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

**I TE KŌTI MATUA O AOTEAROA**
**WAIHŌPAI ROHE**

**CIV-2021-425-000080**
**[2022] NZHC 2221**

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| BETWEEN | WATERFALL PARK DEVELOPMENTS LIMITED<br>Plaintiff |
| AND | JAMES WILLIAM PETER HADLEY and REBECCA HADLEY<br>Defendants |

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| Hearing: | 29 March 2022 |
| Appearances: | M G Colson QC, M Eastwick-Field and G A Lamb for the Plaintiff<br>M E Casey QC and A J Casey for the Defendants |
| Judgment: | 1 September 2022 |
| Reissued: | 19 September 2022 |

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**JUDGMENT OF NATION J**

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## Introduction

[1] The plaintiff (Waterfall Park) is the owner of land in the Wakatipu Basin near Arrowtown. Since 2017, it has taken various steps to obtain zone changes and subdivision consent which would enable it to subdivide land for residential development. The defendants (the Hadleys) own and live on a rural lifestyle property diagonally adjacent to the Waterfall Park land.

[2] Waterfall Park claims, through the tort of abuse of process, the Hadleys have wrongly stymied Waterfall Park's plans to develop its land. In civil proceedings filed in August 2021, Waterfall Park asserts that, as a result of the Hadleys' actions, Waterfall Park lost the opportunity to commence development of its land in June 2021. In that way, it says it has suffered a loss for which it seeks damages in excess of $7 million.

[3] Through an interlocutory application, Waterfall Park seeks an order under s 57 of the Evidence Act 2006 allowing it to put in evidence communications or documents subject to privilege under s 57 of the Evidence Act.

[4] The Hadleys have applied for an order striking out Waterfall Park's claim or for summary judgment on the statement of claim.

## Statement of claim

[5] In its statement of claim dated 25 August 2021, Waterfall Park pleads that the Hadleys' property is subject to an encumbrance which prohibits the owners of the Hadleys' land from objecting to any application to the territorial authority to undertake cluster developments on the relevant part of the Waterfall Park land (the Ayrburn land).

[6] Waterfall Park pleads that the Hadleys:

(a) filed submissions in opposition to submissions made in 2015 by the owners of the Ayrburn land for a change to the zoning of the Ayrburn land that would permit residential development on that land (the PDP submission);

(b) after the Queenstown Lakes District Council (QLDC) in March 2019 zoned the Ayrburn land "Wakatipu Basin Rural Amenity Zone" under the Proposed District Plan and Waterfall Park appealed that decision to the Environment Court (the PDP appeal), filed a notice under s 274 of the Resource Management Act 1991 (RMA) so they could join and oppose the appeal;

(c) in May 2021, terminated the Environment Court directed mediation over the PDP appeal;

(d) after Waterfall Park in 2019 and 2020 planted trees along a boundary of the Ayrburn land, around May 2020, filed an application in the Environment Court for a declaration that the planting of the trees was a non-complying activity under the QLDC Proposed District Plan (the tree planting proceedings);

(e) after the Environment Court on 5 March 2021 made a declaration that the tree planting was a non-complying activity and Waterfall Park filed an appeal in the High Court against that decision, opposed Waterfall Park's appeal in the High Court (the tree planting appeal);

(f) when Waterfall Park filed an application with the QLDC for a resource consent to subdivide parts of the Ayrburn land to create titles for a road which had been consented and built and a title for historic stone buildings that sat on a distinct part of the land (the subdivision application), filed submissions in opposition to that application; and

(g) after the QLDC on 27 October 2020 declined the subdivision application and Waterfall Park appealed that decision to the Environment Court, filed a notice under s 274 of the RMA to join and oppose that appeal (the subdivision appeal).

[7] Waterfall Park pleads that the Hadleys, through these actions, acted with the predominant purpose of obtaining a benefit that was not an achievable outcome in any of the proceedings and was not reasonably related to the relief that might have been available to them in those various proceedings.

[8] As a first cause of action, Waterfall Park claims the Hadleys are liable in tort for having abused both the High Court and the Environment Court processes.

[9] Waterfall Park claims, as a result of the Hadleys' abuses of process, Waterfall Park has lost the opportunity to resolve the PDP appeal at mediation. It therefore lost the opportunity to commence development in June 2021 (with a net impact on the net present value of the development of $6.7 million) and has or will incur costs associated with previous and continuing proceedings in the total sum of $556,974 plus GST. For all that, Waterfall Park seeks damages of $7.26 million.

[10] As a second cause of action, Waterfall Park claims the Hadleys breached obligations to act in good faith and to cooperate in the Environment Court mediation. As a result, Waterfall Park claims it lost the opportunity to resolve the PDP appeal and thus the opportunity to commence development in June 2021. Waterfall Park says this has diminished the net present value of the development by $6.7 million, and Waterfall Park will have to incur legal costs associated with the PDP appeal of approximately $326,000 plus GST and has incurred other costs associated with the mediations of $70,974 plus GST. For all that, Waterfall Park seeks damages from the Hadleys in the sum of $7.1 million.

[11] Waterfall Park applies for an order allowing it to put in evidence communications and documents from the Environment Court mediation and from the ensuing without prejudice settlement negotiations, and thus for the Court to disallow privilege as to such communications and documents. Waterfall Park says admission of such evidence will be in the interests of justice as referred to in s 57 of the Evidence Act or because the communications are for a dishonest purpose, as referred to in s 67 of the Evidence Act. The application also sought leave to file an amended statement of claim which referred to the detail of further negotiations between Waterfall Park and the Hadleys.

[12] In its statement of claim, Waterfall Park referred to negotiations between 6 May and 26 May 2021 with the allegations that "[t]he terms put forward by the Hadleys through these discussions were such that no resolution to the PDP Appeal could reasonably be reached between the Hadleys and Waterfall Park", but said further

particulars would be provided following the determination of Waterfall Park's interlocutory application to disallow privilege.

## Waterfall Park's application as to disallowance of privilege

*Legal principles*

[13] Relevantly, s 57 of the Evidence Act states:

> **57 Privilege for settlement negotiations, mediation, or plea discussions**
>
> (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
>
> (a) was intended to be confidential; and
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> (b) was made in connection with an attempt to settle or mediate the dispute between the persons.
>
> (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.
>
> …
>
> (3) This section does not apply to—
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> …
>
> (d) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.

[14] Before the Evidence Amendment Act 2016, there were legislated exceptions to the privilege for settlement negotiation or mediation in civil proceedings in s 57(3)(a)-(c), none of which are relevant here.

[15] Section 67(1) said, and still says:

**67 Powers of Judge to disallow privilege**

(1) A Judge must disallow a claim of privilege conferred by any of sections 54 to 59 and 64 in respect of a communication or information if satisfied there is a prima facie case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.

[16] The Environment Court of New Zealand Practice Note 2014 includes Appendix 2 – Protocol for Court assisted mediation. Clause 8(c) of that appendix provides:

(c) Subject to (e) below, what is discussed or disclosed in a mediation shall not be referred to or relied upon in any other proceedings in the Court. Specifically, a party shall not, without the written consent of all other parties, introduce as evidence in any proceedings:

(i) documents prepared expressly for the mediation;

(ii) a document disclosed at the mediation on terms that it remain confidential to those present;

(iii) admissions made by a party in the course of the mediation;

(iv) views expressed or suggestions made by any party concerning a possible settlement of the dispute;

(v) proposals made or views expressed by the mediator; or

(vi) the fact that a party had or had not indicated willingness to consider a proposal for settlement.

[17] In various judgments, courts have held that the common law continues to set boundaries to the privilege protecting settlement negotiations.[1]

[18] In *Sheppard Industries Ltd v Specialized Bicycle Components Inc*, the Court of Appeal listed common law exceptions to the privilege as supplementing exceptions listed in s 57(3) of the Evidence Act as it was.[2] Relevant to the issue in this case, one

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1 *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at [44]; *McCulloch v Quinn* [2012] NZHC 1850 at [30]; and *Westgate Transport Ltd v Methanex New Zealand* (2000) 14 PRNZ 81 (HC) at [20].

2 *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [15].

of those common law exceptions was "where the exclusion of the evidence would act as a cloak for perjury, blackmail or other serious impropriety".[3]

[19] In *Rollex Group (2010) Ltd v Chaffers Group Ltd*, Kós J carefully considered judgments from a number of jurisdictions in deciding whether the s 67 exception would apply for a court to disallow privilege as to communications between clients and their legal advisors.[4] Kós J applied a statement he made in an earlier case:[5]

> So the protection is not absolute. But a very high threshold applies before one can enter the s 67 exception, including the "dishonest purpose" aspect. Clearly that can be less than an offence. But at common law at least, inducing a breach of contract did not qualify. What is needed is fraud, sham or trickery …

He said the rationale for setting that threshold was based on public policy considerations, namely the general societal importance in protecting legal advisor communications.[6]

[20] Section 57 of the Evidence Act confers privilege for a communication by one party to a dispute to the other which was intended to be confidential and was made in connection with an attempt to settle it. In *Bradbury v Westpac Banking Corp*, the Court of Appeal held the High Court had been right to say the privilege did not afford protection to a threat contained in a letter marked "without prejudice".[7] The Court of Appeal cited the following statement from the English Court of Appeal:[8]

> … one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for … 'unambiguous impropriety' (the expression used by Hoffman LJ in *Forster v Friedland* [1992] CA transcript 1052) … the exception should be applied only in the clearest cases of abuse of a privileged occasion.

[21] In *Morgan v Whanganui College Board of Trustees*, the Court of Appeal stated:[9]

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3 At [24], citing *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 at [32].

4 *Rollex Group (2010) Ltd v Chaffers Group Ltd* [2012] NZHC 1332, [2012] NZAR 746.

5 At [32], citing *Red Bull GMBH v Manhaas Industries Ltd* HC Wellington CIV-2010-485-1866, 29 July 2011 at [40].

6 At [33].

7 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [83].

8 At [83], citing *Unilever Plc v Proctor & Gamble Co* [2000] 1 WLR 2436 (CA) at 2444 per Robert Walker LJ.

9 *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713.

> [11] The rule protecting without prejudice communications from admission as evidence in Court proceedings is well settled. Its existence is justifiable on two complementary bases. First, as a matter of public policy, the rule is designed to encourage parties to negotiate settlements of disputes (using that phrase in the broad sense), secure in the knowledge of two things – that whatever is said openly and honestly for that purpose will remain confidential; and that if those negotiations are unsuccessful any statements or offers made adverse to the maker cannot be considered in determining liability in later litigation. Second, as a matter of contract, the law should recognise the sanctity of the parties' agreement to communicate on a without prejudice basis with its underlying expectations of absolute confidentiality and protection.
>
> [12] The law has allowed exceptions to this rule, again based largely on considerations of public policy, and we shall return briefly to them. But the guiding precept is that "the Court should be very slow to lift the umbrella [of protection] unless the case for doing so is absolutely plain".
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> (footnotes omitted)

[22] Since the Evidence Amendment Act, s 57(d) now mandates the interests of justice test for negating privilege as to settlement negotiations and mediation.

[23] Section 57(3)(d) and its application were discussed by Fitzgerald J in *Smith v Shaw*.[10] She referred to the rationale for importance of settlement privilege as discussed by Robert Walker LJ in *Unilever Plc v The Proctor & Gamble Co*,[11] and Lord Clarke's statement for the Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* that the importance of the without prejudice rule had been stressed on many occasions.[12]

[24] Fitzgerald J referred to the statutory settlement privilege in New Zealand not being limited to "admissions" but applying to "any communication" intended to be confidential and made in connection with an attempt to settle or mediate the relevant dispute.[13]

[25] She referred to courts in earlier decisions having "warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion" and that,

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10 *Smith v Shaw* [2020] NZHC 238, [2020] 3 NZLR 661.

11 At [35], citing *Unilever Plc v The Procter & Gamble Co*, above n 8, at 2448–2449 per Robert Walker LJ.

12 At [36], citing *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*, above n 3, at [27] per Lord Clarke.

13 At [36].

because of the importance of the without prejudice rule, its boundaries should not be lightly eroded.[14]

[26] Fitzgerald J concluded:

> [46] Accordingly, given the very clear policy reasons for and benefits of settlement privilege, it is right that any exceptions to it are narrow. ... I merely observe that the inquiry as to the "interests of justice" mandated by s 57(3)(d) no doubt envisages a broad and flexible approach on the facts of any given case. But I nevertheless expect it would be rare for a Court to set aside settlement privilege unless there was a very clear or at least very seriously arguable case for doing so.

[27] In *Spackman v Martin*, Associate Judge Lester had to decide whether to disallow legal advice privilege in relation to communications between the defendants and their solicitors.[15]

[28] Mr Colson QC, for Waterfall Park, referred to Associate Judge Lester's decision as if it suggested a lesser threshold for the disallowance of legal professional privilege than Kós J adopted in *Rollex Group (2010) Ltd v Chaffers Group Ltd*, being "fraud, sham or trickery".[16]

[29] I do not consider there was a distinction. Associate Judge Lester referred to the "sharp practice" test described in *Cross on Evidence* as "intentionally taking advantage of a misapprehension".[17] This was what was alleged in the case Associate Judge Lester was dealing with. Associate Judge Lester also referred to the legislature requiring dishonesty, meaning not acting as an honest person would in the circumstances.[18] Associate Judge Lester disallowed privilege because the defendants misled the plaintiffs to believe that the intellectual property rights in a product were to be owned by the company the plaintiffs were investing in. In reality, one of the defendants was to own the rights in his personal capacity. On the facts, as Associate Judge Lester found them, there was dishonesty.

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14 At [37], citing *Unilever Plc v The Procter & Gamble Co*, above n 8, at 2444 per Robert Walker LJ; and *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*, above n 3, at [30].

15 *Spackman v Martin* [2021] NZHC 157.

16 *Rollex Group (2010) Ltd v Chaffers Group Ltd*, above n 4.

17 *Spackman v Martin*, above n 15, at [41], citing Mathew Downs (ed) *Cross on Evidence* (online ed, Thomson Reuters) at [EVA67.3].

18 At [39] and [40], citing *Cityside Asset Pty Ltd v 1 Solution Ltd* [2012] NZHC 3162, [2013] 1 NZLR 722 at [44] and [45].

[30] The communications and documents Waterfall Park seeks to put in evidence were either part of the Environment Court mediation or were intended to be confidential and were made in connection with an attempt to settle or mediate the dispute for which relief may be given in a civil proceeding between the parties. Privilege thus attaches to them unless, applying the s 57(3)(d) approach, Waterfall Park has established a clear case for disallowing that privilege.

*Waterfall Park's allegations in summary*

[31] Mr Meehan is the chief executive and a director of Winton Property Ltd, the parent company of Waterfall Park. In his affidavit in support of Waterfall Park's application, Mr Meehan said "I view the defendants' conduct through these 'without prejudice' communications as amounting to extortion or blackmail. That is why Waterfall Park seeks to have any claims of privilege set aside to allow these issues to proceed to trial."

[32] Waterfall Park alleges the predominant purpose of the Hadleys' involvement in various proceedings under the RMA and in opposing the various steps Waterfall Park has taken to develop the Ayrburn land has been to extract a commercial benefit from Waterfall Park. Essential to that allegation is that, in the course of settlement negotiations between the Hadleys and Waterfall Park's counsel after the Environment Court mediation, the Hadleys sought a financial benefit described as a facilitation fee as one of the terms of settlement.

[33] Mr Colson filed submissions dated 22 February 2022 in support of Waterfall Park's application to disallow privilege. He submitted the Hadleys "have consistently sought to oppose Waterfall Park's development of the Ayrburn Land" through initiating the tree planting proceedings, submitting to the QLDC against the subdivision application, and opposing the PDP, tree planting and subdivision appeals. He submitted these actions have been "persistent and unreasonable" because the Hadleys:

(a) filed, and persisted with, their opposition to the PDP appeal even when reminded of the encumbrance;

(b) singled out Waterfall Park's tree planting by ignoring similar tree plantings on neighbouring properties and the Hadleys' land. This was done after the Hadleys were reminded of the encumbrance;

(c) have contradicted themselves by opposing Waterfall Park's tree plantings (which would screen new dwellings from the Hadleys' property), but insisting on [position B] for the property; and

(d) continued to oppose the subdivision application and appeal despite the subdivision being for purely practical reasons, having no impact on the future use of the Ayrburn land and the QLDC no longer opposing the subdivision.

*Background narrative*

[34] The evidence as to those allegations is largely, if not entirely, undisputed. It is drawn from the affidavits filed from the parties or from the determinations already made either in the Environment Court or High Court in the tree planting proceedings and appeal or from the award in the arbitration to which Waterfall Park and the Hadleys were the parties.

[35] In 2006, the owners of the Hadleys' land wished to subdivide that land into two parcels. Ayrburn Farm Estate Ltd owned a large rural property behind the Hadleys' land used as a sheep and cropping farm. To obtain Ayrburn Farm Estate Ltd's consent to the subdivision, the owners of the Hadleys' land agreed to that land being subject to the encumbrance. The encumbrance reads:

> 5.1 The Encumbrancer of the Land from time to time covenants that the Encumbrancer will not object directly or indirectly or in association with any other party, to any application or applications made by the Encumbrancee to the territorial authority to undertake the following on the Encumbrancee's Land:
>
> (a) A cluster development of residential dwellings on the Homestead Block described in CT 78212.
>
> (b) A subdivision of three (3) residential blocks on the balance land described in CT 177645 and 177646.

(c) Form the presently unformed road adjoining the Encumbrancee's Land to service a cluster development of not more than fifteen (15) dwellings on the land described in CT 78212.

[36] As successors in title to the encumbranced land, the Hadleys agreed to not object to Ayrburn Farm Estate Ltd, and by succession Waterfall Park, carrying out developments on the Ayrburn land as referred to in the encumbrance.

[37] In 2006, the area of land that had the benefit of the encumbrance was zoned "Rural General" under the then partially operative District Plan. The relevant land was categorised as a visual amenity landscape. Subdivision and the erection of new buildings were discretionary uses under that zoning. There is a paper road which includes a walking and cycling trail that partly separates the Hadleys' property and Waterfall Park's land.

[38] In February 2015, the Winton Group entered into an agreement for sale and purchase to acquire the Ayrburn Farm, with Waterfall Park as the nominated purchaser.

[39] In August 2015, the QLDC notified its stage 1 plan review.

[40] On 23 October 2015, the previous owners of the Ayrburn land filed a submission seeking a zoning change for a Rural Residential Zone option involving up to 30 rural residential lots, or a Waterfall Park Special Zone allowing up to 125 units or a similar Ayrburn Residential Zone. On the same day, the Hadleys filed a submission seeking to retain the existing Rural General Zone over the Ayrburn land.

[41] On 16 December 2015, the Hadleys filed a submission opposing Ayrburn's submission of 23 October 2015.

[42] On 7 April 2017, Waterfall Park settled the purchase of Ayrburn land.

[43] In November 2017, the QLDC notified its stage 2 plan review.

[44] On 23 February 2018, the Hadleys filed a submission on the stage 2 plan review, seeking a Rural Amenity Zone which would effectively mean little change to the previous rural zoning.

[45] On the same day, Waterfall Park filed a submission seeking changes to the existing zoning for part of the Ayrburn land for residential uses, and an extension of the urban growth boundary. This added to, rather than replaced, the submission made by the previous owner of the Ayrburn land. In a decision of 5 March 2021, a Judge in the Environment Court, with reference to an affidavit from Mr Meehan, recorded that Waterfall Park was, in submissions in the plan review, seeking a rezoning that would enable up to 200 residential homes, a retirement village of equivalent size, or rural lifestyle development.[19] Mr Meehan had said the future of Ayrburn Farm was dependent on the outcome of the plan review process.[20]

[46] On 27 April 2018, the Hadleys made a further submission opposing Waterfall Park's proposed zonings.

[47] In March 2019, the QLDC declined Waterfall Park's requested zonings for the Ayrburn land.

[48] In May 2019, Waterfall Park appealed that decision to the Environment Court. The Hadleys and some of the earlier submitters joined the appeal as parties under s 274 of the RMA. This was the PDP appeal.

*The Hadleys' involvement in the tree planting proceedings and appeal*

[49] As recorded in a decision of the Environment Court of 5 March 2021, during 2019 and 2020 Waterfall Park planted two parallel rows of evergreen tree species bordering the flat and straight section of the Queenstown Trail used for walking and cycling.[21] The Hadleys live adjacent to that trail. The Hadleys, supported by the QLDC, sought a declaration in the Environment Court that the planting of the trees was a non-complying activity under the QLDC District Plan because it was not a permitted farming activity.

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19 *Hadley v Waterfall Park Developments Ltd* [2021] NZEnvC 18 at [21].
20 At [22].
21 *Hadley v Waterfall Park Developments Ltd*, above n 19.

[50] Judge Hassan in the Environment Court made a declaration that the planting was not a permitted activity under relevant rules in the District Plan and defaulted to a non-complying activity.[22] He also stated the evidence demonstrated that the planting could adversely affect the quality of the trail.[23]

[51] Judge Hassan noted the planting was on an area of the Wakatipu Basin Rural Amenity Zone under the Proposed District Plan.[24] The land was located within an area described as having a low absorption capacity in terms of additional development.[25] The Judge identified relevant provisions in the plan that recognised the landscape character and visual amenity values. Provision for farming and other activities that relied on the rural land resource, and rural residential subdivision and development were "subject to maintaining or enhancing landscape character and visual amenity values".[26]

[52] After a detailed consideration of quite extensive evidence that he referred to, Judge Hassan found that the tree planting, having regard to both established farming activities on the site and the realistic potential of the site for farming purposes, was not for the primary purpose of farming on the site.[27] For completeness, he also recorded his agreement with evidence that the planting had no value in terms of existing residential activity and any future residential activity on the site would be contingent on a successful plan change.[28]

[53] In its statement of claim in these High Court proceedings, Waterfall Park pleads that the Hadleys singled out Waterfall Park when they did not issue the same proceedings as to similar plantings by other neighbours and the Hadleys themselves. In his affidavit in support of Waterfall Park's interlocutory application, Mr Meehan included evidence as to these other plantings.

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22 At [59].
23 At [60].
24 At [7].
25 At [44].
26 At [45].
27 At [55].
28 At [58].

[54] In his affidavit in reply, Mr Hadley said the Hadleys' concern about the planting was not so much the impact on them but on the decade-old public walking and cycling trail alongside the planting and, in particular, the increased likelihood of frost forming in the shade created by the trees which he said posed a health and safety risk on the steeply sloping section of the trail. Mr Hadley said the other plantings were not comparable to the planting undertaken by Waterfall Park. He said it was much lower deciduous hedging, typical of the area, not evergreen screen planting such as that undertaken by Waterfall Park. Mr Hadley said their reasons for objecting to Waterfall Park's planting was specific to the nature of the planting, not because of who had done it. He said the planting Mr Meehan described as being carried out by the Hadleys was over 10 years old, was planted by the QLDC and the Wakatipu Trails Trust and was not unlawful. The planting was done as part of the construction of the countryside trail on the unformed road adjacent to the Hadley property.

[55] Before the Environment Court, the evidence of a former farm manager at Ayrburn Farm was that the planting did not serve any useful farming shelterbelt purpose, that the evergreen species chosen would create frost issues in the winter and block the wind that helps keep stock cool in summer.[29] Mr Cleland, a landscaping expert, said the planting was neither necessary nor suitable as a shelterbelt.[30] He said this planting would block warming from the sun, impede the drying of the trail, give rise to "frost heave" and make the trail muddy.

[56] In his decision, Judge Hassan said:[31]

> The evidence demonstrates that the Planting could adversely impact upon the quality of the Queenstown Trail. The site visit revealed it is already having some impact at least as a plainly visible edge to the site.

[57] The Environment Court decision indicates that the Hadleys' application was made because of the concerns Mr Hadley had referred to in his affidavit and not for the ulterior or dominant purpose of impeding Waterfall Park's development plans. There is nothing in the decision to indicate that the Hadleys' motive in making the application was ultimately to obtain some financial benefit from Waterfall Park.

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29 At [23].
30 At [24].
31 At [60].

[58] Waterfall Park appealed the Environment Court's tree planting decision to the High Court. This is the tree planting appeal. The appeal was opposed by both the Hadleys and the QLDC.

[59] On 7 March 2022, Dunningham J in the High Court gave judgment on Waterfall Park's appeal over the tree planting decision.[32]

[60] Dunningham J referred to evidence from Mrs Hadley that the QLDC's refusal of Waterfall Park's PDP submission to rezone the property was, in part, influenced by landscape evidence she gave at the hearing before the QLDC, which "drew attention to the importance of [Waterfall Park's] property to the maintenance of the landscape values … as described in … the Proposed District Plan".[33]

[61] On the tree planting appeal, Mr Colson for Waterfall Park argued there had been errors of law in the Environment Court's decision. Dunningham J referred to five that had been set out in the notice of appeal as being wide-ranging but said they could be summarised as being whether the Judge erred in:

(a) determining the planting was not a permitted "farming activity"; and

(b) determining, on a proper reading of the proposed district plan, the planting defaulted to a non-complying activity.

[62] Dunningham J found there had been no error of law and dismissed the appeal. In doing so, Dunningham J rejected submissions that the Judge applied the wrong legal test, had regard to irrelevant considerations, failed to have regard to relevant considerations and made findings for which insufficient evidence existed. She also rejected the submission that the Judge had come to an unreasonable conclusion in finding that the planting fell outside the definition of "farming activity".

[63] In light of both the Environment Court and High Court judgments as to the tree planting, it cannot be said that the Hadleys' actions in objecting to Waterfall Park's tree plantings were "persistent and unreasonable".

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32 *Waterfall Park Developments Ltd v Hadley* [2022] NZHC 376.
33 At [7], quoting Mrs Hadley.

*The arbitration award*

[64] The issue for arbitration was whether certain of the Hadleys' actions were in breach of the encumbrance. The actions Waterfall Park complained of in the arbitration included the Hadleys' PDP submission, their joining and opposing the PDP appeal, their tree planting proceedings and their involvement in the Environment Court mediation.

[65] Mr Asher issued his arbitration award on 13 December 2021. In his award, Mr Asher held the submissions of Waterfall Park/Ayrburn Farm Estate Ltd for zoning changes to the Waterfall Park land were not an application to undertake a development in terms of the encumbrance. Mr Asher said:

> The purpose of making a submission on a DPB is far more than to just stop a particular application. It addresses the underlying zoning of land, which could affect its use for decades to come. Very specific words could be expected, if a resident in a rural area was prohibited from resisting a fundamental zoning change which opened an area to more residential development.

[66] And further:

> There is no doubt that the Hadleys' submissions from 16 December insofar as they responded to the Waterfall/Ayrburn submissions did resist them. However, as I have set out, expressing opposing views to a developer's submission on a PDP is neither directly nor indirectly opposing an application to undertake a development, because there is no application for resource consent to oppose.

[67] Mr Asher also found that none of the Waterfall Park/Ayrburn Farm Estate Ltd proposals were for a cluster development. He was satisfied:

> … that the concept of clustering, when used in the Wakatipu Basin, entails a relatively small group of dwellings which will be closely spaced to minimise their impact on a rural site, surrounded by a larger area of open space. It is a method of maintaining the character of a landscape as rural, while providing for some limited residential development by allowing pockets of relatively dense housing which do not significantly damage that overall rural landscape character.

[68] Mr Asher was of the view that none of the developments envisaged by the submissions filed by Waterfall Park/Ayrburn Farm Estate Ltd fell within the definition or concept of a "cluster development".

[69] Mr Asher said "[t]here was therefore no possible breach of the clause that could arise from the Hadleys opposing this zoning change".

[70] In his award, Mr Asher said Waterfall Park had also asserted that the Hadleys' participation in the Environment Court directed mediation over the PDP appeal was a breach of the covenant. Mr Asher said he had found there was no "application" and, if there had been an application, it was not for a cluster development. The Hadleys' participation in the mediation could not give rise to any claim that they were in breach of the encumbrance. Mr Asher said the Hadleys "were entitled to participate in a mediation about proposed zoning changes".

[71] Mr Asher also found the Hadleys' actions in commencing the tree planting proceedings and then opposing Waterfall Park's tree planting appeal were not a breach of the encumbrance. He found the planting of trees was not an application for a cluster development.

[72] The issue in the arbitration was whether the Hadleys had been in breach of the encumbrance. Nevertheless, the arguments advanced for the Hadleys in the arbitration and the arbitrator's determinations were consistent with the arbitrator finding that the Hadleys were seeking to uphold the rural zoning and associated visual landscape and amenity values of land which adjoined their property, as they were entitled to do. There is nothing in the award which suggests the position of the Hadleys, or other parties who made submissions opposed to Waterfall Park's submissions, were unreasonable or that they were for any purpose other than to retain the rural zoning on the Ayrburn land and the associated landscape character and visual amenity values.

[73] In his submissions dated 22 February 2022, Mr Colson submitted that amongst the Hadleys' actions, which were "persistent and unreasonable", was the way they objected to Waterfall Park's tree plantings "shortly after the Hadleys were reminded by Waterfall Park of the existence of the encumbrance". When Mr Colson made that submission, the arbitrator had already determined that the Hadleys' actions over the trees were not in breach of the encumbrance. The Environment Court had also agreed with the Hadleys and the QLDC that Waterfall Park's planting of the trees was a non-complying activity under the District Plan.

*The Hadleys' submission in opposition to the subdivision application and opposition to the subdivision appeal*

[74] Mr Meehan's affidavit also referred to the Hadleys' opposition to Waterfall Park's subdivision application. It appears it had never been suggested that the Hadleys' submissions in opposition to this application or their opposition to the subdivision appeal were breaches of the encumbrance. The steps the Hadleys took as to this were not discussed by the arbitrator in his award.

[75] Waterfall Park filed the subdivision application with the QLDC on 1 April 2020. In his affidavit, Mr Meehan said this application sought to create titles for a road which had been consented and built (to allow it to be vested in QLDC or private owners in due course), and a title for existing historic stone buildings that sit on a distinct part of the eastern Ayrburn land (approximately 542 m from the Hadleys' property). Mr Meehan said the subdivision application did not seek any change in use of the Waterfall Park land.

[76] In his affidavit, Mr Meehan said the application was made for practical and financing reasons and did not involve any perceptible physical change to the land. He said the Hadleys had objected to the subdivision application by filing a submission with the QLDC opposing the subdivision application and then filing a notice pursuant to s 274 of the RMA in respect of the subdivision appeal to join and oppose the appeal.

[77] In his submissions, Mr Colson again referred to the Hadleys' opposition to the subdivision as indicative of their "persistent and unreasonable" opposition to Waterfall Park's development of the Ayrburn land.

[78] However, in his affidavit, Mr Meehan said the application for subdivision consent was originally declined by the QLDC on the basis that the relevant provisions of the QLDC Proposed District Plan did not permit a subdivision of less than 80 ha. That, in itself, would suggest the Hadleys' initial opposition to the subdivision application was not unreasonable. In his affidavit, Mr Hadley said the Hadleys were concerned the outcome of the subdivision appeal would impact the PDP appeal, particularly the precedent it would set for a minimum lot size of less than 80 ha.

[79] Mr Meehan said the subdivision was sought to create "titles for a road which had been consented and built (to allow it to be vested in QLDC or private owners in due course)". The High Court is familiar with the need for roads that are part of a proposed subdivision to be vested in local councils through the numerous applications that are made to the Court under s 317 of the Property Law Act 2007 to vary covenants so this can happen.[34]

[80] It thus seems clear from Mr Meehan's affidavit that consent to the subdivision was being sought in anticipation of a development being allowed for the land on which the road had been built. That development and associated subdivision of land had not been consented to and was not permitted with the land as it was then zoned. The need for a separate title for the road was thus contingent on Waterfall Park obtaining the relief it wanted in the PDP appeal.

[81] The Hadleys' submission in opposition to the subdivision consent application and their seeking joinder on the appeal was thus consistent with their earlier approach in seeking to retain the existing rural zoning for the Ayrburn land.

[82] In his affidavit, Mr Meehan said the QLDC had subsequently agreed to abandon its defence of the subdivision appeal as a result of Waterfall Park agreeing to protect a small area of land as open land, a small public easement along Mill Creek and a restriction on buildings on the proposed historic building site. The fact Waterfall Park agreed to such concessions suggests Waterfall Park's subdivision application was going to have an impact on landscape character and visual amenity values consistent with the concerns the Hadleys and others had as to Waterfall Park's attempts to obtain a rezoning of the Ayrburn land so as to permit residential subdivision of that land.

[83] Mr Meehan said "despite being informed of QLDC's decision to abandon defending the subdivision appeal, the Hadleys have advised that they intend to continue defending the appeal". He said Waterfall Park had sought to resolve the subdivision appeal with the Hadleys without the need to proceed to a hearing, but these

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[34] For example, see *Re Avlis Ltd* [2022] NZHC 1157; *Re Templeton Pegasus Ltd* [2022] NZHC 424; *Taurikura Holdings Ltd v Tauranga City Council* [2022] NZHC 994; and *Fair v Fair* [2019] NZHC 2349, (2019) 20 NZCPR 652.

attempts had been "futile as the Hadleys have made unreasonable demands in exchange for withdrawing their objection". He said, for example, the Hadleys had previously offered to withdraw their objection if Waterfall Park agreed to retain one of the lots comprising the Ayrburn land (totalling 28.49 ha) as an open space area. Mr Meehan said Waterfall park did not consider this to be a genuine offer because, in his view, "the Subdivision Application is both inconsequential and several hundred metres distant to the lot which the Hadleys required to be maintained as an open space area".

[84] While Mr Meehan may have considered this an unreasonable requirement, it is consistent with the Hadleys wanting to preserve landscape character and visual amenity values associated with the then zoning of the land, not with their wanting to extract some financial benefit for themselves.

[85] As Mr Casey QC, for the Hadleys, pointed out in his submissions, counsel for the Hadleys had filed a memorandum with the Environment Court on 30 September 2021 for the s 274 parties as to the subdivision appeal. In that memorandum, they pointed out that the position of the s 274 parties as to that appeal overlapped with the PDP appeal by Waterfall Park. Through that memorandum, the s 274 parties said the outcome of the PDP appeal had the potential to significantly alter the parties' position with respect to the subdivision appeal. The s 274 parties, including the Hadleys, said, if Waterfall Park obtained the relief in part or in full on the PDP appeal, it would have "significant ramifications for the determination of [the subdivision appeal] and would require the s274 parties to reconsider their position and possibly lead to a withdrawal of their interest". They said this was particularly so with respect to the relief sought to rezone the Ayrburn domain from Wakatipu Basin Rural Amenity Zone to Waterfall Park Zone because the new allotment is entirely located within that area.

[86] The s 274 parties said, if Waterfall Park did not obtain the relief it sought in the PDP appeal, "then the findings of the Court on that issue (from a landscape and planning perspective) would be instrumental in considering the parties position in [the subdivision appeal]". In that memorandum, the s 274 parties sought a deferment of case management directions for the subdivision appeal until such time as the Environment Court had determined appeals on the 80 ha regime in the Proposed District Plan and determination of the PDP appeal.

[87] Mr Goldsmith, as counsel for Waterfall Park on the subdivision appeal, filed a memorandum on 13 October 2021 also asking that the appeal be placed on hold. In that memorandum, he referred to the way the PDP appeal was being progressed, the possibility that a relevant aspect of the PDP appeal might be successful and, if that proved to be the case, the subdivision appeal would not have to go to a hearing.

[88] On my assessment of undisputed evidence, there was no evidential basis to support the submission that the Hadleys' conduct as to the subdivision application and appeal was indicative of unreasonable and persistent opposition to Waterfall Park's development aspirations for its land.

*The mediation and settlement negotiations*

[89] Mr Meehan's affidavit included a narrative of what occurred during the Environment Court mediation and in some negotiations afterwards which Waterfall Park argues justifies the disallowance of privilege. Nearly all that narrative is hearsay and inadmissible as evidence. Mr Meehan was not present at the mediation. The post-mediation negotiations were not between Mr Hadley and him.

[90] The affidavit includes numerous statements of argument, submission, opinion and initially the pejorative statements that he considered the Hadleys' conduct through "without prejudice" communications amounted to extortion or blackmail.

[91] Mr Meehan began his discussion by saying he had been involved in numerous mediations and negotiations as to applications for resource consent and similar. He said that, as chief executive of the Winton Group, he knew they needed to accommodate various parties' interests as part of a development, and "we have a demonstrably great and longstanding track record of doing this".

[92] Given he made this claim, observations as to Mr Meehan's negotiating approach in a judgment concerning another property development of the Winton Group are relevant. The observations as to Mr Meehan's conduct in that case are also relevant to the determination I have to make as to whether the civil proceedings brought by Waterfall Park are, themselves, an abuse of process.

[93] Mr Meehan's negotiating approach, as referred to by the High Court, is also relevant to my determination as to whether it is seriously arguable that the failure for the parties to settle matters at mediation was because of the Hadleys' alleged failure to participate in the mediation in good faith. Another possibility was that the mediator had decided that Waterfall Park had insisted a settlement could be reached only on Waterfall Park's terms, the terms were not acceptable to those in opposition and so there was no prospect of compromise.

[94] In his judgment in *Northlake Investments Ltd v Wanaka Medical Centre*, Mr Meehan's negotiating approach was described in some detail by Osborne J with reference to negotiations that took place between the Winton Group (through Northlake Investments Ltd) and doctors associated with a prospective commercial development of a medical centre.[35] Osborne J stated:

> [100] Mr Meehan's approach at the meeting had introduced into the relationship between Northlake and [Wanaka Medical Centre] a very different tone and approach to that which had previously flowed from Northlake personnel. Dr McLeod, a person not inexperienced in matters of commerce and not as a witness displaying a delicate or nervous disposition, described a feeling of having been "bruised" by the meeting. That reaction was not at all surprising in light of the approach Mr Meehan had adopted at the meeting. And, in the absence of evidence from Mr Meehan, I have no basis to conclude that Mr Meehan did not intend to cause such a response in the doctors. I conclude it was, on his part, a deliberate strategy to try to procure the lease terms he wanted.

[95] While not describing it as a "clash of cultures", Osborne J described the meeting between the doctors and Mr Meehan:[36]

> What happened at the meeting was quite simply that someone who adopted an aggressive negotiating style brought both verbal and non-verbal aggression to the discussion. Whether that is viewed in terms of creating a cultural divide or otherwise, the material fact is that Mr Meehan's message was delivered in such a manner as to be believed by the doctors – they understood they had to accept the 6 per cent return on investment (on whatever floor space area [Wanaka Medical Centre] might take) or "the deal would be off".

[96] In the Northlake litigation it was submitted that the prospective tenant's conduct, in breaking off negotiations after Mr Meehan had set the Winton Group's bottom line for a commercial return was not negotiable, was unconscionable. This was

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35 *Northlake Investments Ltd v Wanaka Medical Centre Ltd* [2019] NZHC 3443.
36 At [108].

somewhat akin to Mr Meehan's allegations here, that the Hadleys' conduct in the negotiations was in breach of good faith negotiations. Osborne J accepted the evidence of two principals of the prospective tenant that, largely as a result of what they had seen of Mr Meehan, they had "come to have genuine concerns about the style and future performance of Northlake (and in particular Mr Meehan) in the lessor/lessee relationship" and:[37]

> Whether a particular landlord shapes up as a landlord with whom a prospective long-term tenant can confidently anticipate a satisfactory working relationship is a matter that any tenant will reasonably consider as part of its decision whether or not it should enter a particular lease. [Wanaka Medical Centre] was in December 2017 entitled to bring into consideration its up-to-date, informed view of Mr Meehan and Northlake.

[97] In *Northlake Investments Ltd v Wanaka Medical Centre Ltd*, Northlake also pleaded the commercial tenant was in breach of contract in failing to negotiate an agreement to lease in good faith. As to that, Osborne J referred to the crucial period of negotiation as being the period after 27 November 2017 and said:[38]

> And within that focus, Mr Meehan's own approach to negotiation at the meeting the following day, 28 November 2017, is the most significant feature. It was Mr Meehan's approach to negotiation which caused the disengagement which followed.

[98] In his affidavit, Mr Meehan referred, firstly in general terms, to the Hadleys' opposition to the development. In doing so, he referred to the encumbrance and expressed his opinion:

> While Waterfall Park could have relied on the Encumbrance following its acquisition of the Ayrburn land … to object to the Hadleys having filed submissions with QLDC opposing the [PDP] submission, we did not consider it an appropriate strategy at the time given we would also need to deal in any event with a number of other submitters.

[99] Mr Meehan said he did instruct Waterfall Park's barrister to raise with the Hadleys that the encumbrance prohibited their objection to the development when they sought to join the PDP appeal.

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37 At [132].
38 At [171].

[100] Mr Meehan said, despite what he said were "the clear terms" of the encumbrance, the Hadleys did not accept that the encumbrance prevented them from objecting to the development. Mr Meehan said he believed there was no prospect of resolving the dispute through mediation or negotiation because of his previous dealings with these sorts of disputes and with the Hadleys. He requested to waive the requirement in the encumbrance to mediate and then go to arbitration if the mediation fails. The Hadleys refused to waive the dispute resolution requirements. Mr Meehan said "such refusal was entirely consistent with the Hadleys' approach to dealing with Waterfall Park. In my view, the Hadleys take every opportunity to delay and cause disruption to the Development."

[101] Mr Hadley, in a reply affidavit, said the Hadleys filed their s 274 notice seeking to join the PDP appeal on 31 May 2019. Waterfall Park's barrister did not contact them until 11 May 2020 threatening that, if the Hadleys did not immediately withdraw the s 274 notice on the PDP appeal, Waterfall Park would take proceedings against the Hadleys in the High Court.

[102] As already referred to, the arbitrator found that the Hadleys' response to Waterfall Park's PDP submissions and appeal were not in breach of the encumbrance. Waterfall Park's barrister's threat is however consistent with the purpose of Waterfall Park's civil proceedings in the High Court being to pressure the Hadleys into dropping the opposition they had to the PDP appeal.

[103] An informal mediation took place on 10 June 2020 at Mr Hadley's office in Queenstown. A formal mediation took place on 29 July 2020.

[104] Because of the privilege attaching to all that occurred in those mediations and the Environment Court directed mediation, I refer to what happened during the mediations in only the most general of terms. In the publicly available version of this judgment, reference to one specific matter over which there was no agreement has been expressed in terms that do not disclose what that related to or the parties' respective positions.

[105] Mr Hadley said that Waterfall Park's position at the 10 June 2020 mediation was that the Hadleys had to withdraw the s 274 notice by which they were opposing Waterfall Park's PDP appeal. He said Waterfall Park's representative at that meeting had no authority to settle.

[106] Mr Meehan said Waterfall Park was represented at the meeting by Lauren Christie. In an affidavit in reply, Ms Christie said she disagreed with the statement that she had communicated to the Hadleys that the only acceptable outcome for Waterfall Park was the withdrawal of their s 274 notice. She said the meeting terminated when the parties agreed they had opposing views and the meeting was not going to resolve the dispute. She did not suggest in her affidavit in reply that the meeting was not a meeting over the encumbrance.

[107] I do not need to resolve the conflict between Mr Hadley and Ms Christie as to what had been Waterfall Park's position as conveyed by Ms Christie at the meeting. The mediation took place shortly after Waterfall Park's barrister had asserted that the filing of the 274 notice on the subdivision appeal was a breach of the encumbrance and had demanded that the Hadleys withdraw the s 274 notice.

[108] I do not consider there is any evidence to suggest that the Hadleys' insistence that the parties enter into mediation over their encumbrance is indicative of their unreasonably opposing Waterfall Park's development proposals for its land. Mr Meehan's approach to the required mediation was consistent with his considering there would be no utility in mediation unless the Hadleys were willing to cooperate over what he wanted.

[109] There was then the formal Environment Court ordered mediation as to Waterfall Park's PDP appeal. The mediation began on 10 February 2021 and was adjourned after the first day. The mediation resumed on 4 May 2021.

[110] Ms Christie attended the mediation with Waterfall Park's barrister Mr Goldsmith. In her affidavit, Ms Christie said she provided information to Mr Meehan as to what happened at the mediation, which was included in Mr Meehan's affidavit. His affidavit referred to Waterfall Park, during the course of the mediation, providing

revised plans for a subdivision to address the concerns of the Hadleys and others involved in the mediation.

[111] Mr Meehan said, when the mediation reconvened, he understood progress had been made and resolution was expected.

[112] Ms Christie said, by mid-afternoon on the second day of mediation, she expected to reach an acceptable solution for all. Both Mr Meehan and Ms Christie said in affidavits they were shocked when Mr Hadley suddenly terminated the mediation.

[113] Mr Hadley's evidence was that the meeting was attended by approximately 22 people representing six parties plus the mediator.

[114] Mr Hadley's evidence was that a compromise plan had been discussed on the first day of the mediation, 10 February 2021. The Hadleys were concerned to maintain land between a stream and the public walkway/cycleway free of development to protect the rural landscape as experienced by the public, consistent with the concept of a cluster development. Mr Hadley also said the stream had been identified by both their and the QLDC's landscape experts as a defensible landscape boundary and therefore important in the context of maintaining landscape relief.

[115] Mr Hadley said, at the reconvened mediation, it was clear to everyone in the room that there was still some distance to go before agreement could be reached. He noted that Mr Meehan, in his affidavit, referred to an onsite meeting with the Friends of Lake Hayes and had implied that the proposed amended plan had been agreed with them. Mr Hadley said the Friends of Lakes Hayes did not indicate acceptance of what was proposed, consistent with an email he received from a senior member of that group advising him they and Waterfall Park were "a long way apart at the moment".

[116] Mr Hadley said Waterfall Park's representatives left the room to discuss their proposal. When they came back, the lawyer described verbally (with no plan) some changes to certain matters which Mr Hadley said were inconsequential. He said Mr Goldsmith, for Waterfall Park, also said Waterfall Park would not move from its

[position A]. While Waterfall Park's representatives were out of the room, other parties had discussed their position. The agreed position based on expert advice, with the exception of one party whose position was fixed at an even [lesser position], was they would not go [beyond position B] and this would be subject to an expert site visit to confirm. Mr Hadley said this was a compromise position as their preference had been for a [lesser position].

[117] Mr Hadley said, following this, the mediator asked Mr Hadley for his response as to Waterfall Park's [position A]. Mr Hadley stated, if Waterfall Park's stated position was their final position — and Mr Goldsmith indicated at that point it was — then he could not agree, and that meant all parties would have go to a hearing. He said, with that, the mediator immediately declared the mediation was at an end and he would so advise the Court. Mr Hadley said he was also surprised at "this abrupt termination of the mediation".

[118] An affidavit was filed for Mr Peirce, a solicitor representing Mr Andersson. He was the neighbour who wanted a [lesser position] which Mr Peirce said was [much less than the position A] proposed by Waterfall Park and the [position B] offered as a compromise by the Hadleys and other parties. In his affidavit, Mr Peirce said, immediately after Mr Hadley's response, the mediator declared the mediation had concluded and he would inform the Court that the matter would proceed to a hearing.

[119] Ms Christie and Mr Goldsmith both said, before terminating the mediation, the mediator asked Mr Hadley to explain his position over [position B] and Mr Hadley had refused. That was contradicted by the evidence of both Mr Hadley and Mr Peirce.

[120] Neither Mr Goldsmith nor Ms Christie in their affidavits denied that, before the mediation was terminated, Waterfall Park had said it would not move from its [position A], and the Hadleys and other parties opposing had said [they would not move from position B]. Neither contradicted the evidence of Mr Peirce that the mediation had not ended with the Hadleys leaving the mediation, as Waterfall Park had alleged in their statement of claim. The mediation had ended with the mediator terminating the mediation.

[121] In his affidavit, Mr Meehan purported to give hearsay evidence as to the further settlement discussions that occurred between Mr Hadley and Mr Goldsmith. In doing that, he referred to Mr Hadley maintaining his position for [position B] and other aspects of a subdivision that could be acceptable to the Hadleys. Mr Meehan said, as to "[a]ll these matters, with the exception of [position B], were reasonable and Waterfall Park would have agreed to them".

[122] I find, from the undisputed evidence, that the mediator ended the mediation when he determined the parties were unable to agree on a matter which was of fundamental importance to them so the issues would have to be the subject of a hearing in the Environment Court. In the evidence as to what happened at the mediation, there is no basis for Waterfall Park's allegation, as pleaded, that the Hadleys did not participate in the mediation in good faith. There is also no basis for suggesting that, in the way the Hadleys and others refused to compromise on the terms Waterfall Park wanted at the mediation, the Hadleys were participating in the Environment Court proceedings for an ulterior purpose or to obtain relief which was not available to them through the proceedings.

[123] Waterfall Park has not established or shown that it has a seriously arguable case that the Hadleys or other parties breached any obligation to negotiate in good faith at the mediation, or that there was anything dishonest in their conduct at the mediation which requires the Court to disallow the privilege that attaches to all the communications that took place during the mediation.

[124] The Environment Court mediation ended on 4 May 2021.

[125] The further communications at issue were between Mr Goldsmith and Mr Hadley. They began on 6 May 2021 when Mr Goldsmith contacted Mr Hadley. They ended on 27 May 2021 when Mr Goldsmith emailed Mr Hadley and told him he was instructed not to respond to Mr Hadley's counter-proposal. Shortly afterwards, Mr Goldsmith advised the Environment Court that Waterfall Park wished to proceed to hearing on the appeal.

[126] It is clear, throughout that time, the parties were in negotiation about a settlement of the PDP appeal and related matters. The communications were all without prejudice.

[127] It is also clear from the communications that both parties were concerned with the detail of the development that might be consented to if there was going to be no opposition to the PDP appeal. Consistent with that, on 7 May 2021, Mr Hadley met with Mr Goldsmith and showed him a plan which Mr Hadley had discussed with the QLDC.

[128] There is no dispute that in their discussions on 7 May 2021 Mr Goldsmith and Mr Hadley discussed the possibility of including in the settlement a commercial element. Mr Goldsmith said he doubted his client would entertain one but said he would discuss it and get back to Mr Hadley.

[129] There is no dispute that on 12 May 2021 Mr Goldsmith told Mr Hadley that Waterfall Park would consider a commercial element and, on that basis, they should continue to see if they could reach agreement. In accordance with that, Mr Hadley asked that he and his wife have access to the Ayrburn land. They erected profile poles on the land consistent with their concern as to how a residential development on Ayrburn land would impact on views of the area, landscape and visual amenities.

[130] On 18 May 2021 Mr Hadley emailed Mr Goldsmith his proposals. The email began by thanking Mr Goldsmith for confirmation that "commercial terms are indeed now on the table from [Waterfall Park's] perspective in order to achieve a settlement".

[131] Mr Hadley provided detailed plans and drew Mr Goldsmith's attention to certain aspects. He referred to Waterfall Park's required [position A]. The plans were accompanied by photographs to support the points he was making. Mr Hadley said Waterfall Park's agreement to the matters he raised was fundamental to reach agreement between Waterfall Park and the Hadleys, and the Hadleys getting agreement from the QLDC and the s 274 parties. Mr Hadley also sought confirmation as to a number of other matters including the withdrawal of the arbitration proceedings and the tree planting appeal, and the removal and relocation of planted trees along the

walkway. There was also reference to a facilitation fee and possible ways to calculate it. Mr Hadley said he invited Waterfall Park to consider an appropriate value and present it to the Hadleys for consideration.

[132] On 21 May 2021, Mr Goldsmith responded to Mr Hadley with comments as to various aspects of the proposed development plan. He also proposed a payment at a specific level based on costs the Hadleys had incurred and "cost savings to [Waterfall Park] if a hearing is avoided". The email response concluded "[i]f you have a counter-proposal (as indicated by you) please respond to each element listed above, so that my client can consider a package".

[133] Mr Hadley responded on 26 May 2021. Again, as with all the correspondence from both parties, it was "confidential and without prejudice". That response referred to various aspects of the plan but also had a figure for payment of a facilitation fee with a proposal as to how that might be provided through the sale of a particular lot to the Hadleys at a stipulated price.

[134] The following afternoon, Mr Goldsmith emailed Mr Hadley stating:

> I am instructed not to respond to your email below.
>
> [Waterfall Park] will go to hearing.
>
> I will advise the other parties.

[135] In his affidavit, Mr Meehan gave reasons as to why he considered the facilitation fee proposed by the Hadleys was unacceptable. It is however somewhat ironic that Mr Meehan and Ms Christie in their affidavits represented what they claimed had been Mr Hadley's refusal to explain at mediation [their position B] and abruptly ending the mediation as being in breach of an obligation of good faith. That is precisely how Waterfall Park proceeded after rejecting the settlement proposal that had been put forward by the Hadleys.

[136] I do not consider there was any impropriety or any abuse of the privilege attaching to settlement negotiations in the Hadleys seeking payment of a facilitation fee as part of a settlement of all issues between the parties. There was nothing

underhand or misleading in what they were seeking. Waterfall Park was free to accept or reject the proposal or to make a counter-proposal.

[137] Derek Nolan in *Environmental and Resource Management Law* says "[i]t is acceptable to make payments to potential submitters to avoid objection to resource consent applications".[39] In 1995, the Planning Tribunal was concerned with the grant of a resource consent to enable a service station to be built on a particular site.[40] A number of neighbours close to the site had consented to the proposal. The Tribunal said:[41]

> There was some unsubstantiated suggestion that consents were obtained by unconscionable means, but even if that were true, (and we have no evidence to suggest it is) that is of no concern to the Tribunal under the [RMA]. One consent was effectively paid for but this is open to a developer in terms of the Act because a person who considers he may be adversely affected can effectively be compensated for that fear. The obtaining of consents by all persons nearby can facilitate the obtaining of a resource consent because the strength of allegations of adverse affect tend to fade the further one goes from the scene of activity.

[138] In *MacKay v North Shore City Council*, the Tribunal said:[42]

> We record that it is not unusual in terms of the [RMA] for a payment to be made in return for a consent because the Act appears to contemplate recompense for perceived loss of amenity value as one of the costs of obtaining a consent, the consent operating to negate consideration of amenity effects on the consenting party.

[139] The Hadleys had incurred significant costs in pursuing rights they had to oppose Waterfall Park's PDP submission. Waterfall Park were wanting concessions from the Hadleys so that Waterfall Park would be able to proceed with a development which would likely have an impact on the visual amenity values and landscape character of Waterfall Park's rurally zoned land which the Hadleys had consistently shown was of importance to them. If the Hadleys were willing to compromise over such matters and were able to obtain the agreement of other parties, that would have been of significant financial benefit to Waterfall Park. There was nothing unlawful in

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39 Derek Nolan *Environmental Law and Resource Management Law* (7th ed, LexisNexis, Wellington, 2020) at [4.57].

40 *BP Oil New Zealand Ltd v Palmerston North City Council* [1995] NZRMA 504 (PT).

41 At 508.

42 *MacKay v North Shore City Council* PT W 146/95, 14 November 1995.

the Hadleys seeking to have that recognised in a tangible way. Waterfall Park had agreed that commercial terms could be on the table with any settlement. Mr Meehan's objection was not to the fact the Hadleys were seeking a facilitation fee or a settlement on commercial terms, but to the amount they were seeking.

*Conclusion on application to disallow privilege*

[140] The evidence and previous relevant decisions of the QLDC and Environment Court establish that, at all stages, the Hadleys filed submissions supporting the retention of rural zoning or similar for the Ayrburn land, when they joined the PDP and subdivision appeals as a s 247 party, and when they began the tree proceedings, they were doing so to protect their interest in maintaining the open and visual landscape character of the Ayrburn land and their immediate environment. If admitted, the evidence as to the settlement negotiations would indicate there was a prospect of settlement through the Hadleys agreeing to accept concessions on what they had originally wanted and that the Hadleys then sought to obtain some financial benefit in acknowledgement of those concessions. The fact they did so does not mean their earlier involvement in the proceedings was an abuse of those proceedings. Nor does it mean, if there was no settlement, their continuing involvement in proceedings in the Environment Court would be an abuse of those proceedings.

[141] Waterfall Park has failed to provide evidence which would meet the threshold of a clear or seriously arguable case for setting aside the privilege which attaches to communications made in the course of a mediation or in genuine settlement negotiations. Waterfall Park's application to disallow privilege and admit evidence as to what occurred during mediation and in settlement negotiations is declined. The application for leave to file the draft amended statement of claim referring to those communications is declined.

**The Hadleys' application for strike out or, in the alternative, summary judgment**

*The pleadings*

[142] The Hadleys seek strike out and summary judgment on Waterfall Park's statement of claim on the basis the claims are not reasonably arguable because:

(a) Waterfall Park instigated the encumbrance arbitration, the PDP appeal and the subdivision appeal. The Hadleys' involvement was either as a defendant or as s 274 parties;

(b) the Hadleys' application in the tree proceedings was and continues to be supported by the QLDC;

(c) the tree proceedings were determined in the Hadleys and QLDC's favour in the first instance;

(d) the appeal in the tree proceedings was instigated by Waterfall Park;

(e) Waterfall Park's claims do not disclose, on the face of them, any alleged predominant and improper purpose for which the Hadleys have allegedly conducted the various proceedings in abuse of the High Court or the Environment Court's processes;

(f) the claim for breach of good faith and constructive obligation is not a reasonably arguable cause of action as it is not a recognised cause of action;

(g) Waterfall Park's claims are an abuse of process because the subject matter of the claims was already at issue in the other proceedings;

(h) the claims are an abuse of process because their predominant purpose is to coerce the Hadleys into withdrawing their opposition to Waterfall Park's PDP appeal and subdivision appeal, and to coerce them into ceasing their pursuit of claims or asserting their rights in the tree proceedings and encumbrance arbitration; and

(i) the claim is an abuse of process because it purports to adduce evidence which is confidential and/or privileged under s 57 of the Evidence Act, s 14B of the Arbitration Act 1996, the Environment Court's Practice Note, common law and cl 6.5 of the encumbrance.

[143] In its notice of opposition, Waterfall Park said:

(a) its first and second causes of action are at least reasonably arguable because the Hadleys were voluntary participants as to the PDP and subdivision appeals, and they commenced the first instance tree planting proceedings in the Environment Court;

(b) as pleaded or would be pleaded in the amended statement of claim, the Hadleys' purpose in pursuing those proceedings was to extract a significant "facilitation fee" from Waterfall Park, an object not achievable in the relevant court proceedings and therefore an abuse of those proceedings;

(c) its second cause of action as to a breach of terms that apply to the Environment Court mediations allege a breach of terms which the parties are deemed to accept and are those owed to the mediator and to other parties;

(d) Waterfall Park has legitimate claims for loss caused by the Hadleys' abuse of process and breach of mediation terms which it is entitled to pursue in the current proceeding. In doing so, it does not seek to usurp the other courts' decision-making in their respective process nor to challenge the merits or findings of those processes; and

(e) there are material disputes of facts between the parties on key matters (including as to the motivations of the Hadleys in seeking the "facilitation fee") such that the matter is unsuitable for strike out and/or summary judgment.

*Applicable legal principles*

[144] In submissions for the Hadleys, counsel set out the legal principles applicable to the applications to the strike out and summary judgment applications. Mr Colson said there was no dispute as to those.

[145] As to strike out, the application proceeds on the assumption that facts pleaded in the statement of claim are true and any document relied on was to be construed in

the way most favourable to the impugned pleading.[43] On the material before the Court and in light of the current state of the law, the Court must be satisfied that the causes of action are so untenable that they cannot succeed.[44] However, the onus is on the plaintiff to show a reasonable cause of action in relation to each allegation.[45]

[146] The jurisdiction is to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material.[46] The fact that an application may raise difficult questions of law and require extensive argument does not exclude jurisdiction.[47]

[147] The principles for determining a summary judgment application are:

(a) The onus is on the defendant to show that none of the causes of action can succeed.[48]

(b) The court will not hesitate to decide questions of law where appropriate and should be prepared to determine, after adequate argument, even difficult legal questions.[49]

(c) Summary judgment will not be appropriate where there are genuine conflicts of fact and, in particular, credibility issues that cannot be resolved on the basis of affidavit evidence.[50]

(d) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to reject plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however

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43 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *Wilkins v District Court at Auckland* (1997) 11 PRNZ 232 at 238.

44 *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314 (CA) at 317 per Richmond P.

45 *M v Attorney-General* HC Wellington CP 70/00, 25 October 2002 at [21]; *Worldwide NZ LLC v QPAM Ltd* HC Auckland CIV-2006-404-1827, 1 December 2006 at [87].

46 *Attorney-General v Prince*, above n 43, at 267.

47 At 267.

48 High Court Rules 2016, r 12.2(2).

49 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [37], citing *International Ore & Fertilizer Corp v East Coast Fertiliser Co Ltd* [1987] 1 NZLR 9 (CA) at 16 per Cooke P.

50 *Sandman v McKay* [2019] NZSC 41, [2019] 1 NZLR 519 at [97].

equivocal, imprecise, inconsistent with other statements or inherently improbable.[51]

(e) In weighing these matters, the Court may take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence (or, as here, claim) is plain on the material before the court.[52]

(f) The court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules, which provide for the just, speedy and inexpensive determination of proceedings.[53]

(g) Although tortious claims are usually unsuitable for disposal on a defendant's application for summary judgment, they may be dismissed where the essential facts are not in dispute and they do not support the imposition of a duty.[54]

*Claim as to the tort of abuse of process*

[148] As to the tort of abuse of process, it was contended for Waterfall Park that the essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed.[55] It was also submitted that the tort is available against a defendant to court proceedings where the defendant uses the process (even with an honest belief in his or her defence) for the predominant purpose of achieving an object outside the proper scope of the litigation. Waterfall Park submitted it was therefore no answer to Waterfall Park's claims that the Hadleys did not themselves commence the PDP, subdivision or tree plantings appeals.

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51 *Minister for Canterbury Earthquake Recovery v Ace Developments Ltd* [2015] NZHC 1027, [2015] NZAR 964 at [15](e), citing *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).

52 *Beech Cover Properties Ltd v Bernard Property Investments Ltd* (2010) 12 NZCPR 626 (HC) at [12](g).

53 At [12](i).

54 *Martel v Auckland City* [2012] NZHC 241 at [68].

55 *Crawford Adjustors (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 866 at [149] per Lord Sumption; and *Williams v Spautz* [1992] HCA 34, (1992) 107 ALR 635 at 653 per Brennan J

[149] Counsel for the Hadleys referred to statements from the Privy Council in *Crawford Adjustors (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* that the tort was on the verge of an extinction,[56] and also comments from the English Court of Appeal in *Land Securities Plc v Fladgate Fielder*, the tort was limited to circumstances of compulsion by arrest, imprisonment or other forms of duress.[57] In that case, Etherton LJ said, even if the tort could be committed outside such circumstances:[58]

> … there is no reasonably arguable basis for extending the tort beyond the other particular heads of damage which must exist for invocation of the tort of malicious prosecution. ... It makes no sense severely to limit the cause of action for malicious prosecution, an essential ingredient of which is that the proceedings had been brought without reasonable or probable cause, to three particular heads of damage, but to extend to all cases of economic loss a tort of abuse of process which can apply even where the alleged "abuser" had a good cause of action. The dangers of parallel litigation and—echoing the concerns of Slade LJ in the *Metall* case [1990] 1 QB 301 deterring the pursuit of honest claims are obvious. The wider descriptions of the tort of abuse of process in cases prior to *Goldsmith v Sperrings Ltd* must be reappraised in the light of the decision of the House of Lords in that case and the policy considerations underlying it.

[150] Mr Colson submitted that English, Canadian, New Zealand and Australian courts had all recently recognised that the tort remains a valid cause of action.[59]

[151] It is not necessary for me to determine whether the tort of abuse of process should be limited to the circumstances suggested and in the manner indicated by the English Court of Appeal in *Land Securities Plc v Fladgate Fielder*.

[152] The ingredients of the tort of abuse of process are:[60]

(a) the use of illegal process;

(b) an order to accomplish an ulterior process;

(c) which is the predominant purpose; and

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56 At [149] per Lord Sumption.

57 *Land Securities Plc v Fladgate Fielder* [2009] EWCA Civ 1402, [2010] Ch 467 at [68] per Etherton LJ.

58 At [68].

59 *Kings Security Systems Ltd v King* [2021] EWHC 325 (Ch); *Oei v Yan* [2020] BCCA 214, [2020] BCJ No 1174; *Martin v Norton Rose Fulbright Australia* [2021] FCAFC 216, (2021) 395 ALR 413; and *Paterson v Lepionka & Co Investments Ltd* [2020] NZHC 2184.

60 *Paterson v Lepionka & Co Investments Ltd*, above n 59, at [86]; and *Deliu v Hong* [2013] NZHC 735 at [50].

(d) which causes damage to the plaintiff.

[153] The tort is concerned with the improper use of the court's processes to affect an object outside their legitimate scope.[61]

[154] It is not necessary for a party making a claim based on the tort of abuse of process to establish that the defendant's involvement in court proceedings had no merit or for the defendant to have been unsuccessful in seeking a judgment in those proceedings.[62] Nevertheless, the fact that the QLDC and the Environment Court saw merit in the Hadleys' submissions and tree planting application makes it more likely that the Hadleys' involvement in the various proceedings was for the purpose of obtaining relief available through proceedings.

[155] The steps the Hadleys have taken in court proceedings are steps the Hadleys were entitled to take as a neighbour with genuine concerns as to Waterfall Park's attempts to obtain a rezoning of the Waterfall Park property and its planting of trees in a manner that did not comply with the relevant QLDC District Plan.

[156] To succeed with its claim as to the tort of abuse of process, Waterfall Park has to be able to put in evidence the Hadleys' requirement for Waterfall Park to pay them a facilitation fee as part of a settlement of all proceedings they were involved in. The necessity for that evidence was apparent from the pleadings in the original statement of claim, was confirmed by the proposed pleadings in the draft amended statement of claim and acknowledged in the interlocutory application for orders disallowing privilege. In his affidavit, Mr Meehan said Waterfall Park was seeking the lifting of privilege so it could succeed in the claim it had made.

[157] I have ruled that this evidence is privileged, so is not available to Waterfall Park. On that basis, Waterfall Park's claim against the Hadleys for abuse of process has no prospect of success.

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61 *Paterson v Lepionka & Co Investments Ltd*, above n 59, at [87]; *Robinson v Whangarei Heads Enterprises Ltd* [2015] NZHC 1147, [2015] 3 NZLR 734, at [30]; and *Williams v Spautz*, above n 55, at 645.

62 *Paterson v Lepionka & Co Investments Ltd*, above n 59, at [87]; *Robinson v Whangarei Heads Enterprises Ltd*, above n 61, at [30].

[158] Even if evidence as to the Hadleys' requirement for a facilitation fee was admissible, it would not be enough to establish that the Hadleys' engagement in the various proceedings over the Proposed District Plan and the tree planting was for the purpose of obtaining a financial payment from Waterfall Park. At the time they sought such a payment, it was in conjunction with the Hadleys and others having a continuing concern as to the nature and scope of Waterfall Park's proposed development and seeking to limit the way that development could detract from the visual amenity values and landscape associated with the existing rural zoning for the Ayrburn land.

[159] If Waterfall Park was able to establish that the Hadleys' involvement in various proceedings had been, in part, to obtain some financial recompense in return for their consenting to, or at least not opposing, what Waterfall Park was seeking, that would not be enough to establish that they would be liable to Waterfall Park in tort for abuse of process.

[160] I accept the submission for the Hadleys that the pursuit, via negotiation, of financial recompense not available within the scope of the proceeding is not an ulterior or collateral purpose as contemplated with the tort of abuse of process. The tort is not concerned with every advantage sought or obtained by a litigant which is beyond the Court's power to grant.

[161] I accept the submission that, to succeed, Waterfall Park would have to establish that the Hadleys were continuing to pursue an ulterior purpose unrelated to the subject matter of the litigation and, but for that ulterior purpose, they would not have commenced their participation in the various proceedings complained of or maintained their continuing involvement.[63]

[162] In *Robinson v Whangarei Heads Enterprises Ltd*, Gilbert J noted, with approval, the judgment of the majority of the High Court of Australia in *Williams v Spautz* where he said "[t]he majority noted that proceedings might properly be pursued

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63 *Ullrich v Ullrich* (1996) 10 PRNZ 253 (HC) at 258; *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 (CA) at 503; *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*, above n 55, at [153] per Lord Sumption; and *Land Securities Plc v Fladgate Fielder*, above n 57, at [73] per Etherton LJ.

if the immediate object of them is desired, albeit it as a step towards achieving some other end".[64]

[163] In *Land Securities Plc v Fladgate Fielder*, Etherton LJ extensively considered a number of judgments dealing with the tort of abuse of process. He said:[65]

> What, in my judgment, emerges clearly from the authorities is that the tort is not committed by a person who institutes proceedings with a genuine interest in, and an intention to secure, their successful outcome, even if the claimant's motives are mixed and they hope that they may also achieve an objective not itself within the scope of the proceedings.

[164] There is no evidence to indicate the Hadleys' involvement in the relevant civil proceedings was not for the purpose of maintaining and/or protecting the rural zoning of the Ayrburn land, an outcome and relief which was within the scope of the proceedings to which they were a party.

[165] I have also not been satisfied that Waterfall Park has a seriously arguable case that, even if there had been an abuse of process, it has suffered a loss through a diminution in the value of the Ayrburn land. To have any prospect of succeeding with that aspect of its claim, Waterfall Park would have to establish that, but for the Hadleys' submissions in opposition to their proposed development, the zoning of the Ayrburn land would have been changed to permit Waterfall Park's various development plans. The evidence before me does not satisfy me that Waterfall Park has even a seriously arguable case in that regard.

[166] Waterfall Park did not either plead or provide any evidence as to the precise basis on which it says it would have been able to obtain the consents or plan changes required for it to be able to develop the Ayrburn land so as to significantly increase its value.

[167] As detailed earlier in this judgment, there were other parties in the mediation over the PDP appeal who disagreed with Waterfall Park on material matters with which Waterfall Park needed to reach agreement. Further, as noted by Judge Hassan in the

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64 *Robinson v Whangarei Heads Enterprises Ltd*, above n 61, at [40], citing *Williams v Spautz*, above n 55, at 646.

65 *Land Securities Plc v Fladgate Fielder*, above n 57, at [73] per Etherton LJ.

tree planting proceedings judgment, the Ayrburn land is currently located in an area described as having a low absorption capacity for additional development.[66]

[168] In the Environment Court decision for the tree planting proceedings, Judge Hassan referred to a submission from Waterfall Park's counsel, Mr Goldsmith, that the Ayrburn land:[67]

> … presently has very limited capacity to be developed for residential activity. Unless it is rezoned as [Waterfall Park] seeks, its future potential would be largely confined to farming usage." He points out that Waterfall Park "… faces significant opposition to its rezoning submission, including from QLDC and Otago Regional Council and a number of other submitters. Hence it is far from certain that [Waterfall Park] would realise its rezoning ambitions.

[169] For the above reasons, both separately and cumulatively, the Hadleys have established that Waterfall Park has no prospect of succeeding on its claim again them in tort for abuse of process.

*Breach of alleged good faith obligations in mediation*

[170] Waterfall Park's pleaded second cause of action was that the Hadleys, through their involvement in the various proceedings, were in breach of good faith and the obligation to cooperate in the mediation under the Environment Court's Practice Note as a result of which Waterfall Park says it suffered loss and damage through losing the opportunity to resolve the PDP appeal at mediation.

[171] The Hadleys submit there is no such recognised cause of action. They argue that, for the cause of action as pleaded to be available, Waterfall Park must establish that the Environment Court's Practice Note gives rise to enforceable duty against the Hadleys in respect of which damages can be awarded.

[172] I accept there is no recognised cause of action as asserted by Waterfall Park in its statement of claim. Obligations to cooperate or act in good faith may be express or implied terms in contract, for instance in insurance contracts.

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66 *Hadley v Waterfall Park Developments Ltd*, above n 19, at [44].
67 *Hadley v Waterfall Park Developments Ltd*, above n 19, at [36].

[173] Here, it is not pleaded that the Hadleys were, by contract, bound to negotiate in good faith with Waterfall Park in the Environment Court directed mediation.

[174] It was submitted for Waterfall Park that the binding protocols in the Environment Court's Practice Note impose an obligation on the parties to cooperate in good faith with the mediator and the other parties in attempting to settle the dispute and an obligation to actively and constructively assist the mediation process by genuinely participating in it. It was submitted that the nature of these obligations:

> … are in substance the same as contractual obligations that would apply under the customary mediation agreement that would have been put in place had this mediation occurred other than as an Environment Court ordered mediation.

[175] Mr Colson however acknowledged that this cause of action "to the extent it relies on deemed obligations accepted pursuant to the Environment Court's Practice Note rather than an express bilateral contract, is potentially novel".

[176] It was submitted for the Hadleys that, for this cause of action to lie, Waterfall Park must establish that the Environment Court's Practice Note gives rise to an enforceable duty against the Hadleys at the suit of the other party to the litigation, in respect of which damages can be awarded.

[177] It was submitted for the Hadleys that practice notes are the means by which a court controls its own processes. They are only guidelines and do not operate to give rise to a legitimate expectation that they will be followed, even against the court itself.[68]

[178] It was submitted the practice note is not even secondary legislation and therefore does not impose a statutory duty. Even if a practice note were to be treated as akin to legislation, the policy considerations which would count against the imposition of a statutory duty would count against the imposition of an obligation.

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[68] *Karori Golf Club v Wellington City Council* EnvC Wellington W24/2006, 24 March 2006 at [24]; and *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 (HC) at [21].

[179] There are compelling policy reasons against my holding that, through a novel cause of action, parties could be liable in damages for a breach of a duty to negotiate in good faith in a mediation. Courts, including the Environment Court, recognise the way in which parties and the interests of justice generally can benefit from the parties being given the opportunity to resolve a dispute by agreement, potentially through an outcome which would not be available if the dispute had to be resolved through a judgment from the Court, with all the associated costs and risks. Parties would be seriously deterred from participating in such a process if they had to be advised that the law would allow another party to such a mediation to sue for damages on the basis another party had, in rejecting a proposal, been in breach of an obligation to negotiate in good faith.

[180] I can however deal with the pleaded second cause of action without deciding whether the cause of action is available.

[181] For Waterfall Park to succeed with such a claim, it would have to be able to present relevant evidence as to what happened at the Environment Court mediation. In accordance with the Environment Court's Practice Note, everything that occurred at the mediation was confidential and privileged.[69] I have upheld that privilege. Waterfall Park thus has no evidence available to support this cause of action.

[182] Even if such privilege had been disallowed, I would have found there was no evidence available to Waterfall Park to support this pleaded claim. No agreement was reached at the mediation as to a matter crucial to the participating parties and Waterfall Park had said it would not move from the position it had put forward. Other parties would not move from the position they had arrived at. The parties had demonstrated to the mediator that they were unable to reach agreement. It was the mediator who then ended the mediation. There was no evidence that the Hadleys or other parties who had supported the Hadleys' position failed to participate in the mediation in good faith.

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69 Environment Court of New Zealand Practice Note 2014, appendix 2 cl 8.

*The Hadleys' application to strike out Waterfall Park's statement of claim as an abuse of process*

[183] The Hadleys also asked for the Court to strike out Waterfall Park's statement of claim on the basis it was an abuse of process. That application was made on the basis the subject of Waterfall Park's claim is or was already at issue in other proceedings, being:

(a) the encumbrance arbitration (initiated by Waterfall Park);

(b) the Tree Planting appeal (brought by Waterfall Park);

(c) the PDP appeal (initiated by Waterfall Park); and

(d) the subdivision appeal (initiated by Waterfall Park).

[184] The Hadleys submitted Waterfall Park's claims in these civil proceedings are an abuse of process because:

(a) the relief sought, being damages, was also being sought in the encumbrance arbitration;

(b) the claims are a collateral attack on the decision of the Environment Court in the tree planting proceedings; and

(c) the claims' predominant purpose was and is to coerce the Hadleys into withdrawing their opposition to Waterfall Park's PDP appeal, subdivision appeal, tree proceedings appeal and Waterfall Park's claim in the encumbrance arbitration.

[185] Waterfall Park opposed the application for strike out for abuse of process. It argued it has legitimate claims for loss caused by the Hadleys and that its claims do not seek to usurp other courts' decision-making. Waterfall Park relies on the content of the communications subject to its application to disallow privilege to prove its claims.

[186] Through Mr Asher's arbitration award, Waterfall Park must accept that the Hadleys' submission on the Proposed District Plan and their actions in commencing

the tree planting proceedings were not in breach of the encumbrance over the Hadleys' land. It is only as a result of the Hadleys' stipulation for a facilitation fee in privileged settlement negotiations that Waterfall Park contends it would be an abuse of proceedings for the Hadleys to remain as a party opposing the PDP and subdivision appeals in the Environment Court.

[187] With the breakdown in settlement negotiations, Waterfall Park is free to pursue in the Environment Court the relief it seeks on its PDP and subdivision appeals. There has been nothing stopping Waterfall Park from seeking whatever relief the Environment Court considers appropriate on the PDP and subdivision appeals since settlement negotiations ended in May 2021.

[188] On my assessment of all the evidence I have referred to, I find that Waterfall Park's claim against the Hadleys, filed in August 2021, both as to the causes of action pleaded and the claim for damages of $7.26 million and $7.1 million, was to deter the Hadleys from exercising the rights they had to be heard in the PDP and subdivision appeal proceedings before the Environment Court and on the tree planting appeal to the High Court.

[189] To adopt the phrase used by Etherton LJ in *Land Securities Plc v Fladgate Fielder*, the civil proceedings brought by Waterfall Park are an instance of parallel litigation to deter the Hadleys from honestly exercising the rights they have as parties genuinely interested in the issues which are before the Court in other proceedings to which they effectively are respondents.[70]

[190] I consider the civil proceedings do involve the misuse of the Court's process. As Moore-Bick LJ said in *Land Securities Plc v Fladgate Fielder*, "in general, people should be free to take action to vindicate their rights without facing the threat of collateral proceedings".[71] In *Williams v Spautz*, the majority of the Australian High Court adopted, as a correct statement of principle, Lord Evershed MR's statement in judgment for the English Court of Appeal in *Re Majory*:[72]

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70 *Land Securities Plc v Fladgate Fielder*, above n 57, at [68].
71 At [68].
72 *Re Majory* [1955] Ch 600 (CA) at 623-624, as cited in *Williams v Spautz*, above n 55, at 648.

> … that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.

[191] As stated by the authors of *Todd on Torts*, the general principles upon which a court may act to stay a proceeding for abuse of process were explained by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*:[73]

> [This case concerns] the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

[192] On my consideration of all the evidence put before me, I am satisfied that Waterfall Park has brought these civil proceedings not to seek damages for a loss they can seriously argue the Hadleys are liable. I am satisfied they brought the claim to impose on the Hadleys the burden and costs of having to defend a claim for damages in excess of $7 million. I am satisfied Waterfall Park did that to deter the Hadleys from continuing to oppose Waterfall Park's attempt, through their appeals, to obtain relief from the Environment Court which would allow Waterfall Park to develop the Ayrburn land in the way it wants to. I am satisfied that is Waterfall Park's ulterior and predominant purpose of the civil proceedings.

[193] On that further ground, the Hadleys are entitled to an order striking out Waterfall Park's statement of claim.

[194] Had I not made such orders striking out Waterfall Park's claim, I would have held that the Hadleys were entitled to summary judgment against Waterfall Park. The Hadleys have established that Waterfall Park's claims have no prospect of success.

[195] I have made those determinations based on evidence which has not been in dispute and as to issues which did not require determination at trial.

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[73] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536, as cited in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 1068.

**Costs**

[196] In submissions for the Hadleys, Mr Casey said they would be seeking indemnity costs. Unless agreement is reached over those, counsel for the Hadleys is to file a memorandum seeking costs by 30 September 2022. Waterfall Park is to file its response three weeks after receiving the Hadleys' memorandum. The Hadleys may file a memorandum in reply within two weeks of receiving Waterfall Park's memorandum. The memoranda, exclusive of any necessary annexures, are to be no longer than seven pages.

[197] If required, I will determine costs on the papers.

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