IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2023-004-002170
CIV-2023-004-001625
[2024] NZDC 9439

BETWEEN	WING ON SO JENNIE YUK LIN SO PATRICK RICHARD MURRAY As Trustees of the Jenning Family Trust Appellants
AND	BODY CORPORATE 349200 First Respondent
AND	CROCKERS BODY CORPORATE MANAGEMENT LTD Second Respondent

Hearing:	23 April 2024
Appearances:	Mr Ahern for the Appellants Mr Ashley for the First Respondent Ms Tobeck for the Second Respondent
Judgment:	31 May 2024

RESERVED JUDGMENT OF JUDGE DAVID J CLARK

Introduction

[1] The appellants have appealed four decisions of the Tribunal. The decisions dismissed the appellants applications seeking:

(a) Orders for discovery and/or production of documents;

(b) Leave to amend to the appellants claim;

(c) The transfer of the proceedings to the District Court.[1]

[2] The appellants also applied to join further parties[2] to the Tribunal proceedings which was also dismissed by the Tribunal. This decision has not been appealed. Cost orders were however imposed by the Tribunal in respect of the joinder and production of documents applications and the cost orders are also appealed.

[3] All of the decisions appealed are "interlocutory" decisions of the Tribunal. Although there is no formal procedural interlocutory processes in the Tribunal similar to the District Court and High Court,[3] for the purposes of this appeal all counsel referred to the decisions as being "interlocutory decisions". I will do likewise.

Background

[4] Before I do, I summarise the steps which have occurred to date in the Tribunal. The substantive dispute in the Tribunal is yet to be resolved. One of the key concerns for the respondents is the protracted nature of the proceedings, especially given the underpinning policy which sits behind the resolution of disputes is the "expeditious resolution of disputes between landlords and tenants".[4] The respondents say this has not happened and lay the blame at the feet of the appellants. The appellants say such criticism is unwarranted and say the delays need to be seen in context.

[5] The claim was filed in April 2022. It was for a monetary sum of $2,247.50 claiming compensation for the first respondent's "errors and intransigence". Declarations and orders from the Tribunal were also sought, effectively preventing the Body Corporate and/or its individual committee members to refrain from making

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[1] *Wing On So and Ors v Body Corporate 349200 and Ors* 28 August 2023 [2023] NZTT Auckland 9035062 (application for discovery, amend claim and joinder); *Wing On So and Ors v Body Corporate 349200 and Ors* 12 September 2023 [2023] NZTT Auckland 9035062 (costs order); *Wing On So and Ors v Body Corporate 349200 and Ors* 27 October 2023 [2023] NZTT Auckland 9035062 (application for transfer to the District Court).

[2] Being individual committee members of the first defendant.

[3] It is common ground between counsel the Tribunal's jurisdiction and procedure is exercised in accordance with s 85 of the Residential Tenancies Act 1986 where the Tribunal will determine each dispute in accordance with the general principles of law but will not be bound by strict legal rights or obligations or as to legal forms or technicalities.

[4] As found in Section 85(1) Residential Tenancies Act 1986.

decisions; to resign; from being able to act as committee members; or to be re-elected. Many of the orders sought did not come under the jurisdiction of the Tribunal.

[6] When the claim was filed the appellants were unrepresented. The Tribunal ordered particulars of the claim to be filed and postponed the hearing until 28 October 2022. Mr Leishman was engaged by the appellants and filed a full set of particulars, identifying 11 incidences which were alleged, resulting in nine different claims. Some of these incidences included allegations the first respondent had not produced records and documents which were requested.

[7] Over August and September 2022 further claims were added as well as, by memorandum dated 21 September 2022, the appellants clarified they also sought orders against, and therefore wished to join, the second respondent and the individual committee members.

[8] The hearing was scheduled for 28 October 2022. Rather than hearing the substantive issues, the hearing was to focus on the applications for joinder and the production of documents/discovery. The hearing did not proceed as an AGM had recently been held and, at the request of the parties, the Tribunal granted leave for the parties to ascertain whether they were able to reach a settlement following the AGM.

[9] Matters did not settle. A case management conference was convened for 12 May 2023. On 7 May 2023 the appellants filed a further memorandum with the Tribunal making fresh allegations against the first respondent, the second respondent (who was yet to be joined), and the individual committee members.

[10] At a telephone conference of 12 May 2023, the second respondent was joined by consent and the applications for discovery and joinder of the various committee members was again set down for a hearing in August 2023.

[11] In submissions filed for the hearing the specific areas of discovery were further expanded upon as well as further complaints made about the Body Corporate/ individual committee members alleging they had breached the new code of conduct. The appellants therefore sought leave to add these claims.

[12] Three written decisions were issued by the Tribunal on these matters on 28 August 2023 (in relation to joinder, discovery and additional claims); 12 September 2023 (costs) and 27 October 2023 (transfer of proceedings).

Preliminary Issue

[13] A preliminary issue has been raised by the first respondent which is supported by the second respondent. The issue is whether any right of appeal exists in respect of the decisions now appealed. As noted, all were interlocutory decisions and were not dipositive of the substantive dispute(s) which continue between the parties.

[14] Given the determination of this preliminary issues will also determine whether the remaining appeals remain on foot, I will deal firstly with this issue.

The First Respondents Submissions

[15] Section 117(1) provides:

> **117 Appeal to District Court**
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> (1) Subject to subsection (2), any party to any proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in the proceedings may appeal to the District Court against that decision.

[16] Mr Ashley submits the wording of s 117(1) of the Residential Tenancies Act 1986 (the RTA) expressly provides the only decision which may be appealed against is the (final) decision of the Tribunal.

[17] Mr Ashley says the word *"the"* before the words *"decision of the Tribunal in a proceeding"* means there can be only one decision which can be appealed against. Logically this would be the final dispositive decision. If there was an ability to appeal any decision of the Tribunal including an interlocutory one, the word *"a"* would have been used instead of the word *"the"*.

[18] Relying on s 5 of the Interpretation Act 1999, Mr Ashley submits the interpretation of s 117(1) should be read against its "text and in light of its purpose". A literal reading of the section would suggest there is only one decision capable of

being appealed. He submits reference to the surrounding headings of the sections, the sections themselves,[5] their organisation, and the format of the enactment support this position, as does the overall intent and purpose which sits behind the RTA as encapsulated in s 85. This section enables the Tribunal *"to ensure the fair and expeditious resolution of disputes between landlords and tenants"*. This is further supported by s 96(4) where the Tribunal is entitled to regulate its own procedure. If the policy and intent of the RTA to ensure the process is kept "simple" and disputes between landlords and tenants are quickly resolved,[6] allowing parties to have interlocutory matters "bounce back and forth" between the Tribunal and the District Court is inconsistent with this policy.

[19] Mr Ashley also contrasts the language of the RTA with the language and empowering provisions of the District Court Act 2016, the Property (Relationships) Act 1976 and the Senior Courts Act 2016 where these provisions express what type of decisions may be appealed as of right or in which circumstances, (such as the Senior Courts Act) leave is required. He submits unless the RTA expressly provides for the right of an appeal then such a right does not exist.

[20] Acknowledging there is little case authority on point, Mr Ashley refers to the High Court case of *Tihema v Cook.*[7] In this case the Court dismissed an application for an interim injunction restraining the tenant from re-entering into premises where the Tribunal had previously made an order for the possession of the premises in favour of the landlord. The tenants appealed the substantive decision and at the same time filed an application for a stay of proceedings which was initially referred to the Tribunal. The Tribunal refused the application for a stay without hearing from the parties.

[21] A further notice of appeal was filed in the District Court which included an application to stay the proceedings. The District Court Judge minuted the file stating

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[5] See for example s 104 of the RTA with the heading "Decision of Tribunal". The section refers to "The Decision" in the heading as the "final" decision.

[6] *Angelo v Lehr & Ors* [2022] NZHC [3033] [18 November 2022] at [78] where McQueen J confirmed the well-established policy underpinning the RTA is the process should be simple. See also *Ziki Investments (Properties) Ltd v McDonald* [2008] 3 NZLR 417 at [54] and [70].

[7] *Tihema v Cook* HC Christchurch CP239/89 23 June 1989.

there was no right of appeal against the decision of the Tribunal refusing the stay of proceedings.

[22] The District Court's decision was appealed to the High Court under s 119 of the RTA which also sought interim relief. Fraser J noted s 119 of the RTA referred to a right of appeal on a question of law existed if an appellant is dissatisfied with "the" decision of the District Court Judge.

> It is to be noted that the right of appeal under question relates to "the" decision of the District Court Judge, and I think that means the decision of the District Court Judge on the substantive hearing of the appeal. There is no express specific right of appeal against interlocutory orders such as a stay of proceedings as there is, for example, in the District Court's Act itself, which provides for an appeal as a matter of right in certain circumstances, and by leave in other certain circumstances including appeals against interlocutory orders.
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> …
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> I do not consider that I, in this Court, have jurisdiction to grant the interim injunction sought because there is no right of appeal against interlocutory orders for the reasons which I have set out.

[23] Mr Ashley submits, consistent with the analysis undertaken by Fraser J when dealing with interlocutory decisions from the District Court, the same analysis should apply in this instance, namely no appeal exists against such decisions.

[24] In further support of this submission Mr Ashley referred to several District Court judgments which had reached different conclusions on whether a right of appeal existed where the Tribunal had dismissed applications for a rehearing.[8] In *Patterson v Andrews,*[9] His Honour Judge Perkins found there was no jurisdiction to hear the appeal:

> The decision of the Tribunal relating to an application for a rehearing was not "the" decision of the Tribunal, but merely an interlocutory decision preserving the position of the parties pending the final decision.[10]

[25] Accepting *Patterson* and the other cases on this issue are no longer applicable because of the enactment of s 117A of the RTA, Mr Ashley nevertheless urges the

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[8] The matter was unclear until s 117(1A) of the RTA was enacted.
[9] *Patterson v Andrews* DC North Shore, CIV-2007-044-1988, 1 October 2007.
[10] Ibid at [9].

same analysis of the words "the decision" remains relevant for the purposes of the preliminary issue. For the sake of completeness, it should be noted Judge Perkins did refer to two other District Court judgments[11] where contrary views were adopted. In *McMillan*, His Honour Judge Tuohy agreed with *Goston* on the grounds an inability to appeal a decision refusing to grant a rehearing could relate to substantive issues and there were also risks a miscarriage of justice could occur if appeal rights did not exist.[12] Finally, Mr Ashley refers to the High Court case of *Vincent v Vallis*[13] where Ellis J in analysing the ambit of appeals which can be made under s 39 of the Property (Relationships) Act held there was no general right of appeal against what were, essentially case management decisions.

The Appellants Submissions

[26] Mr Ahern says the starting point is s 80 of the RTA which provides:

> **80 Orders of Tribunal to be final**
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> Subject to sections 105 and 117 to 120, every order made by the Tribunal shall, unless it is expressed to be an interim order made under section 79, be final and binding on all parties to the proceedings.

[27] He submits all orders under s 80 are final and binding on the parties subject only to s 105[14] and ss 117 to 120. He submits further the section does not make any reference to the word "decision" but only talks about "orders". Despite this, s 80 expressly provides every order made is "final and binding" unless it is expressed as an "interim" order under s 79.[15] Consideration then turns to ss 117 to 120 of the RTA. In this instance, ss 117 and 118 are the relevant provisions. Sections 119 and 120 deal with appeals to the High Court and Court of Appeal.

[28] Section 117 does not distinguish between a decision or an order other than what is specifically noted in s 117(2) which provides:

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[11] *Goston v Jamieson* [2001] DCR 361, *Wellington City Council v McMillan* [2003] DCR 50.
[12] Mr Goston had not been served with a notice to attend the hearing and may not have known about the hearing date.
[13] *Vincent v Vallis* [2023] NZHC 2758.
[14] Which is not applicable as this section deals with applications for a rehearing.
[15] Which is also not applicable as this section s 79 deals with interim orders which preserve the position of parties pending any final determination of the (substantive) dispute.

(2) No appeal shall lie—

(a) against an interim order made under section 79; or

(b) against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than $1,000; or

(c) against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than $1,000.

[29] None of the orders which are appealed against fall within these types of orders. Mr Ahern submits given the RTA has specifically excluded rights of appeal for the types of orders referred to in s 117(2), if it was intended any other type of (interlocutory) order would be excluded then such orders would have been expressly mentioned in s 117(2).

[30] In response to Mr Ashley's submission regarding s 104, Mr Ahern says s 104 supports the position of the appellants. If it was intended only "final" decisions can be appealed, the word "final" would have also appeared in s 117(1).

[31] Mr Ahern also points to the Ministry of Justice explanatory notes which are attached to a copy of the Tribunal's decisions. Under the heading "Right of Appeal", parties are advised of their rights to appeal to the District Court other than those which are mentioned in s 117(2). Mr Ahern makes the point it would be manifestly unjust if the Ministry was advising parties of their right to appeal when none exists.

[32] Mr Ahern also rejects *Tihema* is the authority for the proposition all interlocutory orders cannot be appealed. Instead, he says *Tihema* should be viewed as a decision on its own facts which determined in that instance, the High Court did not have jurisdiction to hear an appeal on an interlocutory decision (issued in a minute) arising out of the District Court. It was not a decision relating to whether interlocutory decisions as of right could be appealed to the District Court from the Tribunal.

[33] In reference to *Patterson* Mr Ahern says this decision, and other decisions which were similarly decided, is old law and no longer applies. In any event, he points to the conflicting line of authorities which establish the District Court itself was unsure

whether appeal rights existed and, when Parliament did have any opportunity to consider the matter, made it clear rights of appeal did exist.

[34] Finally, in respect of *Vincent*, Mr Ahern accepts on an interpretation of the Property (Relationships) Act, it was open to the High Court to reach the decision it did. However, the point comes back to the interpretation of the relevant legislation. In this instance, the interpretation of the RTA does not expressly prohibit the appeal of an interlocutory decision. He emphasises, unless it is expressed in the relevant legislation no appeal right exists, then there must be a general right of an appeal.

Discussion

[35] For the sake of completeness, I note Ms Tobeck supported the submissions made by the first respondent.

[36] It is clear the relevant provisions of the RTA do not express whether "interlocutory" decisions are appealable as of right. When similar issues arose for appeals declining a rehearing, it took a legislative change to clarify the position. That clarification made it clear, a dismissal of an application for a rehearing was appealable as of right. This is despite the decision to dismiss being considered as an "interlocutory" decision by many Judges of this Court.

[37] In my view, the enactment which clarified the position,[16] strongly supports the position all decisions and orders of the Tribunal are appealable as of right unless they are expressly excluded by s 117(2) of the RTA. I am further persuaded of this position for the following reasons:

(a) I accept Mr Ahern's analysis of the statutory provisions and how they relate to each other. I see no difficultly in interpreting ss 80, 104 and ss 117(1) and (2), as saying interlocutory decisions cannot be appealed. One of the reasons for this is the distinction between an "order" and the "decision". The difference is what the Tribunal requires to happen in terms of an order which is made and, the decision which is the (written)

[16] Section 117(1A) of the RTA.

justification as to why the order was made. Orders are final under s 80. It follows if they are final, they can be appealed. Those orders which cannot be appealed are set out in s 117(2). If Parliament intended interlocutory orders and/or decisions should not be appealed, then they would have been included in s 117(2);

(b) If am I wrong in my analysis above and rights of appeal exist only for the "final decision" then reference to s 115B of the RTA can be made. This section requires all "final" written decisions must be published on the internet. The section provides a definition of a "final written decision" as being "*a written decision that determines, or substantially determines, the outcome of proceedings in the Tribunal"*.[17] This definition is clearly the last decision which is intended to be made by the Tribunal on the dispute. Notwithstanding the definition, I agree with Mr Ahern if it was intended the only decision which could be appealed was the "final" decision, then the word "final" would have been included in s 117(1).

(c) It follows then I do not consider the word "the" in s 117(1) as meaning "the final" decision. Firstly because of my analysis in (b) above but also "the" can be interpretated to be more than just a single decision. For example, it could be interpreted as "the" decision the Tribunal has just made, or one of "the" many decisions a Tribunal may make during any proceeding. This interpretation seems to be how the Tribunal itself treats the decision because of the advisory appeal rights it attaches to each of its decisions.

[38] The final reason is, and perhaps most importantly, are issues of justice. While this may be a fact specific instance it nevertheless leans towards the concerns which were expressed in *Goston* and *Wellington City Council* and why, if it was necessary, I would have decided this issue on the analysis of these decisions rather than *Patterson*.

[17] Section 115B(5) of the RTA.

[39] In its decision of 12 September 2023, the Tribunal's costs order included a condition the costs needed to be paid before the substantive matter would be set down for a hearing. The consequence of this order meant a de facto substantive decision had been made, because, unless the costs were paid that would be the end of the claim for the appellants. If no appeal right existed, the result would be manifestly unfair for the appellants especially where the costs which were awarded are disputed.

[40] In reaching these conclusions, I do not ignore the balance of the respondents' submissions. For the sake of completeness, I do not consider *Tihema* is authority which says no interlocutory decisions of the Tribunal are appealable. Rather I read the decision in that instance as saying the High Court had no jurisdiction under s 119 (as opposed to s 117) of the RTA to hear an appeal of a District Court interlocutory decision.

[41] I conclude this issue with the following observation. While I have little difficulty in accepting Mr Ashley's and Ms Tobeck's submissions regarding the need to maintain the simplicity of the Tribunal's processes, the risk of cases "bouncing back and forth" between the Tribunal and the District Court should be seen in context. Whilst this Court regularly sees substantive decisions being appealed from the Tribunal, it rarely sees interlocutory decisions being appealed. A lack of case authority on this issue supports this position. I would have thought, in any event, any concern this decision will open the floodgates to such appeals is unwarranted. If there are concerns, the greater concern is the need to ensure matters of justice are met ahead of expeditious decision making for the sake of expeditious decision making.

[42] For the above reasons then, I find jurisdiction does exist for an interlocutory decision to be appealed to the District Court. I turn then to each of the grounds of appeal. Before I do so however, I consider the approach on appeal.

Approach on Appeal

[43] The approach on appeals under 117(1) of the RTA from the Tribunal was summarised by Judge Roderick Joyce QC in *Housing New Zealand Corporation v Salt* as follows:[18]

> So s 117(4) simply tells this court that, like the tribunal in its original jurisdiction, it is to approach the exercise of its appellant jurisdiction in a practical (not rule-bound) and fair way; and, like the tribunal, though bound to adhere to general principles, need not do what otherwise the law might strictly require or impose."

[44] The decision in *Shotover Gorge Jetboats v Jamieson* confirmed appeals from the Tenancy Tribunal are to be by way of a rehearing[19] and sets out the way a rehearing should be conducted.

[45] In *Housing New Zealand Corporation v Salt*[20] Judge Joyce QC stated:[21]

> On an appeal by way of rehearing, the appellant body is not restricted by findings which the … Tribunal has made, but the appellant body nevertheless, acknowledges the advantage employed by the decision maker at first instance, which may have seen and heard the witness.

[46] However, as has already been observed, the decisions appealed were not dispositive of the substantive dispute. Instead, all counsel agree the decisions were exercises of a discretion and therefore, different principles apply on an appeal against such decisions.

[47] In *Taipeti v R*[22] the Court of Appeal explained the different principles as follows:

> The difference between the appellate approach to an ordinary appeal and an appeal against the exercise of a discretion is therefore not in doubt. The issue has been determining where the distinction between the two types of decisions, and therefore the two types of appeal, lies. There is no decision of the Supreme Court or this Court that sets out a guideline for determining

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[18] *Housing Corporation New Zealand v Salt* District Court Auckland CIV 2007-004-002875, 9 May 2008 at para 49.
[19] *Shotover Gorge Jetboats v Jamieson* [1987] 1 NZLR 437 and confirmed by the Supreme Court in *Austin Nichols & Co Inc v Stichting Lodestar* SC 21/2007 11 December 2007 [13]-[17].
[20] *Housing New Zealand Corporation v Salt* supra at n 4.
[21] Ibid at [13].
[22] *Taipeti v R* [2018] NZCA 56 at [44], [2018] 3 NZLR 308 at [50].

> whether a decision is discretionary or not. Tipping J had gone on to observe in *Kacem v Bashir*, "[t]he distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract." Importantly the Judge noted that "the fact that the case involves a [sic] factual evaluation and a value judgment does not of itself mean the decision is discretionary".
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> (Footnotes omitted)

[48] The Court went on to observe:[23]

> Three possible indicia of the presence of discretion emerge. First, the extent to which the decision-maker can apply his or her own "personal appreciation" has been identified as a "key indication". Clearly, the greater the level of prescription in terms of what is required of the decision-making process the more likely the decision is an evaluative process, rather than the exercise of a discretion. Second, procedural decisions are more likely to be an exercise of discretion than wider issues of principle involving the application of law to the facts. Third, if only one view is legally possible, that points away from a discretion. In other words, where there is scope for choice between multiple legally "right" outcomes, that points towards a discretion.

[49] In *Kacem v Bashir,*[24] the Supreme Court held where there is an appeal on a decision which is an exercise of an appeal,

> … the criteria for a successful appeal are stricter: (1) Error of law or principle; (2) taking account of irrelevant consideration; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.[25]

[50] As Mr Ashley also emphasises, in exercising a discretion a decision maker is making a choice between a range of outcomes which might be available to him or her. There is no "right" decision and therefore strict limitations are placed on the scope as to whether the Appellant Court is able to overturn a decision.

[51] I accept then, each of the four decisions which have been appealed against were exercises of discretion. In each instance I examine whether the Tribunal, in exercising its discretion has fallen foul of the criteria set out in *Kacem*.

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[23] Ibid at [49].

[24] *Kacem v Bashir* [2011] 2 NZLR 1. See also *Harrington v Wilding* [2019] NZCA 605 at [14], [49], *K v B* [2010] NZSC 112 at [30]. See also generally *Ministry of Social Development v B* [2022] NZHC 198 [59]-[72].

[25] *Kacem v Bashir* ibid at [32].

The Refusal to Transfer the Proceedings to the District Court

Appellants Submission

[52] Mr Ahern says the application for the transfer was primarily driven by the simplicity and practicality of having all matters heard in the District Court. If the transfer had of been granted then the issues of discovery, production of documents, and the addition of parties would have fallen away given the parties would have been entitled to them as of right.

[53] Mr Ahern submits the Adjudicator accepted the pragmatism all matters should be dealt with in one jurisdiction:[26]

> I agree, that with an application already lodged in the Tribunal and then amended, a potential further claim being contemplated in the Tribunal in two District Court appeals, at first blush, having the one jurisdiction deal with all matters has an air of practicality and simplicity to it.

[54] Despite these comments, the Adjudicator dismissed the application. In doing so she determined the application had been brought at a very late stage, the proceedings had become protracted, (because of the applications for joinder and discovery) and further claims were being pursued. This prompted the Adjudicator to observe,[27] the case was "growing legs" at every junction and needed to be brought to a head and determined.

[55] Mr Ahern submits the Tribunal was in error by blaming the appellants for the delays and state of the proceedings. The Tribunal contradicted itself by accepting the appellants might not have been responsible for the delays[28] yet commented on the claim "growing legs" and the appellants choosing "multiple litigation pathways" including the appeals to the District Court.

[56] Mr Ahern also points out the Tribunal acknowledged there was nothing stopping the appellants from filing fresh proceedings in the Tribunal or the District Court which was entirely inconsistent with s 85 of the RTA. The overriding principle

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[26] Decision dated 27 October 2023 at [27].
[27] At [25].
[28] At [27].

should be all matters should be heard at once with the most appropriate jurisdiction being the District Court.

[57] Whilst Mr Ahern accepts the Tribunal did consider issues of complexity, finding there was nothing in the claim which justified a transfer, he submits the mere fact this proceeding involves multiple claims, parties, and counsel and, having seen a cost award of more than $12,000, establishes the proceedings are more complex than what the Tribunal would normally deal with. Mr Ahern submits the Adjudicator appeared to be more focussed on issues of expediency rather than fairness in bringing the matter to an end.

Respondents Submissions

[58] Mr Ashley and Ms Tobeck emphasise the jurisdiction to hear any disputes between the parties is set out in s 171 of the Unit Titles Act 2010 (UTA). The parties named in the proceeding are listed in s 171(2) of the UTA.[29] The monetary claims which are made fall within the limits the Tribunal may make under s 171(3A). Accordingly, jurisdiction for the Tribunal to determine this dispute is established.

[59] Section 83(2) of the RTA provides the Tribunal with the ability to transfer proceedings to the District Court. In doing so the Tribunal must be "satisfied" the proceedings would be "more properly determined in the District Court". Mr Ashley and Ms Tobeck emphasise these key words which the Adjudicator must consider when exercising her discretion.

[60] Mr Ashley also spent time focussing on the nature of the claims. He made the point the claims, whilst numerous, were not complex but range from claims which were without merit or if they do have merit, are matters which the Tribunal commonly deals with.

[61] They submit when exercising her discretion, the Adjudicator did consider all relevant issues and reached the conclusion the Tribunal, and not the District Court, was the appropriate jurisdiction for the claims to be determined. There was nothing

[29] Owners of Unit titles, Body Corporate and Body Corporate Secretaries are all listed in this section.

particularly complex about the dispute (the involvement of counsel did not make the matter more complex) and the appellants should not be entitled to effectively have another "bite of the cherry" in relation to the applications which were dismissed if the transfer was granted.

Discussion

[62] It is clear the Adjudicator did accept many of the delays were not caused by the appellants but found, despite this, the proceedings had become protracted and would continue to do so if firm directions were not put in place to have the matter set down for a hearing.

[63] The primary issue is whether the Adjudicator failed to consider whether the relevant factors, such as complexity and/or practicality, meant the District Court could more properly determine the dispute.

[64] I am satisfied the Adjudicator considered all of these matters and reached a conclusion the Tribunal was the appropriate jurisdiction rather than the District Court. I can see no error which has been committed. Clearly the Tribunal has jurisdiction under the UTA and none of the substantive issues appear to be overly complex. Furthermore, in terms of practicality, if the matter was transferred, delays would only occur in the District Court which would not assist the parties.

[65] Accordingly, I find that there has been no error by the Tribunal and this ground of appeal is dismissed.

Discovery and the Production of Documents

[66] The Adjudicator refused to order the production of documents, forming the view the documents which had been produced were sufficient for the determination of the particularised claim and the application was nothing more than a "fishing expedition".[30]

[30] See para 41(e) of the decision dated 12 September 2023.

Appellants Submissions

[67] The original notice of appeal appealed the decisions refusing the applications for discovery and the production of documents. Mr Ahern acknowledges the Tribunal does not have a general jurisdiction to order discovery under s 97(4) of the RTA but can order the production of documents. The decision to decline the production of documents is therefore pursued on appeal.

[68] The application for the production of documents (and discovery) was driven by the appellants belief documents had not been produced under s 206 of the UTA. They argue documents are in existence which are relevant to their claims as particularised and/or which supported their further claims individual committee members have acted in a conflict position preferring their own interests over the unit owners. If such documentation had been produced it would have established a claim existed against the committee members. Mr Ahern accepted, without this information, no evidential foundation existed for such a claim to be brought. The refusal to grant the application however, effectively stymied the claim which could have been made. Notwithstanding this, Mr Ahern submits, the Adjudicator erred in exercising her discretion to dismiss the application as the claims, as particularised, justify the production of further documents.

Respondents Submissions

[69] The respondents submit because the production of documents and discovery were primarily based on the appellants now abandoned application to join the committee members, this means this ground of appeal must be "moot". In any event the Adjudicator considered the documents relevant to the particularised claims had already been produced and no further orders were required under s 97(4). The application then was no more than a "fishing expedition". This conclusion was one which the Adjudicator was entitled to make.

Discussion

[70] The Adjudicator properly noted the Tribunal could require the production of documents under s 97(4) of the RTA but would only do so if the documents assisted the Tribunal in determining the matters before it. Section 97(4) was not a provision which entitled a party to seek documents beyond the matter which needed to be determined or support a claim which may or may not exist. I agree with the Adjudicator was entitled to reach these conclusions.

[71] I also find the Adjudicator did not take into account any irrelevant considerations when reaching her conclusions. The purpose of s 97(4) is very clear in its intent. For the appellants to attempt to use the provision to ascertain whether a claim existed against the committee members was outside of the ambit of the s 97(4) purposes. The Adjudicator was entitled to conclude the appellants were on a "fishing expedition".

[72] I find then, in exercising her discretion no error has occurred. This ground of appeal is also dismissed.

Leave to Amend Claim

[73] The Adjudicator's decision to decline the appellants request to further amend their claim is summarised in the Tribunal's decision of 28 August 2023. The decision dealt primarily with the applications for discovery and the joinder of the committee members where a thorough analysis of these issues and reasons for their dismissal were given.

[74] The decision to decline leave for the appellants to amend their claim was relatively brief and covered off in five paragraphs.[31] The application was declined because the Adjudicator determined the particularised claim, which had been filed in August 2022 was "*growing legs at every opportunity* …". The same concerns expressed in the appeal against the decision not to transfer the proceedings are repeated for this ground of appeal.

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[31] [57] to [61].

Appellants Submissions

[75] Mr Ahern again submits the criticism of the Tribunal over the appellants conduct is unfair and unwarranted. In the context of the chronology of events which have occurred, the appellants could not be blamed for the delays, which was recognised by Adjudicator. Despite this, the Adjudicator reached the conclusion the appellants were primarily responsible for why the dispute had not been determined any earlier than it had, but in reaching this conclusion failed to recognise attempts had been made to settle the dispute in 2022, and since then, further conduct of the respondents and the committee members justified the claim being amended.

[76] Mr Ahern says the priority must be on all matters between the parties being resolved in one hearing, rather than multiple hearings, potentially across different jurisdictions. If the Tribunal's focus is on the expeditious determination of disputes, then excluding disputes which genuinely exist between the parties is inconsistent with this policy.

[77] Finally, Mr Ahern points out that notwithstanding the Adjudicator declined to allow the amendment, timetable directions were made leading up to the substantive hearing. He says there was no reason why a direction could not have been included where an amended claim, filed within 10 working days could have been incorporated into the timetable. No prejudiced to the respondents would have occurred.

Respondents Submissions

[78] The respondents' submissions again support the Adjudicator's decision to direct the matter needed to be determined without further delay. As such, the Adjudicator was right to be concerned the appellants ongoing attempts to amend their claims was frustrating the process. It was therefore open to the Adjudicator to reach the conclusions she did and she did not err in this regard.

Discussion

[79] In her decision of 28 August 2023, the Adjudicator stated:[32]

> [60] I am not prepared to allow any further changes to the claim beyond the particularised claim. The particularised claim was a detailed document, prepared with the benefit of Mr Leishman's help and input. This matter needs to now proceed to a hearing based on that document. I am concerned that the claim is "growing legs" and at every opportunity additional matters are being raised.
>
> [61] I consider that the applicants are not prejudiced because they can commence a fresh claim in the future if they wish.

[80] I agree with Mr Ahern there is some inconsistency with the Adjudicator's finding over the wish to amend. By refusing to allow the amendment, yet acknowledging at the same time fresh disputes could be commenced at a later stage, does open up the door for multiple disputes being filed between the parties. I also accept Mr Ahern's submission the delays have not all been caused by the appellants but, because of those delays, further arguments between the parties could have genuinely arisen. Insufficient weight perhaps has been placed on these developments since August 2022 which would justify amendments being made.

[81] While I fully accept there is a need to draw a line under this matter and have it determined as soon as possible, I fail to see there is any prejudice in allowing an opportunity to amend the claim within the timeframe of waiting for the hearing.

[82] In the circumstances, I find that the Tribunal erred in failing to allow the amended claim to be filed.

[83] Any amended claim is not an opportunity however for the appellants to attempt to make a claim against the committee members given this issue has already been determined. In the circumstances, I direct any additional claim must be filed within 10 working days of the date of this judgment. The respondents can then have a further 10 working days in which to file any opposition to those new claims. It will then be up to the Tribunal to make any further directions to progress the matter towards a substantive hearing.

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[32] Decision dated 28 August 2023 at [60] and [61].

Costs

[84] Two issues arise. The first is whether costs should have been awarded in favour of the committee members and the second, the level of costs generally.

[85] Costs were awarded following the Tribunal's decision to dismiss the application to join the committee members. Although the UTA recognises individual committee members can be held liable for breaches of duties, the joinder of individual committee members is rare (on the basis that the Body Corporate is the appropriate respondent to be sued) and there is therefore a high threshold to be satisfied before those committee members can be sued.[33]

[86] Relying on *Singh v Boutique Body Corporate* [34] the Tribunal found there was no basis to join the committee members.[35] In dismissing the application, the Tribunal then called for submissions on costs.

[87] The decision of 12 September 2023 dealt with costs. The first respondent was awarded $5,500 after noting it had incurred actual costs of $8,636.50 (GST inclusive). The second respondent was awarded $3,000 after incurring costs of $3,339 (GST inclusive) and the committee members (being the third proposed respondents) were awarded $4,000 after incurring costs of $9,927.50. Costs were awarded in accordance with s 102 of the RTA which relevantly provides:

> **102 Costs**
>
> (1) Except in a case to which any of subsections (2), (4), or (5) apply, the Tribunal shall have no power to award costs to or against any party to proceedings before it.
>
> (2) The Tribunal may make an order of a kind referred to in subsection (3) in any of the following cases:
>
> (a) where, in the opinion of the Tribunal, the proceedings are frivolous or vexatious or ought not to have been brought:
>
> (b) where any of the parties was represented by counsel:

[33] See *Guardian Retail Holdings Ltd v Buddle Findlay & Ors* (CIV-2013-404-001148) [2013] NZHC 1582.
[34] *Singh v Boutique Body Corporate* [2019] NZHC 1707.
[35] Decision dated 28 August 2023 at [52].

(c) where, in the opinion of the Tribunal, the matter in dispute ought reasonably to have been settled before the Tenancy Mediator but that the party against whom the order is to be made refused, without reasonable excuse, to take part in proceedings before a Tenancy Mediator or acted in any such proceedings in a contemptuous or improper manner:

(d) where any applicant to the Tribunal, after receiving notice of the hearing, fails to attend the hearing without good cause.

(3) In any case to which subsection (2) applies, the Tribunal may order a party to pay—

…

(b) to another party, the reasonable costs of that other party in connection with the proceedings.

Appellants submissions

[88] As to the first issue, Mr Ahern says s 102 of the RTA is very clear. The Tribunal is unable to award costs except in certain specified circumstances. He says the only relevant circumstances here is the parties were legally represented[36] and that the costs were awarded on the general principle, costs should follow the event.[37]

[89] He submits however the committee members were never a "party" to the proceeding given the application to join them was dismissed before they became a "party". Notwithstanding, the Tribunal still awarded them costs noting in a footnote:[38]

> Although the proposed third respondents were technically not a "party" to the proceedings, being proposed third respondents, for the purposes of the application for their joinder, I have treated them as parties.

[90] Mr Ahern submits s 102 does not allow the Tribunal to make a costs award to a non-party. Section 102 should be interpreted (in this instance) to read the Tribunal cannot award costs "to or against any party to the proceedings";[39] unless the "parties are represented by counsel"; and where they are represented "a party" may pay "to

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[36] Section 102(2)(b).
[37] Paragraphs [20] and [23] of the Decision.
[38] Footnote 14 Decision dated 12 September 2023. However, the Tribunal also noted the individual committee members were treated as 'parties' for the purposes of making costs awards at paragraph [11] of the Decision.
[39] Section 102 (1).

another party, the reasonable costs of that other party in connection with the proceedings".[40]

[91] Mr Ahern says the jurisdiction to award costs is created by s 102 and cannot be created when such a jurisdiction does not exist in the first place. The Tribunal does not have any inherent jurisdiction and could not treat the committee members as a party as the Tribunal sought to do.

Respondents Submissions

[92] Ms Tobeck made no submissions on the first issue. Mr Ashley submitted it was a matter of natural justice which entitled the committee members to be heard as to their joinder and then seek costs when the application was unsuccessful. He submits the word "party" is not defined in the RTA and the wording of s 102 does not preclude the committee members from being treated as a "party" for the purposes of the application. To do so does not place a strained interpretation on how s 102 should be read.

Discussion

[93] Mr Ahern drew comparisons with third-party applications which are made in the High Court and District Court.[41] In such instances, proposed third parties have no standing before the Court until they are formally joined to the proceedings. Once joined, it is up to the third party to determine whether steps are available to have the third-party notice set aside.[42] If successful, it is at this stage costs could be sought.

[94] A further comparison to Mr Ahern's analysis, is where a High Court or District Court Judge is entitled to add or strike out a party in a proceeding under r 4.56 of both Court's Rules (HCR/DCR). This will occur where a person's presence is necessary to ensure all matters may be adjudicated on. No formal application is necessary.[43] In such an instance the party who is joined is not a party until the order is made.

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[40] Section 102(3).
[41] High and District Court Rule 4.4.
[42] Rule 4.16(1).
[43] Rule 4.56(2).

[95] I have not been provided with the information leading up to how the committee members were allowed to be heard on the application. Although such a step would not occur in the High Court or the District Court because of how the HCR/DCR are framed, (whether it was the joinder of a third party or as a party under r 4.56) clearly a party added under r 4.56 or a third party would be entitled to apply to be removed from a proceeding if they can establish they should not have been joined in the first place.[44] Such an application can conceivably be made immediately.

[96] In my view the Tribunal pursuant to s 85(2) of the RTA, in the absence of rules such as HCR/DCR 4.4 or 4.16, was entitled to resolve the issue in an informal manner and not be bound by "strict legal rights" or "legal forms or technicalities".[45]

[97] The Adjudicator adopted an approach which effectively combined the application for joinder/adding a party and the application for strike out/set aside. In my view, in accordance with s 85, the Adjudicator was entitled to adopt this approach. It was a practical approach which achieved the objectives of hearing the appellants application, and then determining it by dismissing it on the basis there was no evidentiary foundation for it to be brought in the first place. Had the committee members been joined, without being heard, they would have been entitled to bring an application to be removed from the proceedings. The result would have been the same, namely the committee members would have been removed and would no longer be a party because of the lack of any evidentiary basis.[46] As I have said, the same result would have been achieved.

[98] Accordingly, it follows the Tribunal was entitled to treat them as a party for that application and they were therefore entitled to claim for costs.

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[44] If such an application is brought similar considerations to a strike out application are applied although see *TSB Bank Ltd v Burgess* [2013] NZHC 1228, where Associate Judge Osborne observed at [37] that broader considerations, such as convenience and overall justice, may separately justify an order setting aside a third party notice.

[45] *Housing Corporation New Zealand v Salt* District Court Auckland CIV 2007-004-002875, 9 May 2008 at para [49].

[46] This is accepted by Mr Ahern.

Was the Level of Costs Appropriate?

[99] Mr Ahern's criticism of the level of the costs awarded stems from the apparent starting point where each of the respondents (I include the committee members for these purposes) referred to their actual costs incurred when claiming costs.[47] He submits this is not a principled approach as different counsel, based on their seniority or where they work may dictate what costs are ultimately awarded. He points to the three different awards which were made even though all counsel were dealing with the same issues.

[100] Ms Tobeck's submits the appellants were aware of the risk they faced and knew they would be subjected to multiple costs awards if they were unsuccessful. She submits further the "reasonableness" of the costs which are awarded is based on an assessment of the steps which are properly attributable towards the task at hand and pursuant to the guidelines under r 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (LCAR). This is the analysis which recent cases have emphasised as being the appropriate approach.[48]

[101] Mr Ashley submits there should be a reluctance to revisit cost awards on appeal given the Adjudicator was in the best position to assess the parties conduct in the proceedings, and whether costs awards should be made. He says further, in exercising her discretion to award costs a comprehensive analysis was undertaken by the Adjudicator on the legal principles and on the work undertaken by each of the parties. Accordingly, there is no basis to revisit this decision.

Discussion

[102] In exercising her discretion, the Adjudicator determined costs should be awarded under s 102 of the RTA, applying the principal costs should follow the event. In doing so, she declined to make an award under s 127 of the UTA, determining the

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[47] The committee members acknowledged a discount on their actual costs was appropriate.

[48] *Body Corporate 195681 v Cheah* 12 June 2014, District Court Auckland, *Body Corporate 162791 v Gilbert* [2015] NZHC 185, *Exuberant Limited v Quinovic Property Management Ltd* [2021] NZHC 353.

actions of bringing the applications were not "wilful"[49] on the part of the appellants which would otherwise have exposed them to costs being awarded on an indemnity basis.

[103] The Adjudicator then turned to the level of costs which should be awarded and in doing so, referred to the recent decisions of *Exuberant Limited v Quinovic Property Management Ltd*[50] and the more recent District Court case of *Body Corporate 45131 v 88 Chi Limited*[51]as being the appropriate approach for cost awards.[52] In my view, it is at this point the Adjudicator has misdirected herself.

[104] Where a claim for indemnity costs is made, the Court and the Tribunal will firstly determine whether there is a contractual or statutory basis to claim such costs. If there is, then those costs are assessed on an objective basis, applying the factors set out in r 9 of the LCAR to achieve the tasks at hand in order to test whether the costs are "reasonable". *Exuberant* was an assessment of a claim for indemnity costs based on a clause in a franchise agreement. The High Court held the costs claimed, assessed on an objective basis, were excessive for what was needed in that litigation. *Body Corporate 45131 v 88 Chi Limited* involved a claim for costs under s124(2) of the UTA. Judge Nicholls set out in his judgment guidelines as to what an assessment of indemnity costs[53] should look like including the application of the r 9 LCAR factors. This would necessitate a detailed assessment of hourly rates and time sheets which would need to be supplied.[54]

[105] Having firstly, and correctly, determined the claim for costs could not be brought on an indemnity basis, the Adjudicator then applied *Exuberant* and *Body Corporate 45131* as being the appropriate approach. As these cases dealt with an assessment of whether the indemnity costs, claimed as of right, were reasonable, both

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[49] See *Hart v Body Corporate No 180455* HC Auckland CIV 2005-404-1429, 23 June 2005: *Body Corporate No 164205 v Berachah Investments Ltd* HC Auckland 2010-404-3324 8 June 2005.
[50] Supra at n 46.
[51] *Body Corporate 45131 v 88 Chi Limited* [2023] NZDC 9036, 12 May 2023.
[52] At [33].
[53] Supra at [5]–[8].
[54] For further analysis on the approach of what are reasonable indemnity costs see *Frater Williams & Company Limited v Australian Guarantee Corporation (NZ) Limited* (1994) 2 NZConvC 191, 873; *Body Corporate 162791 v Gilbert* [2015] NZCA 185; *York Trustees Limited v Body Corporate 166208* [2017] NZDC 796; *Body Corporate 85928 v Sherry* [2022] NZDC 11535.

cases deliberately excluded factors such as the scale costs regime in the High Court and the District Court.[55]

[106] If indemnity costs cannot be claimed as of right, then scale costs become an important factor to be considered as a guideline together with the wider discretionary factors which also need to be considered. Arguably, r 9 LACR factors may play a lessor role in this assessment.

[107] There is merit in Mr Ahern's submission parties in the Tribunal should have some certainty when exposed to a costs award in circumstances where indemnity costs cannot be claimed as of right. If a party is exposed to the indemnity costs then at least they know that risk because a statutory right to claim indemnity costs exists (such as s 124(2) of the UTA). This contrasts with the current position where some uncertainty does exist, illustrated by the fact that different awards were made to compensate the same outcome.

[108] Mr Ahern urged the Court to perhaps prescribe a more certain approach in these circumstances. Despite these urgings, in my view it is unwise to attempt to formulate a prescriptive approach. Parliament has deliberately not imposed a scale costs regime and it would be wrong to impose one on a de facto basis. A range of discretionary factors are already considered by the Tribunal in costs decisions and nothing in this judgment should be seen as changing that approach. Those factors are summarised in the text *Residential Tenancy Law in New Zealand*:[56]

> An award of costs for counsel are usually a reasonable contribution to legal costs, not full costs. The usual range is 40 to 70 per cent of actual costs and factors to consider include the party's success, length of hearing, amount involved, importance of the issues, complexity, urgency, time for effective preparation, any unnecessary steps, arguments without substance, abuse of process, poor presentation, where the hearing time was lengthened by parties conduct and for guidance purposes, the District Court scale of costs.

[109] I do agree however with Mr Ahern the Tribunal should avoid an approach which starts with the position of what the actual costs are when indemnity costs cannot be claimed as of right. Rather, the approach should be an objective assessment of what

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[55] *Body Corporate 45131 v 88 Chi Limited* [2023] NZDC 9036, 12 May 2023 at[7(c)]. See also *Body Corporate 346799 v Gueirard* [2023] NZDC 19645 at [20]-[22].

[56] Stewart Benson *Residential Tenancy Law in New Zealand*, Thomson Reuters [2018] at 9.23.

steps had to be undertaken for the successful party to achieve the result they have, and in doing so applying the factors listed in *Residential Tenancy Law in New Zealand,* using the scale costs regime as a guideline. This approach does allow flexibility and does not exclude a claim for close to indemnity costs if, in the context of what is "reasonable", such costs can be justified.[57]

[110] Applying the above analysis to this appeal, in my view the Adjudicator has erred by adopting the approach set out in *Exuberant* and *Body Corporate 45131.* Difficulties immediately arose when the Adjudicator was not provided with detailed information on how the actual costs had been incurred which is a fundamental requirement to assess the steps which were taken. In the claim by the committee members, they sought to overcome this position by discounting their actual costs on the apparent premise the "discount" made the costs "reasonable".

[111] Whilst the Adjudicator did apply factors such as the novelty of the arguments, and issues of complexity, inconsistent cost awards still resulted. This inconsistency was caused because of the starting point used rather than a starting point of what was achieved and what it took to get to that point. As I have found, what the actual costs incurred whilst still playing a part, should play a lesser role in the overall consideration of whether the costs are reasonable for the purposes of s 102.

[112] The only costs which were claimed where a combination of the discretionary factors, actual costs,[58] and the scale costs regime applied, was those of the second respondent. The actual costs incurred were $3,339. These costs were compared with the District Court 2B scale of $3,151 which compensate a successful party based on the reasonable complexity for an interlocutory hearing. The second respondent was awarded $3,000.

[113] It does seem to me this was the approach which should be adopted for all parties. The approach was principled and consistent. In the circumstances I find the sum of $3,000 should have been awarded to each respondent.

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[57] The well-known principles for increased and/or indemnity costs could also be applied in these circumstances.

[58] Details relating to hourly rates, timesheets, and the cost of running a practice were also provided.

[114] I find then the appellants appeal on this issue is upheld in part. I therefore substitute the awards of costs for the first respondents and the committee members to cost awards of $3,000 each. The second respondent's cost award remains at $3,000.

Result

[115] The appeals relating to the transfer of the proceedings to the District Court and the production of documents are dismissed.

[116] The appeals relating to the amendment of the claim (on the terms I have set out at paragraph [83]) and costs (as I have set out in paragraph [114]) are upheld. The findings in relation to these two issues made in the Tribunal are set aside to the extent of the findings I have reached.

[117] Given there has been a degree of success for all parties, I make no award for costs.

Signed at Auckland this 31st day of May 2024 at 3.00 pm

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Judge D J Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 31/05/2024