Litigation newsletter.

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Contents

Cross-leases: A fundamental change to the law on alterations

Liow v Martelli [2026] NZCA 101

The Court of Appeal has determined that the test that had governed disputes regarding alterations to cross-leased properties for the past 35 years is wrong in law. Cross-leases commonly contain a clause prohibiting structural alterations or additions without the prior consent of the other lessors with the proviso that consent is not to be unreasonably withheld. Until recently, the test in *Smallfield v Brown* (1991) 2 NZ ConvC 191, 110 (HC) was applied to decide whether consent to alterations was "unreasonably withheld".

The *Smallfield* test conferred a substantial veto power on lessors whose consent was sought because, under that test, a refusal to consent to alterations would be unreasonable only where the benefit to the party seeking change would be substantial and the proposed alteration would produce only a trifling detriment to the lessors.

Instead, the Court of Appeal has ruled that whether the lessors, acting reasonably, can withhold consent is ultimately a question of fact. The appropriate question to ask in making the assessment is whether a reasonable lessor, having regard to the interests of all the lessees and the context of the cross-lease, could withhold consent. The Court of Appeal considered a key contextual factor for that assessment is the fact that most cross-leases have a term of around 999 years meaning the structures on the cross-leased properties will require rebuilding numerous times during the period of the cross-lease. The Court of Appeal considered that, in that context, it cannot be right that the intention of the alterations clause in cross-leases is to preserve structures in the same overall configuration as at the beginning of the cross-lease.

Practical significance

The Court of Appeal's decision is a significant shift in the law governing disputes regarding alterations to cross-leased properties and the interpretation of the alterations clause that is typically found in cross-leases. The decision reflects the reality that some dwellings and buildings on cross-leased properties are beginning to reach the end of their economic or physical life and will need to be refurbished or rebuilt.

It is inevitable that most dwellings and buildings on cross properties will reach a similar point well before the term of the cross-leases end. The Court of Appeal has delivered a necessary recalibration of the test for assessing the reasonableness of refusing consent to alterations to cross-lease properties.

Section 145 Trusts Act 2019: Power to require alternative dispute resolution undisturbed by Supreme Court

Gatfield v Hinton [2026] NZSC 60 [22 May 2026]

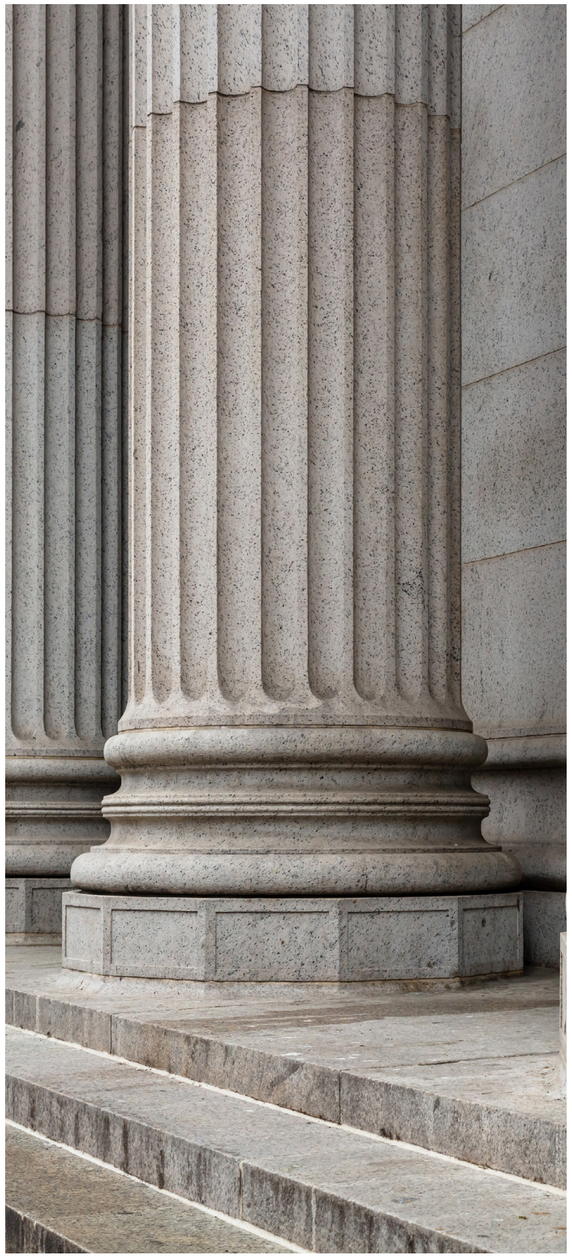
In our previous litigation newsletter, we reported on *Gatfield v Hinton* [2026] NZCA 17. In that case, the Court of Appeal held that the plain wording of s 145 of the Trusts Act 2019, read together with the provisions of the Arbitration Act 1996, gave the Court the power to require binding arbitration in the absence of an arbitration agreement.

In their application for leave to appeal the Court of Appeal's judgment, the applicants argued that s 145 of the Trusts Act 2019 does not confer the power to make coercive arbitration orders in a trust proceeding.

The Supreme Court summarised the applicant's arguments: "[i]f construed in light of various constitutional rights, common law principles, and in the context of the Trusts Act and the Arbitration Act 1996," the applicants say, "an arbitration agreement is a prerequisite to the exercise of the s 145 power".

The Supreme Court held that while the scope of s 145 and its application may raise questions of general or public importance, nothing raised by the applicants suggested the Court of Appeal erred in its assessment that the Court did have the ability to require the parties to attend a binding arbitration, even in the absence of an arbitration agreement.

Nor did the Supreme Court consider there was the appearance of a miscarriage of justice. The Supreme Court referred to the Court of Appeal's statutory analysis in support of its finding, including the permissive wording of s 145(1)(b), and provisions governing the mechanics of an arbitration where there has been no prior agreement. The Supreme Court accordingly denied leave to appeal.



Gatfield v Hinton in action: ADR processes working in unison with Court-ordered discovery

Walsh v Walsh [2026] NZHC 1220 and *Walsh v Walsh* [2026] NZHC 1062

These two cases centre on a separation gone sideways. Mr and Mrs Walsh had been married for 22 years and established a trust, of which both were trustees and discretionary beneficiaries. The majority of the trust's assets were shares in five holding companies (**the Group**). The trust deed included a "divorce clause" requiring, on request, the trust to be divided into two funds of equal value. Although the parties agreed on that obligation, they disagreed on virtually everything else.

The first decision concerned an application by Mrs Walsh under s 145 of the Trusts Act 2019, for a court order requiring the parties to submit to an alternative dispute resolution (**ADR)** process (in this case, mediation, after the exchange of discovery).

Importantly, Robinson J affirmed the Court of Appeal's decision in *Gatfield v Hinton* [2026] NZCA 17 (recently upheld by the Supreme Court), that a s 145 decision is evaluative rather than purely discretionary. This means a party's unwillingness to mediate is relevant but not determinative. Robinson J determined the relevant factors which might bear on the Court's decision included cost, confidentiality, speed, complexity, the suitability of the proposed mediator, and the wishes of the parties. Robinson J also broke new ground by adopting a purposive approach and holding that the Court has jurisdiction under s 145(2)(b) to order legal costs of the ADR process to be paid out of the trust's property, on the basis that the Act's purpose was to provide mechanisms to resolve trust disputes, and a level playing field between parties of unequal means is to be preferred.

The second case ([2026] NZHC 1220) addresses the scope of discovery to be exchanged ahead of the court-ordered mediation. Mrs Walsh sought broad discovery sufficient to undertake a full business valuation of the holding companies. Mr Walsh countered that the divorce clause required only division of trust funds which comprised of shares in the Group – making its underlying asset values irrelevant. Associate Judge Brittain addressed each proposed category, achieving a "mixed success for both parties", with relevance and proportionality as the governing considerations.

Why are these cases significant?

Both cases demonstrate the court's willingness to facilitate alternative means of resolution even in highly emotive disputes. However, the costs ruling is the most significant development: by funding ADR from trust property, the court levels the playing field between parties of unequal means, ensuring disputes are decided on their merits rather than financial firepower. Trustees and their advisers should be conscious of this when navigating trust disputes.

Take it, don't leave it: 'Take or pay' clauses and the incorporation of standard terms

Southern Farms NZ Limited v Winton Stock Feed Limited [2026] NZCA 212

Background

Southern Farms NZ Limited (**Southern**) agreed to purchase a specified tonnage of various stock feeds from Winton Stock Feed Limited (**Winton**) at a fixed rate during the 2022/23 dairy season (the **supply contracts**). Winton's standard terms included a 'take or pay' clause which outlined that at the end of the contract's period any undelivered contracted tonnage would still be invoiced at the contract rate.

In November 2022, a Southern director emailed Winton refusing further payments and stopping all orders. Winton treated this as a repudiation of the supply contracts and cancelled a related palm kernel extract arrangement under which Winton was to be supplied PKE by a third party at preferential rates (**PKE arrangement**).

Winton issued an invoice at the end of the season for the contracted (but undelivered) stock feed. Southern disputed both the invoice and whether Winton's terms had ever been incorporated into the supply contracts.

In the High Court, Associate Judge Lester entered judgment on liability against Southern but deferred judgment of quantum in light of a set-off which may have been available to Southern, arising out of the PKE arrangement. Southern appealed the liability judgment, while Winton cross-appealed the Judge's decision to decline to enter judgment on quantum and liability for Winton's entire claim.

Court's findings

Incorporation of standard terms

Despite Southern's claim it had not retained a copy of Winton's standard terms, the Court held that the terms were incorporated on the basis that the front page of at least one of the contracts expressly acknowledged the terms and conditions overleaf. Further, there was an established course of dealing between Southern and Winton indicating the standard terms applied.

The 'take or pay' clause

The Court found the 'take or pay' clause entitled Winton to invoice for the remaining feed at the contract rate when Southern did not take the contracted tonnage by season's end. The supply contracts was designed to provide commercial certainty for both parties, avoiding the risk that Southern would otherwise need to pay a 'spot rate' on the day of a particular order from Winton. The clause allocated risk in a commercially proportionate way.

Southern argued Winton had no legitimate interest in enforcing the clause rather than claiming damages. The Court rejected this, finding a legitimate commercial interest for Winton in securing the certainty of the 'take or pay' clause in its dealings with Southern over exposure to the volatile spot market at the date of cancellation and then seeking damages.

The Court of Appeal entered judgment for Winton for the invoiced sum for undelivered feed, and found Southern had established a set-off against Winton in its claim for cancellation of the PKE arrangement.

Commentary

Standard terms are very likely to apply by incorporation where the front page of an application or invoice acknowledges them and there is an established course of dealing between parties on those terms.

Contracting parties should also carefully consider 'take or pay' clauses before committing to supply contracts. In seasonal supply arrangements, the full contracted value will be at risk if the trading relationship breaks down mid-season.

The reasonably arguable defence: When a conflict in evidence is not enough to steer off summary judgment

Jaques v Wilson Parking New Zealand Limited [2026] NZCA 129

The Court of Appeal has affirmed the High Court's decision for summary judgment against a personal guarantor who failed to establish any arguable defence to a lender's claim. This case provides some useful commentary on the threshold for presenting a reasonably arguable defence in summary judgment proceedings.

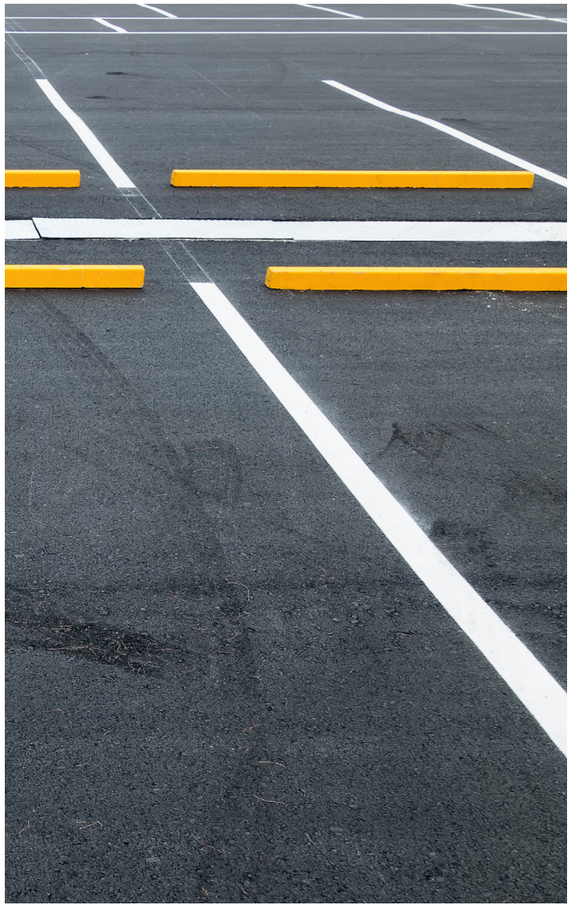
Wilson Parking agreed to advance $570,000 to Digital Advertising Ltd under two loan agreements to fund the construction of two digital billboards on car park sites Wilson Parking owned. Wilson Parking was to then receive a licence fee from this arrangement. Mr Jaques, the sole director of Digital Advertising, provided an unlimited personal guarantee in the form of an Auckland District Law Society standard form deed of guarantee and indemnity.

After $456,000 had been advanced in two tranches, Mr Jaques sent an email to Wilson Parking marked "Without Prejudice" saying "it does not look like we can complete our contracts" and proposing three options for managing the breach. When Digital Advertising subsequently failed to make its August 2024 payment, Wilson Parking appointed receivers and made formal demands under the general security agreement and the guarantee. With the demands going unpaid, Wilson Parking then commenced summary judgment proceedings in the High Court, which granted judgment of $456,000 against Mr Jaques.

Mr Jaques appealed, arguing that a without prejudice telephone call with Wilson Parking's CEO had taken place and resulted in a "meeting of the minds" that "paused" performance of Digital Advertising's obligations, and that subsequent payment demands from Wilson Parking's in-house counsel should be disregarded as merely keeping Wilson Parking's "powder dry". The notes of the telephone call between the parties demonstrated that Wilson Parking intended to consider the offer and communicate further in writing. This resulted in further email correspondence from Wilson Parking requesting further information and noting the payments remained due "pending management's decision".

Mr Jaques claimed that the conflict in evidence entitled him to proceed to trial for cross examination purposes. The Court of Appeal commented that this argument presumed summary judgment must be declined when there is a conflict in affidavit evidence. Instead, the Court of Appeal dismissed the appeal, finding that the evidence put forward by Mr Jaques lacked credibility, was implausible and contrary to the documentary record, and deeming his arguments untenable. It was also persuasive that Mr Jaques had been engaged in the drafting process for the contractual documents and each agreement signed contained a clause preventing the agreement from being varied except for in writing, and therefore were not open to informal variation.

The key take away from this case is that a conflict between affidavit evidence alone will not automatically result in applications for summary judgment being declined, particularly where the defendant lacks credibility. It also reinforces the importance of "no variation except in writing" clauses, which will weigh heavily against arguments that informal discussions gave rise to a binding variation.



When a franchise ends, the restraints don't – and that includes third parties

Mad Butcher Holdings Limited v Vickery [2026] NZHC 1357

Franchisors regularly enforce post-termination non-competition clauses against departing franchisees. This case goes further: the High Court has granted an interim injunction against a third-party business that never signed the franchise agreement but stepped into the same premises immediately after the franchise ended.

Background

Harvest Wagon Ltd (**Harvest Wagon**) operated one of the most profitable Mad Butcher franchises in Christchurch for 23 years, alongside an interconnected produce business. When the franchise and lease expired in March 2026, Elliott Booth (a close associate of the franchisee's owners) set up Harvest Market 2026 Ltd (**Harvest Market**), purchased Harvest Wagon's produce business, secured a new lease of the same premises, and opened as a combined butcher and grocer on 9 April 2026, staffed by Harvest Wagon's former butchery employees.

Harvest Wagon's franchise agreement with Mad Butcher contained a two-year post-termination non-competition clause and a requirement that Harvest Wagon procure that no third party operate a competing business from the interconnected premises for two years after the franchise ended (a premises provision), a provision which Mad Butcher said also extended to the family members of Harvest Wagon. When Harvest Wagon failed to extract that commitment from Harvest Market, Mad Butcher sought an injunction against Harvest Market and Mr Booth directly, alleging they had induced Harvest Wagon's breach and seeking orders that Harvest Market be prevented from operating its butchery arm.

Decision

Paulsen J applied the *Klissers Farmhouse Bakeries* three-stage framework and granted the injunction (having considered whether there was a serious question to be tried, where the balance of convenience lies, and if the overall justice of the case favoured granting the orders). He considered that the non-competition restraints were prima facie enforceable, and there was a seriously arguable case that Harvest Wagon and Harvest Market had acted in concert to engineer a transaction enabling the immediate establishment of a competing butchery to open on the same site.

On knowledge, the Court applied the wilful blindness principle from *Diver v Loktronic Industries Ltd*. Once Harvest Market's own lawyers had formally engaged with Mad Butcher's notices, Mr Booth could not credibly claim ignorance of the non competition restraints.

Paulsen J found that the balance of convenience favoured Mad Butcher. Damages were an inadequate remedy given Harvest Market's apparent inability to pay, and any hardship to Harvest Market was self-induced in circumstances where it had proceeded in the face of clear warnings and with the benefit of legal advice.

Practical implications

- Procurement obligations extend franchisor protection. Premises-style provisions are a powerful tool against both the departing franchisee and incoming operators directly. Franchisors should ensure these obligations appear in their standard agreements.
- Act quickly. Franchisors should monitor former franchise premises closely on termination and move promptly when breaches emerge.
- Notice creates real exposure. Third parties acquiring businesses from outgoing franchisees who receive formal notice of non-competition restraints, particularly where their own lawyers engage with that correspondence, could face liability for inducing breach of contract if they proceed regardless.
- Self-induced hardship is a weak defence. Parties who commit significant resources after being clearly warned of pending litigation cannot effectively rely on the resulting hardship to resist injunctive relief.

The midwives decision: Crown not immune from claims for breach of contract or gender discrimination

The New Zealand College of Midwives Inc v The Attorney-General [2026] NZHC 405

In this case the New Zealand College of Midwives (**NZCOM**) represented 1,473 Lead Maternity Carer (**LMC**) midwives, together with two representative midwives, brought claims against the Ministry of Health (**MOH**) for the under-payment of LMC midwives.

The Crown was found to have breached the 2018 agreement in which MOH agreed it would implement a fair and reasonable service price for LMC midwives by July 2020. A claim for unlawful gender discrimination under s 19 of the New Zealand Bill of Rights Act 1990 (**NZBORA**) also succeeded, while claims in equitable estoppel and quantum meruit failed.

Along with declaratory relief, Gwyn J ordered the representative midwives be paid the shortfall from a fair and reasonable service price since July 2020, plus $1,000 each for injury to dignity. A decision on damages for the further 1,473 midwives was reserved.

Background

Since the introduction of the LMC model in 1996 streamlining maternity care, almost all primary maternity care has been provided by LMC midwives (almost exclusively women). At the same time, a Crown Notice introduced a 'modular payment model', where the price LMCs can claim for services are capped regardless of actual time spent. The plaintiffs argued that pay under this model of remuneration, set unilaterally by the Crown, has not kept pace with workload and caused disparity with historically male-dominated professions, including obstetricians and general practice doctors who may also provide maternity care services, but who were permitted to renegotiate fees or charge co-payments.

Successful claims

Gwyn J found the Crown breached substantive obligations under the 2018 agreement by failing to implement a national midwifery contract and fair and reasonable service price by 1 July 2020, and by failing to provide annual fee renegotiation rights. The Crown's arguments that the obligations were not clear enough, that the MOH signatory did not have authority and could not fetter the Government's future decisions, and that incremental adjustments sufficed were all rejected.

The Crown also breached its good-faith obligation to take all steps to work with NZCOM by pausing work without notice, giving repeated assurances it did not meet, and failing to clearly communicate.

The NZBORA gender discrimination claim also succeeded. Gwyn J found the LMC system unilaterally imposes restrictive conditions on midwives not imposed on obstetricians and general practice doctors (historically male-dominated professions), with gender a material factor in the resulting unjustifiable disadvantage.

Unsuccessful claims

Equitable estoppel failed for lack of ongoing reliance after 1 July 2020 and no Crown representation of backdated payment. Quantum meruit failed because the Crown could not have known the plaintiffs expected a fair and reasonable rate after 1 July 2020 if, in fact, the plaintiffs did not hold that expectation themselves.

Remedies

Declarations confirmed the Crown's contractual and NZBORA breaches. Gwyn J found fair and reasonable take-home pay for a full-time LMC midwife as at 1 July 2020 was $170,340, to be adjusted for subsequent years. Compensatory damages for the two representative midwives were accordingly ordered based on shortfall from actual payments plus 20% for business costs plus $1,000 each for injury to dignity. No additional NZBORA damages were ordered due to the overlap with contract damages.

Leave was reserved to seek further directions regarding the claims of the 1,473 midwives represented by NZCOM.

Judicial review: High Court finds New Zealand's National Super Fund investment policies unlawful

Nazzal v Guardians of New Zealand Superannuation [2026] NZHC 681

This judicial review case considered whether a sovereign wealth fund could hold investments in companies linked to the Israeli occupation of Palestinian territories and still claim to invest consistently with its statutory obligations to avoid prejudice to New Zealand's international reputation.

Ultimately, the High Court held that the Guardians of New Zealand Superannuation (**the Guardians**), which manages the NZ Super fund of approximately NZ$86b, lacked any lawful policy framework to answer this question and could not use that deficiency as a shield.

Background

The Guardians is a Crown entity established by the New Zealand Superannuation and Retirement Income Act 2001 (**the Act**) to help meet New Zealand's future superannuation costs. Unlike any comparable fund, the Act imposes an explicit statutory duty to invest in a manner consistent with "avoiding prejudice to New Zealand's reputation as a responsible member of the world community" (s 58(2)(c)). Specific investment policies were left to be determined and stated by the Guardians' Board.

The applicants, including two Palestinian New Zealanders and the co-chair of the Palestinian Solidarity Network Aotearoa, argued that the fund's investments in four companies breached its statutory duty in s 58(2)(c) of the Act. Each company appeared on the 2023 update of the UN Office of the High Commissioner for Human Rights (**OHCHR**) database, which lists businesses involved in activities connected to the Israeli occupation of Palestinian territories. The Guardians accepted the listings but maintained that none of the companies met its exclusion threshold in the policies. The applicants submitted that was the problem: the policies setting that threshold were unlawful.

The four challenged investments were:

- Airbnb Inc (approximate value NZ$18.26m)
- Booking Holdings Inc (trading as Booking.com; approximate value NZ$48.556m)
- Expedia Group Inc (approximate value NZ$467,000)
- Motorola Solutions Inc (approximate value NZ$123.33m).

Decision

The High Court found in favour of the applicants. It made a declaration that the Guardians' policy documents were unlawful, finding that a 2022 decision to "reduce content" had removed the human rights benchmarks, UN Global Compact references, and procedural clarity that had made earlier policy documents compliant, as upheld in *Mohamed v Guardians of New Zealand Superannuation* [2021] NZHC 512.

The Court emphasised that the requirement to have and adhere to policies and standards was a means to promote consistent decision-making. Without the necessary content, the Guardians had no lawful framework for assessing whether holding these investments were consistent with section 58(2)(c). While the Court stopped short of making an order in the nature of mandamus to reformulate the policy documents, it made it clear that the Guardians have a positive duty to do so, and that once compliant policies are in place, a proper assessment of the four investments should follow.

Crashgate and conspiracy: *Massa v Ecclestone* appealed to the UK Supreme Court

UKSC/2026/0034 *Massa and others (Respondents) v Ecclestone (Appellant)*

Background

This case arises out of a well-known Formula One incident during the September 2008 Singapore Grand Prix when Renault Formula One driver Nelson Piquet Jr deliberately crashed on the 15th lap, forcing deployment of the safety car for five laps.

Known as "Crashgate", the crash allowed Mr Piquet Jr's teammate, Fernando Alonso, to significantly reduce the gap created between himself and the field leaders. Mr Alonso won the race, no doubt benefitting from Mr Piquet Jr's tactical crash.

Prior to the crash and the safety car being deployed, Mr Massa for Ferrari was in the lead but ultimately finished the race in 13th place with no points after a series of errors during a pit stop on lap 17. Sir Lewis Hamilton was in second place prior to the crash and finished the race in third, securing six points. Sir Lewis Hamilton took the title to the 2008 Grand Prix season and on 12 December 2008, he was awarded the title of F1 Drivers' World Champion, finishing the season with a total points tally of 98. Mr Massa had 97.

Arguments

Mr Massa's position is that, had the crash been properly investigated at the time, the Singapore result would have been annulled and he would have been the F1 Drivers' World Champion. The FIA did investigate, but not until mid-2009 after Mr Piquet Jr, who by then had been let go by Renault, provided a sworn statement confirming the crash was deliberate. The World Motor Sporting Council sanctioned Renault, but exonerated Mr Alonso. The Singapore race result was unchanged and Mr Massa did not pursue any legal action at the time.

Mr Massa was prompted to issue proceedings in March 2024 following an interview given by Mr Ecclestone in early 2023. In the interview, Mr Ecclestone claimed that he and Max Mosley, then FIA President, had learned from Mr Piquet Sr in November of 2008 that the crash was deliberate. According to Mr Ecclestone, the two wanted to protect the sport from scandal and so concealed the matter, and "used every last power of persuasion" to prevent Mr Piquet Sr from saying anything further. Mr Ecclestone further acknowledged that, had the crash been properly investigated in 2008, the Singapore result would probably have been annulled and Massa would have been world champion, not Sir Lewis Hamilton.

Mr Massa brought claims against some or all of the defendants in breach of contract, tort, conspiracy, and inducement of breach of contract.

Decisions

On 20 November 2025, the High Court struck out all claims except unlawful means conspiracy. The breach of contract and breach of duty were unsustainable on the basis that the FIA's obligations are owed to its member organisations, not to individual drivers, meaning Mr Massa had no enforceable rights. The remaining claims were time-barred: they had been brought well outside the general six-year limitation period. The conspiracy claim alone survived because Mr Ecclestone's 2023 interview gave a plausible basis for arguing that the wrongdoing had been deliberately concealed. Under s 32 of the Limitation Act 1980, concealment pauses the period for calculating limitation defences until the claimant could reasonably have discovered the concealment.

In this most recent decision, made in May 2026, leave was granted to Mr Ecclestone (and other appellants in related proceedings) to appeal the High Court's refusal to strike out the unlawful means conspiracy claim directly to the Supreme Court of the United Kingdom. The central question for the Supreme Court to determine is the scope of the tort of unlawful means conspiracy, specifically, whether it can be founded on: (1) a civil wrong that is not independently actionable by the claimant; (2) a breach of contract to which the claimant is not a party; (3) a breach of foreign law; or (4) conduct that the defendant did not know to be unlawful. New Zealand will have to await further guidance from the Supreme Court of the United Kingdom on this issue.

Favours amongst family members: When an advance creates an equitable interest

Smith v Koppens [2026] NZHC 759

This case involved a dispute between a mother (**Jane)** and her son (**Jacob**) over Jacob's property in Ngāruawāhia, Hamilton (**Ngāruawāhia Property**). The Ngāruawāhia Property was held in the name of Jacob and another trustee of his family trust. Jane claimed an entitlement to a half-share in the Ngāruawāhia Property based on substantial financial contributions she had made to repay Jacob's debts and improve the Ngāruawāhia Property over an extended period of time. Jacob accepted that he owed his mother money but disputed the amount and claimed he never intended for Jane to own half the Ngāruawāhia Property.

Background

Between 2010 and 2021, Jane made significant financial contributions towards Jacob's finances and the Ngāruawāhia Property (on Jane's calculations, this was in excess of $650,000), with the arrangements included extending her own mortgage and repaying home loans served by Jacob, amongst other things.

In May 2022, the Ngāruawāhia Property was transferred into the names of the defendants as trustees of the Trust. Jacob subsequently could no longer service the mortgage, necessitating a sale of the Ngāruawāhia Property.

Constructive trust principles

The Court applied the equitable constructive trust framework from *Lankow v Rose*.[1] The doctrine does not rely on the parties' intentions but on whether it would be unconscionable, in the circumstances, to refuse a beneficial interest in the property given a party's contributions and reasonable expectations. *Wakenshaw v Wakenshaw* refined the test in *Lankow*, requiring that contributions must exceed any benefits received and must be causally connected to the acquisition, preservation or enhancement of the Ngāruawāhia Property.[2]

Findings on contributions

The Court accepted that three contributions were sufficiently connected to the Ngāruawāhia property, including an advance to assist with the purchase, funds paid towards improvements, and a sum argued to be an "early inheritance payment". The Court considered that the $112,000 loan to purchase a share of a business was excluded as it was unrelated to the Ngāruawāhia Property and Jane could not reasonably have expected to have gained an interest in the Ngāruawāhia Property from the advance.

Findings on unconscionability and the imposition of the trust

Citing *Lankow*, the Court deemed Jacob's subjective intention to be irrelevant. Jane had sold her own home in Dinsdale, advanced a total of $300,000, and moved into the Ngāruawāhia Property on the understanding she could reside there for life. The only reason she could not was a consequence of Jacob's financial position. The Court found that Jane's contributions had exceeded the benefit of five years of occupation and concluded that it would be unconscionable to deny her an interest in the Ngāruawāhia Property.

35 percent beneficial interest

Applying *Stratulatos v Stratulatos*, the Court determined Jane's interest by analysing her contributions relative to the Ngāruawāhia Property's value at the time she moved in and the Court declared a corresponding 35 percent equitable interest in the Ngāruawāhia Property (which was subject to the mortgagee's interest and costs of sale).[3]

Practical implications

- A constructive trust may be imposed despite the legal owner's contrary intentions. The Courts will continue to consider the unconscionability of the circumstances rather than the subjective intentions of the parties
- A party must show that a contribution in issue is causally connected to the specific property
- Reasonable expectations will be assessed objectively, examining what a reasonable person in each party's position would expect under the circumstances.

[1] *Lankow v Rose* [1995] 1 NZLR 277 (CA).
[2] *Wakenshaw v Wakenshaw* [2017] NZCA 252.
[3] *Stratulatos v Stratulatos* [1988] 2 NZLR 424 (HC).

Fraudulent concealment and limitation: Supreme Court raises the bar for claimants

Whangarei District Council v Daisley [2026] NZSC 72

Background

This case concerns claims against the Whangarei District Council (**Council)** for negligence and misfeasance in a public office in relation to enforcement action taken by the Council to restrict quarrying on the respondent's property between 2005 and 2011. In late 2004, Mr Daisley purchased a 48-hectare rural property (**Property)**, which comprised a quarry. Shortly after settlement, the Council asserted Mr Daisley lacked resource consent to carry out quarrying activities and commenced enforcement actions. These efforts escalated, culminating in Environment Court proceedings. During the proceedings, a 1988 Land Use Consent (**LUC)** permitting quarrying on the Property was discovered in the Council's archives. Nevertheless, the Property was ultimately sold in a forced sale at a nearly 25 percent discount from the estimated market price. Mr Daisley commenced proceedings against the Council on 14 August 2015, outside the six-year limitation period from the date his cause of action accrued. This delay was attributed to earlier legal advice in which Mr Daisley had been informed that he had no claim.

Issues before the Court

The four issues on appeal were:

- Whether the fraudulent concealment exception to limitation under the Limitation Act 1950 was engaged
- Whether the continuing breach doctrine extended the limitation period
- Whether the loss from the forced sale of the Property was a distinct damage giving rise to a new cause of action
- On cross-appeal, whether the Council's conduct amounted to misfeasance in a public office.

Majority judgment (Glazebrook, Ellen France, Kós and O'Regan JJ)

Fraudulent concealment under s 28(b) of the Limitation Act 1950

The central issue was the standard for "fraudulent concealment" under s 28(b). The Council's position was that fraudulent concealment required the defendant to have known the essential facts comprising the right of action, to have appreciated that those facts amounted to a wrongful act, to have owed a duty of disclosure to the plaintiff, and to have deliberately failed to disclose the wrongful act.

Mr Daisley submitted that subjective recklessness was sufficient to amount to fraudulent concealment.

The majority accepted the Council's position, holding that fraudulent concealment for the purposes of s 28(b) requires that the defendant either possessed actual knowledge or was wilfully blind to the essential facts comprising the right of action. Mere recklessness or negligence was not sufficient. The Council must have also had actual knowledge/wilful blindness towards how those essential facts amounted to a wrongful act yet still decided to conceal them.

The majority's view was that the evidence at trial established neither actual knowledge nor wilful blindness as to the likely existence of an LUC in the Council's files. The Council officers' actions were negligent, perhaps grossly negligent, yet not fraudulent in the equitable sense necessary to extend the limitation period.

Continuing breach

The majority held that the continuing breach principle could not assist Mr Daisley. The Council's continued failure to check its records did not in itself cause damage; rather, it was the positive enforcement actions that gave rise to causes of action. These were discrete negligent acts, not a single continuous breach.

Loss of property value

The majority agreed with the Court of Appeal in that the only damage fitting the description of distinct loss within the limitation period was the $90,000 loss arising from the forced sale of the Property in December 2009.

Misfeasance in a public office

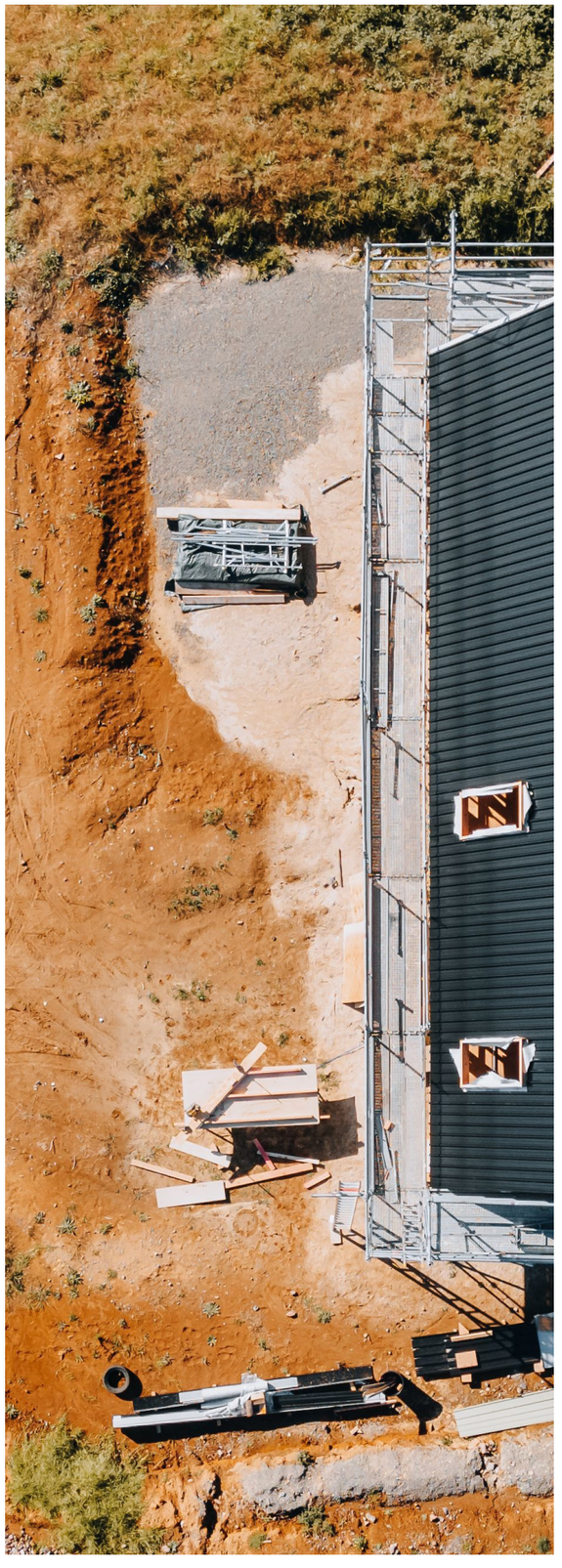
The majority found that the Council was negligent in its management of records and enforcement action, but it could not be said that Council officers knew their acts exceeded the scope of their legal authority or were recklessly indifferent to that fact. The cross-appeal on misfeasance was dismissed.

Dissenting judgment (Winkelmann CJ)

Winkelmann CJ agreed that the cross-appeal should be dismissed yet would have upheld the Court of Appeal's finding of fraudulent concealment and, consequently, the quantum of damages awarded by the Court of Appeal.

Winkelmann CJ agreed with the majority that "fraud" in s 28(b) is used in the sense of equitable fraud but disagreed that the standard should be limited to actual knowledge or wilful blindness. In her view, unconscionable conduct, rather than dishonest, is the correct standard for equitable fraud.

On the facts, Winkelmann CJ considered that the Council's recklessness as to the existence of the essential facts giving rise to a cause of action satisfied the limitation exception. In her Honour's view, the Council's control over its own files, combined with its repeated failure to search them despite being on notice that there was likely a lawful basis for the quarrying, rendered its conduct unconscionable and amounted to equitable fraud.



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