovery in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (*Peruvian Guano*).²³ The excerpt from the judgment of Brett LJ is probably one of the best-known passages in English common law but is worth reproducing in the present context as it has been the source of many subsequent difficulties with the civil litigation process:²⁴

It seems to me that every document relates to matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* — not which *must* — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly,” because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences

It appears from the description of the documents sought by the defendants, as set out in the report of the decision,²⁵ that these consisted of draft agreements, telegrams and letters referred to in minute books and which probably did not total more than 20 in number. No doubt Brett LJ (who died in 1899), would have been somewhat bemused (if not mortified) had he lived to see his dictum applied in literal terms to contemporary commercial cases in which discovery in some cases has entailed the listing of hundreds of thousands, and sometimes even millions, of individual documents.²⁶ Rampant and

23 *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA) [*Peruvian Guano*].

24 At 63. The references to “either directly or indirectly” and “lead him to a train of inquiry” have proved to be particularly problematic in the context of discovery in contemporary civil proceedings. (emphasis in original)

25 At 56–57.

26 As in the notorious recent Australian example of *Seven Network Ltd v News Ltd* [2007] FCA 1062. Edward Foss *A Biographical Dictionary of the Judges of England From the Conquest to the Present Time 1066–1870* (John Murray, London, 1870) at 123 tells us that Brett LJ distinguished himself as a mathematician while a student at Cambridge. He may well have needed skills of that kind had he been required to keep track of the copious documentation in a modern, large commercial case!

uncontrolled discovery of electronic documents generated by a major corporation over a period of more than say 10 years has now raised the spectre of the first billion-document US civil discovery being a possibility in the not too distant future.²⁷

The *Peruvian Guano* test, or close variations of it, were subsequently accepted in Australia,²⁸ Canada²⁹ and New Zealand.³⁰ However, that approach to discovery has now tended to fall out of favour in England and many Commonwealth jurisdictions.

C Reforming Discovery Requirements

Rumblings of judicial discontent in this area were evident in Canada more than 30 years ago.³¹ Canadian provinces such as Ontario³² and British Columbia³³ have now introduced amended rules of civil procedure modifying the discovery process. These have incorporated the concept of proportionality, by which the court can balance the costs and inconvenience of undertaking the further discovery requested against the potential value of

27 See Lauren Ann Ross “A Comparative Critique to U.S. Courts’ Approach to E-Discovery in Foreign Trials” (2012) 11 Duke Law & Technology Review 313 at 319–320.

28 *Hooker Corp Ltd v Commonwealth of Australia* (1985) 80 FLR 94 (ACTSC).

29 *Dufault v Stevens et al* (1978) 6 BCLR 199 (CA); and *GWL Properties Ltd v WR Grace & Co of Canada* (1992) 14 CPC (3d) 74 (BCSC).

30 *M v L* [1999] 1 NZLR 747 (CA).

31 See, for example, *Peter Kiewit Sons Co of Canada Ltd v British Columbia Hydro & Power Authority* (1982) 134 DLR (3d) 154 (in which the Supreme Court of British Columbia declined to adopt a *Peruvian Guano* approach in a case involving hundreds of thousands of discoverable documents which were only of possible relevance to the case); and *Middelkamp v Fraser Valley Real Estate Board* (1992) 96 DLR (4th) 227.

32 Ontario’s new *Rules of Civil Procedure* RRO 190, Reg 194 took effect on 1 January 2010 and introduced a simple test of relevance for civil discovery and considerations of proportionality. International procedural reforms effected in the discovery area are referred to in Friar, King and O’Gorman *New Discovery Rules*, above n 21, at 13–14.

33 British Columbia’s *Supreme Court Civil Rules* BC Reg 168/2009, OC 302/2009 took effect on 1 July 2010 and made discoverability in civil cases dependent upon direct relevance combined with a concept of proportionality.

the documents sought.³⁴ The Alberta courts have also recognised the concept of proportionality in discovery.³⁵

An approach based on proportionality has also been a feature of the US Federal Rules of Civil Procedure since 1983.³⁶ However, some commentators doubt that these initiatives have had any appreciable effect on discovery processes and escalating costs in major United States civil litigation at the federal level.³⁷

In Victoria, Australia, similar amendments to the scope of discovery in civil proceedings took effect on 1 January 2011.³⁸ In relation to the Australian federal courts, the Australian Law Reform Commission (ALRC) issued a report on managing discovery in 2011.³⁹ This drew attention to the shortcomings in the existing discovery regime⁴⁰ and placed emphasis on the need for judges to control the process of discovery through more active

34 As in, for example, *Rossi v Vaughan (City)* 2010 ONSC 214 at [13] (benefits of additional discovery of computerised records not shown to warrant the cost involved on a proportionality basis assessed under the new Ontario rules of procedure); *Ontario v Rothmans Inc* 2011 ONSC 2504 at [163] (the principle of proportionality under the new Ontario rules allows the court to “downsize” the procedure unless the outcome of this process would not be procedurally fair to the parties); and *Markson v MBNA Canada Bank* 2011 ONSC 871 at [45] (in a class action alleging excessive credit card transaction fees the bank argued that the further documents sought offended against the principle of proportionality but the Court held that the documents were relevant to common issues arising in the class action and should be discovered).

35 *Spar Aerospace Ltd v Aerowerks Engineering Inc* 2007 ABQB 543 upheld in *Spar Aerospace Ltd v Aerowerks Engineering Inc* 2008 ABCA 47; and *Innovative Health Group Inc v Calgary Health Region* 2008 ABCA 219 at [23] per Conrad J.

36 Under an amendment to r 26(b) of the *Federal Rules of Civil Procedure* in 1983, United States judges have been obliged to limit the scope of discovery in various circumstances, such as where the discovery process exhibited redundancy or was lacking in proportionality. The validity and utility of the amended rule was upheld by the United States Supreme Court in *Crawford-El v Britton* 523 US 574 (1998), in which the Court stressed that discovery had to be approached in a proportionate manner.

37 See, for example, Emery G Lee and Thomas E Willging “Defining the Problem of Cost in Federal Civil Litigation” (2010) 60 Duke LJ 765, in which the authors point to the urgent need for reform in the area of controlling federal civil litigation costs in the United States, particularly in terms of the discovery process; and Ross, above n 27.

38 Supreme Court (Chapter I Amendment No 18) Rules 2010 SR No 53/2010 (Vic) amending the Supreme Court (General Civil Procedure Rules) 2005 (Vic) by inserting a new r 29.01.1. Sub-rule 5 of that rule introduced a concept of proportionality based on various factors such as ease and cost of retrieval as opposed to potential significance of a document to be found.

39 Australian Law Reform Commission *Managing Discovery: Discovery of Documents in Federal Courts* (ALRC Report No 115, March 2011).

40 At [5.73–5.80].

case management.⁴¹ These changes were introduced in the Federal Court of Australia with effect from 1 August 2011⁴² and included the concept of proportionality.⁴³ At the state court level, the Supreme Court of Queensland has been prepared to assess the extent of discovery obligations in accordance with similar criteria.⁴⁴

Prior to the Woolf reforms in England in 1999 resulting in the new English Civil Procedure Rules there was increasing disquiet about the difficulties and costs associated with the *Peruvian Guano* test.⁴⁵ In the 2007 decision of the English Court of Appeal in *Nichia Corp v Argos Ltd*, Jacob LJ compared the position with discovery under the old *Peruvian Guano* test with that under the new English Rules.⁴⁶ In an illuminating passage in his judgment he stated:⁴⁷

Now it might be suggested that it is cheaper to make this sort of mass disclosure than to consider the documents with some care to decide whether they should be disclosed. And at that stage it might be cheaper — just run it all through the photocopier or CD-maker — especially since doing so is an allowable cost. But that is not the point. For it is the downstream costs caused by over-disclosure which so often are so substantial and so pointless. It can even be said, in cases of massive over-disclosure, that there is a real risk that the really important documents will get overlooked — where does a wise man hide a leaf?

41 At [5.101–5.112] and ch 6.

42 See Federal Court Rules 2011 (Cth), rr 20.14 and 20.15. For a discussion of these procedural changes in Australia see Michael Legg and Lara Dopson “Discovery in the Information Age: The Interaction of ESI, Cloud Computing and Social Media with Discovery, Depositions and Privilege” [2012] UNSWLRS 11.

43 Under r 20.14(3) the criteria which a party can apply in assessing discoverability are the nature and complexity of the proceeding, the number of documents, ease and cost of retrieval, and the significance of any document which is likely to be found.

44 *Central Queensland Mining Supplies Pty Ltd v Columbia Steel Casting Co Ltd* [2011] QSC 183 at [38], where Applegarth J held that the plaintiff’s obligation to the Court to facilitate expeditious resolution of the proceedings with the minimum of expense justified, on what was effectively a proportionality basis, using a keyword search for electronic documents.

45 See, for example, *O Co v M Co* [1996] 2 Lloyd’s Rep 347 at 352 per Colman J, (*Peruvian Guano* test was subject to a requirement of “demonstrable evidential materiality”); and *Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskins & Sells* [1997] 1 WLR 257 at 266 per Neill LJ (the *Peruvian Guano* principles might shortly have to be the subject of re-examination on the grounds of cost).

46 *Nichia Corp v Argos Ltd* [2007] EWCA Civ 741 (CA), [2007] Bus LR 1753.

47 At [47].

In England, recent formulations of the discovery obligation have modified the traditional obligation to undertake extensive discovery. For example, in *Digicel (St Lucia) Ltd v Cable and Wireless plc*, Morgan J stated:⁴⁸

... it must be remembered that what is generally required by an order for standard disclosure is “a reasonable search” for relevant documents. Thus, the rules do not require that no stone should be left unturned. This may mean that a relevant document, even “a smoking gun” is not found. This attitude is justified by considerations of proportionality.

More recently, in England, the implementation of the Jackson reforms has resulted in further amendments to the Civil Procedure Rules in April 2013, which have given express recognition to the concept of proportionality.⁴⁹ These arise in the context of standard disclosure in terms of deciding whether a reasonable search for documents has been undertaken.

D *Proportionality in terms of the New Zealand case law*

New Zealand shared many of the concerns expressed in other common law jurisdictions concerning the excessive scope and cost of *Peruvian Guano*-type discovery in civil proceedings. These concerns were expressed judicially,⁵⁰ by law reform bodies,⁵¹ and by commentators.⁵²

48 *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2008] EWHC 2522 (Ch), [2009] 2 All ER 1094 at [46].

49 Civil Procedure Rules 1998 (UK), r 31.7. Rule 31.7(2) sets out factors which are relevant to the reasonableness of a search for discoverable documents, being the number of documents, the nature and complexity of the proceedings, the ease and expense of document retrieval, and the likely significance of any document.

50 See, for example, *ANZ National Bank Ltd v CIR* [2009] 3 NZLR 123 (CA) at [6] where O’Regan J stated that the *Peruvian Guano* test remained in effect “despite efforts at reform aimed at limiting its scope”. In Commercial List proceedings the High Court has power under r 446J(2)(d) of the High Court Rules 1986 (now superseded by r 29.12(2)(d) and (e) of the High Court Rules 2008) to give directions in relation to discovery. This power was invoked by Barker J in *Pizza Restaurant (NZ) Ltd v Pepsico Australia Pty Ltd* (1992) 6 PRNZ 392 (HC) at 395 to limit the scope of discovery.

51 Rules Committee Consultation Paper *Proposals for Reform of the Law of Discovery* (Rules Committee, Auckland, 11 September 2009) at [7], where the Committee stated that “*Peruvian Guano* or ‘train of enquiry’ discovery has proven to be an expensive and burdensome process in most civil proceedings”.

52 See Friar, King and O’Gorman, above n 21, at 4–7; and Raynor Asher and others, above n 21, at 16–17.

In the case of tailored discovery under the new discovery rules, “[this] must be ordered when the interests of justice require an order involving more or less discovery than standard discovery would involve”.⁵³ The features of tailored discovery are not dissimilar to the disclosure provisions in the IBA rules of arbitration,⁵⁴ as at least one New Zealand commentator has noted.⁵⁵

Rule 8.9 sets out the circumstances in which tailored discovery would be presumed to be required. The rule lists six categories where the presumption arises.⁵⁶

The first significant judicial treatment of the effect of the new discovery rules, particularly in relation to the concept of proportionality, appears to be that contained in the judgment of Asher J in *Commerce Commission v Cathay Pacific Airways Ltd*.⁵⁷

In that proceeding, the Commerce Commission alleged that the defendant, together with other airlines, had agreed to fix fuel and security surcharges at predetermined rates. The interlocutory hearing concerned discovery to be provided by the defendant airline, which opposed three orders for particular discovery being made. These were for discovery of the defendant’s documents held in Singapore in relation to overseas agreements to set fuel surcharges in relation to cargo within a particular defined period, discovery of similar documents held in the United States, and thirdly, general discovery of documents held in Singapore relating to global and regional agreements imposing security surcharges in relation to cargo. The defendant opposed these categories of discovery on the basis that the plaintiff’s request was unreasonable and disproportionate.

Asher J noted that the parties had conducted themselves in compliance with the spirit of the new rules and that there had been co-operation in relation to discovery.⁵⁸ His Honour observed that the essential issue to be

53 High Court Rules, r 8.8.

54 *Rules on the Taking of Evidence in International Arbitration* (International Bar Association, 29 May 2010).

55 Anna Kirk “Document disclosure in litigation and arbitration” [2012] NZLJ 123.

56 These are: (a) where the costs of standard discovery would be disproportionately high; (b) commercial list or swift-track matters; (c) where there are allegations of fraud or dishonesty; (d) where the total of the sums in issue exceeds \$2,500,000; (e) where the total value of the assets in issue exceeds \$2,500,000; or (f) where the parties agree upon tailored discovery.

57 *Commerce Commission v Cathay Pacific Airways Ltd* [2012] NZHC 726. This case has been cited with approval in subsequent decisions, including *No 317 Ltd v Canterbury Regional Council* [2014] NZHC 276 per Associate Judge Osborne at [11]–[12]; and *Body Corporate 398983 v Zurich Australian Insurance Ltd* [2012] NZHC 2333 per Heath J at [15]–[16].

58 At [43].

determined was whether the orders sought by the plaintiff in relation to the specified categories of documents were reasonable and proportionate.

The learned judge then proceeded to analyse the relevant issues as discerned from an examination of the pleadings. He said:⁵⁹

To determine the proportionality arguments in relation to tailored discovery of particular categories it is necessary to consider the chances of finding relevant documents in the discovery exercise and their degree of relevance. This should then be balanced against the cost of carrying out that discovery process. Broader considerations such as the amount at issue, the resources of the parties, and delay to the proceedings may also be relevant, although they do not loom large in this case given the amount at issue, the considerable means of the parties, and their legal resources.

His Honour then went on to consider the various categories of documents in terms of the likelihood of highly relevant material being revealed, and noted:⁶⁰

In a decision whether to order discovery under the particular category it is necessary to measure the likely return of relevant documents against the cost of the exercise. If highly relevant documents may be revealed, then a greater cost can be justified.

Having considered and weighed up these matters, Asher J held that an order for discovery of the documents in the first and second categories would impose a disproportionate burden on the defendant in terms of discovery. However, in relation to the third category, the likelihood of discovering relevant documents outweighed the burden imposed on the defendant.

In *Karam v Fairfax New Zealand Ltd*, Associate Judge Osborne considered an application by the defendant media organisation for discovery of specified documents from the plaintiff. The application was made in the context of the plaintiff's defamation proceedings arising out of Facebook and media articles concerning the conviction and subsequent acquittal on retrial of David Bain for the alleged murder of five members of his family.⁶¹ The learned Associate Judge discussed the framework of the new discovery rules and noted that they imposed a new regime which did not necessarily reflect the previous *Peruvian Guano* approach, although that approach might still be appropriate if the court so directed. As the learned Associate Judge stated:⁶²

59 At [18].

60 At [21].

61 *Karam v Fairfax New Zealand Ltd* [2012] NZHC 887.

62 At [135].

Notwithstanding the submissions of counsel to the contrary, there is nothing in (the new) r 8.19, which applies to this application, to require the Court to automatically apply the assumptions which underpinned discovery rules up to January 2012. While, for instance, the *Peruvian Guano* approach may still form the basis of an order of the Court after 1 February 2012, that will be because the Court finds it to be the appropriate order even in the new discovery climate. If further discovery is appropriate, and a different approach to the additional documents such as standard discovery under r 8.7 is appropriate, then such an order is within the Court's armoury.

On the issue of proportionality, the learned Associate Judge noted that this requirement was “designed to reduce disproportionate cost and delays caused by discovery and to reduce the tactical use of discovery”.⁶³

Various other recent decisions have dealt with particular aspects of the concept of proportionality in discovery.

In *Coote v Murray*, Associate Judge Osborne considered the issue of whether the requirement of proportionality might be reflected in an order of the court specifying an upper limit on the time to be expended by a party in attending to the making of further discovery to be incorporated in a supplementary affidavit.⁶⁴ The learned Associate Judge noted:⁶⁵

I am not aware of a case in which such an order has been made. Counsel, equally, were unable to refer me to any case. It appears to me that in an appropriate case, particularly where the integrity of the intended deponent is accepted, a time limit on the expectation upon the intended deponent might accord with the principle of proportionality and might constitute a just order. On the evidence in this case, however, I have decided to refrain from such an order. The plaintiffs themselves have not given evidence as to any particular difficulty in locating documents or of the time that might be involved.

In *Karam v Fairfax New Zealand Ltd*, the defendant sought discovery of a wide range of documents, which Associate Judge Osborne considered to be disproportionate. He stated:⁶⁶

63 At [131]. Associate Judge Osborne adopted a similar approach in *Southland Building Society v Barlow Justice Ltd* [2013] NZHC 1125 at [16].

64 *Coote v Murray* [2012] NZHC 3399.

65 At [42].

66 *Karam v Fairfax New Zealand Ltd*, above n 61, at [148]. See also *Southland Building Society v Barlow Justice Ltd*, above n 63, in which Associate Judge Osborne adopted, at [17], his previous statement of principle in *Karam v Fairfax New Zealand Ltd* and

Fairfax chose not to seek to define more narrowly the categories of documents which it sought. Equally, Fairfax chose not to re-cast the breadth of its application by adopting a formula based on documents which adversely affect Mr Karam's case, as would apply in standard discovery under the new Rules. It is not for this Court to re-cast into something proportionate an application which I find wholly disproportionate, having regard to all the circumstances of the case.

Other cases have emphasised that the concept of proportionality involves a balancing exercise between transparency and proportionality.⁶⁷ *Truck Master Ltd v Mastagard Waste Ltd* provides some guidance as to how this is to be achieved in practice.⁶⁸ In that case Associate Judge Osborne stated:⁶⁹

There may be a number of means by which the Court in a case such as the present can ensure proportionality at the normal discovery stage. In the present case the applicants seek discovery of a wide range of documents over the entire period of the contracts. A proportionate approach to discovery, if ordinary discovery orders were being made, might be to require the defendant to provide identified classes of documents over a limited sample period to enable plaintiffs to assess whether the resulting information and calculations establish either the existence of breach or a worthwhile level of claim.

Other aspects of proportionality have also been considered in recent decisions. In *Nathans Finance New Zealand Ltd v AIG Insurance New Zealand Ltd* Winkelmann J considered the application of the concept of proportionality in various circumstances.⁷⁰ Her Honour noted:⁷¹

The notion of proportionality underlies the new discovery regime. The first obligation imposed upon the parties by sch 9, r 1 is that they must assess the proportionality of the proposed discovery. The concept of

noted that the concept of proportionality served to prevent a discovery order becoming oppressive.

67 See, for example, *J v P* [2013] NZHC 557 at [118], per Mallon J; and *Deliu v New Zealand Law Society* [2013] NZHC 1584, in which Katz J noted, at [21], that proportionality needed to reflect lost time and cost of compliance balanced against the value of the documents. Since many of the documents sought were only marginally relevant, the requested discovery was lacking in proportion.

68 *Truck Master Ltd v Mastagard Waste Ltd* [2014] NZHC 1676.

69 At [74].

70 *Nathans Finance New Zealand Ltd v AIG Insurance New Zealand Ltd* [2013] NZHC 3137.

71 At [32] (footnotes omitted).

proportionality applies equally to tailored and standard discovery. It is for this reason that one of the categories of cases in which the presumption of tailored discovery applies is where “the costs of standard discovery would be disproportionately high in comparison with the matters at issue in the proceeding.” However in some cases, such as those involving fraud or dishonesty, the principle of proportionality gives way to the need for a full and frank exchange of information. One of the other categories where the presumption in favour of tailored discovery applies is likely to be complex cases, where the parties can be expected to understand the issues sufficiently that they are able to take a surgical approach to discovery.

Some recent High Court decisions have dealt with the relationship between proportionality and the issues before the Court. This is especially the case where the documents sought may support areas of collateral attack or be of peripheral interest.⁷²

The High Court has also had occasion to consider the situation where a party has provided excessive discovery of irrelevant documents. In these cases, the Court has set out what principles might be applicable to a proportionate approach. In *NZX Ltd v Ralec Commodities Pty Ltd*, Dobson J considered a situation of this kind.⁷³ He expressed the view that where the extent of the over-discovery had been modest and re-listing the documents correctly would be a substantial task then it might be a proportionate outcome to allow the inspecting party to be compensated by costs.⁷⁴ However, where the excessive discovery was substantial and imposed an unnecessary burden on the inspecting party then accurate re-listing might be required. The same might apply where over-discovery had been undertaken as a deliberate diversionary tactic.⁷⁵

The foregoing review of the recent New Zealand decisions dealing with the concept of proportionality in the discovery context indicates that the courts have been willing and able to undertake the appropriate balancing exercise between the benefits of comprehensive disclosure as opposed to the need to avoid excessive cost and inconvenience to the disclosing party. No doubt as the number of decided cases in this area increases, litigating parties

72 See, for example, *Walker v Gibbston Water Services Ltd* [2014] NZHC 494 at [17] per Dunningham J (wide-ranging discovery of documents which were of marginal relevance was not proportionate); and *Dotcom v Attorney-General* [2014] NZHC 1343 at [35] per Winkelmann J (discovery of documents showing alleged disregard by one of the defendants of its statutory operating mandate would open up a broad, collateral field of enquiry and was accordingly disproportionate in terms of the allegations pleaded).

73 *NZX Ltd v Ralec Commodities Pty Ltd* [2014] NZHC 376.

74 At [9].

75 At [10].

and their counsel will be provided with further guidance and examples as to where the boundaries between these two concepts are likely to lie.

III Applications for Further Particulars and/or a More Explicit Pleading

The second topic to be covered in this review is that of applications for further particulars and/or a more explicit statement of claim. In New Zealand, the applicable principles are set out in r 5.21 of the High Court Rules, which allows a party to give notice requiring the other party to provide necessary further particulars of a cause of action or defence or to file and serve a more explicit statement of claim or statement of defence or counterclaim. The purpose of the rule is to require a party to provide proper pleadings so as to define the relevant issues in the case and to avoid the other party being taken by surprise.⁷⁶ In this part of the review I shall deal primarily with the nature and scope of the obligation to provide further particulars.

The purpose of particulars is to fill the gap between the pleading of material facts and the provision of evidential detail (which is not to be pleaded as such). As Kós J put it in *Ayers v LexisNexis NZ Ltd*:⁷⁷

Particulars lie in a sometimes uncomfortable no-man’s land between material or essential facts (which must be pleaded and traversed) and evidence (which must not). As Drummond J put it in *Queensland v Pioneer Concrete (Qld) Pty Limited*:

... a pleading must contain only a statement in summary form of the material facts, but not the evidence by which those facts are to be proved, while the primary function of particulars is to ensure that effect is given to “the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs”.

⁷⁶ See the commentary in *McGechan on Procedure*, High Court Rules, r 5.21.01 and, in relation to the English *Rules of the Supreme Court* (in the pre-Civil Procedure Rules era), in the *White Book* (1999 edition) para 18/12/2.

⁷⁷ *Ayers v LexisNexis Ltd* [2012] NZHC 3055, (2012) 21 PRNZ 313 at [49] (footnotes omitted). In the context of Australian civil procedure, the High Court of Australia has stated the principles applicable to further particulars from time to time. See, for example, *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 110 (“their function is to limit the issues of fact to be investigated and in doing this they do not modify or alter the cause of action sued upon”), followed in *Katsilis v The Broken Hill Pty Co Ltd* (1977) 18 ALR 181, (1978) 52 ALJR 189 at 201.

They therefore serve a different function from pleadings; their role is to illuminate, but that is all.

While in principle it might be thought that the dividing line between pleading material facts and illuminating a cause of action by way of further particulars would be capable of being clearly drawn, in practice this may not necessarily be the case. It may often be debatable whether a pleaded allegation primarily relates to a material fact or to the matters of detail which support the essential allegation being made. As was noted by the Court of Appeal in *Price Waterhouse v Fortex Group Ltd*, deciding on the appropriate level of particularity in a pleading is essentially a practical rather than a theoretical exercise and is “not an area for mechanical approaches or pedantry”.⁷⁸ The pleading must clearly outline the case to be met so that the other party can brief evidence and prepare for trial.

These principles have been restated by the Court of Appeal in *CIR v Chesterfields Preschools Ltd*.⁷⁹ In terms of particulars, the Court held that these had to be sufficient fairly to inform the defendant of the case which it had to meet and while required to be adequate they must not stray into evidence.⁸⁰ Furthermore, allegations of bad faith (the case being concerned with a claim for alleged misfeasance in public office) had to be clearly pleaded and “properly particularised”.⁸¹

As Scott LJ stated in the 1941 decision of the English Court of Appeal in *Pinson v Lloyds and National Provincial Foreign Bank Ltd*:⁸²

Their function [ie the function of particulars] is to put the opposite party on his guard and prevent him being taken by surprise at the trial of an action, the “material facts” of which should have been already averred. Nor have mere statements of evidence *as such* a place in particulars, any more than in the pleading, although the dividing line between statements which contain sufficient indication to prepare the opponent’s mind for what he will have to meet at the trial and mere statements of evidence is sometimes hard to draw and should not invite meticulous criticism. The essential rules of modern pleading embody a common-sense view of litigation, and, if complied with substantially and in accordance with their real intention, are well calculated to keep the cost of litigation down. No doubt, it is often a question of degree

78 *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 19, per McGechan J. See also the observations of the Court of Appeal to similar effect in *Hopper Group Ltd v Parker* (1987) 1 PRNZ 363 (CA) at 366.

79 *CIR v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679.

80 At [84].

81 At [86].

82 *Pinson v Lloyds and National Provincial Foreign Bank Ltd* [1941] 2 KB 72 at 75.

and convenience whether details of material facts should be put into the body of the pleading or reserved for particulars

In England, following the Woolf civil procedure reforms, there are recent statements of principle cautioning against allowing demands for the provision of excessive particulars, especially in specialised areas such as defamation. For example, in *McPhilemy v Times Newspapers Ltd*, Lord Woolf MR noted:⁸³

The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification.

These principles are illustrated by the decided New Zealand cases. In *BNZ Investments Ltd v Commissioner of Inland Revenue*, Miller J noted:⁸⁴

The temptation to insist upon excessively refined pleadings is to be resisted as unnecessary and wasteful of costs and Court time. That is particularly so in complex cases, where over-pleading can obscure rather than clarify the issues. Case management should ensure that each side is fairly informed of the case that must be met. It can extend to requiring leading counsel to agree a list of issues. Evidence can be exchanged in good time before trial.

Other recent New Zealand cases have dealt with various differing factual situations where particulars have been sought. For example, in *Body Corporate 351522 v Queenstown Lakes District Council*, Associate Judge

83 *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 792–793. See also *Tancic v Times Newspapers Ltd* EWCA No QBENI 99/0625/A2, 7 December 1999 in which the English Court of Appeal noted that particulars should “be strictly confined to those matters which are essential to the proper disposal of the real issues between the parties” (at 4). Some caution needs to be exercised in applying the principles contained in the English authorities decided under the Civil Procedure Rules passed following the Woolf reforms. These may not be transferable without reservation to the contemporary New Zealand context given that the new English rules have a different scheme in relation to matters such as the provision of witness statements at an early stage of the proceedings.

84 *BNZ Investments Ltd v Commissioner of Inland Revenue* HC Wellington CIV-2004-485-1059, 4 February 2008 at [45] per Miller J.

Osborne, in the course of a lengthy judgment dealing with particulars relating to a weathertightness claim affecting a Queenstown apartment block, set out the relevant principles relating to further and better particulars in some detail.⁸⁵

His Honour observed that the extent to which particulars would be ordered depended on the facts of each individual case. While there was no “bright-line distinction” to be drawn between facts requiring to be pleaded and matters of evidence, a statement of claim was essentially an abbreviated statement of basic facts.⁸⁶ While complex commercial litigation might give rise to the need for detailed particulars, there was also a counter-balancing need to ensure that these did not obscure rather than clarify the issues.⁸⁷

Other recent cases have dealt with the need for particulars in relation to different kinds of claims. These have included a claim for exemplary damages arising from the alleged failure of officers of the Probation Service to take reasonable care to supervise a parolee,⁸⁸ a claim for indemnity by a finance company in receivership against its D & O insurers,⁸⁹ and a claim by a Christchurch property owner against her earthquake insurer in which the issue was whether particulars of her representative or trustee capacity ought to be provided.⁹⁰

Another recent illustration concerns an application by, inter alia, a defendant helicopter engineer for particulars of alleged negligence concerning maintenance work and inspections on a helicopter purchased by the plaintiff.⁹¹ The Court held that in cases of alleged negligent inspection and certification, the plaintiff was not required to particularise the way in which a defendant had negligently performed its tasks but was only required to prove that if the work had been properly carried out the defects would not have occurred.⁹² However, the statement of claim did need to list and

85 *Body Corporate 351522 v Queenstown Lakes District Council* [2013] NZHC 559.

86 At [59].

87 At [59].

88 *Couch v Attorney-General* [2012] NZHC 2285, in which Associate Judge Bell discussed the elements of a claim for exemplary damages arising from alleged deliberate misconduct and, with the agreement of counsel for the plaintiff, directed that certain amendments be made to the claim.

89 *Nathans Finance New Zealand Ltd (in rec) v AIG Insurance New Zealand Ltd* [2013] NZHC 3137, in which Winkelmann J declined to order further particulars of the decision-making process (at [17]–[19]), which induced the directors of the plaintiff company to settle a claim for breach of duty brought by the company in receivership.

90 *Sisson v IAG New Zealand Ltd* [2014] NZHC 616, in which Associate Judge Osborne held (at [30]–[35]) that particulars of the plaintiff’s alleged trustee capacity ought to be provided.

91 *Helicopter Finance Ltd v Tokoeka Properties Ltd* [2012] NZHC 686.

92 At [23]–[25].

identify the defects relied upon and specify the repair cost of each defect with reference to the applicable invoices.⁹³

The principles in the foregoing case are also applicable in relation to particulars of leaky building claims. Typically in this context, building owners are aware of the existence and general nature of the problems. However, identifying the various causes and effects may not be a straightforward task and indeed may require extensive expert examination and testing of the building. A detailed recent analysis of these issues and of the kinds of particulars which may be ordered in leaky building litigation was provided by Kós J in his recent judgment in *Platt v Porirua City Council*.⁹⁴ In that case the defendant City Council sought various particulars in relation to the alleged defects. These included the sections of the Building Code said to have been breached, why the Council was required to ensure compliance and how this alleged non-compliance caused damage, when the defects should have been detected, and particulars of remedial costs and consequential losses.⁹⁵

His Honour set out the basic elements which needed to be pleaded in a case based on negligent construction or performance relating to a building. These included the physical defects complained of, the particular standards which each defendant failed to meet in respect of each alleged defect, the basis for an allegation that a defendant was acting as a supervisor or inspector and the required standard of performance, and particulars of the alleged breach of duty and of the resulting loss. The applicable standard of care might not necessarily be of the same nature and kind in relation to each defendant.⁹⁶

Applying this statement of principle to the leaky building case before him, Kós J reviewed previous, recent decisions of associate judges concerning the provision of particulars in leaky building cases.⁹⁷ His Honour held that in the present case certain further particulars were necessary, consisting of the applicable standards which the Council had to meet, how the Council was required to ensure compliance with those standards in relation to each alleged defect, and how that non-compliance resulted in loss together with particulars of quantum to the extent that it was possible to provide these.⁹⁸

93 At [26]–[28].

94 *Platt v Porirua City Council* [2012] NZHC 2445.

95 At [7]–[9].

96 At [24].

97 *Body Corporate 170812 v Auckland City Council* [2008] BCL 884; *Body Corporate 207715 v Auckland Council (formerly known as Rodney District Council)* [2012] NZHC 519; and *Tucker v Welch Construction (1998) Ltd (in liq)* [2012] NZHC 514.

98 *Platt v Porirua City Council*, above n 94, at [33]–[40].

However, beyond that, the details sought by way of further particulars were either matters of evidence for trial or could be sought through interrogatories.

IV Costs Against Legal Representatives

This third and final part of the review deals with a topic which may well be dear to the heart of litigation practitioners. That is the circumstances under which an award of costs can be ordered against a legal representative personally in the litigation context.

In New Zealand, this is an issue which continues to be dealt with by the High Court under its inherent jurisdiction.⁹⁹ This is in contrast to the position in other common law jurisdictions, such as England and Australia, where the issue has been the subject of specific legislative provisions or rules of procedure.¹⁰⁰ In England, for example, this issue (under the heading of “wasted costs orders”) is now covered by the Civil Procedure Rules.¹⁰¹ Before a Court can make a wasted costs order in England against a legal representative personally it must fix the amount to be paid and give the legal representative a reasonable opportunity to attend the hearing to give reasons why the order should not be made. There have been a number of English cases on the applicable statutory and procedural provisions and the relevant principles are now well established.¹⁰²

In general, under the English provisions, acts of negligence on the part of the legal representative are not sufficient in themselves to attract a wasted costs order (and these can be pursued by the client through separate litigation in the normal way), but in addition there has to be an element of abuse of process or a breach of duty to the court. The conduct in question must be serious. To take the perennial example, pursuing an obviously hopeless case on the client’s instructions (preferably clearly documented in writing by the legal representative), in itself may not necessarily attract a wasted costs order in the absence of accompanying aggravating conduct by the

99 Excavating into back issues of the New Zealand Law Review reveals that the present author wrote on the topic of the inherent jurisdiction of the High Court in John Turner “Review of Civil Procedure” [2000] NZ L Rev 155 at 162–167.

100 For a summary of the relevant provisions in England and Australia see *Yelcich v Davies & Co Solicitors Nominee Co Ltd* [2013] NZHC 433, (2013) 21 PRNZ 499 at [6] and n 1.

101 See Civil Procedure Rules 1998 (UK), r 48.7; and Senior Courts Act 1981 (UK) (formerly the Supreme Court Act 1981 (UK)), s 51(6).

102 See Civil Procedure Rules, commentary to r 48.7; *Ridehalgh v Horsefield* [1994] Ch 205; *Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736; *Medcalf v Mardell (Wasted Costs Order)* [2002] UKHL 27, [2003] 1 AC 120; and *Hedrich v Standard Bank London Ltd* [2007] EWHC 1656 (QB).

legal representative. The jurisdiction is to be exercised with care and only in clear cases.

In Australia, the Federal Court Rules make specific provision for the court to order costs against legal practitioners in certain circumstances.¹⁰³ This jurisdiction is based on misconduct by the lawyer in question, which is a concept defined in the applicable rule.¹⁰⁴ The Australian authorities have tended to hold that costs against a legal practitioner personally are not appropriate unless some form of abuse of process or similar conduct is also present. This might include pursuing proceedings for an ulterior purpose or failing to provide proper legal advice on the merits to the client. Pursuing a hopeless case upon the informed instructions of the client should not therefore in itself necessarily expose the legal practitioner to personal liability for costs.¹⁰⁵ However, some Australian authorities have exhibited a harder line in this area, both in the Federal Court¹⁰⁶ and in the state courts.¹⁰⁷ This has resulted in costs orders against the legal practitioners in question.

The New Zealand courts have tended to follow a basically similar approach to the English and Australian authorities, with some differences of emphasis. A review of the early New Zealand reports shows that this issue is far from being a recent one and was the subject of at least two 19th-century decisions.¹⁰⁸ In the course of the next 100 years there were several cases in which costs were ordered against legal representatives of the parties to

103 Federal Court Rules 2011 (Cth), r 40.07 and formerly the Federal Court Rules 1979 (Cth), Order 62, r 9(1)(c).

104 Under Federal Court Rules 2011, r 40.07(2), “misconduct” arises where a proceeding is delayed, adjourned or abandoned because the lawyer in question has failed to take defined procedural steps, has incurred costs improperly or without reasonable cause, has incurred costs that are unnecessary or wasteful, or has been guilty of undue delay. The previous rule was in basically similar terms with some differences in wording.

105 See, for example, *Levick v Commissioner of Taxation* [2000] FCA 674, (2000) 102 FCR 155; *Kumar v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 18, (2004) 133 FCR 582; *Bagshaw v Scott* [2005] FCA 104; and *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153, (2005) 63 NSWLR 300, which contains a detailed review of the authorities in this area.

106 *Tran v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2006] FCA 199; *Menzies v Paccar Financial Pty Ltd* [2011] FCA 1161; *Modra v Victoria* [2012] FCA 240, (2012) 205 FCR 445; and *Ambrose (Trustee) in the matter of Poumako (Bankrupt) v Poumako (No 4)* [2013] FCA 418.

107 *Steindl Nominees Pty Ltd v Laghaiifar* [2003] QCA 157, [2003] 2 Qd R 683.

108 *Huddleston v Marshall* [1863] Mac 88 (costs ordered against solicitor on grounds that judgment was obtained otherwise than in good faith and the order was subsequently not set aside on the nominal application of the client); and *Diviani v Hanchard* (1887) 6 NZLR 294 (CA) (costs sought against appellant’s solicitor but not awarded as notice of the application had not been served on the solicitor in accordance with the recognised practice).

litigation,¹⁰⁹ as well as discussions of the general principles applicable in this area.¹¹⁰

However, the leading New Zealand authority in this area is the decision of the Privy Council in 2001 in *Harley v McDonald*.¹¹¹ In that case the Privy Council considered the jurisdictional basis for the award of costs against a legal representative of a party to litigation pursuant to the inherent jurisdiction of the High Court. The Privy Council emphasised that the issue of a costs order against a legal representative was a separate and distinct exercise from a disciplinary complaint arising from an alleged breach of the rules of professional conduct and also from considerations of whether the client had a claim against its legal representative for negligence. This was a matter which ought to be addressed in separate proceedings.¹¹²

Their Lordships went on to observe that the court ought to be careful to “confine its attention to the facts which are clearly before it or to facts relating to the conduct of the case that are immediately and easily verifiable”.¹¹³ The Court then went on to consider the nature of the conduct which could be considered as being a serious breach of the duty of the legal practitioner to the court.¹¹⁴ Their Lordships observed that the English common law test (prior to its statutory codification in England in 1981) was applicable.¹¹⁵ They went on to observe that officers of the court had to exhibit competence and care. However, pursuit of a hopeless case after proper advice had been given to the client, as opposed to pursuing proceedings which amounted to

109 *Stephens v Stephens* [1991] 1 NZLR 633 (HC) (costs awarded by the Master pursuant to the inherent jurisdiction of the High Court but the order was subsequently set aside as the solicitor had not been given the opportunity to be heard and the facts did not justify a finding of misconduct on the part of the solicitor); *Harvey v Taste Tease Ltd* HC Rotorua CP219/88, 2 April 1990 (solicitors ordered to pay costs of an adjournment as they had failed to ensure that witnesses were available for the hearing); *Kamo Sports & Dive Ltd v Harrison Sports (Kamo) Ltd* (1993) 7 PRNZ 321 (HC) (costs ordered against plaintiff’s solicitor for failing to comply with various pre-trial directions); and *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 (HC) at 590 (solicitors liable for costs when they had appeared in a matter in which their advice was in issue, thereby lacking independence and being in an actual or potential conflict of interest situation).

110 *Utah Construction and Mining Co v Watson* [1969] NZLR 1062 (CA); and *Stephens v Stephens*, above n 109.

111 *Harley v McDonald* [2001] UKPC 18, [2002] 1 NZLR 1, [2001] 2 AC 678. The relevant excerpts from the advice of the Privy Council in *Harley* are cited in *Yelcich v Davies & Co Solicitors Nominee Co Ltd*, above n 100.

112 At [51].

113 At [53].

114 At [55].

115 At [55]. The common law test required the conduct to be “a serious dereliction of duty”, which might include acts of gross negligence, as opposed to a “mere mistake or error of judgment”: *Myers v Elman* [1940] AC 282 at 291–292.

an abuse of process, would not necessarily attract personal liability for costs on the part of the legal representative.¹¹⁶

Applying these legal principles to the present appeal, their Lordships proceeded on the basis that the case pursued by the legal representative for the client was indeed a hopeless one. However, the judge at first instance had taken into account conduct in relation to pre-trial preparation as well as the trial itself and the Court of Appeal had failed to exercise its own judgement in the matter even though the legal practitioner had by then provided her own account of the events in question.¹¹⁷ After considering the facts, their Lordships said that the practitioner's conduct could not be considered to be malicious, dishonest or an abuse of the Court's process.¹¹⁸ While the Court was entitled to "penalise incompetence which leads to a waste of the Court's time or some other abuse of its process resulting in avoidable cost to litigants", the pursuit of a hopeless case could not inevitably be regarded as demonstrating incompetence on the part of the legal practitioner.¹¹⁹ It therefore followed that the legal representative was not, in the absence of anything more, in serious breach of her duty to the Court.¹²⁰ The appeal was therefore allowed and the orders of the High Court and Court of Appeal imposing personal liability for costs on the practitioner were set aside.¹²¹

The issue of liability for wasted costs in civil proceedings was the subject of some consideration by the Law Commission in its 2012 paper reviewing the Judicature Act 1908.¹²² The Commission noted that, since the decision in *Harley v McDonald*, there had been three instances in New Zealand in which legal practitioners had been ordered to pay costs by reason of "serious dereliction of duty to the court" (the test as articulated by the Privy Council).¹²³ The Law Commission recommended that a wasted costs provision should be included in the new legislation.¹²⁴

116 At [56]–[57] applying the observations of Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 205 at 234.

117 At [58]–[65].

118 At [66].

119 At [67].

120 At [67].

121 At [68].

122 Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [5.24]–[5.45].

123 Law Commission, above n 122, at [5.33]–[5.35]. These cases were *Body Corporate No 192964 v Auckland City Council* [2006] BCL 250 (HC); *L v Chief Executive of the Ministry of Social Development* (2008) 19 PRNZ 116 (HC); and *ANZA Distributing New Zealand Ltd (in liq) v USG Interiors Pacific Ltd (No 2)* HC Auckland CIV-2007-404-3474, 18 September 2009.

124 Law Commission, above n 122, at [5.42]–[5.45] and Appendix 4.

Three recent New Zealand decisions have served to illustrate these principles further. *Yelcich v Davies & Co Solicitors Nominee Company Ltd* concerned an ex parte interlocutory injunction to restrain a pending mortgagee sale which had been filed by solicitors who had not disclosed that the plaintiff was an undischarged bankrupt but had instead filed an undertaking as to damages.¹²⁵ Wylie J reviewed the inherent jurisdiction of the Court to order costs against a legal representative with reference to the principles set out by the Privy Council in *Harley v McDonald*.¹²⁶ Wylie J held that had the legal practitioner acting for the plaintiff enquired of the staff solicitor dealing with the matter or perused his firm's records he would readily have discovered that the plaintiff was an undischarged bankrupt and was unable to commence the court proceedings. The Court had therefore been misled.¹²⁷ The Court held that this was a case where the relevant facts were clear and that the Court's processes had been abused. The Court ordered costs against the plaintiff and these costs were to be paid by the plaintiff's legal representative.

In *He v Huang*, the defendant had obtained an order disqualifying his former solicitor from acting for the plaintiff against him in the proceedings.¹²⁸ The Court noted that it had an inherent jurisdiction to award costs against a legal representative. However, the Court held that there was not satisfactory evidence justifying an order requiring the legal representative to pay costs personally. Even though the lawyer's own conduct was in issue and he had appeared on the contentious application on which those issues arose, these lapses did not constitute a sufficiently serious breach of duty to give rise to personal liability for costs.¹²⁹

Jin v Konishi concerned an appeal against a District Court order requiring the second appellant's solicitor to pay costs personally.¹³⁰ The order in the District Court had been based on the mistaken belief by the District Court Judge that a provision of the new District Courts Rules 2009 conferred an implied power on the District Court to impose personal costs awards against a legal practitioner for serious dereliction of duty.¹³¹ Gilbert J noted that the Court's jurisdiction to award costs against a legal practitioner was based on an exercise of the Court's inherent jurisdiction and the District Court did not possess any inherent jurisdiction.¹³² The appeal by the second appellant

125 *Yelcich v Davies & Co Solicitors Nominee Co Ltd*, above n 100.

126 *Harley v McDonald*, above n 111.

127 At [16].

128 *He v Huang* [2014] NZHC 378.

129 At [11]–[14].

130 *Jin v Konishi* [2014] NZHC 1150.

131 At [48]–[49].

132 At [51].

was allowed and the order requiring the second appellant, as the legal representative of the first appellant, personally to pay costs was quashed.

In situations where a hopeless case has been pursued, but the circumstances are not such as to expose the legal representative to personal liability to costs, the court retains power to address the situation by way of an award of indemnity costs or increased costs. Pursuit of a hopeless case itself does not, however, necessarily justify indemnity costs in the absence of other aggravating circumstances.¹³³ These principles have been reaffirmed by a further judgment of the Court of Appeal.¹³⁴

The cases on the liability of a legal representative for costs illustrate the importance of a competent approach to the litigation process on the part of litigation practitioners. Litigation is a process which by its intrinsic nature often brings out the worst aspects of human nature, including a regrettable tendency on occasions to try to shift blame on to others, including a party's own lawyers.

These risks can be minimised or eliminated by practitioners adopting a conscientious approach when dealing with their clients throughout the litigation process. This includes maintaining good communication with the client in relation to each step of the process, obtaining the client's written consent to important decisions both before and during trial, and ensuring that there is proper documentation on the practitioner's file. This should include file notes and evidence of receipt by the client of opinions and advice concerning steps in the litigation and prospects of success. If the practitioners involved in many of the cases in this section of the present review had adhered to these fundamental practical principles then many of the costs issues canvassed above would never have arisen in the first place.

While the courts have exonerated the legal practitioners concerned from personal liability for costs in many cases, being on the receiving end of a costs application is never a pleasant experience. As always, an ounce of prevention is better than a ton of cure in this and other areas of the litigation process.

133 See *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 (FCA) at 232–234; *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 (HC) at [11]; and *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400.

134 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348.