IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2013-404-001504
[2019] NZHC 1459

IN THE MATTER	of Botany Downs Secondary College
BETWEEN	MINISTER OF EDUCATION First Plaintiff
	SECRETARY FOR EDUCATION Second Plaintiff
	BOARD OF TRUSTEES OF BOTANY DOWNS SECONDARY COLLEGE Third Plaintiff
AND	H CONSTRUCTION NORTH ISLAND LIMITED (IN RECEIVERSHIP AND LIQUIDATION) Original Defendant

.../cont over

Hearing:	10 June 2019
Counsel:	MT Davies, WR Potter and BS Rorrison for Plaintiffs AS Ross QC and JEM Lethbridge for Defendant
Judgment:	26 June 2019

JUDGMENT OF DOWNS J

This judgment was delivered by me on 26 June 2019 at 10.00 am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
Meredith Connell, Auckland.
Martelli McKegg, Auckland.
AS Ross QC, Auckland.

McCONNELL LIMITED
First Defendant (non-party costs)

DAVID ARNOT WILLIAMSON McCONNELL
Second Defendant (non-party costs)

JOHN ARNOT WILLIAMSON McCONNELL
Third Defendant (non-party costs)

The issues

[1] Non-party costs are exceptional. They are awarded only when it is just to do so, and when "something more" about the non-party's conduct warrants costs.[1] The plaintiffs contend McConnell Ltd[2] and two of its directors, David and John McConnell, should pay non-party costs.

[2] McConnell is the ultimate parent of H Construction North Island Ltd, formerly known as Hawkins Construction North Island Ltd, or Hawkins for short. Hawkins built the buildings comprising Botany Downs Secondary College.[3] They leak. After a four-week trial, I found Hawkins liable for almost $13.5 million, "the amount necessary to repair the School".[4] Ten days later, Hawkins was placed in receivership. Within a month of my judgment, Hawkins went into voluntary liquidation.

[3] The plaintiffs seek $1,485,556.77 from the defendants: $801,548 costs and $684,008.77 disbursements. The defendants accept Hawkins would ordinarily be liable for the disbursements and $285,000 costs. They contend the $801,548 figure is grossly inflated. Much turns on whether costs should be increased because Hawkins rejected a settlement offer; unreasonably sought to adjourn the trial; or both. The defendants also contend *they* are not liable for the plaintiffs' costs and disbursements. They submit the "something more" element required for non-party costs is missing.

[4] So, two issues arise. What is the correct costs figure? And, are the defendants liable for the plaintiffs' costs and disbursements? An unusual feature informing both is the availability of Hawkins' own legal advice: the liquidators waived privilege over this material and it was adduced, without objection.

[5] Knowledge of my earlier judgment is important—and assumed.

What is the correct costs figure?

[6] Some less significant aspects first.

---

1 *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452 at [16].
2 McConnell.
3 The School.
4 *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871 at [336].

[7] The plaintiffs submit the nature of the case warranted four lawyers: two seniors and two juniors. They note, as I have, the trial took a month. They also note the claim was for $17 million, the parties called hosts of expert and lay witnesses, the electronic bundle required maintenance, and several lawyers appeared for each side. In short, the plaintiffs contend this was a big case.

[8] I accept the trial was significant but go no further. Yes, there was a lot of evidence and much was at stake, but this is so of many High Court trials. And, while a multiplicity of issues arose, the case was not complex. Scale costs exist to promote certainty in litigation. Departures from scale should be predictable. If they are not, lawyers and their clients suffer because litigation risk and cost become ever more difficult to manage. One senior and one junior lawyer should be able to conduct a case of this size and nature: a substantial but sadly unremarkable leaky building claim involving several similar causes of action, and only one defendant. That the plaintiffs (and Hawkins) chose to have more lawyers does not mean this should be reflected in costs.

[9] Another point influences my thinking. Experience suggests trials once presented by two lawyers are now presented by a team. Bundles of documents routinely extend to thousands of pages, even though key documents are few. Briefs of evidence are often more like books. And so on. Over-litigation may reflect client expectation or pressure, or other factors. Scale costs presuppose no such influences.

[10] The plaintiffs also contend they should have costs for four lawyers because Hawkins changed lawyers late, and this affected the timetable for filing evidence in reply. I return to this topic later. For the moment, it is sufficient to observe this aspect is better addressed another way.

[11] It is common ground preparation of briefs of evidence and trial preparation should attract 2C categorisation. Each provides five days' preparation. The plaintiffs

contend they should have 50 days' preparation for briefs and 40 days' trial preparation on the basis their time substantially, and reasonably, exceeded the 2C datum.[5] The defendants argue this is indulgent; indeed, a "torturing" of the scale.

[12] Some adjustment is required. The plaintiffs called eight experts and seven lay witnesses. Evidence from the former was detailed. And, technical. The alleged defects affected most of the School. More time was reasonably required. In *Body Corporate 90247 v Wellington City Council*, Ronald Young J allowed 30 days' preparation for briefs of evidence and 10 days' trial preparation.[6] That was a leaky building case too, albeit one afflicted by "factual and legal complexities [which] could not have been anticipated … when the proceedings were [first] categorised".[7]

[13] That said, 20 days' preparation for briefs is sufficient; likewise, 10 days' preparation for trial. Again, this case was fact-heavy; not legally complex; and departures from scale must remain predictable.

[14] Hawkins sought a late adjournment. Whata J declined it.[8] The Judge also declined to review a decision of Associate Judge Bell, before whom Hawkins unsuccessfully pursued several late applications.[9] The defendants acknowledge these should attract 2B costs.[10] The plaintiffs contend 2C is the correct categorisation. I consider 2B adequate given the evidence and submissions advanced by the plaintiffs on these applications.

[15] All of which brings me to the real contest between the plaintiffs and defendants in relation to the amount claimed: whether it should be higher because Hawkins rejected a settlement offer;[11] unreasonably sought a late adjournment of the trial;[12] or both. The plaintiffs contend these aspects, taken together, justify an increase of 50 percent for steps from September 2017. More background is necessary.

---

5 High Court Rules 2016, r 14.6(3)(a).
6 *Body Corporate 90247 v Wellington City Council* [2014] NZHC 962, (2014) 21 PRNZ 821.
7 At [16].
8 *Minister of Education v H Construction North Island Ltd* [2017] NZHC 3228.
9 *Minister of Education v H Construction North Island Ltd* [2018] NZHC 20.
10 Mr Ross QC responsibly acknowledged as much at the hearing.
11 Costs may be increased if a party fails, without reasonable justification, to accept a settlement offer; High Court Rules, r 14.6(3)(b)(v).
12 Costs may also be increased if a party takes an unnecessary step; r 14.6(3)(b)(ii).

[16] By late 2017, the plaintiffs' claim was more than four years old. It had been filed March 2013. Inactivity characterised the first two years of litigation. Indeed, Hawkins did not then have lawyers. Directions were given to facilitate settlement. In March 2015, the plaintiffs filed an amended claim. Hawkins instructed lawyers. In May 2015, it filed a statement of defence. A fixture was allocated, and later vacated to allow mediation. This failed. A new fixture was set; four weeks beginning 12 February 2018—the trial before me. In September 2017, Hawkins instructed new lawyers, Kensington Swan. Related history is helpfully recorded by Whata J:[13]

> In September 2017, the defendant instructed new lawyers, Kensington Swan. In a telephone conference on 21 September 2017, Associate Judge Bell directed a face-to-face conference on 29 September. On 27 September 2017, the defendant's new lawyers wrote to the plaintiffs' lawyers, Meredith Connell, requesting particulars of the third amended statement of claim. On 29 September 2017 Associate Judge Bell directed the plaintiffs to file and serve a new statement of claim by 6 October 2017, the defendant to file and serve a new statement of defence by 13 October 2017, and any reply by the plaintiffs by 20 October. Associate Judge Bell also made directions for a conference on 19 October 2017 to deal with any outstanding pleadings questions. He also gave amended timetabling directions through to trial, which maintained the fixture for 12 February 2018. Finally, he encouraged information-sharing and directed the parties to visit the school with experts.
>
> The plaintiffs filed a fourth amended statement of claim on 6 October 2017, but the defendant says one schedule was served late. The defendant served a statement of defence on 16 October 2017. The parties, their lawyers and experts visited the school for four hours on 12 October 2017.
>
> In the telephone conference on 21 September 2017, counsel for the defendant was not able to name any experts instructed for the defendant. By the time of the visit on 12 October 2017, it had two experts in attendance.
>
> In his 8th Case Management Conference Minute of 25 October 2017, Associate Judge Bell addressed the defendant's request for further particulars. In doing so, he observed it had not sought an adjournment of the 12 February 2018 fixture, and dealt with the request for a more explicit pleading on the basis the case would go ahead on that date. He advised the defendant to file and serve a formal application and seek a prompt hearing if it wished to seek an adjournment. Overall, he was of the view the defendant had made "its pitch too late", and that it was not at any significant disadvantage without further particulars being ordered.
>
> The only further development of note is on 5 November 2017, Thomas Wutzler, who was engaged by the defendant on 29 September 2017 to act as an expert witness, withdrew on the basis of a possible conflict of interest.

---

13 *Minister of Education v H Construction North Island Ltd*, above n 8, at [12]–[16] (footnote omitted).

[17] On 28 November 2017, Hawkins sought an adjournment. The trial was then only two and a half months away (including the Christmas vacation). Hawkins argued it would suffer prejudice if the trial went ahead because the plaintiffs' claim was "vague and unclear" and, it said, lacking "particulars". Hawkins also argued the plaintiffs' claim had expanded to encompass new allegations and defects. In short, Hawkins argued ambush. Hawkins sought review of Associate Judge Bell's decision to decline particulars on the same basis.

[18] Whata J dismissed both applications. The Judge considered Hawkins' "difficulties [were] largely of its own making".[14] He described its decision to appoint new lawyers as "unexplained", and risk of prejudice as "largely self-induced".[15] The Judge held the plaintiffs would be "substantially prejudiced by any delay", noting they had "expended considerable resource to comply with the Court's timetabling orders".[16] The Judge also held there was "no real risk the defendant may face … an ambush if further particulars are not provided".[17] Rather, Hawkins had been given sufficient information "to enable it to take steps to respond".[18]

[19] All this occurred while the parties ought to have been preparing earnestly for trial, including by exchanging evidence. Despite these distractions, the plaintiffs met their obligation to serve evidence by early November 2017. They also offered to settle. On 28 September 2017, 27 November 2017 and 3 February 2018, the plaintiffs offered to settle for $7.1 million. Hawkins declined all; its highest counter-offer was $2.1 million.[19] As will be recalled, I found Hawkins liable for almost $13.5 million.

[20] The defendants submit none of this justifies increased costs, much less 50 percent. They note reasonableness in relation to the rejection of a settlement offer must be assessed at that time—not with hindsight. They observe the plaintiffs' claim oscillated between $25 and $17 million, leading Hawkins to reasonably believe it was inflated. They note Hawkins had little money, a topic better addressed later. And, they argue the plaintiffs' initial offers were made while Hawkins was distracted by its

---

14 *Minister of Education v H Construction North Island Ltd*, above n 8, at [54].
15 At [54].
16 At [55].
17 At [100](b).
18 At [100](a).
19 Made 6 November 2017.

change of lawyers and missing experts, thereby mitigating the lateness of its applications.

[21] I am satisfied an increase is warranted, and of the magnitude sought by the plaintiffs. I conclude Hawkins failed, without reasonable justification, to accept the plaintiffs' settlement offer. I also conclude Hawkins took an unnecessary step in seeking an adjournment in late 2017. Six reasons unite these conclusions.

[22] First, the most important aspect of the plaintiffs' claim concerned the School's roofs.[20] The plaintiffs claimed Hawkins' workmanship on these failed to comply with the Building Code and would cost more than $11 million to fix.[21] Hawkins should have appreciated this aspect of the claim would likely be established:

(a) Lay evidence served November 2017 revealed "constant" and "extensive leaking" since 2010. The same evidence referred to the regular use of buckets—indoors—to collect rainwater, and collapse of ceiling tiles from water ingress.[22] Hawkins did not contest this evidence at trial. I later likened it to an "elephant", such was its obviousness and importance.[23]

(b) Expert evidence, also served November 2017, identified many examples of poor workmanship including over-tightened fixings, inadequate fixings, poorly formed roof edges, poorly formed penetrations, and inadequate roof pitch. Having built the roofs, Hawkins might have been thought familiar with their condition.

(c) Other served evidence implied Hawkins was in serious jeopardy on this issue. Dr Robin Wakeling is a microbiologist, and, as Hawkins' expert later accepted, New Zealand's leading expert on wood deterioration in leaky buildings. Dr Wakeling's brief foreshadowed wood samples

---

20 By roofs, I include the gutters.

21 I found the roofs would cost approximately $11 million to fix. This did not include the substantial cost of temporary accommodation, for which I also found Hawkins liable.

22 Evidence of Ms Karen Binsden, the School's principal.

23 *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871 at [13].

from the School exhibiting soft rot, signs of stachybotrys and "unarguable" evidence of an unacceptably high moisture level.

[23] Second, Hawkins own advisors counselled settlement, and had done so since late 2015. Mr Brian Duffy is the director of Contrado Consulting Ltd, and a construction expert. Hawkins engaged him in 2015. On 29 October 2015, Mr Duffy informed Hawkins' lawyers his "initial rough assessment" of liability was $3.5 million, a figure he described as having been "badly received!". Mr Duffy described an alternative figure of $7.8 million as "perhaps a little high but … difficult to reduce a lot unless we win the majority of our arguments". The next day, Mr Duffy emailed Hawkins' lawyers, saying, "there are enough deficient construction details for virtually every element of the claim [so] that Hawkins has inevitably quite significant liability that … will be hard to deflect".[24] Hawkins did not call Mr Duffy as a witness.

[24] Fast forward to 30 January 2018, less than two weeks before trial. Mr Cash, the Kensington Swan partner acting for Hawkins, emailed the company that morning. Mr Cash said "a good result"—which he described as "a win" for Hawkins—involved liability "at or around $3.2 million plus interest over several years and costs". Mr Cash continued: there is "a substantial risk that the sum could be much greater given the starting point that there are several basic workmanship issues at the School and in particular in relation to the roof".

[25] On 2 February 2018, Mr Cash wrote again. He said Hawkins should settle "between $4-5 million", noting it faced "a worse (and potentially much worse) outcome".

[26] On 1 March 2018—hence during trial—Mr Cash told his client the outcome looked bleaker. He described the prospect of a bad judgment as "likely". Mr Cash expressed concern "the directors should be aware of this in case it has any impact on settlement strategy".

---

[24] Mr Duffy advised Hawkins in May 2017 about the scope of repairs proposed by the plaintiffs' experts.

[27] Third, as will be apparent, Hawkins was well-advised. But, Hawkins did not like the advice it received. Email reveal Hawkins' apparently intractable view the plaintiffs' claim had serious flaws, a related view the Ministry of Education was adopting "a scorched earth policy" in relation to its leaky building litigation, and a belief that somehow making the Ministry's approach "an industry issue" would change the litigation calculus.[25]

[28] Fourth, Hawkins' adjournment application was not merely unsuccessful. It was unnecessary. Internal email demonstrate the application was part of a stratagem to improve Hawkins' prospect of settlement on terms favourable to it. Three pieces of correspondence are sufficient to make the point.

[29] On 10 September 2017, Hawkins told Kensington Swan to request "a delay to the court case". Hawkins wanted more time to achieve "a commercial settlement", which it saw as frustrated by poor Ministry "behaviour". On 27 September 2017, Mr Cash reported he was "looking to set up a potential application to adjourn the … trial". "Discovery complaints" were cited as a possible basis for "groundwork" to adjourn the trial. So too complaints about "issues with the Ministry's claim". On 19 December 2017, Mr Cash informed Hawkins the application had failed. So too the application to review Associate Judge Bell's decision, which Mr Cash described as having been "pursued to help bolster the adjournment application".

[30] Noticeably absent from the internal correspondence are concerns about ambush, the gravamen of the application advanced to Whata J. The defendants submit the application was reasonable, noting Whata J did not criticise it. The answer to this submission is that the Judge could not have known of this correspondence. If he had, it is most unlikely his Honour would have written a 108-paragraph decision carefully addressing the alleged prejudice Hawkins would suffer if the trial proceeded, all on the eve of the Christmas vacation, and instead dismissed the application as animated by ulterior concern.

---

[25] On 27 September 2017, Mr Cash told Hawkins its "industry-related agitation to the Ministry's … leaky building claims" would not affect "resolution of the current leaky schools proceedings".

[31] Fifth, the adjournment application placed significant pressure on the plaintiffs because of the timetable for exchanging evidence, a matter commented on by Whata J (see [18]) and foreshadowed at [10]). As observed earlier, this occurred while the parties ought to have been preparing earnestly for trial.

[32] Sixth, after I released my judgment, Mr Cash told Hawkins the Ministry "has a reasonable argument … it should be awarded a percentage uplift on the costs it was entitled to for the steps it took post the Calderbank letter". Fifty percent was described as "likely the maximum". Again, Hawkins was well-advised.

[33] This is not to overlook the points Hawkins raises or the affidavit of David McConnell, in which he says Hawkins and the defendants acted reasonably. No significance attaches to the fact the plaintiffs' claim oscillated between $17 and $25 million between 2017 and trial.[26] The amount sought by a plaintiff depends on information, and information can change, especially in leaky building cases. Hawkins was not distracted by its change of lawyers or availability or otherwise of experts. Again, Hawkins was not interested in settlement at a realistic level; it was convinced of the correctness of its position.[27]

[34] I increase costs by 50 percent on all steps after 28 September 2017, the date of the plaintiffs' first Calderbank offer. This captures the unnecessary adjournment application; it was filed exactly two months later.

[35] This produces a costs figure somewhere between those advanced by the parties of $416,118 (plus the undisputed disbursements of $684,008.77).

Are the defendants liable for this sum?

[36] More context is necessary, first factual, then legal.

[37] Hawkins sits at the bottom of a chain of companies, with McConnell at the top:

---

[26] The initial claim was more modest. It grew as buildings were added (with defects of the same nature as the buildings in the original claim). By 2017, the claim was essentially that tried.

[27] On 19 November 2017, Hawkins sent a long email to Mr Cash describing its own counter-offer as "excessive" and identifying a series of alleged deficiencies with the plaintiffs' case.

Company	Directors:
McConnell Ltd	David and John McConnell, and Mr Arthur Young
Hawkins Group Ltd (now Orange H Group Ltd (in rec) (in liq))	David and John McConnell, and Mr Arthur Young
Hawkins Construction Group Ltd (now H Construction Group Ltd (in rec) (in liq))	
Hawkins Construction North Island Group Ltd (now H Construction North Island Group Ltd (in rec) (in liq))	
Hawkins—the company that built the School (now H Construction North Island Ltd (in rec) (in liq))	David and John McConnell

[38] Hawkins had long been winding down. From 2012, it entered no new contracts and began to shed operations. By 31 March 2015, Hawkins held cash of only $116,000. A year earlier, it held $8.7 million. Hawkins continued to report assets. Most, perhaps all, involved related companies. In March 2017, other companies within the group were sold to Downer New Zealand Ltd for $80 million. Not so Hawkins. At 31 March that year, Hawkins' draft financial statements identified cash of only $105,000 and net assets of $45 million. All assets were receivable from related companies. And, Hawkins had no staff. So, Hawkins was cash poor but asset rich, at least on paper. It bears repeating it was no longer doing anything. I was told Hawkins did not even have a bank account.

[39] Hawkins Group Ltd or HGL, the company second from the top, paid Hawkins' legal fees. HGL did so because Hawkins could not, and because HGL performed a "treasury function" for this group of companies.

[40] HGL struggled to pay. It fell behind in meeting Hawkins' legal fees from at least November 2017. On 30 January 2018, Mr Cash emailed Hawkins, noting outstanding fees were "significant, and now cover January, December and

November". Mr Cash observed Hawkins had made "several comments about cashflow issues affecting the whole group", and thanked Hawkins for confirming "an arrangement will be put in place for McConnell Limited to meet all costs associated with the trial". Mr Cash sought "more information about the arrangement" and McConnell's "ability … to pay the fees". Other correspondence that day emphasised Kensington Swan's Chief Executive Officer wanted outstanding accounts paid promptly.

[41] On 7 February 2018, Mr Cash told Hawkins that Kensington Swan wanted "its fee issues sorted by *tomorrow*, including payment of the outstanding December invoices".[28] By then, the firm was owed "just under $700,000".

[42] On 12 and 15 February 2018, McConnell guaranteed payment of Hawkins' "future" legal fees and disbursements, and those "presently unpaid". The guarantee was not called on. However, it is beyond doubt Kensington Swan would have withdrawn their services had McConnell not guaranteed payment. Had that happened, Hawkins would have been unrepresented at trial.

[43] As observed at the outset, costs against non-parties are exceptional.[29] This is especially true of pure funders.[30] If a non-party funds a case and controls or benefits from it, "justice will ordinarily require" they pay costs.[31] This because he, she or it is regarded as the "real party".[32] New Zealand cases emphasise the need for "something more" by the non-party, otherwise the rule could be overbroad in an economy populated by smaller, closely held companies, especially when a director (and owner) uses her or his own capital to fund litigation their insolvent company could not otherwise conduct.[33] The "something other" element is not closed. Impropriety suffices but is unnecessary.[34]

---

28 Emphasis added.
29 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [25](1).
30 At [25](2).
31 At [25](3).
32 At [25](3).
33 *Kidd v Equity Realty (1995) Ltd*, above n 1, at [14]–[20].
34 At [20].

[44] The plaintiffs contend this element is established in two ways, advanced together and as alternatives. I call these: (a) the security contention; and (b); the broader contention. These are labels only.

The security contention

[45] The plaintiffs argue the defendants benefitted from Hawkins not being placed in liquidation before 4 April 2018, because of improvements to the defendants' position under a general security agreement of two years earlier.

[46] On 4 May 2016, HGL entered a security agreement by which it gained security over existing and future assets of Hawkins. On 2 May 2017, HGL exercised a power under the same agreement to add its parent, McConnell, as a secured creditor. On 7 May 2018, HGL transferred its rights as security trustee to McConnell. These steps improved McConnell's position as a secured party. By 11 May 2018, it was owed $15.9 million.

[47] The plaintiffs maintain the defendants wanted an adjournment, and when it was declined, adopted an unrealistic approach to settlement, all to ensure Hawkins was not placed in liquidation before 4 May 2018. This date has alleged significance because a liquidator's ability to clawback money is enhanced when the impugned transaction occurred within two years of liquidation.[35] The plaintiffs submit this was well known to McConnell's directors, hence that company too. Timing is emphasised. My judgment was issued 1 May 2018; McConnell placed Hawkins in receivership on 11 May 2018. The plaintiffs observe several email contain oblique references to the effect of liquidation on creditors, which should be understood as references to McConnell and the improvement of its position under the general security agreement.

[48] I am not satisfied the security contention is established. Hawkins' refusal to acknowledge the possibility of settlement (on reasonable terms) is traceable to at least October 2015; see [23]. The general security agreement *post-dates* this behaviour; it had not been entered then. The allegation is serious. No piece of internal correspondence or other evidence provides obvious, material support for it.

---

35 See, for example, ss 292 and 293 of the Companies Act 1993.

David McConnell swore an affidavit categorically denying the allegation. The plaintiffs could have cross-examined him. They did not.[36]

The broader contention

[49] The plaintiffs submit the defendants exploited Hawkins' inability to settle at a realistic level while funding a "gold-plated defence", so that, to borrow the phrase of William Young P, the defendants adopted a "heads I win, tails you lose" approach to the litigation.[37]

[50] The defendants resist this contention.[38] They stress the dangers of revisionist history; argue the case is unexceptional; and highlight the awkwardness of Hawkins' position, so too theirs. Hawkins was in "wind-down mode" and facing a very large claim, which it could not necessarily meet because of its financial position. The defendants also emphasise their role as defendants—they did not bring the claim.

[51] I am satisfied the broader contention is established for three reasons, taken together.

[52] First, as observed, Hawkins was not interested in settling at a realistic level. I shall not repeat my earlier reasoning.

[53] Second, Hawkins robustly defended the case at great cost *while* exploiting its possible insolvency. This addresses the defendants' submission Hawkins could not necessarily afford to settle. It is one thing not to be able to afford to do so; it is another to employ possible impecuniosity as a negotiating tactic while being funded to advance this very argument with representation the litigant could not otherwise afford. This lies at the heart of William Young J's observation about adopting a "heads I win, tails you lose approach" to litigation, and is something approaching a moral precept: a litigant should not speak with two tongues. The facts bear this out.

---

36 The plaintiffs objected to the admission of the affidavit on the basis the timetable did not contemplate it, but abandoned their objection at the hearing. Section 92 of the Evidence Act 2006 creates a duty to put the case to a witness.

37 *Kidd v Equity Realty (1995) Ltd*, above n 1, at [20].

38 David McConnell filed an affidavit. So too Mr Geoffrey Hunt, McConnell's Group President. Each essentially said the defendants acted reasonably.

[54] On 5 October 2017 Mr Cash replied to the Ministry's Calderbank offer of 28 September. Mr Cash sought more time for Hawkins to respond, noting among other things, "Our client is in a difficult transition period following the sale of the construction business. It is dealing with the end of various projects and both claims against and by the business." Mr Cash advised Hawkins the letter had been drafted in the hope it "dropped some hints around financial position without saying anything prejudicial".

[55] On 19 January 2018, Hawkins instructed Kensington Swan to stop all preparation for trial. On 23 January, Hawkins told the Ministry "the claim would not be defended and [it] would be liquidated" unless the plaintiffs settled for $500,000. The offer was advanced as a global one for the plaintiffs' claim and two other leaky-school claims against Hawkins. The Ministry quickly rejected it.

[56] On 25 January, the plaintiffs sought urgent clarification of Hawkins' position, noting they were "incurring substantial costs actively preparing for trial". On 1 February, Hawkins told the plaintiffs the claim would be defended. The Ministry repeated the plaintiffs' $7.1 settlement million offer.

[57] On 7 February, Mr Cash wrote to the plaintiffs observing, Hawkins' directors "have been in active engagement with its security holders and funders as to receivership options given its solvency issues should there be a material sum owed to the Ministry". Mr Cash said there was "no commercial rationale" for Hawkins to increase its offer from $500,000 "having regard to the inevitability of receivership and the associated outcomes should the pending trial determine a material sum owed". Mr Cash also said this figure "will greatly exceed any recoveries that the plaintiffs, as an unsecured creditor, will obtain through the receivership and liquidation of Hawkins".

[58] The plaintiffs replied 8 February, questioning how it could be in Hawkins' interests "to incur the expense of a four-week trial in the High Court". Later that day, Mr Cash advised Hawkins the plaintiffs response was unsurprising, "given the mixed messages [Hawkins] has sent around ability to pay and liquidation". Mr Cash said

there was "value" for Hawkins "in avoiding … liquidation"—and encouraged settlement. Again, Hawkins did not accept this advice.

[59] A day later, McConnell told Mr Cash it would guarantee payment of Kensington Swan's legal fees and all disbursements. The guarantee was confirmed in writing on 12 and 15 February. 12 February was the first day of trial.

[60] As observed, Hawkins robustly defended the claim. It called seven experts and five lay witnesses. Trial took a month, with extended sitting hours. On day 10, Hawkins sought leave to file six additional briefs of evidence.[39] Hawkins advanced a suite of affirmative defences. Its closing address filled an Eastlight folder.

[61] From September 2017, Hawkins spent $2.9 million on legal fees and disbursements (including experts). These were met by HGL. But for this and McConnell's guarantee, Hawkins would have been unrepresented at trial.

[62] Third, McConnell authorised Hawkins' approach, at least implicitly, given commonality of directorships. Mr Geoffrey Hunt had "direct oversight" of the litigation. He was employed by HGL until August 2018, and thereafter by McConnell, as "Group President". Mr Hunt was Kensington Swan's primary contact. He liaised directly with the Ministry too.[40] So, Mr Hunt was familiar with detail. Internal correspondence demonstrates Mr Hunt kept the defendants abreast of developments. David McConnell acknowledges as much but says McConnell was a "passive holding company" which "did not get involved with day-to-day matters". It is unnecessary to resolve either aspect. It is clear the defendants knew about material aspects of the litigation, including settlement negotiations; Hawkins' precarious financial position; and HGL's payment of Kensington Swan's fees and disbursements. It is equally clear the defendants supported a trial.

[63] Four sequences are illustrative:

---

39 Five in relation to existing witnesses.

40 Related correspondence was signed "President, McConnell Group".

(a) On 31 October 2017, Mr Hunt emailed Mr Cash. Mr Hunt wanted to know why "have we not joined … the council and architect" as third parties. He said, "we would like" copies of identified reports in relation to the trial. He continued, "We are willing to make an offer of settlement but not quite yet. They want to see the evidence due 3 November … our offer is sitting at $1.5 million". Mr Hunt also said, "we want the adjournment". Mr Hunt's use of "we" and "they" must be references to "David and Arthur", with whom Mr Hunt said he had met in the same email to Mr Cash. As will be recalled, Mr Arthur Young was a director of HGL and McConnell, and David McConnell a director of HGL, McConnell and Hawkins.

(b) On 25 January 2018, Mr Cash advised Mr Hunt of the plaintiffs' request for urgent clarification of Hawkins' position: was it about to be placed in liquidation? (see [55]). Mr Cash encouraged Hawkins to respond "sooner rather than later", noting the Registry had been inquiring about the "prospect of settlement". Mr Cash asked Mr Hunt to consider this when Mr Hunt met "with Arthur". Mr Cash sent this advice by email at 11.15 am. At 11.32 am, Mr Hunt forwarded the email to "Arthur Young" and "David McConnell".

(c) Mr Hunt prepared a "President's" report for HGL dated 9 February. The report must have been given to HGL the same day, in time for its board meeting. The report recorded the plaintiffs' settlement offer of $7.1 million, and Hawkins' "refreshed offer of $0.5 million". It continued, "[r]egrettably the combined legal costs will exceed the repair costs". The report recommended HGL should "[s]upport the Botany trial". HGL's board agreed. Minutes record the presence of Mr Hunt, Mr Young, David and John McConnell, and Mr Michael Wardle, McConnell's Chief Financial Officer.

(d) David McConnell became directly involved with the litigation on the first day of trial. He offered the Ministry $500,000 of "family" money

> to settle. Mr McConnell urged reconsideration with "our practical limitations in mind".

[64] In summary, McConnell authorised Hawkins to vigorously defend a claim that should have been settled; knew HGL was paying Hawkins' legal fees and disbursements because Hawkins could not; was complicit in wielding Hawkins' likely insolvency as a weapon; and guaranteed representation for its subsidiary when Hawkins would otherwise have been unrepresented. In combination, this constitutes the "something other" required for non-party costs to be just.

[65] What then of personal liability of McConnell's directors? The plaintiffs appear to assume if McConnell is liable for non-party costs, so too are David and John McConnell. This assumption might have been well-founded had the security contention been established, because the directors might, on that scenario, have been party to impropriety. However, that contention was not established for reasons explained earlier, foremost of which was lack of evidence.

[66] Establishment of the plaintiffs' broader contention should not result in the directors' personal liability. The directors did not inject any of their own money.[41] And, there is no evidence the directors would benefit personally from eschewing settlement in favour of trial. Non-party costs are confined to McConnell itself.

[67] This leaves one matter. On 25 June 2018, I ordered Hawkins disclose its funding arrangements. The plaintiffs later sought wide-ranging discovery orders in relation to this issue, and this aspect assumed something of a life of its own, including several mentions before the Duty Judge. On 10 October 2018, Fitzgerald J directed the plaintiffs file and serve an expanded discovery application. The defendants opposed that application. But, everyone later agreed it should be determined on the papers. On 14 December 2018, I dismissed the application with this caveat:

> Minutes of board meetings of H Construction Group Ltd; H Construction North Island Ltd; Orange H Group Ltd; and McConnell Ltd between 1 August 2017 and 31 March 2018 in relation to funding of this litigation, including provision of a guarantee by McConnell Ltd, must be discovered.

---

[41] I have not overlooked Mr David McConnell's *offer* of "family" money. The plaintiffs declined it.

[68] I said I would give my reasons when I determined non-party costs. These can be very brief.

[69] Discovery orders in this context stem from implied power.[42] As Ackner LJ said: "Where a power exists to grant a remedy, there must also be inherent in that power, the power to make ancillary orders to make that remedy effective."[43] *Arklow Investments Ltd v MacLean* provides an example.[44] The defendants succeeded on appeal and sought discovery orders in relation to the plaintiffs' funding, in the hope of bringing an application for non-party costs. Fisher J granted these, noting the case was "classically one which would warrant disclosure".[45]

[70] The minutes of the boards described above had obvious relevance. So too the guarantee given by McConnell. The balance of the application risked disproportionate expense, particularly given the quantity of material already provided to the plaintiffs—and delay.

Result

[71] McConnell must pay non-party costs (and disbursements) of $1,100,126.77. The application is dismissed in relation to David and John McConnell.

……..

Downs J

---

42 *Abraham v Thompson* [1997] 4 All ER 362 (CA).
43 *A J Bekhor & Co Ltd v Bilton* [1981] 2 WLR 601 (CA).
44 *Arklow Investments Ltd v MacLean* HC Auckland CP49/97, 19 May 2000.
45 At [22].