

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA246/2021
[2023] NZCA 89**

BETWEEN LEISURE INVESTMENTS NZ LIMITED
PARTNERSHIP
Appellant

AND CECILE GRACE & ORS
Respondents

(See Schedule A for complete list of
Respondents)

Hearing: 25 and 26 May 2022

Court: Cooper P, French and Collins JJ

Counsel: C T Walker KC, W J Hamilton, L A Merrick and G N Gallaway
for Appellant
M G Ring KC, C M Stevens, B R D Cuff and C S M Henley for
Respondents

Judgment: 31 March 2023 at 3.00 pm

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellant must pay the respondents one set of costs for a complex appeal on a band B basis together with usual disbursements. We certify for two counsel.**
-

REASONS OF THE COURT

(Given by French J)

Table of Contents

Introduction	[1]
Background	[4]
<i>The events of Monday 13 February 2017</i>	[11]
<i>The events of Tuesday 14 February 2017</i>	[20]
<i>The events of Wednesday 15 February 2017</i>	[36]
The High Court proceedings	[50]
<i>The evidence at the hearing</i>	[54]
<i>The High Court findings</i>	[60]
Negligence	[64]
<i>The grounds of appeal</i>	[64]
<i>Analysis</i>	[66]
Claim under s 43 of the Forest and Rural Fires Act 1977	[84]
<i>Legal background to s 43</i>	[88]
<i>Arguments on appeal</i>	[121]
Causation and responsibility	[122]
Outbreak or spread?	[129]
Nuisance	[148]
<i>The argument</i>	[148]
<i>Our view</i>	[153]
Damages	[157]
<i>The Flanagans</i>	[170]
Repair costs	[170]
Alternative accommodation costs	[187]
Stress benefit	[192]
<i>Mrs Grace</i>	[196]
Cost of alternative accommodation and stress	[200]
Sustainability benefit	[202]
<i>The Kwons</i>	[204]
Contents claims	[204]
The cost of alternative accommodation	[208]
<i>The Pflaums</i>	[212]
General damages and cost of alternative accommodation	[212]
Outcome	[216]

Introduction

[1] In February 2017, a large number of residential properties located around Worsley's Road in the Port Hills of Christchurch were badly damaged by fire. Some were completely destroyed. The owners claimed their properties would never have been damaged or destroyed had it not been for the actions of the appellant Leisure Investments NZ Limited Partnership (Leisure Investments), the owner and operator of a nearby adventure park (the Park). The property owners issued

proceedings in the High Court against Leisure Investments seeking compensation for their losses.

[2] The claim was heard by Gendall J who found in favour of the owners and awarded damages.¹

[3] Leisure Investments now appeals the decision to hold it liable. It also appeals the quantum of the damages awarded.

Background

[4] The Park comprises around 358 hectares, and contains mountain bike tracks, a zip line and hiking area. It was opened on 16 December 2016, that is to say only two months before the catastrophic fire.

[5] A feature of the Park was a chairlift manufactured by an Austrian firm called Doppelmayr Seilbahnen GmBH (Doppelmayr), part of the Doppelmayr/Garaventa Group. Doppelmayr has an international reputation being one of the two main suppliers of ropeways (including chairlifts) in the world.

[6] The Park's chairlift operated in a 12–20 metre wide corridor of cleared pine trees and was used to ferry mountain bikers, zipliners and sightseers from the bottom of the Park to the top. At the time of the events in issue, substantial quantities of dry pine slash from the cleared corridor remained under and around the chairlift line. In an adjacent area, there was also dry coconut matting that had been installed to try to prevent erosion. In some places, the chairs only cleared the forest by a little over a metre.

[7] The chairlift was just under 1.8 kilometre long with a 3.587 kilometre haul rope. Attached to the haul rope were 84 carriers. Half of these were four seater chairs and the other half bike racks. The average dead weight of each carrier was 282 kg which meant the total weight placed on the haul rope was close to 24 tonnes. The haul rope had a plastic core sheathed in metal.

¹ *Grace v Orion New Zealand Ltd* [2021] NZHC 705 [High Court judgment].

[8] Significantly, the summer of 2017 had been exceptionally dry and windy in Christchurch. There was a city-wide fire ban in place and an elevated fire risk particularly in the Port Hills, an area with a long history of fires.

[9] It was a condition of the Park's resource consent that it have a fire safety management plan in place. The plan identified forest fire as the Park's biggest risk, both to human safety and the Park's assets.

[10] The key events at issue took place over a three day period commencing Monday 13 February 2017.

The events of Monday 13 February 2017

[11] At around 7 pm on Monday 13 February 2017 a fire started in an area of the Port Hills known as Marleys Hill. An investigation by Fire and Emergency New Zealand (FENZ) later concluded that arson was the probable cause of the fire, although the arsonist was never identified. The area where the fire was started was close to the Park's boundary and about 500 m from the top station of its chairlift.

[12] The fire was the second fire that had broken out in the Port Hills that day. Only one and a half hours earlier, another fire had broken out near Early Valley Road where there were electricity conductors and equipment belonging to a power company Orion New Zealand Ltd (Orion). The smoke from this earlier fire was visible from the Park and as a precaution all patrons had been asked to leave and the Park had closed. The chairlift had already stopped operating before 6 pm because of high winds.

[13] To distinguish the two fires, we will refer to the first in time as the Early Valley Road fire and the second the Marleys Hill fire.

[14] The second fire, the Marleys Hill fire, was first noticed at approximately 7.10 pm on Monday 13 February 2017. The top station of the Park's chairlift was evacuated and a fire watch set up at the bottom station to monitor the fire. The chairlift was put on what was called "unmanned status" which meant it ran automatically at a speed controlled by the bottom station.

[15] By around 9.30 pm that same evening, the fire was thought to be only 300 metres from the top chairlift station and not long after midnight it was observed within the Park boundary.

[16] The chairlift was kept running through the night. Although that was not usual, it was done as a precaution because of the need to protect the haul rope from heat concentration. In making that decision, Mr Johnstone, the Park's operations manager relied on the Doppelmayr operation and service manual and the fire safety plan.

[17] The Doppelmayr manual relevantly provided:

Behaviour in the case of fire below the line

...

- Keep the ropeway installation running to avoid a local overheating of the haul rope.
- Cool down the haul ropes close to the source of the fire to avoid overheating of the haul ropes.

...

[18] The reason it was seen as important to keep the haul rope moving was to avoid its plastic core melting and causing the haul rope to break. Given the weight of the chairlift, a break in the haul rope was potentially very dangerous.

[19] Mr Johnstone and other employees remained at the bottom station all night to ensure the chairlift kept running.

The events of Tuesday 14 February 2017

[20] As detailed in the judgment, several things happened on the following morning.

[21] First, at 1.30 am, it was noted that the fire had breached the Park's boundary below the car park area. Later that morning around 9 am and 9.30 am respectively, Park management advised its insurer and banker of the fire risk. One email stated that the fires are "now significantly into our property on the eastern flank" while the other

said that staff were doing all they could to protect the company's assets while noting that "safety of the people involved is paramount".

[22] Mr Johnstone issued a direction that no one was to go to the top of the chairlift because of the fire danger.

[23] At around 10.30 am Mr Johnstone did however himself drive to the top station of the chairlift to investigate concerns about a possible power failure up there. He confirmed that, as suspected, there had indeed been a power failure. The chairlift had been able to keep running because of a back-up battery. To conserve the battery, the lift was stopped at 11 am. In evidence, Mr Johnstone said the Marleys Hill fire was at that point some distance away and did not appear to be making progress towards the top station.

[24] Also on site that day was a Mr Charity. He was deputising for the Park's General Manager while she was overseas on leave. Responding to an email from a Board member that it "[s]ound[ed] like [the fire was] coming under control", he replied at 11.48 am that the fire was "actually a lot worse for us today".

[25] During the day there were communications from the Fire Service and Civil Defence indicating the fire was under control. Twelve helicopters and two aeroplanes were deployed. When those communications were put to Mr Charity at the hearing in the High Court, he said that the feeling for him on site was that the fire was "amplifying rather than getting under control".

[26] At 12.54 pm on Tuesday, Mr Johnstone received an email from Mr Hayman, the General Manager of Doppelmayr New Zealand advising that "if [the fire was] getting close to the chair it's best to keep the lift running for [as] long as possible to protect the haul rope and the plastic core". The email also stated that even if the power was cut to the top station, they should run the emergency drive for as long as it was safe to do so.

[27] At some time in the early afternoon, Mr Johnstone returned to the top station to check on the fire's progress. He could see helicopters with monsoon buckets dropping water on the Marleys Hill area behind him.

[28] He remained at the top station for some time trying unsuccessfully to work out a way of restoring the power. While he was up there, he saw the Marleys Hill fire for the first time from the deck. By this point it was some time between mid and late afternoon. He estimated the fire was then about 200 metres from the top station. He also saw a fixed wing aircraft dropping fire retardant on cell towers behind him and not wishing to get in the way drove back down.

[29] With the fire getting closer to the top station, Mr Johnstone then directed the chairlift be restarted. Because it was being operated on battery power, the chairlift was run at a slow walking speed, about one metre per second as opposed to the usual five metres per second.

[30] At around 5 pm that same afternoon Tuesday 14 February, Mr Johnstone noticed that large clumps of chairs and bike carriers were coming down the line from the top station. This suggested clusters of chairs and carriers were becoming jammed in the top station, with the resulting pile up eventually forcing some of the clusters down the line. The clusters were a direct result of the power failure at the top. The loss of power meant the clutch mechanism that regulated the space between the chairs and carriers was no longer working. Bunching or clumping was a potential problem because it affected the weight distribution and hence the loading on the haul rope.

[31] In light of this development, Mr Johnstone asked Mr Godwin, a New Zealand based Doppelmayr representative who was on site at the time, whether there was any way of quickly removing the chairs off the lift line to stop them bunching. The answer was in the negative. While some chairlifts have what are called parking rails which enable carriers to be removed easily and quickly, the Park's chairlift did not. It only had a maintenance rail at the bottom station where approximately five carriers could be diverted at a time for maintenance purposes. In short, it was possible to remove the carriers off the chairlift but not quickly.

[32] Over the course of several hours, the staff did however manage to pull all the clumps at the bottom station apart by removing the wheel rails on the bike carriers. That had to be done manually. By dusk, between 15 to 18 rails from the bike carriers had been removed. There were still chairs and carriers stuck in the top station.

[33] In evidence, Mr Johnstone said they needed to get the haul rope moving but without taking the risk of any more chairs getting to the top station and also becoming stuck. He testified that at Mr Godwin's suggestion, it was decided to run the lift backwards and forwards in 20 minute intervals. In order to be able to do that, it was necessary to operate the lift manually from the bottom station.

[34] The lift was run that way all night.

[35] At around 9.30 pm, Mr Johnstone drove to a nearby area where he observed the fire crossing the chairlift line. In evidence he said up until that point he had thought the Marleys Hill fire was under control and not likely to move towards the lift and down towards the bottom station. However, in light of what he saw, he contacted Mr Charity to discuss a plan to remove chairs from the lift in the morning. His thinking was that if the fire moved down the hill, they would need to evacuate the bottom station and so be unable to continue to run the lift backwards and forwards. If as many chairs as possible could be removed that would in the event of an evacuation reduce the risk of damage to the haul rope.

The events of Wednesday 15 February 2017

[36] At 6.30 am Wednesday 15 February morning, the fire was seen to have entered further into the Park with flames evident around chairlift tower 10, a little over two thirds of the way up the line.

[37] At 7 am, staff began the process of removing the carriers from the haul rope at the bottom station. At first, they tried to do this using a digger but that proved an ineffective method and was quickly abandoned in favour of using a truck with a crane. The crane and truck were brought in by a contractor and were in use by 9.30 am.

[38] The fire continued to spread but as at 9.53 am it had not yet reached the top station. By 1.21 pm, it had tracked to both the eastern and western sides and become a crowning forest fire, that is to say a fire burning along the tops of the trees. Trees on either side of the lift corridor were on fire.

[39] At around 1.45 pm, staff at the bottom station noticed that a chair coming down the hill on the haul rope was on fire. Mr Johnstone estimated that by then only about 12 of the 84 carriers (six chairs and six bike carriers) were between stations. The rest had either been removed or were jammed in the top station.

[40] Immediately on hearing of the burning chair, Mr Johnstone instructed staff to reverse the lift so as to send the burning chair back up to the top station and called on everyone to evacuate.

[41] After the evacuation, the Fire Service gave Mr Johnstone permission to return to refill the diesel tank for the emergency drive to make sure the lift kept running. The lift was kept running all through Wednesday night.

[42] At around the time of the evacuation, flames were seen towering 20 to 30 metres above the height of pine trees in the Park.

[43] Video footage showed that before the evacuation, between 1.08 pm and 1.30 pm on the Wednesday, a total of six to seven chairs passed through the burning forest towards the top of the lift line. At one point during the uphill and downhill reversals of direction, some of the chairs were held stationary in the fire for up to seven minutes before travelling down the slope towards the bottom forest.

[44] The chairs were upholstered with plastic material (polyurethane foam) and as a result of the chairs igniting, the plastic started to melt. From 1.30 pm onwards, the molten plastic dripped from the moving burning chairs onto the pine slash, igniting that material and causing spot fires along the length of the line.

[45] The spot fires created by the molten plastic igniting the slash and the matting then joined together to create what was called in the High Court judgment the “Chairlift Fire”.

[46] We pause here to interpolate that the question of whether the spot fires represented the outbreak of a new fire (as the Judge’s label of a distinct name the “Chairlift Fire” might suggest) or the spread of the existing Marleys Hill fire is a key issue on appeal. We address that issue later.

[47] Returning to the narrative, the fire rapidly grew in intensity and assisted by a change in wind direction and wind speed, it advanced rapidly through pine slash and forestry on the Park property and then from 1.45 pm onwards progressed out of the Park to the Worsley’s Road area where the respondents’ properties were located.

[48] It is common ground that had the chairs not caught on fire, the fire from the Marleys Hill area would have passed well south of the respondents’ properties and those properties would not have been affected.

[49] At around 3 pm, the fire burning out of the park merged with the Early Valley Road fire creating what we will call the merged fire. The Early Valley Road fire, it will be recalled, was a fire that had started one and half hours before the Marleys Hill fire. The merged fire destroyed property owned by the respondents Mr and Mrs Flanagan. Before it merged with the fire coming from the park, the Early Valley Road fire had already caused damage to other properties.

The High Court proceedings

[50] The High Court proceedings were issued by three categories of property owners:²

- (a) owners of properties damaged by the Early Valley Road fire who held Orion responsible for that fire;

² See High Court judgment, above n 1, at [4].

- (b) owners of properties in or around Worsley's Road impacted by the fire progressing from the Park who held Leisure Investments responsible for their losses; and
- (c) the Flanagans whose property was destroyed by the merged fire and who sued both Orion and Leisure Investments.

[51] As regards the claims against Leisure Investments, it was common ground that it did not cause the Marleys Hill fire. That was accepted to be the work of an arsonist. What was contended was that Leisure Investments caused the spread or outbreak of a growing fire from its property by creating the Chairlift Fire which then joined with the Early Valley Road fire to create the additional merged fire.³

[52] The statement of claim against Leisure Investments pleaded three causes of action: liability under s 43 of the Forest and Rural Fires Act 1977, negligence and nuisance.

[53] Part way through the High Court hearing, a settlement was reached between Orion and the Early Valley Road claimants. As a result of the settlement, the claims against Orion were discontinued. The hearing then continued to deal only with the claims against Leisure Investments. It was agreed that in the event Leisure Investments was found liable, then as regards the Flanagans, the liability would be split evenly between Leisure Investments and Orion.

The evidence at the hearing

[54] As already indicated, there was evidence regarding the establishment of the Park as well as eyewitness accounts about the fire and Leisure Investments' response to it.

[55] Leisure Investments also called evidence of industry practice from Doppelmayr's Mr Hayman and from a Mr Mauch, a representative of the other main global manufacturer of ropeways. Their evidence was to the effect they had never

³ At [12].

seen a manual recommending the removal of carriers in the event of a fire, at least not in a manual for a chairlift without parking rails. Mr Hayman had seen an express recommendation to that effect for a chairlift with parking rails. While he accepted chairs catching alight was not unheard of and therefore a foreseeable risk, neither he nor Mr Mauch was aware of any previous occasion where an adjacent forest fire had ignited a moving carrier with such drastic consequences as had occurred in this case.

[56] For reasons never explained, Leisure Investments did not call Mr Godwin the other Doppelmayr representative who, it will be recalled, was on site during the fire. He was the person who Mr Johnstone claimed had suggested running the chairlift backwards and forwards.

[57] The evidence called on behalf of the homeowners included expert evidence about the ignition temperature of the foam coating the chairs and the properties of the foam once ignited. That evidence confirmed that its ignition temperature would be reached in a crowning forest fire despite the average 6–10 metre or so clearance between the lift and the trees and that the chairs would melt long before the haul rope.

[58] Evidence for the homeowners was also given by a Mr McCrostie a New Zealand expert on chairlift operations in ski fields and an accredited safety auditor. He opined that a competent chairlift operator should not rely solely on the manufacturer's operation and service manual for the development of safety plans but also needed to consider the environment in which the lift is operating, identify the highest risk and plan for it. The Doppelmayr manual at issue in this case was generic and predominately contemplated a snow operation.

[59] Mr McCrostie was of the view that the Park's operational plan should have provided for removal of the carriers in the event of fire, that a competent operator should have known that once the power was lost, the chairs would bunch, and that Leisure Investments should have removed them before the chairs ignited.

The High Court findings

[60] In his decision, the Judge made the following key findings:

- (a) a reasonable operator in the position of Leisure Investments would have appreciated that the plastic on the chairs would melt and create a fire spread risk and would have removed the chairs;⁴
- (b) Leisure Investments negligently failed to remove the pine slash under the chairlift in breach of its fire safety management plan as well as failing to remove highly inflammable matting in the adjacent area;⁵ and
- (c) the spot fires caused by the dripping molten plastic created a new fire.⁶

[61] The Judge concluded Leisure Investments was liable under all three causes of action and awarded damages totalling \$10,296,041 together with interest and costs.

[62] On appeal, Leisure Investments challenges the finding of liability in respect of each cause of action. It contends the Judge erred both in his analysis of the evidence and his interpretation of the Forest and Rural Fires Act.

[63] The Judge's findings in relation to the negligence claim inform the findings as regards the other two causes of action and accordingly we address the negligence cause of action first.

Negligence

The grounds of appeal

[64] Mr Walker KC on behalf of Leisure Investments submitted that, correctly analysed, the evidence did not support the finding that the company had breached its duty of care. He identified the following alleged errors in the approach taken by the Judge:

- (a) The Judge wrongly relied on hindsight and expert scientific evidence instead of focusing as he should have done on what Leisure Investments reasonably understood at the time.

⁴ At [181(b)-(c)].

⁵ At [181(e)].

⁶ At [120].

- (b) failed to give sufficient weight to the evidence that Leisure Investments responded to the fire in accordance with the Doppelmayr manual, the fire safety management plan and Doppelmayr's instructions. No one else including fire safety officers appreciated the risk of continuing to run the chairlift. What happened was an entirely unforeseen and unprecedented event.
- (c) wrongly relied on evidence about previous incidents where forest fires were said to have burned chairlift carriers without recognising or appreciating that those incidents all involved stationary carriers.
- (d) made errors of fact, including in particular mistakenly believing that a previous version of the Park's fire safety management plan was for a 60 metre corridor instead of the as constructed 12–20 metres, and secondly that the Doppelmayr manual did not apply to a crowning forest fire when the correct position was that it did.
- (e) relied on allegations of negligence that had not been pleaded.
- (f) failed to apply the legal principle that in cases alleging failure to abate a danger, the fact the defendant was confronted by a situation not of its own making should be taken into account in assessing the standard of effort required.⁷ In this case, the Judge took no account of Leisure Investments' knowledge, the resources at its disposal or the advice it received.

[65] In summarising Leisure Investment's position, Mr Walker contended that it behaved responsibly and robustly throughout the emergency. It co-operated with the authorities and acted in accordance with best industry practice, the Doppelmayr manual and its emergency plans. It sought advice from the manufacturer and followed that advice. Leisure Investments was confronted with a fire it did not start and, in his submission, it was unjust and wrong to weigh its conduct in fine scales, with the

⁷ Relying on *Goldman v Hargrave* [1967] 1 AC 645 (PC).

benefit of hindsight and to an exacting standard. It should not be held liable for failing to identify a fire-spread risk that no one else had identified.

Analysis

[66] We are not unsympathetic to the difficulties faced by Leisure Investments and consider the arguments raised by Mr Walker have some force. However, having carefully reviewed the evidence ourselves, we are not persuaded that the Judge reached the wrong conclusion.

[67] At the time of the events at issue, Leisure Investments was aware of the close proximity of the Marleys Hill fire, a major forest fire. It had itself already identified such a fire as its greatest risk. It knew that the majority of its chairlift corridor ran through plantation forests that adjoined urban development and at all material times during the three critical days was aware there was a reasonable possibility of a major crowning forest fire in the chairlift corridor. It was also aware that the seats on its chairlift were coated in plastic. Leisure Investments knew too that there were considerable quantities of dry slash underneath the chairlift and that there was an elevated fire risk in the Port Hills area.

[68] In those circumstances, it was not in our view necessary for Leisure Investments to have knowledge of relative ignition temperatures and melting points before it could be held liable as failing to meet the standard of a reasonable chairlift operator by continuing to run the chairlift at walking pace backwards and forwards through a crowning forest fire and over flammable ground cover with the plastic chairs still on it. It is common knowledge that plastic melts when exposed to excessive heat and burns. It is also common knowledge that dry slash in the summer heat is highly flammable especially in the sort of conditions prevailing in Christchurch that summer.

[69] The concern to protect the haul rope was understandable but as Leisure Investments knew the haul rope could run without the chairs still attached and it knew it was possible to remove the chairs. The fact Mr Johnstone did not advert to the possibility of running the haul rope without the chairs or delayed taking that action because there was no such instruction in the Doppelmayr manual and/or the chairs

were not easily able to be removed – or at least not as easily as they might have been had there been parking rails – is no answer.

[70] Mr Johnstone conceded in evidence that he was aware the chair seats were coated in plastic polyurethane foam. Armed with that knowledge, a reasonable chairlift operator would, in our assessment, have appreciated that if the fire was capable of damaging the encased plastic core of the haul rope, then the unprotected plastic on the chair would obviously catch fire even more readily and accordingly would have taken the necessary precautions.

[71] Further, while the chairs were not easily removed, it was by no means impossible as evidenced by the fact that a significant number of chairs were able to be removed in just a four hour period on the Wednesday morning. We agree with the property owners' counsel, Mr Ring KC, that there was sufficient time for Leisure Investments to have removed all the chairs and so prevented his clients' loss had it only started that exercise earlier. To put it another way, given the risk of leaving the chairs still attached, the burden of taking the precaution of removing them to eliminate that risk was not unduly onerous. As Mr McCrostie said in evidence, the worst that would have happened is that Leisure Investments would have spent eight hours taking the chairs off and another eight hours putting them back on.

[72] This last point bears on the question of the standard of effort required of Leisure Investments in a situation where the fire was caused by a third party, the arsonist. We accept as indeed do the respondents, that in determining whether Leisure Investments was negligent, the "standard of effort" required of it must take into account its lack of initial responsibility, its knowledge and its resources. Removing the chairs was not as easy as it would have been had there been parking rails but there was no evidence it was prohibitively resource intensive or excessively demanding.

[73] All of this of course raises the question: when would a reasonable operator in the position of Leisure Investments have commenced the exercise of removing the chairs?

[74] In our assessment of the evidence, there was sufficient reason for concern on the Tuesday that a reasonable operator in the position of Leisure Investments would have started to remove the chairs in the afternoon at the latest instead of leaving it until 9.30 am the following day. While there were reports on Tuesday that the fire was on the boundary but under control, that evidence needs to be tempered with the consideration that at the same time, Leisure Investments itself thought it necessary to keep running the chairlift. Not only was Mr Charity apprehensive but Mr Johnstone himself clearly anticipated the fire might reach the chairlift. He instructed staff for example not to go to the top station because of the danger.

[75] At the hearing before us, Mr Walker stressed that the concern that led to removal of bike carriers on late Tuesday afternoon was about clumping. Thus, in his submission, the inference could not be drawn that this action was taken because Leisure Investments appreciated the risk of the carriers themselves catching fire. It was not, he argued, until Wednesday morning that the risk of the fire reaching the chairlift materialised. We disagree. In our view, on the evidence that risk was ever present from Monday evening onwards and should have been appreciated by Leisure Investments given the inherently unpredictable nature of major forest fires.

[76] In coming to these conclusions, we have not overlooked the specific criticisms made of aspects of the Judge's analysis.

[77] First, as regards the pleading point, we agree the allegations of "negligently leaving pine slash under the chairlift in breach of the fire safety management plan" and "negligently failing to remove the highly flammable coconut matting which was adjacent" were never pleaded as particulars of negligence. Had they been, Leisure Investments would have called other evidence about the pine slash, the coconut matting and the plan. In those circumstances, we therefore agree with Mr Walker that the absence of a pleading unfairly prejudiced Leisure Investments and the Judge should not have found failing to remove the pine slash, coconut matting or non-compliance with the plan to be a distinct breach of the company's duty of care.

[78] However, in our view, that does not absolve Leisure Investments from liability. The critical point is that Leisure Investments knew the slash was there and must have

known it was highly flammable. The known presence of the slash must be relevant to an assessment of what a reasonable operator in Leisure Investments' position would have done.

[79] Similarly, although we accept the Judge did make factual errors regarding the original width of the corridor and the application of the manual to a crowning forest fire, we are not persuaded the mistakes were sufficiently material to vitiate his finding of liability. We have independently reviewed the evidence knowing the correct facts and reached the same conclusion.

[80] Another criticism made of the Judge is that he placed excessive weight on Mr McCrostie's evidence and little or no weight on the evidence of Mr Mauch (the representative from the other chairlift manufacturer) despite the latter having considerably greater expertise and knowledge than the former and despite Mr McCrostie making mistakes and concessions which were never addressed in the judgment.

[81] As is well established, it is open to a trial judge to prefer the evidence of one expert over another. Mr McCrostie was qualified to give the evidence he did and he was truly independent. According to the respondents, in contrast, Mr Mauch was demonstrably an advocate. We agree there are aspects of Mr Mauch's evidence that smack of advocacy but would not discount his evidence on that basis. The more telling point is that the concessions made by Mr McCrostie did not in our assessment detract from his central thesis and much of what he had to say was essentially common sense. Further, while industry practice is undoubtedly very relevant in assessing standards of care and negligence, the evidence adduced was not evidence of an accepted industry practice to take the various actions that Leisure Investments took. Nor did the Doppelmayr manual actively authorise or recommend those specific actions, namely running the haul rope with plastic coated chairs still attached through a crowning forest fire backwards and forwards at walking speed.

[82] For all these reasons, we agree with the Judge's finding of liability in negligence.

[83] Although that conclusion means the appeal relating to liability must fail, out of deference to the detailed argument we heard on the other two causes of action, we now turn to consider them.

Claim under s 43 of the Forest and Rural Fires Act 1977

[84] We begin by noting that s 43 of the Forest and Rural Fires Act 1977 is actually no longer in force, the Act having been repealed on 1 July 2017 and replaced by the Fire and Emergency Act 2017.⁸ The latter does not provide for any civil liability relating to forest and rural fires, only the imposition of criminal sanctions.

[85] However, because the events at issue in this case occurred before the date of 1 July 2017, the Forest and Rural Fires Act, including s 43, applies to this proceeding.⁹ According to Mr Walker, the claim under s 43 was the respondents' "lead claim" at trial.

[86] Section 43 at the time of the Port Hills fires read as follows:

43 Recovery from person responsible for fire

- (1) Where any property has wholly or partially been destroyed or damaged by or safeguarded from an outbreak or threat of outbreak of fire, and responsibility for the outbreak is acknowledged by, or is established by action or otherwise as caused by, any person—
 - (a) the costs of control, restriction, suppression or extinction of the fire may be recovered from that person by the Fire Authority or the New Zealand Fire Service Commission or the eligible landholder or eligible landholders of the forest area affected, as the case may be, incurring those costs pursuant to fire control measures under this Act; and
 - (b) any loss in, or diminution of, value of that property, and any consequential loss or damage not too remote in law, may be recovered from that person by the owner of the property.
- (1A) *[Repealed]*
- (2) The amount of the costs so recoverable may be wholly or partially established by agreement, or by a Rural Fire Mediator, or by proceedings under section 48(4).

⁸ Fire and Emergency Act 2017, s 195(b).

⁹ See generally the Legislation Act 2019, s 34.

- (3) This section shall be deemed to be supplementary to and not in substitution for any other rights of recovery that may exist in law or by enactment or otherwise howsoever.
- (4) Before imposing any levy under section 46 or section 46A, a Fire Authority shall reasonably endeavour to recover its costs pursuant to this section.

[87] The claim in this case by the property owners against Leisure Investments was made under s 43(1)(b) and as mentioned was upheld by the Judge.

Legal background to s 43

[88] In order to understand the issues raised on appeal, it is necessary to provide a brief explanation about the background to the Forest and Rural Fires Act, the common law that relevantly applied prior to its enactment and subsequent case law.

[89] Civil liability for damage caused by fire was part of the early common law. It took the form of a special action known as the *ignis suus* rule, the Latin phrase *ignis suus* meaning “his fire”. Under the rule, an occupier of land was strictly liable for damage caused by the escape of fire from their land unless they could show the fire was started or spread due to the act of a stranger or an act of God.¹⁰

[90] The rule was later modified by s 86 of the Fires Prevention (Metropolis) Act 1774 (GB) 14 Geo III c 78 (the 1774 Act). That section of the 1774 Act later became part of the law of New Zealand and remained in force until 2008.¹¹ Section 86 provided that an action could not be maintained if the fire had begun accidentally. “Accidentally” was interpreted to mean “produced by mere chance” or “incapable of being traced to any cause”.¹²

¹⁰ See Bill Atkin “The Rule in *Rylands v Fletcher*” in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, 2019) 597 at [11.6.01], citing among others *Mayfair Ltd v Pears* [1987] 1 NZLR 459 (CA) at 461 and 467; and *Balfour v Barty-King* [1957] 1 QB 496 (CA) at 505.

¹¹ The operation of s 86 of the 1774 Act in New Zealand was preserved until then under sch 1 of the Imperial Laws Application Act 1988. Section 86 ceased to have effect in New Zealand on 1 January 2008: see the Property Law Act 2007, s 365(3)(a).

¹² Atkin, above n 10, at [11.6.01], citing *Filliter v Phippard* (1847) 11 QB 347, 116 ER 506 (QB) at 357 and 510; and *Goldman v Hargrave*, above n 7, at 665–666.

[91] Then in 1865 the landmark decision of *Rylands v Fletcher* established a new strict liability tort for the escape of harmful things from one property to another.¹³ Liability under what became known as “the tort of *Rylands v Fletcher*” was subject to a requirement that the harmful thing must have been brought onto the defendant’s property for a non-natural use.¹⁴

[92] The new tort was applied to fire, it being held that the old *ignis suus* rule had been subsumed into the new tort. This prevented claimants from being able to avoid the non-natural use requirement.¹⁵

[93] Prior to the enactment of the Forest and Rural Fires Act, the common law position as modified by s 86 of the 1774 Act can be generally summarised as follows. An occupier was liable for the escape of a fire lit deliberately (as in one lit intentionally and not accidentally) on their land if:¹⁶

- (a) the occupier was negligent in lighting the fire or in allowing it to spread;
or
- (b) the lighting of the fire amounted to a non-natural use of the land so as to attract strict liability.

[94] The Forest and Rural Fires Act came into force on 1 April 1979. There had been earlier legislation dealing with rural fires and recovery of firefighting expenses but none of the previous statutes contained a provision identical to s 43.

[95] For some time, there was a degree of uncertainty about whether s 43 created a new cause of action or whether its purpose was the more limited one of simply

¹³ See *Rylands v Fletcher* (1866) LR 1 Exch 265 (Exch Ch), which was affirmed in *Rylands v Fletcher* (1868) LR 3 HL 330 (HL) [*Rylands* (HL)].

¹⁴ The non-natural use requirement was added by the House of Lords on appeal: see *Rylands* (HL), above n 13, at 330 and 339.

¹⁵ See Atkin, above n 10, at [11.6.01], citing among others *Boulcott Gold Club Inc v Engelbrecht* [1945] NZLR 556 (SC) at 557; and *Holderness v Goslin* [1975] NZLR 46 (SC) at 51.

¹⁶ At [11.6.01], citing *Tucker v New Zealand Fire Service Commission* [2003] NZAR 270 (HC) at [28].

extending the scope of the remedies recoverable under the existing actions.¹⁷ Unfortunately, the relevant legislative materials shed little light on Parliament's intention in this regard.

[96] The first decision to consider the section in any depth was the 2002 High Court judgment of William Young J in *Tucker v New Zealand Fire Service Commission*.¹⁸

[97] The facts of *Tucker* were that Mr Tucker was driving a properly maintained and certified B train vehicle down a state highway.¹⁹ Without warning two tyres on one of the trailers burst with the result that the rims on two of the wheels came into contact with the road. This produced sparks and a roadside fire which damaged a pine plantation. The New Zealand Fire Service Commission and the Minister of Conservation incurred costs of just over \$21,000 in bringing the fire under control and sought to recover these from Mr Tucker relying on s 43(2).

[98] In his decision, William Young J addressed the meaning of what he described as the “scrambled syntax” of s 43 (1),²⁰ in particular, the requirement that:

... responsibility for the outbreak is acknowledged by, or is established by action or otherwise as caused by, any person—

...

[99] William Young J held that in order to make sense of those words, they should be interpreted as requiring that the person either admitted being responsible for the outbreak in the sense of having caused it or that there was a judicial finding in a court action that the person had caused the outbreak.

¹⁷ See for example *Hollamby v Attorney-General* HC Blenheim M24/82, 31 March 1983 at 9–10. John Smillie, in an earlier edition of *Todd on Torts*, identifies “the strongest alternative view” to the view that s 43(1) creates a distinct cause of action as being “that s 43(1) was intended merely to confirm the position taken by Mahon J in *New Zealand Forest Products Ltd v O’Sullivan* [1974] 2 NZLR 80 (SC) that a person who is otherwise *legally* responsible for causing a fire is liable for economic loss consisting of firefighting costs incurred by a claimant who suffers no physical damage to his or her property”: see John Smillie “The Rule in *Rylands v Fletcher*” in Stephen Todd (ed) *The Law of Torts in New Zealand* (4th ed, Brookers, 2005) 442 at n 167.

¹⁸ *Tucker*, above n 16.

¹⁹ A B train vehicle is a tractor unit with two semi-trailers.

²⁰ At [42].

[100] In coming to that conclusion, William Young J rejected an argument that “responsibility for the outbreak” meant legally responsible. In his view, the section was intended to apply so as to impose liability on a person who causes the outbreak, irrespective of whether that person was otherwise civilly liable for the fire and its consequences. That is to say, the “responsibility” connoted was causation in fact rather than responsibility in law and the breach of an existing legal duty.²¹

[101] That meant the key issue was whether Mr Tucker could be regarded as having caused the fire.

[102] In deciding this issue, William Young J accepted that foreseeability was not the criterion. However, relying on the House of Lords decision in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*, he held that for the purposes of causation under s 43 a “common sense” distinction could be drawn between (a) acts and events which although not necessarily foreseeable in the particular case are generally a normal and familiar fact of life and (b) events which are abnormal and extraordinary.²² Events in the latter category could not properly be regarded as causative. The facts of the present case were clearly in this category and therefore Mr Tucker was not liable under s 43.²³

[103] The Judge also observed that the application of causation principles had to take into account the legislative context, the paradigm case Parliament had in mind being a deliberately lit fire. The Judge acknowledged that liability was not limited to deliberately lit fires but what Parliament had in mind was relevant to “draw[ing] the causation line”.²⁴ He also stated that in his view “where a person causes fire accidentally but without negligence (or other breach of legal obligation) causation is likely to be difficult to establish”.²⁵

[104] In 2005 – three years after *Tucker* was decided – s 43(1) was amended by the addition of s 43(1A). It provided:

²¹ At [42].

²² At [49]–[54], citing *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL).

²³ At [47]–[61].

²⁴ At [55].

²⁵ At [66].

To avoid doubt, section 86 of the Fires Prevention (Metropolis) Act 1774 (Imp) does not apply—

- (a) in determining, for the purposes of this section, responsibility for the outbreak or threat of outbreak of fire; or
- (b) to a recovery made under this section.

[105] It will be recalled that s 86 of the 1774 Act stipulated no action was to lie against a person where the fire accidentally started. It follows that the intention of the amendment to s 43 (in precluding the application of s 86) was to make it clear that the fact a fire was accidental was *not* an impediment to liability under s 43.

[106] The authors of *Todd on Torts* state that by merely reaffirming the strict nature of s 43 and not taking the opportunity to make any other amendments, Parliament must in enacting s 43(1A) be taken to have endorsed the interpretation given the section in *Tucker*.²⁶ While we agree that s 43(1A) does affirm the existence of a distinct cause of action based on strict liability, the implications of s 43(1A) for the *Tucker* approach to causation are, in our view, less clear cut. As already mentioned, “accidentally” under the 1774 Act was interpreted as meaning a fire produced by mere chance. Thus, if the 1774 Act is excluded from s 43, fires produced by mere chance should still be caught under s 43 and the person held liable. Yet, arguably “mere chance” appears to be the reason why Mr Tucker escaped liability.

[107] Unfortunately, the background legislative materials provide no guidance as to the reasons for the addition of s 43(1A).

[108] Section 43(1A) was subsequently repealed in 2008. That came about because the 1774 Act was repealed in its entirety under the Property Law Act 2007. The repeal of the 1774 Act was part of a general “clean out” of obsolete imperial legislation.²⁷ In those circumstances, we do not consider it appropriate to attach any significance to its repeal in terms of the application of s 43.

²⁶ Bill Atkin “The Rule in *Rylands v Fletcher*” in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, 2016) 591 at [11.6.02].

²⁷ See Law Commission *A New Property Law Act* (NZLC R29, 1994) at 4 and 422.

[109] Counsel referred us to a number of decisions that have considered s 43 since 2008.

[110] The first of these is a 2011 decision of this Court in *Garnett v Tower Insurance Ltd*.²⁸ It involved a dispute in the summary judgment context between a person being sued under s 43 and their insurer. Although the focus was on the interpretation of the relevant insurance policy, this Court did have occasion to consider the scope of s 43. The Court expressly stated that liability under s 43 was “of a different nature from liability for negligence” and that:²⁹

... by s 43(1) a person who is responsible for causing a fire in a forest or a rural area is strictly liable for costs incurred both in fighting the fire and for damage done to property – that is, without proof of negligence or want of care,
...

[111] Liability under s 43 for the fire at issue in *Garnett* was the subject of a later High Court trial and judgment in *Nelson Forests Ltd v Three Tuis Ltd*.³⁰ That judgment provides further details about the fire. Mr Garnett and his partner ran a bed and breakfast business through their company, the first defendant Three Tuis Ltd. Guests had lit a fire in a wood burner and two days later Mr Garnett dumped the ashes by a scrub covered bank at the edge of a mown lawn. Within two hours, a serious fire had taken hold about the bank. Driven by a strong wind, and encouraged by dry conditions, the fire spread 4.7 kilometres destroying a large neighbouring forest. Both the forest’s owner and the Fire Service who incurred costs bringing the fire under control filed proceedings under s 43, respectively relying on s 43(1)(b) and (a).

[112] The trial judge Miller J found that the ashes had caused the fire and that they were hot when Mr Garnett dumped them against combustible material.³¹ He also found that although Mr Garnett thought the ashes were cold that was only on the basis of an inadequate visual inspection.³²

²⁸ *Garnett v Tower Insurance Ltd* [2011] NZCA 576.

²⁹ At [37]–[38].

³⁰ *Nelson Forests Ltd v Three Tuis Ltd* [2013] NZHC 856, [2013] NZAR 1151.

³¹ At [16]–[17].

³² At [16] and [23].

[113] Miller J summarised what he considered the relevant legal principles in the following terms.³³

[24] I accept, following *Tucker v New Zealand Fire Service Commission* and *[Environment] Agency [(formerly National Rivers Authority)] v Empress Car Co (Abertillery) Ltd*, that liability under s 43 is strict. The harm need not be foreseeable. However, the defendant is not liable where the harm, although produced by his or her actions, was an extraordinary consequence, not a normal fact of life.

[114] The Judge went on to hold it could not possibly be said that the fire in question was an extraordinary consequence such that Mr Garnett could not be taken to have caused it at all. Unlike *Tucker*, the case did not feature any.³⁴

... succession of events of which only one, an action not in itself intrinsically likely to cause fire, was directly attributable to Mr Garnett. The connection between his actions and the fire was immediate.

[115] The next case in time was another decision of this Court, *AMI Insurance Ltd v Legg*.³⁵ Mr and Mrs Legg had built and burnt a fire heap on their property on 16 December at a time when no fire restrictions were in place and conditions were suitable. The fire burned without incident. It was tended from time to time by Mr Legg using a tractor to push material from the periphery into the heart of the fire. The last time he did this was 22 December. On 10 January, embers deep within the heap unexpectedly caused it to reignite in very dry and windy conditions. Material from the heap then blew onto nearby vegetation. Fire spread rapidly onto neighbouring properties. The firefighting authorities sought recovery under s 43 from the Leggs for the costs of fighting the fire, which in turn prompted the Leggs to seek indemnity from their insurer.

[116] Although the focus of this Court's decision was, as it had been in *Garnett*, on the interpretation of an insurance policy, the Court expressly noted that the liability under s 43 was strict liability.³⁶

³³ Footnotes omitted.

³⁴ At [25].

³⁵ *AMI Insurance Ltd v Legg* [2017] NZCA 321, [2017] 3 NZLR 629.

³⁶ At [13].

[117] The final decision referred to us was a High Court decision of Churchman J in *Marlborough Lines Ltd v New Zealand Fire Service Commission*.³⁷ In that case, a person carrying out work on a property cut down a tree which then fell across power lines on the property. As a result, vegetation in the vicinity ignited causing a fire. The fire then spread over approximately six hectares of vegetation. In extinguishing the fire, the relevant authorities incurred costs of over \$100,000 which they then sought to recover in the District Court under s 43 from the owner of the power lines, Marlborough Lines Ltd. The firefighting authorities alleged that by operating the power lines, the lines company had produced a situation in which a fire could occur.

[118] Marlborough Lines unsuccessfully sought a defendant's summary judgment in the District Court. It then appealed to the High Court, Churchman J dismissing the appeal and holding that the claim under s 43 was tenable and should proceed to trial.³⁸

[119] In the course of coming to that conclusion, Churchman J noted that s 43 does not limit liability to situations where traditional causes of action such as negligence, nuisance or *Rylands v Fletcher* are made out. Instead, he said, it imposes strict liability.³⁹ He went on to hold following *Tucker* that the case turned on whether the sequence of events that had occurred was extraordinary or ordinary.⁴⁰ It seems clear the Judge considered the firefighting authorities were likely to face an uphill battle at trial but ultimately decided it was not sufficiently clear cut as to warrant summary judgment.

[120] We turn now to the issues raised on this appeal.

Arguments on appeal

[121] Leisure Investments says that in allowing the claim under s 43, the Judge erred in the following key respects:

³⁷ *Marlborough Lines Ltd v New Zealand Fire Service Commission* [2017] NZHC 2127.

³⁸ At [133].

³⁹ At [10].

⁴⁰ At [16].

- (a) wrongly characterised the so-called Chairlift Fire as an outbreak for the purposes of liability under s 43. There was only one relevant outbreak and that occurred when the arsonist ignited the Marleys Hill fire. Leisure Investments only spread the fire. Liability under s 43 is based on outbreak.
- (b) misinterpreted s 43 to require only causation in fact and failed to address whether Leisure Investments was responsible for the outbreak of the fire.
- (c) wrongly determined that Leisure Investments had caused an outbreak and could only be excused from liability by a subsequent extraordinary event.

Causation and responsibility

[122] This was the primary argument raised by Leisure Investments and we therefore address it first.

[123] As we understand it, the thrust of Leisure Investments' argument on causation and responsibility is that *Tucker* wrongly conflated the two. It is further argued that there is an internal contradiction in the *Tucker* analysis. While asserting that the cause of action is one of strict liability and equating responsibility with causation in fact, at the same time the High Court Judge through the guise of causation introduced an element of fault so as to produce a fair result on the facts before him. That was to strain concepts of causation. The result reached in *Tucker* cannot be justified on correct causation principles and the Court should acknowledge that causation and responsibility are intended to be distinct concepts.

[124] In short, the argument is that it is a necessary pre-condition to liability that the defendant must be responsible which requires a judgment about their conduct and culpability over and above causation.

[125] We do not accept this submission if it is intended to suggest that the Court should go further than the *Tucker* extraordinary event exclusion and hold that foreseeability of harm and negligence are pre-requisites to liability under s 43.

[126] As detailed above, all the post-*Tucker* decisions including decisions of this Court have held that the action is one of strict liability and not dependent on fault. That approach was unequivocally re-affirmed by Parliament when it enacted s 43(1A).

[127] It is also supported by the existence of s 43(3) which states that s 43 “shall be deemed to be supplementary to and not in substitution for any other rights of recovery that may exist in law or by enactment or otherwise howsoever”. In our view, that section makes clear that while there may be concurrent liability under both s 43 and negligence, that does not mean the two causes of action are co-extensive. Otherwise there would be no point in making a s 43 claim available to property owners.

[128] As regards the superadded *Tucker* requirement of ordinary event, for reasons already identified that was arguably overly generous to defendants. However we acknowledge that has become settled law. Whether that is more accurately viewed under the rubric of responsibility or causation is immaterial. Further and in any event neither the ordinary event requirement nor an argument that we should introduce further concepts of fault can avail Leisure Investments given our conclusions in relation to the negligence cause of action.

Outbreak or spread?

[129] As the Judge noted, the Oxford English dictionary definitions of the word “outbreak” refer to “a sudden or violent occurrence ...” while “spread” has been defined as to “open something out so as to increase its surface area, width, or length” and “to extend or distribute over a large or increasing area”.⁴¹

[130] On appeal, it was common ground that under the Forest and Rural Fires Act an “outbreak” of fire is not the same thing as an “occurrence” of fire, the latter term

⁴¹ High Court judgment, above n 1, at [134], citing Catherine Soanes and Sara Hawker (eds) *Compact Oxford English Dictionary of Current English* (3rd ed, Oxford University Press, Oxford, 2005) at 718 and 1003.

encompassing both controlled and uncontrolled fires whereas “outbreak” refers to the uncontrolled sudden happening of a fire. Importantly, both parties also agreed that under the Act the “outbreak” of a fire is not the same thing as the “spread” of a fire.

[131] We agree it is reasonable to conclude those terms were intended to be distinct concepts. All three – “occurrence”, “outbreak” and “spread” – are used in various sections in the Act⁴² including sections where they are used disjunctively such as “outbreak or spread”,⁴³ “occurrence or spread”.⁴⁴ The fact that s 43 imposes liability in respect of “outbreaks” only, with no reference to “spread” or “occurrence” must be taken to have been a deliberate choice on the part of Parliament.

[132] We also consider it reasonable to infer that liability under s 43 was limited to outbreaks in recognition of the fact that the liability being imposed was strict.

[133] It follows from all of this that if Leisure Investments is correct and the fire that damaged the respondents’ property is properly characterised as the spread of an existing fire (the Marleys Hill fire) rather than an outbreak then regardless of whether Leisure Investments was negligent the Judge should have dismissed the s 43 claim from the outset.

[134] While the parties agree the two words “outbreak” and “spread” were intended to mean different things, they do not agree on the features that differentiate one from the other. Unfortunately, neither word is defined in the Forest and Rural Fires Act and the issue is not specifically addressed in any of the background legislative material.

[135] Adding to the difficulty is that none of the decided cases involves a factual situation similar to this one where the claim in effect depends on there being two actionable outbreaks: the first the Marleys Hill fire ignited by the arsonist and the second the fire that (to use a neutral expression) emanated from the Park. As a result, this is the first occasion on which the issue of what is an outbreak as opposed to a spread has been considered in any depth.

⁴² The term “occurrence” appears in ss 20 and 34; “outbreak” appears in ss 20, 21, 32, 35, 36, 38 and 43; and “spread” appears in ss 2, 14, 20, 21, 23, 25, 32, 34, 35, 36, 38, 39, 40, 45, 53 and 58.

⁴³ See for example s 32.

⁴⁴ See for example s 34.

[136] Mr Walker referred us to s 53 of the Forest and Rural Fires Act which uses the phrase “the origin of the fire or the spread thereof” and argued that this supported the interpretation of “outbreak” as meaning the original fire, and not a secondary ignition. So too in his submission did the dictionary meaning of “spread” cited by the Judge, being to “open something out so as to increase its surface area” or to “extend or distribute over a large or increasing area”.⁴⁵ That, Mr Walker argued, is exactly what happened on 15 February 2017 in the Port Hills.

[137] Mr Walker further argued it was unreasonable and artificial to conclude the ignitions below the chairlift caused by the arsonist’s fire constituted a new outbreak. He contended that what happened in this case was no different from a common form of fire spread, namely where brands and embers from an existing fire are carried on the wind ahead of the fire to ignite new flammable material.

[138] As will be apparent, if that were correct, it would arguably mean that in the *Legg* decision Mr and Mrs Legg should not have been found liable for the fire that reignited several weeks later in dry and windy conditions. When that contention was put to Mr Walker, he responded by submitting that the issue of whether the reignition was an outbreak was never considered in *Legg* and further that unlike *Leisure Investments* it was Mr Legg who lit the original fire.

[139] For the property owners, Mr Ring accepted that the word “spread” in the context of fire is used in the sense of a fire expanding its borders or even moving locations. He also accepted “spread” can be used colloquially and generally to refer to any new fire location. However, he argued that for the purposes of s 43, regard must be had to the “[i]ndustry/technical meaning of spread” which in turn means that a distinction should be drawn between, on the one hand, the “passive” spread of a fire by natural forces, and on the other, the “active” spread of it as a result of human or mechanical intervention or agency. The fire at issue was in the latter category. It was a case of igniting material being physically transported by human agency from the main fire to a secondary location where it then ignited combustible material. It was

⁴⁵ High Court judgment, above n 1, at [134].

therefore no different in principle from someone uplifting a firebrand and dropping it in a different and removed location.

[140] We have found this a difficult issue to decide.

[141] While the bright line test suggested by Mr Ring – “spread” is limited to the expansion of a fire due to natural forces, but once human or mechanical agency is involved it becomes an “outbreak” – has some obvious attractions, it is not without its problems.

[142] It relies on technical understanding of what is meant by a spread but there is no evidence before us of any such general technical understanding. Mr Ring did refer us to American literature but there is no evidence that terminology has been adopted in this country. Indeed, it is arguably inconsistent with aspects of the reports of the New Zealand fire authorities regarding the fire in this case. While arguably consistent with the *Garnett* case, the test is also difficult to reconcile with *Legg* as well as s 25 of the Act. Section 25 creates an offence of “negligently permit[ting] any fire to spread” and although “permitting” can arguably be characterised as passive, the section does clearly contemplate it is possible for spread to occur by human act or omission. Further, when asked by us whether a fire caused by an arsonist throwing an accelerant on an existing fire would be in the same category under his test as transporting the embers to a new location (the latter being Mr Ring’s paradigm example of an outbreak) he was uncertain.

[143] On the other hand, we do consider there is some force in Mr Ring’s argument that the use of “outbreak” in the context of personal responsibility for the outbreak must be intended to refer to the sudden existence of a fire at a time and place where previously there had been no fire, the fire starting in a particular way and caused by the defendant. We also agree it cannot have been intended that a fire resulting from someone lifting embers from an existing fire and relocating them near flammable material elsewhere would be outside the scope of s 43. That would in our view be an absurd result and contrary to the purpose of s 43 as identified in *Tucker*. There is no reason either as a matter of language or statutory purpose and policy which would in

our assessment justify taking the absolute position that in any given scenario there can be only one outbreak.

[144] We consider that it is ultimately a matter of impression as to whether the fire that damaged the respondents' properties can properly be described as a new and distinct fire and so an outbreak, or whether it was the spread of an existing fire. In short, it is a matter of fact and degree. Each case must turn on its own facts.

[145] In our view, there are two critical factors in this case. The first is that the fire which damaged the respondents' properties was ignited beyond the head of the spreading fire. The second is the very significant element of transportation that was involved in creating the fire. Having regard to those two factors, we conclude that the fire at issue was an outbreak for the purposes of s 43.

[146] It follows from all the above that we are satisfied the pre-requisites to liability under s 43 were made out and that the Judge was correct to find Leisure Investments liable.

[147] We now turn to consider the third cause of action.

Nuisance

The argument

[148] The tort of private nuisance is concerned with protecting the right of an owner or occupier of land to the quiet use and enjoyment of their land, free from unreasonable interference. The interference must be both substantial and unreasonable before it will be actionable.⁴⁶

[149] Mr Walker identified the basis on which the Judge found Leisure Investments liable in nuisance as being:

- (a) a party need not have acted negligently to be liable in nuisance;⁴⁷

⁴⁶ See generally Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 533 at [10.2.01]–[10.2.03].

⁴⁷ High Court judgment, above n 1, at [200].

- (b) the focus is on the unreasonable effect of the interference on the claimant's enjoyment of land, rather than the reasonableness of the defendant's conduct;⁴⁸
- (c) Leisure Investments created a state of affairs that caused the outbreak of the Chairlift Fire on its property, which was a nuisance;⁴⁹
- (d) the nuisance was avoidable if Leisure Investments had removed the chairs earlier;⁵⁰ and
- (e) the damage caused by the Chairlift Fire was reasonably foreseeable.⁵¹

[150] On appeal, Mr Walker took particular issue with a statement made by the Judge that if physical damage is caused to a neighbouring property, there must have been an unreasonable use of land by the defendant.⁵² In Mr Walker's submission, if that were correct it would mean that every fire constitutes a nuisance. The Judge still needed to have regard to the reasonableness of the defendant's conduct to assess whether the effect was unreasonable.

[151] Mr Walker further developed this argument to submit that where an arsonist has started a fire which has come onto the defendant's land and then because of some feature of that land or the defendant's operation, the fire has accelerated or spread in a particular way, the resulting interference with the claimant's use or enjoyment of their land should only be considered unreasonable if the defendant was at fault in respect of the feature. It has to be reasonably foreseeable that the fire would accelerate or be spread by reason of the feature.

[152] This case, he submitted, had to be fairly treated as one of a defendant dealing with a third party fire, rather than starting its own fire.

⁴⁸ At [203].

⁴⁹ At [201].

⁵⁰ At [207].

⁵¹ At [211].

⁵² At [206].

Our view

[153] We acknowledge the existence of authority that where a nuisance proceeds from a state of affairs created on a person's land due to the unauthorised act of a third party over whom the occupier has no control, the occupier is not strictly liable.⁵³

[154] However, it is also the law that if such an occupier continues the nuisance they will be liable. An occupier is considered to have continued a nuisance if with knowledge of it they fail to take reasonable steps to remove or abate it.⁵⁴

[155] In this case, even if the fire is considered a spread rather than a new fire, it was unquestionably the actions of Leisure Investment which caused the spread, actions which we have found were unreasonable.

[156] We therefore conclude the Judge was correct to find Leisure Investments liable in nuisance as well as in negligence and under s 43 of the Forest and Rural Fires Act.

Damages

[157] The focus in the High Court in relation to damages was on the claims made by the owners of the four most seriously damaged properties, namely Mrs Grace, Mr and Mrs Kwon, the Pflaums and the Flanagans.

[158] As the Judge noted, the claims made by those owners were generally advanced on the basis they were entitled to recover what their respective insurers paid to settle claims under their insurance policies, plus additional uninsured losses. To the extent the claims related to insured losses they were subrogated claims by the insurers.⁵⁵

[159] The Judge also noted that all claimants relied heavily on "extensive" evidence provided by a loss adjuster, Mr Bird. Mr Bird undertook an analysis of the quantum of insured and uninsured losses suffered by each claimant. He conducted face to face

⁵³ Atkin, above n 46, at [10.2.06(3)], citing among others *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (HL); and *Goldman v Hargrave*, above n 7.

⁵⁴ See *Tindall v Far North District Council* HC Auckland CIV-2003-488-135, 20 October 2006 at [65]–[70].

⁵⁵ High Court judgment, above n 1, at [213].

interviews with many of the claimants and reviewed details of their properties as well as reviewing documentation relating to the damaged properties and items. He then collated the information and material he had collected into a master spreadsheet and prepared individual claim summaries. In his evidence, he said he considered all the claims made appeared to be reasonable, save for a claim for damage to a bicycle, which was too remote.⁵⁶

[160] Initially, Mr Bird's evidence was the only material evidence on quantum. During the hearing, the claimants also called evidence on quantum from Mrs Grace and her son, Mrs Kwon and Mr Pflaum.

[161] The damages awards made by the Judge comprised compensatory damages as well as general damages.⁵⁷ The awards included losses for which the claimants were insured as well as uninsured losses.

[162] On appeal, Leisure Investments argues that the Judge's approach to damages was flawed. In particular it contends that:

- (a) The Judge applied the wrong legal principles by awarding damages based on the owners' indemnity entitlements from their insurers instead of tort principles. This was contrary to the well-established principle that in subrogated recovery claims, the sum paid by the insurer is irrelevant.
- (b) Related to the above error, the Judge wrongly awarded damages for losses in the absence of evidence the particular claimant had actually suffered that loss.
- (c) And finally, the Judge wrongly relied on the hearsay evidence of Mr Bird.

⁵⁶ At [245]–[251].

⁵⁷ General damages are not available in a claim under s 43 of the Forest and Rural Fires Act but are available in negligence and nuisance.

[163] The complaints are most usefully addressed by reference to individual claims, but before doing so we consider the general question of the admissibility of Mr Bird's evidence.

[164] The Judge expressly acknowledged that aspects of Mr Bird's evidence raised hearsay issues. However, he went on to note that the hearsay issues were "not pursued ... to any degree" by Leisure Investments. According to the Judge, "[g]enerally, they seemed to be overtaken by the parties' approaches to all the evidence, including close scrutiny and cross-examination of Mr Bird as an expert loss adjuster".⁵⁸

[165] Leisure Investments contends the Judge is wrong about this. It drew our attention to a minute issued by the Judge recording a discussion he had with counsel following opening submissions at the hearing. Amongst other matters, the minute records that Leisure Investments objected to Mr Bird's evidence on the grounds of hearsay.

[166] However, after recording the objection, the same minute goes on to say that this matter (along with others related to the plaintiffs' quantum evidence) was "simply noted at this point" and that "[n]o directions [were] required from the Court". Mr Bird's evidence was subsequently read into the record without any further objection, clearly leading other participants, including the Judge, to believe that in the interests of efficiency and economy Leisure Investments had effectively acquiesced in the evidence being admitted. The Judge estimated that requiring each plaintiff to themselves give evidence would have resulted in an additional three weeks of hearing time.⁵⁹ A further point is that a significant part of Mr Bird's evidence would in any event have been within the business records exception to the hearsay rule.⁶⁰

[167] In all those circumstances, we are not persuaded that the admission of Mr Bird's evidence was an error warranting appellate intervention.

[168] We also do not accept a further contention that Leisure Investments was prejudiced by late quantum evidence from or on behalf of the property owners.

⁵⁸ At [253].

⁵⁹ At [375].

⁶⁰ See Evidence Act 2006, ss 17 and 19.

No objection was taken to the admissibility of the evidence in terms of its lateness and much of it, in any event, was confirmation of Mr Bird's claim summaries which had been provided to Leisure Investments in advance of the hearing.

[169] We now turn to the specific claims.

The Flanagans

Repair costs

[170] The Flanagans were an elderly couple and in poor health. Their house, situated on their farm, had just been reinstated to an as-new condition following damage caused by the Christchurch earthquakes. They had only been back in the house around one or two weeks when it was again severely damaged, this time by the fire. Mr Flanagan suffered a significant turn in his health as a result of the events of the fire and the couple could not face the stress of another reinstatement project. They shifted to another town and then into a retirement village, leaving the farm to be managed by their son and the house unrepaired.

[171] Under their insurance policy, they were entitled to the reasonable reinstatement costs required to restore their home to an as new condition.

[172] They did not give evidence at the trial.

[173] The Judge awarded them damages based on a notional reasonable cost of reinstating the house, being the same as the cash amount paid under the insurance policy which the Judge accepted represented a proper assessment of the Flanagans' loss.⁶¹

[174] There was no evidence the Flanagans intended to reinstate the house. And Leisure Investments says in the absence of such evidence, the award should have been on the basis of loss of value – that is, the difference between the value of the house in its damaged condition and its value immediately before the fire – not the cost of reinstatement, a cost the Flanagans never incurred.

⁶¹ At [266]–[269].

[175] There is undoubted support for this argument in the case law.

[176] The orthodox view is as follows:

- (a) The basic measure for compensatory damages for physical damage to land and improvements was traditionally the amount by which the value is diminished, rather than the usually higher cost of reinstating the property to its former state.⁶²
- (b) In more recent times, the courts have taken a more flexible, pragmatic approach and will award the cost of reinstatement where the plaintiff intends to restore the property and it is reasonable to do so.⁶³ In *Chase v de Groot* it was held that the plaintiff “must” intend to reinstate before such an award may be made and therefore the fact the plaintiffs had already sold the damaged property meant they were only entitled to the reduction in value.⁶⁴

[177] These propositions are stated in *Todd on Torts* as representing the current law.⁶⁵ However according to Mr Ring, there are no absolute or rigid rules. The overriding objective is to be fair to both sides and reflect the extent of the loss actually and reasonably suffered by the plaintiff so as to put them back, as far as money can, in the position that they were in before the tort was committed. Any so-called rules are guidance only and in any event there is, in his submission, no logical reason for a rule requiring an intention to reinstate.

[178] Mr Ring referred us to a 2004 High Court decision in *La Grouw v Cairns*,⁶⁶ which he submitted should be taken as reflecting the current legal position in preference to what was said in *Chase v de Groot*.

⁶² Bill Atkin “Remedies” in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 1313 at [25.2.08(3)(a)], citing among others *Moss v Christchurch Rural District Council* [1925] 2 KB 750 (KB); and *Cousins v Wilson* [1994] 1 NZLR 463 (HC) at 467.

⁶³ At [25.2.08(3)(a)].

⁶⁴ *Chase v de Groot* [1994] 1 NZLR 613 (HC) at 627.

⁶⁵ Atkin, above n 62, at [25.2.08(3)(a)].

⁶⁶ *La Grouw v Cairns* (2004) 5 NZCPR 434 (HC).

[179] In *La Grouw v Cairns* the defendant argued that damages should not be based on the cost of cure because the plaintiff had not undertaken the repairs and there was no guarantee they would do so if damages were awarded on that basis. O'Regan J rejected that submission and held that intention or lack of intention to reinstate has relevance only to reasonableness and hence to the extent of loss which has been sustained, but once that loss has been established, intention as to the subsequent use of the damages ceases to be relevant.⁶⁷ In coming to that decision, the Judge relied on a House of Lords decision in *Ruxley Electronics and Construction Ltd v Forsyth*.⁶⁸

[180] Mr Ring also drew our attention to a passage in the judgment of Tipping J in the Supreme Court decision of *Marlborough District Council v Altimarloch Joint Venture Ltd* and noted that he too endorsed *Ruxley*.⁶⁹ The relevant passage reads:

[156] It is as well to remember at the outset that what damages are appropriate is a question of fact. There are no absolute rules in this area, albeit the courts have established prima facie approaches in certain types of case to give general guidance and a measure of predictability. The key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff. The reference to reasonableness has echoes of mitigation. A plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps.

[181] Although those comments were made in the context of a contract case, Mr Ring submitted in effect that they were of universal application in the law of damages generally and that it was significant that Tipping J was the author of *Chase v de Groot*. We assume the suggestion is that Tipping J had resiled from his previous view in light of more recent developments.

[182] In a later passage in the same Supreme Court judgment, Tipping J did however also say:⁷⁰

Of course the plaintiff must have a genuine intention to expend the damages to protect the performance interest. If that is not so, it would hardly be reasonable to award damages according to the performance measure.

⁶⁷ At [36].

⁶⁸ *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL).

⁶⁹ *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

⁷⁰ At [161] (footnote omitted).

[183] The footnote at the end of those statements refers the reader to a paragraph in the decision of *Tito v Waddell (No 2)* where Sir Robert Megarry V-C graphically said of a plaintiff:⁷¹

... why ... should [the plaintiff] recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages.

[184] Drawing all these threads together, we make the following points:

- (a) Contrary to Mr Ring's contention, we consider there is a logical reason for the approach taken in *Chase v de Groot* as articulated in *Tito v Waddell (No 2)*.
- (b) We do however agree there are no absolute rules and that the statements made in *Chase v de Groot* are best seen as a statement of a prima facie approach.
- (c) Damages should reflect the extent of the loss actually and reasonably suffered by the claimant.
- (d) Where a court is required to choose between alternative measures of damages (such as cost of repairs and diminution in value), the court must decide whether in the circumstances of the particular case, the higher yielding measure is reasonable.
- (e) One of the key factors in determining reasonableness is whether the plaintiff genuinely intends or desires to pursue the course which involves the higher cost.
- (f) The absence of such an intention or desire is likely to undermine the reasonableness of the higher cost measure.
- (g) Compelling circumstances will be required before the higher cost measure will be awarded in the absence of such an intention.

⁷¹ *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 332.

[185] In awarding the Flanagans damages based on the cost of repairs instead of diminution in value when they had no intention of repairing, the Judge noted the usual position. However, he considered that flexibility was required given the “particular and tragic situation which the Flanagans faced following the fires”.⁷² The Judge went on to say that any decision they had taken not to themselves reinstate (for a second time) their lost house was understandable. A pragmatic approach in his view required that the Flanagans were properly compensated for the loss of their brand new high quality home by a full payment to replace it.⁷³

[186] Having regard to the principles listed above at [184], we are not persuaded in all the circumstances that this was an error on the part of the Judge warranting appellate intervention. There were compelling circumstances justifying a departure from the prima facie position and awarding damages on the basis of the cost of reinstatement, even although the Flanagans did not intend to reinstate.

Alternative accommodation costs

[187] The Judge awarded the Flanagans damages of \$30,000 for the cost of alternative accommodation. This was the amount paid for alternative accommodation costs by their insurer under their policy.⁷⁴

[188] Leisure Investments argues the claim should not have been allowed in the absence of any evidence that the Flanagans had actually incurred the costs. The insurance position was irrelevant.

[189] We accept, as indeed do the respondents, that as a general rule a plaintiff’s insurance position is irrelevant. We further accept the usual rule is that a person who claims special damages such as the cost of alternative accommodation must prove it.

[190] However, we also agree with the Judge that there can be no doubt that alternative accommodation costs must have been incurred by the Flanagans. Their home was entirely gutted by the merged fire along with contents, vehicles and

⁷² High Court judgment, above n 1, at [267]–[268].

⁷³ At [268].

⁷⁴ At [276]–[277].

major farm buildings. Alternative accommodation would have been needed immediately and whether that involved imposing on friends or family there would inevitably have been dislocation and other associated costs.

[191] The approach taken by the Judge was in our view both pragmatic and just. The figure of \$30,000 was in our assessment reasonable.

Stress benefit

[192] The Flanagan's insurance policy provided for a stress benefit of \$2,000 and this amount was claimed and awarded by the Judge.⁷⁵

[193] Leisure Investments says the claim was in the nature of general damages for distress, upset and inconvenience and that contrary to established principle there should have been no award in the absence of supporting evidence.

[194] Again, we accept the usual rule is that a person who claims general damages for distress, upset and inconvenience must provide evidence to support their claim by detailing the impact the defendant's tortious conduct has had on their emotional wellbeing.

[195] However, on the other hand, requiring the Flanagans and the other claimants to give evidence about the fire's emotional toll would undoubtedly have unduly and unnecessarily prolonged the hearing. Common sense would suggest that the Flanagans must have suffered very significant distress. As the Judge put it, the minor \$2,000 stress payment would in reality have gone nowhere to address the real stress caused by the circumstances of these harrowing events.⁷⁶

Mrs Grace

[196] Before the fire, Mrs Grace was living in a 436 square metres home which was insured for a replacement value of approximately \$1.12 million. It was destroyed by the fire. The insurance cover did not cover the full cost of replacing it with a like for

⁷⁵ At [276]–[277].

⁷⁶ At [277].

like 436 square metres home and Mrs Grace did not have sufficient resources of her own to make up the balance. She could only afford to replace her destroyed home with a 284 square metres house at an actual cost of \$895,000.

[197] The Judge awarded Mrs Grace damages of \$1.32 million for the loss of her house based on the notional reasonable cost to reinstate a 436 square metres home, the calculation being done by using the rate per square metre which Mrs Grace had been quoted for construction of the smaller house that was actually built.⁷⁷

[198] Leisure Investments contends that the Judge's award means Mrs Grace has been overcompensated by some \$425,000. In its submission, the award should have been limited to her actual rebuild costs, or at most the cost of building the smaller replacement house together with the depreciated replacement value of the 152 square metres that she could not afford to reinstate. It contends the approach taken is contrary to the conventional approach that where reinstatement is carried out in a different manner, damages may still be awarded on a notional reinstatement basis but any award must not exceed the cost of the work actually carried out.

[199] We are not persuaded either of the outcomes posited by Leisure Investments would have been a just outcome in the particular circumstances and agree with the approach taken by the Judge. As Mr Ring points out, had it not been for the fire, Mrs Grace would still be living in her 436 square metres home and when the time came to sell she would have received its sale proceeds. In contrast, now and for the foreseeable future as a direct result of Leisure Investments' tortious conduct she is living in a smaller home which when sold will yield a lesser sum.

Cost of alternative accommodation and stress

[200] Mrs Grace was awarded damages for the cost of alternative accommodation pending completion of her replacement home in an amount that exceeded the sum payable under her insurance policy.⁷⁸ Leisure Investments says these costs should be

⁷⁷ At [286] and [290].

⁷⁸ At [301].

disallowed, although it is unclear on what basis given that, unlike for the Flanagans, there was evidence these costs were incurred.

[201] As regards compensation for stress, although Mrs Grace gave evidence about the significant emotional toll the fire had taken on her, the Judge only awarded her the amount of the stress benefit paid under the insurance policy of \$2,000. The Judge's pragmatic approach thus worked on this occasion in Leisure Investments' favour.

Sustainability benefit

[202] A component of the \$1,948,828.21 ultimately awarded to Mrs Grace was \$20,000 that was described in the itemised list of insured losses simply as "[s]ustainability". It appeared alongside other items such as the stress payment and accommodation allowance. This was described by counsel before us as a sustainability benefit and appears to represent a component of Mrs Grace's insurance policy designed to ensure sustainable materials were used in the construction of her new house.

[203] Leisure Investments says this payment, together with the accommodation allowance and stress benefit, should also be disallowed. We are not, however, persuaded that it should be. There is no reason to doubt that Mrs Grace incurred this cost as part of the cost of reinstatement. It is, in the scheme of the total damages awarded, relatively modest and we do not see a reason to interfere with the Judge's careful assessment of what was reasonable as between the parties.

The Kwons

Contents claims

[204] The Kwons sought compensatory damages of just over \$307,000 for the loss of house contents. They had calculated this on the basis of the price Mrs Kwon thought she had paid for the items when new. The Judge discounted the amount by 10 per cent to account for the depreciation in value since new.⁷⁹

⁷⁹ At [320]–[324].

[205] Leisure Investments contends the amount of the discount was insufficient as well as being inconsistent with the Judge's treatment of the contents claim made by the Pflaums. In the Pflaums' case, the Judge applied a discount of 40 per cent despite the fact that unlike Mrs Kwon, the Pflaums' contents claim was not exclusively new for old, but also included some old for old.⁸⁰

[206] On the other hand, a comparison between the respective claims also needs to take account of the fact that the Pflaum claim was for a sum three times more than the sum insured and double the next largest contents claim.⁸¹ Any complaints about inconsistency therefore need to be seen in that light.

[207] We are not persuaded the discounts were unreasonable. Appellate intervention is not warranted.

The cost of alternative accommodation

[208] The Judge awarded Mr and Mrs Kwon damages of \$20,000 for the cost of alternative accommodation.⁸² This, as in the case of the Flanagans, was the amount that had been paid under their insurance policy. Unlike the Flanagans, Mrs Kwon did however give evidence, including evidence that she had reviewed Mr Bird's claim sheet and that it accurately reflected the loss she had suffered as a result of the fire.

[209] Mrs Kwon did not specifically address the issue of alternative accommodation. However, their house was also completely destroyed by the fire. In those circumstances we consider it was reasonable for the Judge to infer that alternative accommodation would have been needed and that the amount of \$20,000 was reasonable.

[210] The stress benefit payable under the Kwons' insurance policy was \$1,000 and that was the amount of the general damages awarded by the Judge.⁸³

⁸⁰ At [355]–[361].

⁸¹ At [355].

⁸² At [328]–[329].

⁸³ At [329].

[211] For the same reasons already traversed in the case of the Flanagans, we agree with the Judge that a discrete payment for alternative accommodation and stress was reasonable and properly claimed. We are not persuaded that either award should be quashed.

The Pflaums

General damages and cost of alternative accommodation

[212] The Judge awarded Mr and Mrs Pflaum their policy benefits for alternative accommodation (\$20,000) and stress (\$1,000).⁸⁴ Leisure Investments says they should not have been awarded.

[213] Mr Pflaum gave evidence. He said the house was totally destroyed by the fire and that as at the date of the hearing (some three years after the fire) they were still living at another property pending a rebuild. He also confirmed in evidence the accuracy of the items claimed in Mr Bird's spreadsheet.

[214] In our view, no objection can be taken to the awards. The Judge did not overlook the usual principles. He was cognisant of them but in the particular circumstances considered a pragmatic approach was required. Importantly in the cases where he adopted the amount of the insurance pay outs, he did so because, in his view, they represented a reasonable measure of the particular loss and were for that reason properly claimable.

[215] This ground of appeal is therefore also dismissed.

Outcome

[216] The appeal is dismissed.

[217] As regards costs, there is no reason why costs should not follow the event. We are also satisfied that the appeal should be classified as a complex appeal given the volume of material.

⁸⁴ At [368].

[218] We therefore make an order that the appellant must pay the respondents one set of costs for a complex appeal on a band B basis together with usual disbursements. We certify for two counsel.

Solicitors:
Chapman Tripp, Christchurch for Appellant
Wotton + Kearney, Wellington for Respondents

SCHEDULE A – complete list of Respondents

CECILE GRACE

ALEXANDER DOUG PFLAUM

BAE KUEN KWON

MARK BALOGH AND HLS TRUSTEES LIMITED
AS TRUSTEES OF THE BALOGH FAMILY
TRUST

CORY BEYNON

PAUL JOSEPH DORRANCE AND DAVID PAUL
AMODEO AS TRUSTEES OF THE DORRANCE
FAMILY TRUST

FABEL MUSIC LIMITED

GRAEME MCVICAR AND JOY MCVICAR

GAVIN BRINDLEY

GREGORY GRAHAM

IAN HOUGHTON

JAMES FROST

JUNG KWON JANG

DARA BIGWOOD

DAVID BAILEY AND SHARON BAILEY

RICHARD WILHELM AND SUSAN WILHELM

TERRENCE POWERS AND KAREN POWERS

ALAN BEUZENBERG AND
DEBBIE BEUZENBERG

CHRISTOPHER JOHNSTONE AND KAREN
JOHNSTONE

THE TRUSTEES OF THE TIROHANGA FAMILY
TRUST

GRANT POULTNEY AND SUSAN POULTNEY

GLEN MENZIES AND TRACEY MENZIES

JERRY O'NEILL AND JILL O'NEILL

PAUL DORRANCE

PETER MORGAN AND MARY BRENNAN

WARREN FLANAGAN AND VILMA FLANAGAN

TRACEY COOK AND CLAUDE COOK

JOANNE KINLEY AND WAYNE GIBBON

NICK THURLEY AND
CATHERINE BARENDRECHT

NORMAN MATTHEWS

PERCY BULL

PHILIP JOHNSTON

PEER PRITCHARD AND SONYA ANNE BROOKS
AS TRUSTEES OF THE PRITCHARD BROOKS
FAMILY TRUST

ROSS BONNINGTON

SHONA MOORE

STEVEN WILLIAMS

ALAN BEUZENBERG AND
DEBBIE BEUZENBERG AS TRUSTEES OF THE
BEUZENBERG FAMILY TRUST

MONIQUE MENTINK AND LANDBOROUGH
TRUSTEE SERVICES NO. 10 LIMITED AS
TRUSTEES OF THE MONIQUE MENTINK
FAMILY TRUST

MIRANDA ANGELIQUE AND CRAIG NEWBURY
AS TRUSTEES OF THE NEWBURY FAMILY
TRUST

MIRANDA ANGELIQUE AND CRAIG NEWBURY

TIMOTHY FOURNIER AND KATE BRACEFIELD

VIKKI PFLAUM

SUZANNE MILLAR AND CHRIS MILLAR

RACHEL CULLENS

MARK AND KAREN SINCLAIR