IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-1328

BETWEEN	CLIVE RICHARD BRADBURY First Plaintiff
AND	BRADBURY & MUIR Second Plaintiff
AND	WESTPAC BANKING CORPORATION First Defendant
AND	RICHARD WILLCOCK Second Defendant

Judgment: 23 May 2008

COSTS JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 4:30 pm on 23 May 2008

SOLICITORS
Wynyard Wood (Auckland) for Plaintiffs
Chapman Tripp (Wellington) for Defendants

COUNSEL
Nathan Gedye; Richard Wallis

BRADBURY And Anor V WESTPAC BANKING CORPORATION And Anor HC AK CIV 2006-404-1328 [23 May 2008]

Table of Contents

Introduction

[1] Westpac Banking Corporation applies for an order for indemnity costs in unusual circumstances.

[2] Messrs Clive Bradbury and Gary Muir were at all material times partners in the law firm of Bradbury & Muir (B&M). Mr Bradbury performed specialised legal services for Westpac for 10 years before the bank ended the relationship in early 2005.

[3] B&M then sued Westpac and Richard Willcock, its group secretary and legal counsel, for damages for breach of a contractual obligation to provide perpetual or continual instructions with secondary causes of action in estoppel, defamation and conspiracy. The claim was fixed originally at special damages of $13.9m plus substantial general, aggravated and punitive damages of $500,000, $250,000 and $250,000 respectively, and interest. The first head was reduced to $5.415m before trial but the other items remained.

[4] The litigation was driven by Mr Bradbury's deep-seated sense of grievance. He believed that the bank treated him unfairly by ending the relationship and disregarding his long, loyal and effective service. It is trite but true, though, as any lawyer knows, that a sense of grievance without more is not justiciable. It was a novel proposition that an institutional client would commit itself to providing instructions to a firm of solicitors for an indefinite period, subject only to an implied right to terminate for cause, and the claim demanded proof of a clear and unequivocal undertaking to that effect, to say nothing of public policy considerations.

[5] The trial of the proceeding commenced before me on 4 February 2008. Opening addresses and evidence from both sides occupied six days. However, in closing submissions on the seventh day B&M's junior counsel progressively abandoned each cause of action, leading inexorably to the inference that the firm recognised its case was hopeless. The issue for the purpose of determining

Westpac's claim for indemnity costs is whether B&M knew or should have known of the hopelessness of their case when the proceeding was filed or at a later stage before trial.

[6] The parties attempted unsuccessfully to settle costs. On advice of their failure I entered judgment for Westpac and reserved costs for later determination. Counsel have since filed comprehensive memoranda but do not require an oral hearing.

[7] The parameters of this dispute are illustrated by the gap between the parties. Westpac seeks an award of indemnity costs for legal fees of $1.683m plus disbursements of $136,865 or alternatively an award of increased costs. While accepting liability, B&M say scale costs of $89,250 plus disbursements of $57,515 are appropriate. The argument must, of course, be determined primarily according to principle and not by reference to actual expenditure. Nevertheless, the figures are revealing and cannot be disregarded if justice is to be done in these particular circumstances, a point acknowledged by Mr Nathan Gedye who did not appear for B&M at trial but who now represents the firm.

Indemnity

(1) Principles

[8] Mr Stephen Kos QC for Westpac submits that indemnity costs should be awarded, being 'the actual costs, disbursements and witnesses expenses reasonably incurred': r 48C(1)(b). He submits that B&M acted 'vexatiously, frivolously, improperly, or unnecessarily in commencing or continuing [this] proceeding or a step in the proceeding': r 48C(4)(a). Messrs Kos and Gedye acknowledge that the threshold is high – both refer to a standard approaching egregious conduct.

[9] The decision in *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) gives guidance on the approach to be applied. The starting point in any assessment is objective, not subjective, and is to be applied by reference to rules and

not to actual costs. The integrity of the scale, with its associated value of predictability and certainty, is not to be lightly discarded. Nevertheless, Judges of this Court retain an overriding discretion to depart from the scale and 'if satisfied that it is appropriate to do so they ought not to hesitate to resort [to it]': at [28]. That exercise must, of course, like the exercise of all discretionary powers, be considered and particularised.

[10] The current costs scheme is underpinned by the premise that a successful party should receive a reasonable contribution towards its costs: *Glaister* at [14]; see also Elias CJ in *Prebble v Awatere Huata* [2005] NZSC 18 (SC), endorsing this statement by Cooke P in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 3 NZLR 457 at 460:

> [The costs scheme] reflects a philosophy that litigation is often an uncertain process in which the unsuccessful party has not acted unreasonably and should not be penalised by having to bear the full party and party costs of his adversary as well as his own solicitor and client costs. **If a party has acted unreasonably - for instance by pursuing a wholly unmeritorious and hopeless claim or defence** - a more liberal award may well be made in the discretion of the Judge, but there is no invariable practice.
>
> [Emphasis added]

[11] The philosophy underlying the highlighted passage from Cooke P's judgment is now recognised by r 48C. The practical test for determining a claim for indemnity costs remains whether the losing party has pursued a wholly unmeritorious or hopeless case. In *Lewis v Cotton* [2001] 2 NZLR 21 (CA) at [65]-[72] the Court of Appeal upheld an award of indemnity costs in this Court where it was satisfied a claim '… border[ing] on the hopeless …' (at [67]) and '… indicating a lack of focus on the essential ingredients of [a] claim' (at [68]) fell within the realm of vexatious, querulous, improper or unnecessary conduct in commencing or continuing a proceeding.

[12] It has been said that costs have not been awarded in New Zealand to indemnify successful litigants for actual solicitor and client costs 'except in rare cases generally entailing breach of confidence or flagrant misconduct': *Prebble* at [6]. This Court has required proof of exceptional circumstances such as where allegations of fraud are made without foundation; or where proceedings are

commenced for an ulterior motive or in wilful disregard of known facts or clearly established law; or where allegations are made that ought never have been made: *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694, applying *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248; *Paper Reclaim Ltd v Aotearoa International Ltd* HC AK CIV 2004-404-4728 22 April 2005.

[13] Mr Kos submits that exceptional circumstances exist here. He says that from the outset it was objectively obvious, and must have been obvious to B&M, that this proceeding was not sustainable. Alternatively, he says, that state of actual or deemed knowledge must have arisen at various and distinct interlocutory stages up to and including trial.

[14] Mr Kos also points to the raft of intentional torts pleaded against individual Westpac employees. Viewed compositely these allegations are, he says, akin to allegations of civil fraud but were always without foundation. And Mr Kos submits that the proceeding was part of a deliberate strategy to apply pressure on Westpac to settle by making the litigation as complex, embarrassing and expensive as possible.

(2) Inquiry

[15] Having reviewed the leading authorities, I propose to undertake a two-staged inquiry. First, and primarily, is there a principled ground for exercising my discretion to award indemnity costs? The question is necessarily fact and circumstance specific: was it or should it have been objectively obvious to B&M at any stage of the proceeding up to trial that their claims could never be substantiated?

[16] In other words, I must be satisfied that B&M knew or ought to have known that at the relevant times their case had no prospect of success, and that they acted unreasonably by '… pursuing a wholly unmeritorious and hopeless claim …': *Kuwait Asia Bank* at 460. If so, they acted vexatiously, frivolously or unnecessarily within r 48C(1)(b). The inquiry must be viewed through a contemporaneous lens and not with the benefit of hindsight. I shall consider also whether or not B&M were guilty of misconduct and thus of acting improperly in pursing their claim.

[17] Second, and contingently, if an award of indemnity costs is appropriate, were Westpac's actual costs, disbursements or witness expenses reasonably incurred and, if not, what costs were reasonable? The rule introduces an objective qualification upon a successful party's right of recovery. It is not entitled to all costs actually incurred, but to those reasonably incurred. By this means the Court retains a discretionary power to ensure that the ultimate award is just in all the circumstances.

[18] Mr Kos' approach, and Mr Gedye's forthright rejection of it, require a staged assessment of the merits of B&M's claim as they were known or ought to have been known when this proceeding was filed in March 2006. A careful analysis of the evidence and relevant legal principles relating to each cause of action is necessary. So too is an evaluation of the comprehensive written synopses of closing submissions filed by both sides on the merits but designed to justify their competing arguments on costs. Effectively I must write a substantive judgment which is appropriate in any event given that the decision is akin to an award of damages following a finding of liability. While this exercise has proven time-consuming, I start from the advantage of having heard all the evidence and addresses at trial.

[19] I must observe, though, that Mr Gedye's sustained arguments on the merits bordering upon a submission in favour of judgment for B&M is not easily reconcilable with the acknowledgements made by Mr Richard Wallis in closing submissions and with the firm's decisions to abandon and not to oppose entry of judgment in Westpac's favour.

Background

[20] Messrs Bradbury and Muir are experienced lawyers aged in their early 50s. Mr Bradbury was successively a partner in two national law firms specialising in banking and finance work. He met Mr Gregory Peebles in 1999, while a partner in the first firm. Mr Peebles had been appointed to head Westpac's loan administration team in Auckland, which was later called the Asset Management Group (the AMG). Its function was to handle recoveries for the bank's corporate and investment banking group in New Zealand. Westpac was by then and remained Mr Bradbury's

main client in both national law firms. He and Mr Muir, who specialised in tax advice, were briefly partners in the second firm.

[21] Mr Peebles engaged Mr Bradbury from 1989 onwards to provide professional services for Westpac on a wide range of what was called high end or high value credit recovery work. The pair operated in tandem to achieve excellent results for the bank in the aftermath of the 1987 sharemarket collapse, although the scale and intensity of their work necessarily tapered during the 1990s.

[22] Messrs Peebles and Bradbury discussed the latter's professional future after his resignation from the second national law firm. At that stage in early 1995 Mr Bradbury was undecided about his future. He says that thereafter he and Mr Peebles had a series of discussions leading to the formation of a special contract. That alleged agreement, which Mr Bradbury says amounted to an undertaking by Westpac to provide instructions to his new firm for an indefinite term to carry out high end or high value credit recovery work, is the centrepiece of this case and I shall refer more fully to its terms shortly.

[23] Messrs Bradbury and Muir commenced practice in partnership together on 3 April 1995. In the following years Mr Bradbury became closely aligned with Westpac. Other trading banks perceived him as Westpac's lawyer. He also developed close relationships with insolvency specialists engaged by the bank to conduct receiverships and liquidations, including BDO Spicers and Ferrier Hodgson.

[24] It was apparent to Mr Bradbury by late 1998 that Westpac's high value work was falling off. While he was busy with existing instructions, Mr Bradbury realised that it would be necessary for him to seek work from other clients within the next six to 12 months. He and Mr Peebles discussed this situation. Mr Peebles advised him in about November 1998 that the AMG would provide the firm with a sufficient volume of low value work (mortgagee sales and summary judgment instructions of less than $1m) to occupy a solicitor fulltime and a legal executive part-time. He said he wanted to ensure Mr Bradbury's ability 'to pay the rent'. Mr Bradbury accepted this proposal and engaged an additional solicitor and legal executive.

[25] In time Mr Peebles, like other senior Westpac employees in New Zealand, came to resent the intrusion as he saw it of members of the bank's legal services division in establishing an approved panel of law firms to be engaged to perform legal services. That process occurred progressively from late 1999 onwards. B&M were appointed to the panel but were subject to the overriding control of Westpac's legal services division. Mr Peebles wanted to preserve his right to engage whichever solicitor he wished, primarily Mr Bradbury, to advise the AMG. Apart from their professional and personal relationship, Messrs Peebles and Bradbury became progressively associated in various commercial ventures.

[26] Mr Willcock wrote to Mr Bradbury in early 2005. His letter represented the culmination of a protracted exchange of communications which had started in November 2004. Mr Willcock advised Mr Bradbury that Westpac would no longer be engaging his firm's services. His letter was silent on the reasons for Westpac's decision.

[27] I shall return to the circumstances of the bank's termination of B&M's services. For now it is sufficient to record this fact to provide context for the firm's principal argument that Westpac was subject to an implied contractual limitation on its right to end the relationship only if it established cause.

Causes of Action

(1) Contract

(a) Special Retainer

[28] B&M issued this proceeding in March 2006 by alleging the existence of a binding agreement with Westpac on terms that (1) the two entities would form an enduring relationship whereby B&M would be treated as an integral part of the Westpac team; (2) Westpac would continue the practice which had developed of seeking advice from Mr Bradbury on its 'over the horizon projects' and 'high value' recoveries; and (3) Westpac would retain the firm for these purposes so long as it

met an obligation of undivided loyalty to the bank and B&M and the AMG 'continued together to perform to the satisfaction of Westpac'.

[29] These terms allegedly constituted a 'retainer agreement requir[ing] a high level of mutual good faith, trust, loyalty and confidence'. That was because B&M's performance of their obligation would inevitably affect the firm's ability to develop its practice and form ongoing solicitor/client relationships with other banks and financial institutions. B&M alleged that certain terms were implied in the retainer agreement, in particular that Westpac would act in all matters relating to the relationship 'in good faith, fairly and within appropriate bounds of loyalty'. In opening the firm's senior trial counsel, Mr Michael Reed QC, submitted that the obligation of good faith embraced the concept of compliance with standards of conduct that are honest or reasonable, having regard to the interests of the parties.

[30] However, Mr Reed accepted that the retainer agreement was also subject to Westpac's right of termination (1) if Mr Bradbury ceased to perform or work effectively with Mr Peebles as a team; or (2) if Mr Peebles ceased to control the AMG work, which could arise either because he was dismissed or resigned or his contract was not renewed; or (3) for cause. Mr Reed denied, though, that the retainer could be terminated simply by Westpac giving reasonable notice to B&M. Such a term, which would of necessity be implied, would contradict the contract's express terms: *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506.

[31] I shall set out in full what Mr Bradbury said of his discussions with Mr Peebles because it forms the basis of B&M's claim for the existence of a special contract:

> 34. He then [at discussions in February 2005] suggested that I should set up as a sole practitioner. I said I would need to have assurances that I would continue to get AMG work… Mr Peebles responded with words to the effect that he had authority to engage whatever solicitors he wished and in need he would enlist Vern Curtis' support. Vern Curtis was then Westpac's Head of Credit in New Zealand and both Mr Peebles and Simon Jensen had a direct reporting line to him.
>
> …

37. At one point during perhaps our third or fourth conversation on the topic I can recollect thinking that Mr Peebles had obviously put considerable prior thought into how he saw our relationship going forward. He said he wanted me to be available on tap to him to handle AMG work on a preferential or first priority basis. He explained that this meant that if Westpac was involved in a matter, like a syndicated loan, then I would give him the opportunity to instruct me before I accepted instructions from any other person in relation to that matter; and that in any situation where there was a conflict of interest I would send the other client away; and that I wouldn't act for anyone else, or use my knowledge, against Westpac.

38. We discussed how this would 'lock me into Westpac' and make it difficult for me to work for any other bank. While he did not actually say that he would look after me in terms of workflows, I got the impression that this was where he was coming from. I can recollect saying that I wasn't interested in employing anyone to do lower value work like mortgagee sales or summary judgment applications and him saying that all that work would continue going to Simpson Grierson and Rudd Watts & Stone and that he would continue to instruct me on higher value work as he had done in the past.

39. He said he wanted me to become an 'integral part of the Westpac team' and that he wanted to establish an 'enduring relationship' between AMG and my firm. I asked him what he meant by 'enduring relationship'. He said words to the effect that it was a relationship which would last as long as the two of us continued together to produce 'skyrockets' for the Bank. From our further discussions at the time, I took this expression to mean, for so long as we could together keep achieving excellent results for Westpac thus ensuring that he remained in control of AMG. I remember him being particularly focused on realising the upside from [a] deal…

40. He said that he saw more scope for me doing work on a contingency fee basis. He said also that the firm's partners and associated companies would need to continue to bank with Westpac.

41. These discussions with Mr Peebles were a key turning point in my life. I would not have made the decision to stay in the law had Mr Peebles not given me the assurances he did in relation to establishing an 'enduring relationship' under which he would continue to instruct me on higher value work as he had done in the past.

[32] It is appropriate to pause at this stage in the contractual narrative. I have recorded verbatim Mr Bradbury's evidence relevant to his principal cause of action in contract (Mr Muir was not a witness) and will refer to material parts of his cross-examination. Mr Bradbury knew when issuing this proceeding in March 2006 and continually thereafter what he would be able to say on the subject. And he knew or

must have known, as an experienced lawyer, and acting with the benefit of independent advice, that his own account of events did not approach the factual threshold necessary to establish the existence of a contract. His evidence, objectively construed, fell well short. His version of what passed between him and Mr Peebles could not possibly constitute an agreement entered into on clear, binding and enforceable terms.

[33] Mr Bradbury is unable to resort to an argument of reliance on Mr Peebles to make out this claim. To the contrary, as Mr Kos points out, Mr Bradbury knew on 27 April 2006, one month after issuing this proceeding, that Mr Peebles contradicted his allegation. On that date Mr Peebles provided B&M with his own brief of evidence which he had prepared himself (the personal and professional conflicts which this litigation raised for Mr Peebles were of such a nature that with the consent of both counsel I took the unusual step of calling him as a witness). Mr Peebles' brief affirms that he did not give Mr Bradbury a promise of work on Westpac's behalf. And Mr Peebles said nothing on the subject at trial except that in his mind Mr Bradbury was 'a member of the AMG team' and their arrangement was of 'a partnership type'.

[34] Furthermore, on 8 August 2006 a senior member of Westpac's legal services division filed an interlocutory affidavit. It was designed to respond to an assertion by B&M that Westpac had indulged in coaching Mr Peebles and other potential witnesses. Annexed was an email from Mr Peebles which stated:

> [Mr Bradbury] spoke to me before setting up back in 1995 to see whether he could still get the bank's work. I said yes subject to continuing the understanding we had at the time, eg, my work was to take priority, he was available at all times and there were to be no conflicts…
>
> If I were asked whether B&M could/would demand the work I would reply not in my view. If I were asked whether B&M could/would expect work I would reply yes.

[35] Mr Bradbury conceded under cross-examination by Mr Kos that the alleged contract was not only terminable for cause but also for 'possibly changed circumstances' to allow for a 'category of structural change'; that somebody senior to Mr Peebles would determine whether or not their relationship was performing 'to the satisfaction of Westpac' (which was the pleaded performance criteria); and that

Mr Peebles was subordinate to senior executives in Australia who oversaw the bank's credit functions. Mr Willcock confirmed that the head of Westpac's legal services division has the final authority on appointing outside legal counsel to act for the bank, subject only to direction from the group chief executive officer in Australia.

[36] These fatal deficiencies in Mr Bradbury's evidence must have been obvious to him and his legal advisers from the outset. But his case was doomed for additional reasons. First, phrases used by Mr Peebles such as the formation of an 'enduring relationship' or his treatment of B&M as 'an integral part of the Westpac team' were meaningless, either on their own or in context. They were broad statements of goodwill at a high level of generality which are incapable of enforcement.

[37] Mr Peebles' words were at best expressions of a common understanding or an expectation that the relationship would endure or continue indefinitely or at least so long as the two constituents were successful. The understanding was, as Mr Kos submits, personal to Messrs Bradbury and Peebles, and was never intended to create an enforceable contract. Both must have understood his statement was subject to an implicit condition: that is, Mr Peebles' intention could only be effective for so long as he retained the power to implement it. Both must have known that Mr Peebles was unable to bind or fetter the powers of Mr Peebles' superiors. Mr Bradbury could not expect any long-term certainty in the event of a change in personnel or what he properly admitted was a structural change. That event occurred progressively from late 1999 when Westpac's legal services division called for tenders from law firms to carry out its legal work.

[38] Second, the subject or content of the alleged agreement defies accurate definition. B&M pleaded that the phrase 'over the horizon projects' referred to matters where Mr Peebles 'was expected to keep his actions out of sight and report only to particular officers within Westpac's executive group rather than to his direct superiors'; and that 'high value recoveries' were 'matters concerned [with] recovery work relating to high value debts and loans'. Neither phrase is capable of an objective measure.

[39] Mr Gedye submits that this particular retainer agreement should not be approached by requiring B&M to 'defin[e] and prov[e] precisely what quantity or type of work would be provided'. He describes the arrangement as 'a long term relational agreement … involv[ing] the continuation of a longstanding existing relationship and a close personal working arrangement'. He says Messrs Bradbury and Peebles each knew what was meant by 'top end' or 'over the horizon' work and what it meant to continue to produce 'skyrockets' for Westpac.

[40] I am unable to accept Mr Gedye's argument. An arrangement is not a contract unless it gives rise to legally enforceable rights and obligations. And rights and obligations cannot be enforced unless they can be defined. This requirement is not satisfied by reliance on the subjective knowledge and states of compatibility of representatives from each of the two entities said to have entered into an agreement.

[41] Third, in the event of a claim by B&M for enforcement, whether for specific performance or damages, a Court would have to determine whether or not Westpac had breached a promise to continue an existing practice of seeking advice from the firm on 'over the horizon projects' and 'high value recoveries'. On B&M's own pleading, this practice was of a discretionary nature. It recognised an entitlement to instruct the firm without a corresponding right of enforcement.

[42] Mr Peebles did not give an undertaking regarding the level and intensity of future instructions to provide advice; and Mr Bradbury did not and could not assert an exclusive arrangement. Mr Bradbury admitted that Mr Peebles did not 'actually say that he would look after me in terms of workflows'. Instead, that was simply his impression. Mr Peebles' freedom to engage other firms introduces a further fatal element of uncertainty.

[43] Mr Gedye acknowledges that Mr Bradbury 'could not necessarily expect to get all the high end instructions'; and that, provided Westpac decided in good faith why in its interests a particular instruction should go elsewhere, B&M could not complain. However, he says this issue was not likely to cause any difficulty because Messrs Peebles and Bradbury 'had such a good working relationship he could expect to receive the bulk of the high end instructions'.

[44] This submission could never be sustained. The issue is not one of practice but, as noted, of rights to enforce a clearly defined or definable contractual provision. It may legitimately be asked how in the event of a claim for breach a Court could determine whether the bank acted 'in good faith' without an objective assessment of the relevant contractual term coupled with consideration of a transaction or transactions where the bank had not instructed B&M. The Court could only take this latter step if Westpac disclosed its reasons for instructing other solicitors, and probably breach its obligations of confidentiality to a borrower or borrowers.

[45] Mr Kos is right that Westpac was unable to take steps before trial to strike out B&M's proceeding. The evidence available to the bank from the outset of this litigation pointed strongly to the untenability of an allegation of the existence of a perpetual contract of retainer. It could not move to strike out, however, given the settled premise that facts pleaded to found a cause of action are assumed to be correct. In any event Westpac's omission to take this step does not change the character of B&M's case when considering an application for indemnity costs. Mr Gedye does not argue that Westpac's argument fails because it did not move at an early stage.

[46] Nor would Westpac have been able to obtain summary judgment before trial. That remedy is only available to a defendant if a Court is satisfied that it will determine all causes of action. Mr Kos concedes that the contractual issues would have been amenable to summary judgment but this option was ruled out by the existence of other causes of action, even though based on the same or similar facts.

[47] Accordingly I am satisfied that for these reasons, separately and collectively, B&M's primary claim for breach of contract was never arguable, as they themselves must have known or ought to have known in March 2006. But the matter does not rest there. The same conclusion is put beyond doubt by other events.

(b) Termination Without Cause

[48] There was always a discrete and fatal answer to B&M's claim even if they had established the existence of a special contract of retainer.

[49] The firm would never be able in law to sustain the implication of a term requiring Westpac to cancel or terminate for cause, and after following a fair process. I agree with Mr Kos that a term is implied to the contrary into all contracts of retainer between a solicitor and client. The principal may cancel a retainer at any time without cause and without an obligation to give reasons.

[50] This right is implied by operation of law, rather than according to the standard test for implying a term, as a matter of public policy arising from the special nature of the solicitor/client relationship and its foundation in the elements of trust and confidence. The client is justified as a consequence in dissolving the relationship, irrespective of its preceding quality, duration and success, whenever it ceases to have absolute confidence in the solicitor: *JH Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894, 900; *McQuarrie, Hunter v Foote* (1982) 143 DLR 354 (BCCA) at 356-359; see also R6.05, New Zealand Law Society Rules of Professional Conduct (NZ).

(c) Request for Proposal

[51] Westpac raised an independent and affirmative defence to B&M's claim for breach of the retainer contract based upon the firm's subsequent entry into written contracts with the bank which entitled it to terminate without cause.

[52] The relevant background is this. In late 1999 Mr Simon Jensen, in his capacity as Westpac's general counsel, sent members of the bank's senior management a memorandum proposing requests from various legal firms to tender for work. Mr Jensen advised of his intention to submit a formal document known as a Request for Proposal (RFP) of certain types of legal services. B&M were one of the nominated invitees. A specimen form of the RFP was annexed to Mr Jensen's memorandum.

[53] Mr Peebles was among the recipients of Mr Jensen's memorandum. He raised a number of questions about the value and composition of a formal legal panel.

[54] The final form of the RFP was extensive. Its purpose was explained in this way:

> 4.4 Westpac Trust's view is that its control of the amount of outsourcing of legal services has become diffused and savings and efficiencies can be made by better management of its legal service providers and controls being put in place with a group of preferred providers, without compromising on legal service quality.
>
> 4.5 Westpac Trust is committed to the practice of forming strategic alliances with a limited number of suppliers. Preferred providers will be expected to enter into effective partnering relationships with Westpac Trust's Business Units and Legal Services so that both parties can better understand the business needs and requirements of the other party and derive the maximum mutual benefit from the relationship.

[55] The RFP's objectives were:

> 5.1 … to appoint preferred legal service providers from 1/7/2000 for an initial period of either two or three years depending on responses to this RFP…
>
> 5.2 Whilst Westpac Trust makes no representation as to the volume or frequency of instructions, it is intended that preferred providers will provide most of Westpac Trust's external legal requirements…
>
> 5.3.2 The key elements Westpac Trust seeks from this RFP process are … the introduction of formal control mechanisms, monitoring and reporting on all areas of the legal services being performed by external providers to ensure the efficient delivery of high quality, relevant and cost effective legal service. Part of that process is likely to be the requirement that all instructions to preferred providers be validated by the issuing of an Identifier Number…

[56] The RFP also recorded Westpac's intention to enter into a Service Level Understanding (SLU) with each of its preferred providers. That document was expected to set out in more detail a number of matters affecting the delivery of legal services including reporting requirements and noted:

> It is Westpac Trust's intention that the appointment will be for at least two years… However, Westpac Trust reserves the right to terminate the relationship at any time at its absolute discretion on one month's notice. If the legal services provider ceases to be a customer of Westpac Trust, commits a serious breach of the arrangements it enters into with Westpac Trust, or a key relationship partner leaves the firm, Westpac Trust may terminate the relationship (in whole or in part) without notice.

[57] Mr Jensen sent Mr Bradbury an invitation to complete and return a RFP in standard form on 4 May 2000. His letter was an invitation to treat. Mr Bradbury responded with detailed information in answer to a large number of questions. Westpac sought some further information on 29 May 2000 which Mr Bradbury supplied.

[58] B&M's completion and return of the RFP with the requested information was an offer to perform legal services. Westpac's letter to the firm on 3 July 2000, advising of its appointment as a preferred supplier for high value recovery work and of the bank's intention to finalise an SLU to be effective on 1 July 2000, constituted a formal acceptance. On that date a binding contract of engagement came into existence.

[59] Mr Bradbury said that on receipt he noted the RFP's reservation of a right to terminate a contractual relationship at Westpac's absolute discretion on one month's notice in writing. He said that he told Mr Peebles 'there was no way I would agree to that'; and that Mr Peebles responded 'this wouldn't happen' (presumably meaning that Westpac would not enforce the right) with advice to Mr Bradbury to ignore the provision. This was effectively Mr Bradbury's answer to the bank's argument that the RFP governed the contractual relationship between the parties from 2000 onwards.

[60] Mr Bradbury must have known that this proposition was unsustainable. While Mr Peebles was the person within the AMG primarily responsible for briefing Mr Bradbury, all dealings on and settlement of the terms of a formal contract to provide legal services were conducted between the bank's legal services division and the firm. Mr Bradbury participated directly and exclusively with Mr Jensen.

[61] Mr Bradbury knew also that Westpac's general counsel was appointed its duly authorised agent to settle the terms of a contract of engagement in 2000. He was the person to whom the bank had delegated authority for this purpose. Mr Gedye does not suggest that at any stage of this process Westpac represented Mr Peebles' authority to participate in the negotiations on its behalf; nor does he say that the bank held out to Mr Bradbury that a standard written term which he had

accepted would not be enforced. It is untenable to argue the existence of an oral term contradicting an express written provision.

[62] Nevertheless, Mr Gedye seeks to advance two counter arguments. He says that on an objective assessment of the totality of the representations made on each side B&M did not understand that '… the pre-printed standard terms and conditions of the [RFP] were intended to vary the enduring nature of its engagement and did not accept any such variation'. This explanation suffers from its variance with the facts. Mr Bradbury admitted to the contrary at trial, saying he had read the RFP carefully. He knew he could never assert ignorance or lack of understanding of the contractual effect or intention of a document which he signed.

[63] Alternatively Mr Gedye says there was no intention to form a contract based on the RFP unless and until the parties signed an SLU. Clearly the RFP envisaged the execution of a SLU. But the parties' omission to execute that document is immaterial. The question is and always was whether or not they entered into a binding and enforceable agreement when B&M tendered an offer on the terms contained in the RFP. The answer must be in the affirmative.

[64] It is significant also that, as Mr Kos emphasises, if the parties' relationship was governed by the terms of a contract entered into with Mr Peebles in 1995, Mr Bradbury never once raised its existence throughout his correspondence with Westpac's legal services division in 2000 leading up to acceptance of the RFP. It defies comprehension that an experienced lawyer would have remained silent on this point if the contract was in existence.

[65] B&M's agreement to abide by the RFP's terms and conditions marked a shift, as Mr Kos notes, in the control of the relationship between the bank's relevant business units and outside law firms. The individual units were only able to use firms appointed through the RFP. The legal services division was now in charge of the formal process of engaging legal advice – a development which Mr Bradbury did not welcome but which he had to accept. In evidence he actually volunteered that the RFP was 'intended to formalise the appointment of Westpac's existing lawyers'.

[66] Thus, Mr Bradbury must have known in March 2006 that, even if there was a retainer agreement of the type alleged in 1995, it would have been cancelled by mutual consent on 3 July 2000; and from that date the parties agreed their relationship would be governed by the RFP's terms and conditions. Among them was the existence of a fixed term until 31 March 2003 and Westpac's right to terminate at its absolute discretion on one month's notice in writing.

(d) Standard Terms and Conditions

[67] Subsequent events confirm the true nature of the contractual relationship. Messrs Bradbury and Willcock first met at the latter's request in Auckland in late November 2001. Mr Willcock wrote to Mr Bradbury in July 2002 advising of Westpac's intention to modify panel arrangements in both New Zealand and Australia to bring them within a single management role. He anticipated this process would take place over the next 12 to 18 months.

[68] Mr Willcock's letter enclosed a copy of a document known as Westpac's Australian Standard Terms and Conditions (STCs) setting out in particular a number of service expectations and reporting requirements. He sought Mr Bradbury's feedback on the document and expressed his wish to meet later that month. Mr Bradbury was unavailable but he did write on 30 August 2002 commenting on the STCs.

[69] Mr Willcock wrote to B&M on 19 March 2003. He advised of Westpac's decision to extend the existing panel (including B&M) for a further term of 24 months beyond its agreed expiry date of 31 March 2003 to synchronise with its Australian operation; that is, until 31 March 2005. Another copy of the STCs was enclosed.

[70] The STCs were materially similar to the RFP. The first part set out Westpac's requirements including an obligation on B&M to provide a quarterly certificate of compliance to be addressed to the bank's group secretary and general counsel. Westpac reserved the right to remove a firm from the panel 'at any time and without cause on reasonable notice (which in usual circumstances will not be

less than six months prior notice) [and] to terminate its panel arrangements (in whole or in part) at any time on reasonable notice'. The bank imposed conditions relating to professional indemnity insurance and commercial conflicts and exclusivity.

[71] The second part of the STCs governed the firm's dealings with Westpac. It was in the nature of a detailed specification to perform its services. The third part related to fees and financial reporting. A Westpac Identifier Number was attached, with a note that all instructions to panel firms must have a WIN. B&M were one of the seven New Zealand firms identified.

[72] B&M submitted their first quarterly certificate of compliance required by the STCs for the period ending 15 June 2003 on 26 August 2003, later submitting a further seven certificates for the quarters commencing on 15 September 2003 through to 15 March 2005. All certificates were in standard form as follows:

> We certify that we are complying with the following:
>
> 1. Westpac's Service Terms and Conditions; and
>
> 2. Bradbury & Muir's Risk Management and Quality Assurance Procedures.
>
> We are unaware of any material breach of any Risk Management and Quality Assurance Procedures relating to work which has been undertaken by Bradbury & Muir on behalf of Westpac Banking Corporation or a customer of Westpac Banking Corporation.

[73] Mr Bradbury sought at trial to explain away the contractual significance of his provision of these certificates on the basis that it was 'a practice provided for in the STCs'. He said further that he:

> … did not expect that by complying with the service standards and reporting templates that Bradbury & Muir had thereby conferred on Mr Willcock the power to terminate Westpac's relationship with Bradbury & Muir on six months notice. I regarded these matters to be part of the ancillary reporting aspect that had been introduced into Bradbury & Muir's relationship with Westpac. Bradbury & Muir continued to take instructions from the AMG and not from Legal Services.

[74] Mr Bradbury's explanation contradicts an experienced lawyer's deemed state of knowledge of legal principle. B&M accepted the variation introduced by the STCs to the existing contract by submitting a quarterly certificate to Westpac in

August 2003. Submission of each certificate thereafter was an act of part performance or affirmation of that contract. Both sides knew their rights and obligations were governed by this new document. Mr Bradbury's own personal views or intentions are irrelevant.

[75] Mr Bradbury's true state of knowledge was revealed by his answer to a question from Mr Kos. He was asked about his delay in providing a quarterly certificate in August 2003. The document was overdue when signed and delivered. He said that he was 'embarrassed not to have met an obligation'. He referred to the STCs as the source of his obligation to provide a certificate. Mr Bradbury knows that an obligation only arises out of a contractual relationship. He was effectively acknowledging the STCs as its source.

[76] It is difficult to follow Mr Gedye's arguments in answer. His synopsis contains a lengthy recitation of notes of meetings between various Westpac employees in 2002 and 2003. The results were generally communicated to Mr Bradbury. Mr Gedye seems to argue that the bank's employees had agreed the STCs would not bind B&M 'into a standard panel relationship with legal services'. Whatever was discussed or even agreed between Westpac management had no effect whatsoever upon an objective evaluation of the effect of documents passing between the bank and a third party.

[77] Viewed objectively, Mr Bradbury's conduct amounted to an unequivocal acceptance of Westpac's STCs including in particular an expiry date of 31 March 2005 with a right of termination at any time earlier without cause but on reasonable notice. Mr Bradbury must have known from August 2003 that the firm's panel contract would expire on that date unless renewed. And the firm did not require receipt of Westpac's statement of defence or completion of discovery to tell them what they already knew. I reject Mr Gedye's submission that the contractual significance of the RFPs and STCs was not a foregone conclusion.

(e) Cancellation

[78] However, I must consider B&M's argument that Westpac was only entitled to cancel for cause if I am wrong in my primary findings that (1) there was no enduring contract of retainer between the parties; (2) if there was, it was subject in any event to an implied term entitling Westpac to cancel without cause or notice; (3) if there was such a contract it came to an end in July 2002 when Westpac accepted B&M's RFP; and (4) the terms of the 2002 contract were varied by the firm's acceptance of Westpac's STCs including an extension of the original expiry date to 31 March 2005 and a right to terminate panel arrangements without cause at any time in the interim.

[79] The question of whether Westpac was only entitled to cancel for cause is of an intensely factual nature, requiring a careful examination of circumstances occurring in late 2004 and early 2005.

[80] Mr Muir had devised what is known as the Trinity investment scheme in 1996. He and Mr Bradbury took all necessary steps to establish and implement it. Both were investors through corporate entities. So too was Mr Peebles who was introduced to the scheme by Mr Bradbury.

[81] The Trinity scheme involved a number of investors in a douglas fir growing forest in Southland. The forest is due for harvesting in 2047 or 2048 when it reaches maturity or 50 years of age. Some investors claimed deductions in 1997 and 1998 against income for expenses incurred for licence and insurance premiums in the forestry operation. The Commissioner of Inland Revenue disallowed those deductions and fixed a penalty for the latter year.

[82] A group of investors challenged the Commissioner's decisions by issuing proceedings in the High Court at Auckland. The issues for determination at trial before Venning J in late 2004 were whether the investors were entitled to the deductions or whether the investment arrangements amounted to tax avoidance. The Commissioner also alleged that the scheme was a sham.

[83] Venning J delivered an interim judgment shortly before trial. He suppressed publication of the names of the challenging investors including B&M provided they

file affidavits in advance of a full hearing. The trial commenced on 20 August 2004. The next day Mr Jensen learned of the firm's involvement. Mr Jensen passed on his information to Mr Willcock and Ms Ann Sherry, then Westpac's New Zealand chief executive officer. Mr Peebles had earlier advised his immediate superior in Westpac of his participation but B&M had made no formal disclosure.

[84] Mr Bradbury had sworn an affidavit on 6 August in support of an application for permanent suppression of publication. He referred to the firm's clientele as being largely banks and other financial institutions. He expressed his concern that adverse publicity would result 'in the disappearance of most of our practice and the eventual collapse of the firm'. He reinforced this message with a description of the likely harm as 'serious and irreparable'. He repeated his expectation that 'a large number of the firm's clients will cease to use our services'. Some media publicity of the existence of Mr Bradbury's concerns followed without of course disclosing his identity.

[85] Venning J delivered a judgment on 23 August dismissing the application by B&M and others for permanent suppression orders. The Judge stayed his decision pending determination of an appeal which was dismissed by the Court of Appeal on 14 October. The Supreme Court refused B&M leave to appeal further on 16 November.

[86] These events, including the attempts by B&M to obtain permanent suppression, were widely and adversely publicised.

[87] Mr Justin Moses, head of Westpac's Legal Services, wrote to Mr Bradbury on Mr Willcock's instructions on 23 November as follows:

> Westpac in Sydney has become aware through certain media reports of recent proceedings in the New Zealand Courts, involving an alleged tax avoidance scheme (the 'Trinity Scheme') that partners of the firm are alleged to have participated in the creation of.
>
> The Group Secretary & General Counsel has asked me to urgently review the information that we have about this matter, and to provide him with a report.
>
> Pending the completion and analysis of that report, Westpac intends to withhold from Bradbury & Muir all instructions to act on any new matters. I

> will be communicating this position to Westpac's Asset Management business in New Zealand via the Head of Asset Management.
>
> It would be very useful if you could provide us with a summary of the key assertions involved in the proceedings and your response to them. There are also some questions that we would like to raise:
>
> 1. has the Firm previously disclosed the existence of the tax investigation and the substance of the matters in question to Westpac? If so, what were the details of that disclosure?
>
> 2. is Westpac or any former or current Westpac employee in any way involved? If so, what are the details of that involvement?
>
> 3. has Westpac in any way and with knowledge consulted, procured, facilitated or in any way assisted any third party (being a customer or otherwise) to participate in the Trinity Scheme? If so, what are the details.
>
> I would be grateful if you would give some consideration to these questions with a view to discussing them with me. I will have my EA contact your office to arrange a convenient time.
>
> We would also be grateful if you would ensure that any records which are held by the firm on behalf of Westpac and which relate directly or indirectly to the Trinity Scheme are preserved from destruction.

[88] Mr Moses advised Mr Peebles contemporaneously of Mr Willcock's instructions and of B&M's suspension. Mr Peebles registered his dissatisfaction.

[89] As Mr Willcock explained at trial, a fundamental objective of the panel arrangement is to ensure that risk to Westpac's reputation is reduced by having a line of communication to the legal services division separate from the instructing business unit. He was concerned to learn of the nature of B&M's involvement in the Trinity proceeding along with a senior Westpac employee. He was anxious to conduct an immediate inquiry to obtain all information necessary for determining whether or not Westpac faced a reputational problem as a result.

[90] Mr Willcock did not consider it prudent to allow new instructions to go to B&M while the inquiry was proceeding. But he saw no reason to interfere with existing instructions. He assumed Mr Bradbury 'would be keen to co-operate' while Mr Moses conducted the investigation. He did not expect the result of the process would terminate the bank's relationship with the firm.

[91] Mr Willcock's assumption about Mr Bradbury's willingness to engage in dialogue was misplaced. Instead of replying to Mr Moses' letter Mr Bradbury wrote to Ms Sherry on 25 November. Mr Bradbury said in evidence that he did not respond to Mr Moses' invitation because the two had no relationship.

[92] Mr Bradbury's letter to Ms Sherry was headed with the words 'private and confidential and without prejudice'. It provided a brief summary of the Trinity litigation and rated 'the chances of the plaintiff investors succeeding [as] high'. It also contained answers to the four questions raised in Mr Moses' letter. Mr Bradbury offered Messrs Moses or Jensen an opportunity to speak with the investors' senior counsel, Mr Bruce Stewart QC, 'if Legal Services are genuine' about their inquiry. Mr Bradbury concluded by requesting Ms Sherry to intervene and 'direct Legal Services to withdraw its letter and its instruction to [the AMG]'. He did not apparently understand Mr Willcock's overriding authority in this area.

[93] Ms Sherry forwarded a copy of Mr Bradbury's letter to Mr Willcock. He was surprised by its existence. Mr Bradbury's decision to write to Ms Sherry, rather than respond to Mr Moses' letter, and the tone and content of his communication raised questions about his judgment. Mr Willcock concluded that Mr Bradbury did not consider he had 'any real form of relationship with Legal Services'.

[94] Nevertheless, Mr Moses, again at Mr Willcock's direction, wrote to Mr Bradbury to express his appreciation for his offer to assist the investigation and setting out a list of further questions which he wished to discuss with Mr Bradbury. Mr Willcock saw a discussion as critical to restoring a level of trust and confidence in the relationship.

[95] Mr Bradbury emailed Mr Moses on 30 November. Again his communication was headed 'without prejudice'. He opened in these terms:

> My letter to Ann Sherry may have been too subtle so let me be blunt about all this.
>
> The Trinity case is a high stakes game with the Crown using all the resources at its disposal and every conceivable tactic to influence the Court (just to give you an objective insight into some of the Crown's more outrageous conduct, could I suggest that you talk to Mr Bruce Stewart QC).

> My offer to Ann Sherry was to assist your investigation in exchange for the withdrawal by Legal Services of its letter and its instructions to Asset Management. I think we need to get that offer out of the way before we have the discussion you requested.

[96] Mr Bradbury's email repeated his view that the Trinity proceeding had 'absolutely nothing to do with Westpac'; that Westpac was not entitled to withhold instructions under the STCs; and that Mr Bradbury did not believe the bank was able to withhold instructions and the firm accordingly reserved its 'rights in that regard'.

[97] Mr Bradbury's letter only served to compound Mr Willcock's concerns. He thought its terms were extraordinary. He had 25 years experience as a solicitor (including 15 years in corporate advisory and commercial litigation as a partner in a Sydney law firm). Mr Willcock had never before 'encountered a position where a legal firm has so overtly challenged their client's right to give, withdraw or suspend instructions'. His concern, and the scope of his inquiry, began to develop into 'a more general concern about the nature of Westpac's relationship with Bradbury & Muir as a panel law firm'.

[98] Mr Willcock thought also that Mr Bradbury was confused about the nature of a law firm's relationship with its client. The bank was not obliged to give a panel firm any work at all. The right to instruct, and to dictate the relationship, rested with the client, not with the lawyer.

[99] By coincidence Mr Willcock was in New Zealand on business when Mr Bradbury's email dated 30 November was forwarded to him. He was concerned that Mr Bradbury was unnecessarily 'digging a hole for himself'. He knew that he would have been under considerable stress as a result of the Trinity proceeding. He sought a way of breaking the consequent impasse. So he attempted to meet Mr Bradbury face-to-face to discuss the issues.

[100] Mr Willcock asked Mr Moses to arrange a meeting. Mr Moses' approach elicited a response from Mr Bradbury's secretary that Mr Bradbury did not wish to meet. So Mr Willcock attempted to phone him directly. He left three telephone messages with Mr Bradbury when he was unable to make contact with him on

30 November and 1 December. Mr Bradbury's secretary advised in answer to one message that Mr Bradbury was unable to be interrupted.

[101] Mr Bradbury did not return Mr Willcock's calls. Instead he sent another email to Mr Moses later on 1 December. He confirmed his knowledge that Mr Willcock was attempting to contact him. He said he was not prepared to enter into a discussion with Mr Willcock until the legal services division withdrew its notice of suspension given on 23 November. Mr Bradbury made plain at trial that he had no time for Mr Willcock and that he was deliberately ignoring his invitations to meet.

[102] Mr Moses advised Mr Bradbury that the bank would have to complete its investigation on the basis of the information already in its possession. In his time as Westpac's group secretary and general counsel Mr Willcock said he had never experienced a situation where anybody, let alone a relationship partner of a panel law firm, had 'simply refused to meet and talk about an issue'.

[103] A senior Westpac employee in New Zealand advised Mr Moses on 3 December that he was prepared to act as an intermediary between legal services and Mr Bradbury on the basis that the latter said he would answer Mr Willcock's questions provided they were routed through him. This advice only added to Mr Willcock's mounting concern.

[104] Mr Bradbury responded in writing to Mr Willcock's additional questions on 8 December but channelled his communication through another Westpac employee. The letter provided further information about the Trinity litigation. But it did not alleviate what had developed into Mr Willcock's primary and more fundamental concern – the nature of Mr Bradbury's relationship with Westpac's legal services division.

[105] In the meantime Mr Moses had completed a draft report, recommending maintenance of the suspension until either delivery of Venning J's substantive judgment or provision of further information from B&M. Venning J's decision was released on 20 December 2004. Contrary to Mr Bradbury's stated expectations, it

was adverse to the Trinity investors. The Judge found that the scheme was designed to avoid tax liability.

[106] I should interpolate at this juncture that by then Westpac was itself the subject of a reassessment by the Commissioner to tax liability of nearly $600m on income earned from structured financing transactions entered into from 1999 and afterwards. The Commissioner contends that the transactions were designed to avoid tax. This fact is noted not in recognition of its relevance but because it was raised frequently by Mr Bradbury in his communications at this time and afterwards with the bank and by his counsel before and at trial. The apparent purpose of these references was to suggest that Westpac was guilty of practising double standards in deciding to suspend instructions to B&M on 23 November.

[107] This view was exemplified in a letter sent by Mr Wallis to Chapman Tripp after this proceeding was filed as follows:

> … The bank terminated Bradbury & Muir not for performance issues but apparently because of 'concerns' about its involvement in tax avoidance through the Trinity forest investment. At least such was the stated reason but that seems to be a specious [reason] given the fact that the IRD have labelled as tax avoidance Westpac's own sustained involvement in certain structured financing transactions during the relevant period and, on the basis, is reportedly claiming $647m from the bank. My clients suspect that this claim is probably closer to $1.5b and believe it will be only a matter of time before the IRD publicly trumpets that Westpac has unseated the Trinity investors as New Zealand's largest ever alleged tax avoider.
>
> There is a double standard evident in the contrast between the conduct by the bank of its own tax affairs and its professed reasons for terminating Bradbury & Muir. This apparent double standard highlights the question as to whether the defendants' professed reasons were a case of unwitting hypocrisy or whether those reasons were intended to dissemble a malicious, concerted and ultimately successful attempt to terminate Bradbury & Muir.
>
> This is a seminal issue in the case and so documents relating to the aggressive stance Westpac has taken over the last decade towards New Zealand income tax and structured finance arrangements it has entered into during that time in order to implement that stance will be relevant and discoverable.

[108] Mr Wallis' letter reveals the extent of Mr Bradbury's misunderstandings, apparently shared by his counsel, of the facts that, first, Westpac's decision to suspend arose as a result of B&M's failure to make full and proper disclosure at an

earlier date to Westpac of its involvement in the Trinity scheme; second, the firm's attempts to obtain name suppression had generated adverse publicity; and, third, and most significant, Mr Bradbury's conduct in the intervening month following suspension had overtaken issues about the Trinity scheme itself – his treatment of Mr Willcock and other senior Westpac employees had sewn the seeds of destruction of the professional association.

[109] The firm's problems were only compounded by Venning J's condemnatory findings about the veracity and reliability of evidence given by Mr Muir at trial: *Accent Management Ltd v Commissioner of Inland Revenue* HC AK CIV 2003-404-002966 20 December 2004 at [231] as follows:

> I regret that having seen and heard Dr Muir give evidence over four days I have to say I formed the clear impression that he was less than candid about a number of matters and in relation to some issues, was simply not credible. As noted, he set out from the outset to minimise and downplay his and Mr Bradbury's involvement in the establishment of CSI and the benefits their family trusts obtained through the related Parentis transaction. He was not forthright. He made concessions rarely and then only when forced to by clear documentary evidence. On occasions, when faced with documents that caused him particular difficulty, he gave a number of implausible explanations. Dr Muir's evasive and unhelpful approach to his evidence was also reflected in his approach to discovery obligations. I came to the view that Dr Muir was an unsatisfactory witness over the entire period he gave evidence, but particularly during the course of his cross-examination. I refer to a number of specific examples to support the adverse findings I have made against him.

[110] Mr Willcock was particularly troubled by this passage when he read Venning J's examples of Mr Muir's failure to properly discharge his discovery obligations. I add only that the Judge's conclusions, which reflected directly and publicly upon the probity and integrity of one member of a two partner law firm, would have provided ample justification in themselves for an immediate termination of a contract of retainer even if B&M are correct that the bank was required to show cause. An institutional client like Westpac could not afford the reputational risks of a continued association with a firm including Mr Muir. Nor could it continue to have any real degree of trust and confidence in the same entity.

[111] Mr Bradbury sealed his firm's fate by his subsequent conduct. Mr Moses sent Mr Bradbury an email drafted by Mr Willcock on 24 December. He only had

extracts of Venning J's judgment including the section containing the Judge's adverse findings about Mr Muir which Mr Jensen had faxed him on 21 December. Mr Willcock through Mr Moses sought a full copy of the judgment and Mr Bradbury's comments on the findings.

[112] Mr Bradbury did not respond to Mr Moses' email until 2 February 2005 when he sent a note saying that he had only recently returned from holiday and that:

> A copy of the decision was emailed to Doug Carter the day it was released. I assume that Doug sent you a copy.

[113] Mr Willcock emailed Mr Bradbury on 4 February. He asked Mr Bradbury to direct any future panel correspondence to Mr Moses or himself and said:

> We are reviewing the judgment which, as you know, is lengthy and contains a number of findings and comments relating to your firm and the evidence which was given. In some places in the judgment the Court has been strongly critical of the evidence of your partner, Dr Muir. In a number of places the findings and comments are generally adverse.
>
> I have asked Justin to complete his review of the Trinity tax matter in the context of Westpac's relationship with your firm as a member of our Legal Services panel in New Zealand. I am keen to ensure that your firm has an opportunity to provide us with your perspectives and views about the matters canvassed and the findings made in the judgment before we conclude our view.
>
> I note that Justin has previously invited you to provide us with your comments in relation to any of the findings which have been made to the Court and generally. To that end, would you please provide us with any comments about the matters which are referred to in the judgment, or otherwise and which you believe are relevant to our review of Westpac's relationship with your firm by no later than 17 February 2005.

[114] Mr Bradbury emailed Mr Willcock back immediately the same day. Again his letter was headed 'without prejudice'. It opened with these words:

> I am sure the judgment will be of interest to the bank in the context of its own tax avoidance dispute with the IRD. Please let me know if I can be of any assistance in that regard.

[115] The rest of Mr Bradbury's email was brief and asserted that Venning J's judgment '… contains no adverse findings or comments relating to Bradbury & Muir. The firm itself had no involvement with the case …'. This assertion was at best for Mr Bradbury inaccurate and at worst deliberately misleading. But the

sarcasm inherent in the opening words, and Mr Bradbury's criticism about the length of time taken by Mr Willcock to complete an investigation with which he had refused to co-operate, confirmed to Mr Willcock that there was now little prospect of the parties continuing in a functional working relationship.

[116] Mr Bradbury's latest email led Mr Willcock to seek outside legal advice. Shortly afterwards, on 22 February, he decided that Westpac would continue to allow B&M to remain on the panel until expiry of the existing contract on 30 June (it had been extended by three months in the interim) but would continue in the interim to withhold new instructions. He also decided that the firm would not be invited to tender for the new panel which was to begin on 1 July 2005. He conveyed this advice by letter to B&M.

[117] Mr Willcock explained his decision in these terms:

> By the end of this process, I as Group Secretary and General Counsel, and Justin Moses as head of Legal Services for Westpac, had lost any sense of trust and confidence in Clive and Bradbury & Muir as a firm.
>
> It would be fair to say that we never managed to develop the sort of relationship with Bradbury & Muir and Clive Bradbury as the relationship partner that we had with all of our other panel law firms. Until now, however, that had never manifested itself in a way that was of any practical concern. Despite some initial frostiness, Bradbury & Muir had been complying with all of our relationship management requirements, in terms of financial reporting, quarterly certification, the use of WINs and participating in relationship management meetings to discuss new instructions they had received and the like.
>
> While the findings in the High Court judgment were obviously relevant to my decision, of greater importance to me was the attitude and approach which had been shown by Clive from the time I advised him of my intention to investigate what had occurred and to suspend new instructions in the meantime. By February, given Clive's attitude and approach to his firm's relationship with Westpac Legal Services, it was simply untenable to me that Bradbury & Muir would be invited to be a member of Westpac's new panel arrangement that would commence from 1 July 2005.
>
> I was, however, content for Bradbury & Muir to complete the current term on the basis that no new instructions would be given, largely because it was a pragmatic way forward. Bradbury & Muir were doing very little high end work and that effectively provided for a four month period of notice.

[118] To complete the picture, I record that Mr Bradbury wrote to Ms Sherry on 8 March 2005. His letter was again headed 'strictly confidential and without prejudice' and stated among other things:

> I have repeatedly warned Westpac over the last three months or so that Richard Willcock and his colleagues, Simon Jensen and Justin Moses, were engaged in a course of conduct which seemed designed to intentionally and unlawfully cause horrendous damage to Bradbury & Muir. I have today written to each of these individuals advising that we intend to file legal proceedings against the three of them, claiming that they conspired to induce Westpac to wrongfully breach its contractual obligations to Bradbury & Muir, conspired together without legal excuse to injure Bradbury & Muir commercially and conspired to publish statements which by innuendo were defamatory of the partners of Bradbury & Muir. While we have yet to calculate our damages claim, we expect it will be substantial.
>
> The case against the bank will also include claims for breaches of contractual and other legal and equitable duties stemming from my special relationship with Westpac over the last 17 years. To prove the nature and scope of that relationship I will have to produce evidence of the myriad of transactions and affairs which I have handled for Westpac over that time and to call a long list of former and current Westpac officers as witnesses.
>
> **Facets of the case will no doubt be extremely embarrassing for the bank and some of its officers. I would expect that it will draw a lot of media attention and by a PR nightmare for the bank in New Zealand.**
>
> I have yet to sit down and compile a comprehensive description of my involvement with Westpac over the last two decades, but I thought I would briefly mention a few episodes at this stage so that you have some appreciation of where matters might go. They are in no particular order…
>
> I am sure that I will be able to call on a long list of Westpac employees who will be able to attest to my loyalty to the bank and my performance on its behalf over the last 17 years.
>
> [Emphasis added]

[119] Mr Bradbury's letter denigrated Mr Willcock personally at length, accusing him and Westpac of 'rank hypocrisy' in relying on the Trinity tax case given Westpac's own differences with the Commissioner. He then summarised the details and results in a number of other transactions where he had represented Westpac. He concluded by expressing a willingness to meet and discuss settlement '… rather than expose [Westpac] to a publicly embarrassing Court case'. Westpac's reaction was measured but no progress was made towards resolution.

[120] Even on Mr Bradbury's own account the alleged 1995 contract was subject to Westpac's right to terminate for cause. These events largely speak for themselves. The nature and tone of Mr Bradbury's communications (or refusal to communicate) with his principal client over a four month period left the bank with no choice other than to sever the association. Mr Bradbury progressively destroyed any remaining scintilla of the trust and confidence which is integral to a client's relationship with a legal advisor. As I read the correspondence during cross-examination, I was at a loss to understand what might have driven Mr Bradbury to behave in this way; I could only infer in his favour that he was under extreme personal and professional stress due to the Trinity litigation.

[121] However, Westpac could not be expected to continue to tolerate Mr Bradbury's abuse. Mr Willcock could have justifiably ended the relationship immediately upon reading Venning J's judgment delivered in December 2004. Instead he displayed patience and moderation in the face of Mr Bradbury's increasing irrationality. But his professionalism was not reciprocated.

[122] Mr Bradbury treated Mr Willcock with open disdain, both directly and to other senior Westpac employees. He was rude and dismissive. He sought to demean and ridicule the senior employee within the bank who was ultimately responsible for their relationship. Towards the end, Mr Bradbury's communications all but invited termination. And the result was exactly as he forecast in his affidavit filed in the Trinity name suppression application in August 2004.

[123] Mr Gedye submits that Westpac could only cancel for cause if it acted in good faith. He says that obligation required the bank to adopt 'a fair and reasonable process'. The proposition is itself contradictory. But even if it was true Mr Bradbury could not have more emphatically rejected Westpac's repeated invitations to participate in an inquiry into his involvement with Trinity. That was the 'fair and reasonable process' postulated by Mr Gedye. Mr Bradbury preferred to follow what he called at trial a 'strategy' of imposing conditions upon his primary client and pursuing a path designed to end the relationship.

[124] The reasonableness of Westpac's decision to terminate even if it was necessary to show cause must have been obvious to B&M immediately it was made, a year before this proceeding was issued. The validity of the bank's action did not require testing by evidence. The contemporaneous documents said it all. Even if B&M crossed all the other obstacles in the way of their contractual claim, they knew or must have known in March 2006 that the reasonableness of Westpac's decision to terminate was beyond challenge and that the STC contract of engagement would have expired on 30 June 2005 in any event.

(2) Estoppel by Representation

[125] B&M raised a second and related cause of action in equity. They alleged Westpac was estopped by Mr Peebles' representations made to Mr Bradbury in 1995 to the effect that their enduring relationship would not be terminated while the firm continued to achieve excellent results and then only for good cause determined by a fair and reasonable process. Mr Gedye says these representations were renewed by Westpac's provisions of instructions to the firm from 1995 to 2004; by representations by senior Westpac management in 2002 that a specialist arrangement would be made to ensure the AMG could continue to instruct B&M if the firm was not appointed to a new panel; and by representations to the effect that notwithstanding Westpac's panel arrangements the AMG would continue to be able to choose its legal advisors and that the firm's primary relationship with the bank would be through the AMG, with its relationship to legal services relegated to an ancillary reporting rung.

[126] It is unnecessary to dwell at length on this cause of action. Mr Wallis acknowledged in closing that it could not survive independently of the claim for breach of contract. Plainly any representations made were, as Mr Kos submits, wholly subsumed by the STCs to which B&M subscribed in 2003.

[127] This claim was doomed for other obvious and independent reasons. First, proof of detriment is a critical element of estoppel by representation. Mr Gedye says that Mr Bradbury suffered detriment by developing his legal practice in reliance on Mr Peebles' representations and in particular that he decided to continue working in

the law when he had the independent financial ability to pursue a different lifestyle; he formed a partnership with Mr Muir; he created a practice which revolved solely around Westpac to the exclusion of other clients; he expanded the firm by taking on extra staff and larger premises; and he provided the AMG with a great deal of informal advice and guidance at no cost.

[128] These events do not approach a detriment. Mr Bradbury's evidence was that he had two options after leaving the second national partnership in 1995. One was to form his own law firm. The other was to devote his energies to develop his own subdivision of coastal property (which he completed in any event within a few months).

[129] I agree with Mr Kos. B&M could not possibly show detriment from relying on Mr Peebles' representations even if they were actionable (which they are not). To the contrary, their years in partnership were very profitable. They acknowledged annual incomes of about $1m each in the three years to 31 March 2005.

[130] Mr Bradbury is an astute and successful commercial operator as well as a competent solicitor. He made his own decision on whether or not to form a legal practice based largely around provision of Westpac's work. He knew the risks; and he knew he could not rely indefinitely on any informal arrangement he enjoyed with Mr Peebles. He acknowledged at trial that his relationship with the bank would probably come to an end if Mr Peebles left Westpac's employment.

[131] Second, Mr Bradbury knew from his own conduct in late 2004 and early 2005 that he could never argue unconscionability by Westpac in bringing the relationship to an end. The bank acted in accordance with its legal rights. His conduct was largely instrumental in its decision to cancel.

[132] Third, B&M would never be entitled to damages based upon a lost expectation. In this area the relief available in equity and contract divurges. Mr Gedye says that without the offer of an enduring relationship Mr Bradbury would have undertaken different employment or the firm would have acted for additional

clients. In that event 'it is likely that it would have secured the gain it expected to receive from Westpac through revenue from other clients'.

[133] This argument is not only contrary to the facts but speculative. As noted, in early 1995 Mr Bradbury said he had only one other choice which was of limited duration. Westpac was a very profitable source of funds; and no evidence was led that B&M would have secured a comparable income stream from a differently structured client base.

[134] This claim had no prospect of success whatsoever, as B&M knew or would have known in March 2006.

(3) Unlawful Interference with Business Interests

[135] B&M's third cause of action against Westpac and Mr Willcock alleged interference with trade or business. It was a discursive narrative of disconnected events. The business interest which lay at the heart of the claim was said to be the firm's 'relationship with Westpac'. The culpable intention to end that relationship was principally pleaded as inducing or procuring the bank to breach the retainer agreement, or defaming B&M in various ways. The firm pleaded that its financial consequence was loss of 'the benefit of the retainer agreement'.

[136] This allegation was pointless. The pleaded lost business interest was the contract of retainer entered into in 1995. I have already found that the contractual claim was hopeless. The unlawful interference cause of action added nothing to the primary claim and was circular.

[137] In any event, even assuming there was such a contract, B&M do not suggest that either Mr Willcock or Mr Jensen knew of its existence prior to March 2005 when the relationship came to an end. Mr Bradbury acknowledged that he did not tell Mr Willcock about it when they first met in November 2001. He never asserted its existence in subsequent correspondence with Westpac's legal services division when negotiating the terms of RFPs and STCs. Mr Willcock could not act with the

aim of procuring the breach of a contract of whose existence he was unaware. This much is fundamental.

[138] The first two particulars of unlawful means thus lead nowhere. The other three are of allegedly defamatory statements made by either Messrs Willcock or Jensen at various times. They are discrete torts. Their inclusion in this cause of action was redundant or superfluous. They added nothing.

[139] There is also the separate conceptual hurdle inherent in the proposition that one party could interfere with another's business interest constituted by a contract of retainer between the two of them. The same observations apply to the claim against the bank and Mr Willcock jointly. The principles of vicarious liability apply; Mr Willcock could not unlawfully interfere with B&M's contract with his employer unless he was acting outside the scope of his employment, which Westpac never suggested.

[140] While the scope of the tort is wider than the companion right to sue for unlawful interference of a contractual relationship, the two claims in this case are one and the same. I repeat that the business interest in issue is the alleged contract of retainer. Furthermore, even a passing familiarity with the leading authorities would have shown to B&M that the tort is normally only arguable in a very different commercial context – where the conduct of trade competitors causes financial damage to one or a third party: see *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354 (CA).

(4) Unlawful Interference with Contractual Relations

[141] B&M's fourth cause of action was an allegation of interference with contractual relations. The elements are well known. A binding contract must exist; Mr Willcock must have known of its existence and deliberately intended to interfere with it in order to bring harm or pressure to bear on B&M; the interference must be occasioned either by direct persuasion or interference or indirectly; and the interference must have been without lawful justification.

[142] This cause of action was also pointless. It expressly incorporated and adopted the preceding claim of breach of unlawful interference with business interests. It was doomed to failure for the same reasons.

(5) Defamation

[143] B&M's fifth cause of action was in defamation. They alleged that Mr Willcock defamed them by publishing or causing to be published a memorandum for the Westpac board referring to tax evasion. To defeat the defence of qualified privilege they said Mr Willcock was predominantly motivated by ill-will towards them or otherwise took improper advantage of the occasion of publication: s 19(1) Defamation Act 1992.

[144] This cause of action arose following formal discovery by Westpac in this proceeding in late 2006. B&M would not have learned of its existence but for their decision in March 2006 to file a hopeless proceeding. Nevertheless, I shall proceed on the basis of deemed knowledge of the right of action when the proceeding was issued.

[145] The allegedly defamatory publication was a memorandum which Mr Willcock allegedly caused or authorised to be published for a meeting of Westpac's board of directors between 24 January and 7 February 2005 in these terms:

> **The High Court has recently ruled that a complex forestry investment scheme, Trinity, was established specifically to evade tax…** Some of the individuals who [established] the scheme and are also parties to the test case, are the principals of Auckland law firm Bradbury & Muir. Bradbury & Muir is one of the firms on Westpac's Legal Panel… The Board should also be aware that Westpac suspended Bradbury & Muir from its legal panel when we became aware of its involvement in the conception of the Trinity investment, pending the outcome of a Westpac inquiry into the issues. Progress on this inquiry is being led by [the second defendant] with respect of the future of Bradbury & Muir's relationship with Westpac, and by Ann Sherry with respect to Greg Peebles' employment.
>
> … Westpac suspended Bradbury & Muir from its asset management responsibilities when we became aware of its involvement in the conception and design of the Trinity investment… [This message] will remain relevant,

> and have integrity, until Richard Willcock and Ann Sherry have made their decisions on Bradbury & Muir and Greg Peebles.
>
> [My emphasis]

[146] A statement is defamatory if it is false and to the discredit of another party. The first question is whether or not a statement is in fact untrue. The test is objective: what is the ordinary meaning of the words conveyed to an ordinary reader? The meaning conveyed to a board member reading the memorandum is immaterial. The words must be read in context and within the document as a whole. Accordingly it will be relevant if the offending word or phrase is contradicted or moderated by a later reference.

[147] B&M alleged that the statements made in the memorandum had many adverse meanings including that: (1) they had established a complex forestry investment scheme for the specific purpose of evading payment of tax; (2) the establishment of the scheme constituted a criminal offence; (3) Venning J's findings meant that Trinity was different in character and severity from the Commissioner's allegations about Westpac's investments; (4) accordingly Westpac was likely to be the subject of damaging publicity and fallout from customers if it continued to engage the firm as solicitors; (5) B&M had engaged in criminal or grossly unethical conduct so it was fair and proper to suspend the firm from undertaking the AMG's instructions; (6) no reputable bank or commercial client would engage or continue to engage B&M as their legal advisors, and Westpac should not seek to preserve but should sever its relationship with the firm; and (7) Mr Willcock was leading the conduct of a fair, competent and bona fide investigation into the relevant facts about and foreseeable consequences of B&M's involvement in Trinity.

[148] In summary B&M asserted that the reference to 'evade tax' amounted to an allegation that they were suspected of discreditable conduct, implied a lack of judgment or honesty in the conduct of their work and was thus defamatory.

[149] Not for the first time, these assertions amounted to a gross overstatement of B&M's case. I agree with Mr Kos. The words 'evasion' and 'avoidance' carry much the same meaning for a lay person. The latter does not suggest impropriety in the income tax context. While the word 'evasion' carries a connotation of improper

conduct to somebody familiar with income tax law, ordinary people are not aware of this nuance.

[150] Even for a sophisticated lay person, knowing the difference between evasion and avoidance, the distinction is often fine. Evasion occurs when the taxpayer does not inform the Commissioner of all facts relevant to an assessment of tax; but not all evasion is criminal – if innocent, it will lead to a reassessment, and if fraudulent it may lead to a criminal charge as well: *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 (PC) per Lord Templeman at 560. It is essentially a question of degree of unlawfulness.

[151] Also the memorandum later expressly referred to:

> Speculation about whether Westpac will continue to employ Greg Peebles given his position as a party to an investment scheme that the High Court has decided represents **tax avoidance**.
>
> [Emphasis added]

[152] The opening reference in the memorandum to a finding by the High Court that Trinity was established specifically to 'evade tax' was wrong. But the document considered as a whole was not a defamatory statement. Its purpose was to provide information for Westpac's board. The message was correct to the extent that the finding was adverse to B&M and those associated with the scheme in that Venning J had found that Trinity amounted to tax avoidance.

[153] However, assuming that threshold conclusion was wrong, the memorandum was plainly published on an occasion of qualified privilege. Advice by senior management to directors in a board memorandum about the circumstances leading to suspension of instructions to a firm of solicitors engaged by the company falls unarguably within the category of a common interest shared by the publisher and recipient necessary to secure the law's protection: *Lange v Atkinson (No1)* [1998] 3 NZLR 424 (CA). The reciprocity of a duty or interest could not have been more obvious. Mr Wallis admitted as much in oral closing.

[154] The only live issue remaining would be whether or not Mr Willcock acted with malice. Mr Gedye initially identified numerous evidential extracts said to show

that Mr Willcock was predominantly motivated by ill-will towards B&M or otherwise took improper advantage of the occasion of publication. I do not intend to address any of them; they stem from a misguided perception of Mr Willcock as the root cause of the severance of the firm's relationship with the bank.

[155] In any event, Mr Gedye's submission is contradictory. His closing proposition was that Mr Willcock failed to act with the degree of responsibility required by the occasion. On an objective evaluation of the memorandum in context, he could not have put the case any higher.

[156] A moment's consideration would have disclosed that at best for B&M, Mr Willcock was guilty of a lack of care (and of a minor and understandable nature). The reference to tax evasion was plainly accidental. The law could not have been more settled in March 2006 or later that a lack of care does not equate with malice even if Mr Willcock was shown to be the publisher: *Lange v Atkinson (No2)* [2000] 3 NZLR 385 (CA).

[157] Furthermore, an informal inquiry would have revealed that, while drafts were shown to Mr Willcock, he did not prepare the memorandum or submit it to the board for consideration. He was not its publisher; it was published in Ms Sherry's name. He was simply one of a number who saw drafts and failed to detect the error.

[158] Moreover, had B&M jumped all these hurdles at trial, and established that the publication was defamatory, an award of damages would have been nominal. Publication was restricted to a handful of bank directors and employees. All except one were Australian. They would not have known B&M. And the publication had no effect on Westpac's termination of B&M's retainer. That decision was taken by Mr Willcock at a later date without reference to the board.

[159] This final cause of action was also hopeless, and should never have been pursued.

Summary

[160] In summary, I am satisfied that all five causes of action pleaded by B&M against the bank and Mr Willcock which survived to trial were hopeless from inception in March 2006, and in particular that:

(1) There was no evidential basis for alleging the existence of an indefinite or perpetual contract of retainer entered into between Messrs Bradbury and Peebles in early 1995;

(2) If such a contract of retainer could be proven, it was cancelled or superseded by B&M's acceptance of Westpac's RFPs and then its STCs from 2002 onwards on terms providing for termination without cause on one month's notice or expiry on 30 June 2005;

(3) If, to the contrary, the parties did enter into the 1995 contract, and it was on Mr Bradbury's own admission terminable for cause, Westpac's decision to cancel it was justified.

[161] The claims of estoppel by representation and of unlawful interference with contractual and business relations added nothing to the principal claim in contract. The defamation claim, while arising from a distinct event, was unsustainable and if successful would have yielded no more than nominal damages.

[162] All B&M's claims were, in my judgment, inherently unarguable when made either because they lacked an evidential foundation or because they were legally untenable. The trial process was not necessary to expose these fatal deficiencies. Messrs Bradbury and Muir are experienced and able lawyers. They were advised by independent counsel. They must have known in March 2006 that their case could never be substantiated; if they did not have that state of knowledge, they ought to have known. An award of indemnity costs is appropriate.

Misconduct

[163] An award of indemnity costs is justified on a related ground; I am satisfied that B&M, knowing that this proceeding was hopeless, used the litigation for the

ulterior purpose of attempting to force a financial settlement from Westpac. This independent conclusion provides the rationale for the firm's decision to pursue an unsustainable case. I draw this inference from a combination of four factors.

(1) Threats of Exposure

[164] First, there is Mr Bradbury's letter dated 5 March 2005.

[165] Mr Gedye submits that Mr Bradbury's use of the words 'Strictly Confidential : Without Prejudice' affords his letter privilege from production. He says that it was written 'in connection with an attempt to settle': s 57(1)(b) Evidence Act 2006 (confirming the test adopted in *Unilever v Procter and Gamble* [2001] 1 All ER 783 (CA)). He says the case law is against eroding the cloak of protection or expanding its exceptions.

[166] The public policy behind the rule protecting without prejudice communications is well known: it is designed to encourage settlement of disputes wherever possible without resorting to litigation. It allows parties to put their cards openly and frankly on the table, free from the risk that statements or offers made in the negotiation process may be brought before the Court as admissions on liability: see generally *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 (HC) at 1299.

[167] The rule's justification as an exception to the rules relating to admissions against interest was explained by Hoffman LJ in *Muller v Linsley & Mortimer* [1996] PNLR 74 (CA) at 79-80:

> If one analyses the relationship between the without prejudice rule and other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted … But the public policy rationale is, in my judgment directed solely to admissions…

[168] This is not such a case. A without prejudice letter containing a threat is admissible to prove that the threat was made; that is because its relevance does not lie in the truth of any of its assertions or admissions but simply in the fact that it was made: *Muller* at 79-80. Westpac does not rely on Mr Bradbury's letter to take advantage of an admission on liability but as part of an examination of his motives in bringing this claim. Mr Bradbury's letter is admissible, not to prove the truth or otherwise of any admissions it contained, but as evidence of an open threat – to expose the bank to adverse publicity if it did not need his demands for a substantial financial settlement.

[169] Mr Bradbury's letter was carefully structured. It opened with allegations of serious wrongdoing by Mr Willcock and others, and advised of an intention to sue them for conspiracy. The damages claimed 'will be substantial', based on breaches of contractual and equitable duties arising from a special relationship. He made no mention of a binding contract allegedly entered into in 1995. To prove the relationship's nature and scope, Mr Bradbury said he would have to 'produce evidence of a myriad of transactions and affairs' which he had handled for Westpac. He would also have 'to call a long list of former and current Westpac officers as witnesses'.

[170] The letter then said:

> Facets of the case will no doubt be extremely embarrassing for the bank and some of its officers. I would expect that it will draw a lot of media attention and be a PA nightmare for the bank in New Zealand. I have yet to sit down and compile a comprehensive description of my involvement with Westpac over the last two decades, but I thought I would briefly mention a few episodes at this stage so that you may have some appreciation of where matters might go. They are in no particular order.

[171] Mr Gedye seeks to explain away the threat inherent in this passage. He draws a distinction between threatening to provide confidential information directly to the media and pointing out that the information would inevitably emerge as part of the evidence at trial (which would be covered by the media). The subtlety of this difference may be lost on a lay person. Mr Bradbury's message was unequivocal. He was declaring his intention to issue proceedings which would disclose

confidential information and reveal differences between senior bank employees. He proceeded to outline each of the relevant transactions, concluding with the words:

> Out of respect for all these people I am prepared to discuss a settlement of my firm's claim against the bank rather than expose it to a publicly embarrassing court case…

[172] Mr Bradbury's threats of exposure extended to Westpac's own taxation dispute with the Commissioner. His letter suggested a failure by the bank to report tax avoidance or the risk of additional penalties in its disclosure statements. He characterised the omissions as 'no doubt deliberate'. Mr Bradbury went further, though. He linked these alleged omissions to a suggestion of 'misleading' conduct by the directors. He said that 'I see that you [Ms Sherry] signed those two statements'. This was an unmistakable threat against Ms Sherry; that she would be exposed to personal risk if proceedings were issued, even though Mr Bradbury knew the truth or otherwise of a disclosure statement signed by Westpac's directors had no relationship whatsoever to the bank's decision to terminate his engagement.

[173] Two years later Mr Bradbury applied to this Court for discovery of 'all documents relating to the stance adopted by Westpac … to the payment of tax in New Zealand'. In my judgment it was a significant step in furtherance of his threatened objective. Mr Bradbury swore a lengthy affidavit in support on 5 April 2007. Mr Gedye relies on its contents to support Mr Bradbury's position but I am in no doubt that its effect is adverse.

[174] Mr Bradbury's affidavit identified relevant categories of discoverable documents. Among them were: (1) documents said to indicate knowledge by Westpac and its senior employees that its conduit investments amounted to tax avoidance; (2) documents indicating the effective rate of tax paid in New Zealand by Westpac in the financial years 1999 to 2005; NOPAs (Notices of Proposed Adjustment issued by the Commissioner) received by the bank on or before 28 February 2005 in connection with the conduit investments; (3) documents dealing with the consistency of the structured finance transactions with the bank's obligations as a good corporate citizen and social responsibility; (4) minutes considered by Westpac's structured finance committee in New Zealand as they relate to the approval of conduit investments or their tax effect; and (5) documents relating

to concern expressed by senior New Zealand employees, including Mr Harry Price, the former chief executive officer, about the tax effect or use by Westpac of conduit investments and how the bank resolved those concerns.

[175] These assertions speak for themselves. None of the documents identified by Mr Bradbury could ever have had the slightest relevance to the issue of Westpac's termination of his professional services. The nature and scope of his request lead to one conclusion; Mr Bradbury was seeking to use the Commissioner's decision to reassess liability on the structured finance transactions in furtherance of his threat to turn this litigation into a publicly embarrassing inquisition into Westpac's tax affairs.

[176] Mr Gedye acknowledges that Mr Bradbury's letter was heavy handed and ill judged. But he says it does not cross the line into misconduct. He says it was written at a time of great stress and in Mr Bradbury's misguided hope that raising the prospect of extensive publicity at trial represented the best way to reach an immediate settlement.

[177] Mr Gedye's plea in mitigation might carry some weight if the letter, despite its extortionate terms, was an isolated event. Its relevance lies, however, in its place within a sustained pattern of misconduct, as a signal of Mr Bradbury's intention to extract a financial windfall from the bank by abusing the process of this Court.

(2) Joinder of Individual Employees

[178] Second, B&M joined Messrs Willcock and Jensen as parties to the proceeding by pleading intentional torts. They abandoned against Mr Jensen on the eve of trial but maintained their case against Mr Willcock.

[179] Mr Gedye says that joinder 'followed naturally and logically' from Mr Bradbury's beliefs; namely, that Messrs Willcock and Jensen had decided to terminate his services for reasons unrelated to performance and had seized upon the Trinity case as a pretext. Mr Gedye says discovery produced significant further material supporting Mr Bradbury's conviction that Mr Willcock was the main player. In any case, Mr Gedye says it would be normal and reasonable to join individuals

who are alleged to have intentionally caused harm. He also advances by way of justification that Mr Bradbury had reason to believe there were divided factions within the bank and a 'distinct lack of unity'.

[180] This explanation only serves to confirm my view of ulterior purpose. I am satisfied that the pleadings were a pretext for a gratuitous and vengeful attack on Mr Willcock within the broader strategy of applying pressure on Westpac. As already explained, B&M had no legal basis for suing employees where Westpac was liable for the same alleged wrongdoing. An employee cannot unlawfully interfere in a contractual relationship between his employer and a third party.

[181] In recognition of the obstacle presented by the principle of vicarious liability, B&M alleged that Mr Willcock was acting outside the scope of his employment. But Westpac never raised that affirmative defence, and the firm never particularised its pleading to that effect nor suggested as much in cross-examination. B&M would have known the irrelevance of a belief about internal responsibility for termination of an alleged contract. Similarly it is difficult to comprehend how factionalism within the bank was relevant.

[182] Mr Gedye makes the bald assertion in this context that B&M 'had been advised by counsel throughout'. Mr Gedye was not engaged until after trial, while Mr Wallis' retainer remains. If this reference is meant to imply that in pursuing Mr Willcock B&M acted on the advice of Mr Reed QC, senior trial counsel, I reject the implication in the absence of any waiver of privilege.

[183] Mr Gedye's submissions confirm that B&M consciously singled out Mr Willcock as the villain responsible for their fate. He was portrayed as the person with the requisite determination and authority to end the firm's relationship with the bank. Mr Bradbury denigrated Mr Willcock openly in communications with Westpac in late 2004 and early 2005 before formalising serious allegations of unlawful conduct or improper behaviour in pleadings.

[184] B&M's allegations forced Mr Willcock to give evidence at trial. Mr Reed's cross-examination was aggressive, causing him apparent distress at one stage.

Mr Willcock expressed his 'disappointment' to me at the way he was being addressed. Mr Reed was obliged to act on instructions but his questioning of Mr Willcock in the witness box was consistent with B&M's strategy.

[185] The progressive emergence of documentary and other evidence through the interlocutory process confirmed the untenability of B&M's originating allegations. Yet the firm persisted in pursuing him personally. I should record my view that Mr Willcock's conduct throughout epitomised professionalism and propriety, even in the face of Mr Bradbury's personalised attacks through late 2004 and early 2005. He faithfully observed Westpac's legal obligations at all times and his honesty, integrity and competence have been reinforced by this litigation.

(3) Threats of Joinder

[186] Third, in February 2007 B&M joined as additional defendants Westpac's chief executive officer, Dr David Morgan; another senior Westpac employee, Mr Philip Chronican; and Ms Sherry. The ground for joinder was that the three together with Messrs Willcock and Jensen conspired to injure the firm's economic interests.

[187] I am satisfied that this was another step taken for the improper purpose of applying pressure on Westpac to settle. But Mr Gedye asserts to the contrary. He relies on an affidavit sworn by Mr Bradbury on 7 February 2007. He says it is a detailed exposition of Mr Bradbury's reasons for a belief that he had 'tenable and legitimate pathways of claim' against all five employees.

[188] I read Mr Bradbury's affidavit differently. It is an extraordinary document. It tracks through seven drafts the board memorandum upon which the defamation case was brought against Mr Willcock. It alleges that Westpac's discovery was incomplete in tracing the input of each of Dr Morgan, Mr Chronican and Ms Sherry into the wording and approval of the document. It provides individual summaries of their backgrounds and status. It then links the alleged knowledge of each of the three of Westpac's structured financing transactions to knowledge of the difference between tax evasion and avoidance.

[189] The thrust of Mr Bradbury's allegations was that these three together with Messrs Willcock and Jensen participated in a conspiracy to injure the firm's economic interests. An assertion that Westpac's senior management, responsible for running Australasia's largest trading bank, would place their reputations and employment at risk by unlawfully agreeing to divert their collective energy and resources to ending the bank's retainer of a two partner law firm with three active major instructions reflects an arguable lack of self-insight. B&M did not agree to withdraw these claims against Dr Morgan, Ms Sherry and Mr Chronican until April 2007 on Westpac's undertaking to provide answers to extensive interrogatories issued against all three.

(4) Damages

[190] Fourth, there is the nature and quantum of B&M's claim for damages.

[191] Originally the firm's claim for special damages was formulated at $13.9m, reduced belatedly with judicial encouragement before trial to $5.4m. Mr Gedye says the original figure of $13.9m was based on a methodology which B&M thought was tenable. That was the loss of revenue calculated on a straight line for each of the 2005 to 2007 financial years together with what they considered was a reasonable estimate of lost revenue for 2008 and each of the ensuing seven years. Mr Gedye says that it was not until a conference in this Court on 16 October 2007 that they understood the need to revisit this approach. Subsequently B&M retained an independent expert who calculated loss at the lower figure of $5.4m.

[192] I do not accept this submission. It might have had some possible credence if advanced for lay litigants. But B&M are experienced lawyers. They know the rules governing claims for special damages. Principles of foreseeability, remoteness, reasonableness and mitigation always apply. They knew they could not sustain a claim for lost revenue for an effective period of 10 years calculated at the same level as their incomes over the three years prior to 31 March 2005. The originating claim of $13.9m must have been deliberately inflated as part of the pattern of improper pressure applied on the bank.

[193] Even then, the brief prepared by B&M's expert in late 2007 to support a claim at the lower figure of $5.4m was plainly misconceived. It proceeded in a factual and legal vacuum. The expert took no account of events since early 2005 or of the principles of foreseeability, remoteness, reasonableness and mitigation. He failed to allow for the firm's substantial income from other work after 31 March 2005 despite Mr Bradbury's failure to mitigate the loss of Westpac as a client (the partnership was dissolved before trial and Mr Muir gave no evidence of his loss). Even if the firm had established liability, an award of special damages would have been problematic and at a maximum of $200,000 to $300,000.

[194] Similar comments apply to the additional claims, raised through the medium of pleading intentional torts. B&M sought judgment for:

(1) General damages of $500,000. Awards for this type of loss are unusual in the commercial realm. Even then, a maximum of $25,000 might have been sustainable;

(2) Aggravated damages of $250,000. Awards for this type of loss are rare. And such claims are necessarily compensatory, not punitive: *Attorney-General v Niania* [1994] 3 NZLR 106; *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA) per Tipping J at [59]-[62]. B&M made no attempt to identify how unlawful conduct by Westpac or its employees might have caused them greater loss than those sought under the compensatory head of special damages. Mr Gedye's justification – that Westpac and Mr Willcock would not have taken this claim seriously – is remarkable. It implies that his clients were of the same view, but were nevertheless prepared to abuse the processes of the High Court to assert a right of recovery;

(3) Exemplary damages of $250,000. Outrageous conduct must be established to cross the threshold of entitlement to this head of loss. There was no evidence or particulars to support this allegation – a feature which must have plain to B&M at the latest upon completion

of discovery. Mr Gedye did not attempt to justify this claim's existence. B&M must have been aware that any awards for exemplary damages, being necessarily punitive in purpose, are always modest. They would have known of the sentiment underlying the words of Blanchard J, if not the words themselves, when criticising a claim for $250,000 (and endorsing a hypothetically adequate award of $15,000) that (*Ellison v L* [1998] 1 NZLR 416 (CA) at 419):

> Legal advisers should be careful not to be associated with claims for amounts of damages which on any objective view are unattainable and give the appearance of being brought in terrorem.

To the same effect is Chambers J's express endorsement of awards of indemnity costs where parties act improperly in advancing a huge claim for punitive damages: *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [181] and [182].

[195] These authoritative observations apply, in my judgment, even more aptly when all four heads of claim are considered together; there was no arguable basis for any one, other than for special damages, and that was patently excessive.

[196] In summary, I am satisfied that B&M abused this Court's process in pursuit of an ulterior motive – of applying improper pressure on Westpac to settle a claim which they knew was hopeless. Principal tools in the strategy were joining and applying to join individual bank employees as defendants, using the interlocutory process in an attempt to introduce adverse evidence relating to Westpac's taxation affairs, pleading intentional torts, and quantifying unsustainable and grossly inflated claims. B&M's threat was to expose all this in the public forum of a trial, and at great cost and inconvenience to Westpac, if the bank did not capitulate by paying a substantial sum.

[197] The scale and nature of B&M's egregious conduct is difficult to comprehend but its financial consequence is manifested by the level of costs which Westpac was obliged to incur in defending itself and its employees.

Actual Costs

[198] Having concluded that an award of indemnity costs is appropriate, I must now determine, first, whether Westpac's actual costs of $1.683m plus disbursements of $136,865 were 'reasonably incurred' and, if not, what costs were reasonably incurred.

[199] There is a superficial degree of tension in assessing Westpac's claim. On the one hand the question can be rhetorically asked why, when a case was so obviously hopeless from the start, did the bank not adopt a minimalist but nevertheless effective approach towards expenditure on legal costs? On the other hand, though, what should only at most have ever only been a claim for breach of contract metamorphosed into a diffuse attack on the honesty and integrity of a number of Westpac's senior employees.

[200] If this case had been confined to a contractual claim, only one or two witnesses from either side would have been necessary at trial together with relevant documentary evidence. The hearing would have lasted two or three days (even then, B&M's contractual cause of action occupied 31 paragraphs and 12 pages of their final statement of claim). The firm's introduction of intentional torts changed the complexion of the litigation, expanding its character into a range of unstructured allegations of unlawful and improper conduct by senior Westpac employees.

[201] The bank had to take Mr Bradbury's claims against its management seriously and was required to commit substantial resources in response to B&M's numerous interlocutory steps. This was expensive and wasteful. Only one example among many is required. In order to persuade B&M to abandon their claims against Messrs Morgan and Chronican and Ms Sherry, Westpac had to agree to provide briefs of evidence by each answering interrogatories. B&M administered 38 interrogatories against Dr Morgan, 25 against Mr Chronican and 43 against Ms Sherry; none of them was simple or straightforward (or even relevant) and considerable time would have been expended in considering them.

[202] Westpac was also put to unnecessary expense in applying for a succession of orders in an attempt to bring some discipline to B&M's pleadings. Various interlocutory applications were set down for hearing but withdrawn or compromised at the last moment. Costs were reserved throughout.

[203] Nevertheless, were Westpac's actual costs reasonably incurred for the purpose of assessing B&M's liability? Should the bank be entitled to an award for all its costs? This aspect of the case has caused me the most difficulty, and I regret that Mr Gedye did not develop a principled argument in opposition but simply criticised the bank's level of costs.

[204] There is a powerful policy argument for imposing liability on plaintiffs for all costs incurred by defendants in opposing a hopeless proceeding brought for an ulterior purpose and designed throughout to put the other side to the maximum expense, embarrassment and inconvenience. It could legitimately be said that all costs incurred in defending that strategy were reasonable regardless of the actual amount. By analogy to the law of damages, the plaintiffs should be liable for all the consequences of their misconduct provided only that the categories of legal expenditure are foreseeable. All of Westpac's costs satisfy this test. There could be little sympathy for B&M's complaint that the result was much more expensive than contemplated.

[205] On the other hand, the phrase 'reasonably incurred' envisages a degree of judicial oversight of awards of indemnity costs. The discretion must be exercised in a manner which delivers a just and fair result. The scales of principle, while finely balanced, are ultimately tipped in B&M's favour by my conclusion that Westpac's fees are of a magnitude which an objective observer would not have expected for this litigation, however egregious the firm's conduct may have been. That observation is not meant as a criticism; the bank is entitled to incur whatever level of legal costs it considers appropriate. But standing back and adopting an overview for the purpose of assessing B&M's liability, I am not satisfied that all Westpac's actual costs were reasonably incurred.

[206] Thus I must assess what costs were reasonably incurred when fixing an award of indemnity costs. The Rules do not provide guidance and again Mr Gedye did not attempt to assist. This exercise is quintessentially one of judgment informed by my participation in interlocutory hearings and at trial. It is necessarily imprecise and unscientific but it represents a review of all relevant steps.

[207] I shall approach the assessment in this way. The concept of reasonableness is well known. It is an objective criterion which is necessarily fact and circumstance specific. While the ultimate result must be just and fair for B&M, what is reasonable is to be determined so as not to defeat the purpose and spirit of a rule which provides a right to recover actual costs. Care must be taken not to apply an unduly rigorous measure when acting with the benefit of hindsight, or to subject items of expenditure to an unnecessarily exacting examination. The resulting figure will reflect an overall evaluation of what costs are reasonably incurred.

[208] Only two principled methods of calculation appear to be available. One is by reference to the scale of categories for calculating appropriate daily recovery rates according to the principles found in r 47(b), (c) and (d). These provisions are carefully structured to provide the level of predictability and certainty which underlies the integrity of the scale: *Glaister*.

[209] There is nothing, however, in r 48C to suggest that the scale is relevant to an award for actual or indemnity costs. In my judgment the appropriate course for assessing what actual costs were reasonably incurred is to (1) determine whether a particular item of expenditure is reasonably incurred – for example, preparation of a statement of defence; (2) fix what would be a reasonable allocation of actual costs, measured by reference to an appropriate time taken and allowing for the significance and complexity of the category of work; and (3) quantify the costs by reference to a median hourly rate reasonably applicable to it.

[210] In assessing what is reasonable I have been greatly assisted by Ms Kos' provision of schedules of scale costs, a breakdown and analysis of actual costs and witnesses expenses and a thorough chronology of steps taken. All give some indication of the intensity of this proceeding and copies are appended to this

judgment for reference purposes. Mr Kos has also provided a breakdown of the hourly rates charged for senior counsel and partners and solicitors within Chapman Tripp. While the rates may seem high to a layman, I am satisfied that they are reasonable based upon my own knowledge of rates charged by leading counsel and leading commercial law firms.

[211] Mr Kos' breakdown of Westpac's actual costs is the critical document for these purposes. Its format is replicated in abbreviated form below with summaries of major steps taken by reference to categories of activities identified in Mr Kos' schedule, the bank's actual costs and my assessment of reasonable sums. The legal services performed for each major category are more fully itemised or narrated in Mr Kos' schedule.

(a) Costs

[212] In my judgment the actual costs reasonably incurred by Westpac are as follows:

Category	**Westpac's Actual Costs**	**Reasonable**
(1) Statements of claim and defence (activities 1, 2 and 3)	$62,203	$48,000 (120 hours at $400 per hour)
(2) Judicial conferences (activity 4)	$43,663	$32,000 (80 hours at $400 per hour)
(3) Discovery (activities 5-10)	$192,269.50	$120,000 (400 hours at $300 per hour)
(4) Inspection (activities 11-14)	$43,449.50	$24,000 (80 hours at $300 per hour)
(5) Interlocutories (activities 15-21)	$203,388	$100,000 (250 hours at $400 per hour)
(6) Interrogatories and advance briefs (activities 22-25)	$107,964.50	$40,000 (100 hours at $400 per hour)
(7) Subpoenas (activity 26)	$1,905	$1,000 (4 hours at $250 per hour)
(8) Witness briefing (activities 27-36)	$338,722.50	$160,000 (400 hours at $400 per hour)
(9) Communications (activity 37)	$183,101	$120,000 (300 hours at $400 per hour)
(10) Miscellaneous research (activity 38)	$52,242	$21,000 (70 hours at $300 per hour)
(11) Trial preparation (activity 39)	$292,969.50	$200,000 (500 hours at $400 per hour)
(12) Trial (activity 40)	$130,712	$130,712

(13) Separate advice (activity 41)	$30,981.65	Nil
TOTAL	**$1,683,571.15**	**$996,712**

[213] By way of general explanation for these allocations:

(1) Prolixity and confusion were hallmarks of B&M's various statements of claim. An unusually large amount of work would have been necessary for Westpac to isolate the essential allegations, evaluate the legal foundation for each cause of action, assess the evidence relevant to an affirmative defence or defences, and plead accordingly;

(2) Discovery was a huge task. Mr Gedye criticises Westpac's provision of some unitemised documents or lists. But the demands placed upon Westpac and Mr Willcock, and a number of other employees, by B&M's unreasonable assertions cannot be underestimated. The scale of work necessary to comply was extensive, in part to pre-empt ongoing allegations of insufficient discovery, regardless of relevance;

(3) Costs were also compounded by B&M's demands to inspect commercially sensitive material belonging to Westpac, particularly relating to its tax affairs, which were of no relevance;

(4) In most cases a maximum of three or four judicial conferences would be necessary. The number was compounded by the lack of focus in B&M's case and their conduct of the interlocutory process;

(5) Westpac's costs for answering interrogatories, preparing advance briefs and witness briefing are excessive. It was not necessary for three lawyers to travel to Australia to brief the bank's executives. Answering the myriad of misplaced interrogatories would have been time consuming. But otherwise the allegations against each employee, although serious, were plainly spurious. The actual costs allocated to briefing Mr Willcock, for example, were $82,122. On an objective analysis, his evidence fell within a reasonably confined,

although important, compass. And other witnesses did not need to be briefed to the extent charged;

(6) The costs of communications with Westpac, its witnesses and solicitors and counsel for B&M, are high but that was an inevitable consequence of the complexity and confusion introduced by B&M;

(7) All Westpac's costs for attendance at trial are allowed, including for three counsel.

[214] Accordingly, I fix the sum of $996,712 as the actual legal costs reasonably incurred by Westpac.

(b) Disbursements

[215] Westpac also claims disbursements as follows:

(1)	Individual legal advice for witnesses paid by Westpac		
	Price (Phillips Fox)	$12,727.29	
	Peebles (Waalkens & Grove Darlow)	$38,368.31	
	McCabe (Phillips Fox)	$1,513.21	
	Waller	$1,500.00	
			$54,108.81
(2)	Expert fees (Hagen)		$29,192.20
(3)	Witness travel and accommodation expenses		$11,309.48
(4)	Counsel travel and accommodation expenses		$17,700.02
(5)	Other disbursements		
	Photocopying	$9,788.00	
	Filing fees	$1,875.54	
	Discovery scanning costs	$12,891.10	
			$24,554.64
Total			$136,865.15

[216] I agree with Mr Gedye. Westpac cannot claim the costs of providing independent legal advice to a witness or witnesses who may or may not be called. I might add that those costs are very high, particularly for Mr Peebles whose evidence was always going to be of marginal relevance. Mr Gedye accepts that Mr Hagen's

fees are an appropriate disbursement. He challenges the bank's claim for witness travel and accommodation expenses of $11,309. I agree with him that a figure of $8,793.35 is appropriate (to meet the travel and accommodation expenses of Messrs Willcock, Gregory and Wilson and Ms Sherry).

[217] I agree also with Mr Gedye that Westpac's claim for counsel's disbursements of $17,700.02 is unsustainable. It includes the expenses incurred by three counsel in travelling to Australia to brief evidence in August 2007. An allowance should be made for only one. Also Westpac cannot claim the cost of flights and accommodation for a third counsel at trial even though her fees are recoverable. The appropriate figure is $11,330.16.

[218] Finally, Mr Gedye challenges Westpac's claim for miscellaneous disbursements of photocopying, filing fees and discovery scanning costs of $24,554.64. He says that scanning was not essential or reasonably required. I agree that Westpac's scanning of documents for the benefit of itself and its solicitors cannot be charged to B&M. I disagree with Mr Gedye, though, that Westpac is not able to claim for the disbursement of $3,465 for the cost of sending 11,550 pages of documents to Auckland for inspection.

[219] In the result B&M must pay witnesses expenses and disbursements to Westpac of $60,979.25.

Order

[220] I enter judgment for Westpac against B&M for costs, witnesses expenses and disbursements in the sum of $1,057,691.25.

_____

Rhys Harrison J

Appendix 1
Scale Costs
Bradbury & Anor v Westpac & Anor

General civil proceedings		A, B, C	Days	$	Allocated days or part days		
	Category 3 - $2,370.00 per day				A	B	C
2	*Commencement of defence* by defendant (receiving instructions, researching facts and law, and preparing, filing, and serving statement of defence or notice of opposition).	C	6	14,220.00	1	2	6
3.6	Pleading in response to other party's amended pleading (payable regardless of outcome except where formal or consented to) – 9 July 2007	C	2	4,740.00	0.3	0.6	2
	Pleading in response to other party's amended pleading – 3 December 2007	C	2	4,740.00			
4	*Interlocutory proceedings and related steps:*						
4.2	Answer to interrogatories				0.4	1	4
	David Morgan	C	4	9,480.00			
	Phil Chronican	C	4	9,480.00			
	Ann Sherry	C	4	9,480.00			
4.5	List of documents on discovery	C	6	14,220.00	0.7	1.5	6
4.6	Production of documents for inspection	C	3	7,110.00	0.3	1	3
4.7	Inspection of documents	C	6	14,220.00	0.5	1.5	6
4.10	Filing memorandum for 1st case management conference– 1 May 2006	C	1	2,370.00	0.2	0.4	1
	Filing memorandum for 2nd case management conference – 17 July 2006	C	1	2,370.00			

	Filing memorandum for case management conference – 23 August 2006 – memorandum in relation to adjournment of interlocutory proceedings	B	1	948.00			
	Filing memorandum for case management conference – 1 December 2006 – memorandum as to consent orders	C	1	2,370.00			
	Filing memorandum for case management conference – 7 February 2007 – memorandum in opposition to ex parte application	C	1	2,370.00			
	Filing memorandum for case management conference – 23 March 2007 – memorandum in relation to hearing date	C	1	948.00			
	Filing memorandum for 3rd case management conference – 3 April 2007	B	1	948.00			
	Filing memorandum for case management conference – 12 April 2007 – memorandum in relation to compliance with pre-hearing timetable	C	1	2,370.00			
	Filing memorandum for 4th case management conference – 15 August 2007	C	1	2,370.00			
	Filing memorandum for case management conference – 24 September 2007 – requesting adjournment	C	1	2,370.00			
	Filing memorandum for 5th case management conference – 12 October 2007	C	1	2,370.00			
	Filing memorandum for 6th case management conference – 29 October 2007	C	1	2,370.00			
	Filing memorandum for case management conference – 6 December 2007	C	1	2,370.00			
	Filing memorandum for case management conference – 12 December 2007	B	1	948.00			
	Filing memorandum for 7th case management conference – 14 January 2008	C	1	2,370.00			
4.11	Appearance at 1st case management conference – 2 May 2006	C	0.7	1,659.00	0.3	0.3	0.7

	Appearance at 2nd case management conference – 20 July 2006	C	0.7	1,659.00			
	Appearance at 3rd case management conference – 4 April 2007	C	0.7	1,659.00			
	Appearance at 4th case management conference – 17 August 2007	C	0.7	1,659.00			
	Appearance at 5th case management conference – 16 October 2007	C	0.7	1,659.00			
	Appearance at 6th case management conference – 30 October 2007	C	0.7	1,659.00			
	Appearance at 7th case management conference – 18 January 2008	C	0.7	1,659.00			
4.12	Preparing and filing interlocutory application (excluding summary judgment application) and supporting affidavits				0.3	0.6	2
	Application by defendants for directions concerning privileged and confidential information – 1 May 2006	C	2	4,740.00			
	Application by defendants for orders setting aside privilege – 7 August 2006	C	2	4,740.00			
	Application by defendants for particular discovery – 23 March 2007	C	2	4,740.00			
4.13	Preparing and filing opposition to interlocutory application (excluding summary judgment application) and supporting affidavits				0.3	0.6	2
	Notice of opposition to application for non-party discovery – 18 July 2006	C	2	4,740.00			
	Notice of opposition to application to add further defendants and file an amended statement of claim – 14 March 2007	C	2	4,740.00			
	Notice of opposition to application for particular discovery (Peebles) – 23 March 2007	C	2	4,740.00			

	Notice of opposition to application for particular discovery (Tax) – 23 March 2007	C	2	4,740.00	
4.14	Preparation of hearing of defended interlocutory application (excluding summary judgment application)	C	0.5	1,185.00	Time occupied by the hearing (measured in quarter days)
4.15	Appearance at hearing of defended interlocutory application (excluding summary judgment application) for sole or principal counsel	C	0.5	1,185.00	Appearance in Court (measured in quarter days)
4.16	Second and subsequent counsel if allowed by Court	C	0.25	592.50	50% of allowance for appearance for principal counsel
4.17	Appearance at mentions hearing or callover – 9 June 2006	C	0.2	474.00	0.2 0.2 0.2
4.18	Sealing order or judgment	C	0.2	474.00	0.2 0.2 0.2
	Subtotal (Items 1-6)			**166,255.50**	
8	Preparation for hearing if case proceeds to hearing	C	14	33,180.00	Twice the time occupied by the hearing (measured in half days)
9	*Appearance at hearing:*				
9.1	For sole or principal counsel	C	7	16,590.00	Appearance in Court (measured in half days)
9.2	2nd and subsequent counsel if allowed for by Court	C	3.5	8,295.00	50% of allowance for principal counsel
	Subtotal (Items 7-11)			**58,065.00**	
	Total Fee Allowance			**224,320.50**	

Note: Minute of Associate Judge Abbot for first case management conference dated 2 May 2006 noted that the defendants said cost category 3 was appropriate and that whilst not necessarily agreeing, the plaintiffs did not oppose that categorisation. His Honour provisionally designated the proceeding to be cost category 3, to be revisited at the second case management conference. There was no further discussion in subsequent conferences with regard to cost category.

APPENDIX 2 – BREAKDOWN AND ANALYSIS OF ACTUAL COSTS

	Activity	Narration	Total Fees
1	Statement of Defence	Analysing statement of claim (elements necessary to 8 causes of action); drafting defence and associated research; preliminary analysis of correspondence and documents relevant to claim	$20,660.00
2	1st Amended SoD	Analysing amended claim; comparison with original – significant change in pleading, new defamation and conspiracy causes of action. Drafting amended defence and associated research. Amended defence included full pleading of affirmative defence.	$36,860.50
3	2nd Amended SoD 3rd Amended SoD	Analysing amended claim; comparison with previous claim; drafting amended defence and associated research	$4,682.50
4	Judicial conferences	Preparation for and attendance at 7 judicial conferences, including drafting of 15 memoranda and liaison with plaintiffs' counsel.	$43,663.00
5	Discovery – 1st list	Liaison with client to identify relevant files and file holders in NZ and Australia; assessment of files (295 files, approx 32,000 docs); creation and uploading of documents to electronic database; preparation of discovery affidavit (135 pages)	$138,870.50
6	Discovery – 2nd list	Obtaining and assessing recovered electronic documents and emails (34 files); preparation of discovery affidavit (further 26 pages)	$17,292.50
7	Discovery – Merged list	Reclassification of open section of prior lists to reflect solicitor/client confidence in certain documents, due to plaintiffs' view regarding confidentiality of open docs; sub-categorisation of commercially sensitive documents	$17,503.50
8	Discovery - 4th list	Obtaining NOPAs; further email recovery exercise and assessment of recovered material (10 files); preparation of further affidavit (12 pages)	$10,525.50
9	Discovery – lists for 2nd and 3rd defendants	Reviewing discovery process to ensure all documents provided for 2nd and 3rd defendants; drafting discovery affidavits	$2,687.50
10	Discovery – lists for non-party Westpac executives	Liaison with Morgan, Chronican, Sherry and their offices regarding discovery; assessment of documents provided; drafting discovery affidavits for Morgan, Chronican, Sherry	$5,390.00

11	Inspection by plaintiffs	Copying and masking of documents for inspection (12 Eastlights for 1st and 2nd list; 5 Eastlights for 4th list and small quantities of further documents from merged list, individual Westpac executive lists and Westpac documents in Grove Darlow list)	$13,148.50
12	Inspection by defendants	Receiving and reviewing discovery material provided	$3,505.00
13	Requests for further discovery and subsequent interlocutory (Def)	Correspondence regarding discovery questions; informal requests for further discovery; application for further discovery; submissions for 23/4/07 hearing; discussions with plaintiffs' counsel	$3,466.00
14	Inspection by plaintiffs of commercially sensitive material	Copying of documents and preparation of electronic database for counsel's inspection in Auckland office (3229 documents); Discussions with Mr Wallis regarding specific documents	$23,330.00
15	Interlocutory (Def) – direction re priv / conf material	Research; preparing application; correspondence and discussion with plaintiffs regarding confidentiality; negotiation of confidentiality orders; preparation of consent memoranda and undertakings; submissions for 23/4/07 hearing	$12,613.00
16	Interlocutory (Def) – WP correspondence	Research; preparing application and affidavit; submissions for 23/4/07 hearing	$7,576.50
17	Interlocutory (Pl) – tax discovery	Reviewing application; research; liaison with counsel for parties named in application (Price & Curtis); preparing opposition and 23/04/07 submissions	$11,048.00
18	Interlocutory (Pl) – joinder	Reviewing ex parte application; research; drafting Pickwick memorandum and attendance at teleconference; drafting opposition and affidavits; liaison with proposed new defendants; preparing submissions for 23/04/07	$37,953.00
19	Interlocutory (Pl) – Grove Darlow docs	Reviewing application; research; liaison with Grove Darlow; analysis of documents held by Grove Darlow; comparison with documents already provided by Westpac; drafting opposition and affidavit; correspondence with plaintiffs re resolution; submissions for 23/4/07 hearing	$48,898.00
20	Interlocutory (Pl) – Peebles briefing docs discovery	Reviewing application; research; reviewing relevant documents; discussion with client; drafting opposition and affidavit; preparing submissions for 23/04/07	$15,299.00
21	Interlocutory hearing – 23 April 2007	2 day fixture allocated for hearing of 7 applications (4 plaintiffs, 3 defendants). Plaintiffs abandoned 2 applications (Grove Darlow & Peebles docs) on day prior to hearing	$70,000.50

22	Interrogatories & advance briefs - Sherry	Receiving and reviewing interrogatories; research; correspondence with plaintiffs regarding opposition; liaison with Sherry and office personnel; preparation of briefing bundle; teleconference and meeting with Sherry; transcript of discussions; preparing advance brief	$28,663.50
23	Interrogatories & advance briefs – Morgan	Receiving and reviewing interrogatories; research; correspondence with plaintiffs regarding opposition; liaison with Morgan and office personnel; preparation of briefing bundle; meeting with Morgan; transcript of meeting; preparation of advance brief	$17,615.00
24	Interrogatories & advance briefs - Chronican	Receiving and reviewing interrogatories; research; correspondence with plaintiffs regarding opposition; liaison with Chronican and office personnel; preparation of briefing bundle; meeting with Chronican; transcript of meeting; preparation of advance brief	$21,229.00
25	Interrogatories & advance briefs - Gregory	Correspondence with plaintiffs regarding evidence of Gregory; preparation of briefing bundle; liaison with and meeting with Gregory; transcript of meeting; preparation of advance brief	$40,457.00
26	Subpoenas – Price, McCabe	Correspondence with plaintiffs; research; liaison with counsel for parties subpoenaed	$1,905
27	Witness briefing – general	Analysis of discovered material; Preparation of key document folders and detailed chronology; briefing sessions with other parties not ultimately called as witnesses; correspondence and discussions with plaintiffs regarding witnesses; general liaison and communication with witnesses	$104,443.00
28	Witness briefing – Richard Willcock	Preparation of briefing bundle; meetings and teleconferences; preparing transcript of briefing meetings and drafting brief; revising brief; further discussions	$82,122.50
29	Witness briefing – Simon Jensen	Preparation of briefing bundle; meetings; preparing transcript of briefing meetings and drafting brief; revising brief; further discussions; liaison with independent counsel	$50,686.50
30	Witness briefing – Justin Moses	Preparation of briefing bundle; meeting; preparing transcript of meeting and drafting brief; revising brief; further discussions	$31,015.00
31	Witness briefing – Ann Sherry	Preparation of briefing bundle; 3 meetings and further teleconferences; preparing transcript of briefing meeting and drafting brief; revising brief; further discussions	$30,344.00
32	Witness briefing – Harry Price	Preparation of briefing bundle; 2 meetings; preparing transcript of meeting and drafting brief; revising brief; further discussions; liaison with independent counsel	$8,322.00

33	Witness briefing – Peter Wilson	Preparation of briefing bundle; meeting; preparing transcript of meeting and drafting brief; revising brief; further discussions	$10,195.50
34	Witness briefing – John Hagen	Preparation of relevant material; instructing and meeting with Hagen; further analysis and preparation of discovered material to assist in preparation of brief	$11,937.00
35	Witness briefing – Paul Gregory	Preparing brief based on material covered in advance briefing process; revising brief; further discussions	$7,444.00
36	Witness briefing – John Waller	Preparation of relevant material; discussions; reviewing brief; preparation and service of subpoena	$2,213.00
37	Communications	Correspondence/discussions/meetings between counsel (CT/Kos); counsel and defendants/various employees of first defendant; counsel and plaintiffs' counsel; counsel and witnesses/potential witnesses; counsel and Court; counsel and third party lawyers (Grove Darlow, Phillips Fox, Bell Gully)	$183,101.00
38	Research	Further various research not specifically related to the above categories	$52,242.00
39	Trial preparation	Agreed bundle; brief bundles; preparing opening submissions, preparing draft of closing submissions, finalising without prejudice and privilege/ confidentiality submissions; preparation for XXE of plaintiffs' witnesses; preparation of defendants' witnesses; liaison with all parties; foreshadowed subpoenas of Chronican, Lynch, Morgan	$292,969.50
40	Trial	Attendance at trial 4-13 February 2008	$130,712.00
41	Separate advice - Jensen	Mark O'Brien, Bell Gully. Separate advice provided to Simon Jensen from the outset of proceedings, particularly after Mr Jensen was no longer an employee of Westpac. Involved in sessions to brief Mr Jensen's evidence	$30,981.65
	TOTAL		**$1,683,561.65**

SUMMARY ANALYSIS

Chapman Tripp	$1,315,788.00
J Stephen Kos, QC	$336,792.00
Bell Gully	$30,981.65

HOURLY RATES	
Lawyer	**Rate**
J Stephen Kos, QC	$480 $560 (from 1 July 2007)
Bruce Scott	$440 - $460
Melanie McRandle	$260 - $280
Carolyn Elliott	$115 - $220
Solicitor 5 years	$260
Solicitor 4 years	$240
Solicitor 3 years	$220
Solicitor 2 years	$180
Law clerk	$115
Paralegal	$120
Litigation support students	$70

APPENDIX 3 – WITNESS COSTS

Witness	Travel	Accom	Indp Advice	Fee	Sundry Disb	Total
Richard Willcock	$1,163.73	$1,252.90	-	-		$2,416.63
Justin Moses	$1,294.83	$1221.30	-	-		$2,516.13
Ann Sherry	$2,738.30	$380.00	-	-		$3,118.30
Harry Price	-	-	$12,727.29[1]			$12,727.29
Simon Jensen	-	-	-			-
John Hagen	-	-		$29,192.20		$29,192.20
John Waller	-	-	$1,500.00[2]			$1,500.00
Peter Wilson	$579.13	-	-	-		$579.13
Paul Gregory	$1,333.30	$950.00	-		$395.99	$2,679.29
June McCabe	-	-	$1,513.21[3]	-		$1,513.21
Greg Peebles			$38,368.31[4]			$38,368.31
Total						**$94,610.49**

---

[1] Richard Fowler, Phillips Fox. Instructed to provide independent advice relating to non-party discovery application against Mr Price, including preparation of discovery affidavit, and subpoena issued by plaintiffs.

[2] Simon Judd. Providing legal advice as to whether Mr Waller able to give factual evidence given PWC's position as Westpac auditor. (Mr Waller did not charge for his own time).

[3] Richard Fowler, Phillips Fox. Independent advice following plaintiffs' issue of subpoena and work on brief of evidence (although evidence not ultimately called).

[4] Chris Darlow, Grove Darlow & Partners and Harry Waalkens, QC. Independent advice to Mr Peebles throughout proceedings.

Appendix 6

Chronology of steps taken by defendants in the proceedings

15 March 2006	Statement of claim served.
12 April 2006	Statement of defence filed.
27 April 2006	Greg Peebles provides both parties with his brief of evidence.
1 May 2006	Application by defendants for directions concerning privileged and confidential information. Opposed by defendants by notice of opposition dated 18 July 2006.
2 May 2006	Attendance at first case management conference.
5 July 2006	Plaintiffs apply for (a) non-party discovery from Grove Darlow of documents they held relating to Greg Peebles' evidence (b) an order for production of Peebles' brief of evidence with all attachments: • Chris Darlow and Harry Waalkens QC had assisted (at Westpac's cost) Greg Peebles to prepare his brief of evidence. • Grove Darlow had provided all documents to Westpac and relevant documents were to be included in Westpac's first list of documents. • Supporting affidavit of Bradbury (5 July 2006) made allegations that the defendants were attempting to inappropriately influence the evidence of particularly Greg Peebles (refer for example paras 12(b) and 16(e)). • Application opposed by Westpac. See detailed notices of opposition dated 22 January 2007 and 12 April 2007. Ultimately resolved by agreement prior to April 2007 hearing. • Affidavit of Ann Brennan filed responding to allegations and waiving privilege over all briefing correspondence with Greg Peebles to demonstrate that nothing inappropriate occurred in the briefing of him. At paragraph 35 quotes email from Greg Peebles confirming that Bradbury & Muir had no right to demand work.
14 July 2006	First affidavit of documents for the defendant filed (135 pages with 32,000 documents assessed and approximately 3,500 listed).
20 July 2006	Second case management conference. Detailed memorandum filed by defendants dated 17 July 2006 dealing with timetabling and various interlocutory issues.
7 August 2006	Application filed by defendants for orders setting aside claim for without prejudice privilege. Supported by affidavit of Evan McCaughan dated 15 August 2006. Opposed by plaintiffs. Defendants prepared detailed written submissions, which are at attachment two to Closing.

21 August 2006	Second affidavit of documents filed by defendants. Primarily dealt with restored electronic documents (26 pages, 285 documents listed, 585 assessed).
23 August 2006	Memorandum of counsel for defendants in relation to plaintiffs' application for adjournment of interlocutory applications filed.
7 November 2006	Request by plaintiffs for the defendants to recategorise its discovery to differentiate which documents were confidential by reason of the solicitor/client relationship. This was done in the merged list (see 23 March 2007 below).
9 November 2006	Application by plaintiffs requiring (a) second and third defendants to swear separate affidavits of documents; (b) requesting disclosure of *"all documents relating to the stance adopted by Westpac Banking Corporation to the payment of tax in New Zealand"*, including the structured financing documents; and (c) non party discovery from Price and Curtis concerning tax documents they held: • The second and third defendants agreed to swear further separate lists of documents, which they did on 14 March 2007. • Price took separate advice from Phillips Fox and swore a list of documents on 7 March 2007 (confirming that he had no tax documents). Westpac paid for this work. • Westpac opposed the application for discovery of its tax documents. Affidavit of Ann Brennan dated 23 March 2007 filed in support. • Application determined at 23 April 2007 hearing.
21 November 2006	Interlocutory application by plaintiffs that the first defendant provide discovery including documents relating to the briefing of Greg Peebles. Made express allegation that officers or employees of Westpac had *"sought improperly to coach the evidence of Mr Peebles"* and *"by means of improper pressure"* had tried to change his evidence: • This application was made notwithstanding Ann Brennan's affidavit 8 August 2006 in which she had fully responded to this unfounded allegation. • Westpac filed a notice of opposition on 23 March 2007 and relied on earlier Brennan affidavit. • Plaintiffs abandoned application at April 2007 hearing. They did not even file submissions in support.
1 December 2006	Plaintiffs file undertakings as to interim inspection arrangements reflecting the agreement contained in consent orders and memorandum of counsel for the defendants dated 1 December 2006 as to consent orders. Plaintiffs refuse to agree to comprehensive orders dealing with privileged and confidential client information. Court (by consent) allocates fixture for hearing of interlocutory hearings. Date ultimately set for 23 April 2007.

Late December 2006	Defendants provide inspection copies of all open documents in the first and second list (12 Eastlite folders).
7 February 2007	Ex parte application by defendants to add Morgan, Chronican and Sherry as defendants to the proceeding on the basis that documents discovered by Westpac disclosed further defamatory statements and other intentional torts to which Morgan, Chronican and Sherry were a party. Ex parte application made on the basis that two year limitation of defamation cause of action about to expire.
7 February 2007	Memorandum of counsel for defendants in opposition (on Pickwick basis) to ex parte application by the plaintiffs for orders adding defendants to the proceeding.
7 February 2007	Telephone conference with Potter J concerning ex parte application to amend. Order that application be dealt with on an inter partes basis at the 23 April 2007 hearing on the basis that time is frozen.
14 March 2007	Defendants file notice of opposition to application by plaintiffs for leave to (1) add further defendants and (2) file an amended statement of claim.
15 March 2007	Affidavit of Emma Lawler (Westpac) filed in opposition to application by plaintiffs for orders adding defendants to the proceeding.
23 March 2007	Memorandum of counsel for the defendants in relation to fixing hearing date in week of 23 April 2007 and assignment of Judge.
23 March 2007	Notice of application by defendants for orders for particular discovery relating primarily to the plaintiffs' alleged financial loss, mitigation of loss issues and the Trinity proceedings. Affidavit of Ann Brennan dated 13 March 2007 filed in support.
23 March 2007	Merged affidavit of documents for defendants in response to request by plaintiffs for the defendants to differentiate which documents were confidential by reason of the solicitor/client relationship (168 pages).
23 March 2007	Affidavit of Ann Brennan: (a) in support of opposition to application for (1) proper deponent to swear affidavit of documents for first defendant (2) particular discovery of tax documents (3) non-party discovery against Grove Darlow; and (b) in support of application by plaintiffs for directions concerning privileged and confidential information (see copy at *Appendix 8*).
27 March 2007	Curtis files affidavit in support of plaintiffs' application for tax documents.
4 April 2007	Third judicial teleconference (following assignment of Harrison J). Memorandum filed in advance dated 3 April 2007.
13 April 2007	Memorandum of defendants drawing the court's attention to the plaintiffs' failure to comply with timetabling orders.

18 April 2007	Synopsis of submissions for defendants in support of applications for (1) setting aside claim for without prejudice privilege (2) directions as to privileged and confidential information and (3) further and better discovery against plaintiffs.
23 April 2007	Consent memorandum as to the treatment of privileged and confidential information during the interlocutory phases of the proceedings (still no agreement as to treatment of information at trial).
23 April 2007	Hearing of interlocutory applications. Seven applications to be heard: 1. Joinder: essentially abandoned on the basis that Morgan, Chronican and Sherry agreed to swear separate lists of documents and answer interrogatories on a narrow range of topics. 2. Tax application: essentially abandoned. Plaintiffs agreed sufficient for defendants to provide copies of certain NOPAs concerning structured financing transaction to see if sham was alleged and 2004 Q&A for AGM concerning structured financing. 3. Peebles' briefing material: abandoned without any prior notice. No submissions even filed. 4. Grove Darlow documents: resolved by agreement. 5. Without prejudice documents: agreed to be left for trial. 6. Privileged and confidential information: dealt with by consent order as above. 7. Application for further discovery: consented to. Plaintiffs required to replead their claim, including as to quantum. See court Minute of 23 April 2007.
24 May 2007	First amended statement of claim filed. Did not materially alter pleading as to quantum. Even though leave not given to join Morgan, Chronican and Sherry the amended pleading now named them as co-conspirators in two new conspiracy to injure causes of action. Also new defamation causes of action based on Board paper and 2004 and 2005 Q&As.
15 June 2007	Separate affidavits of documents filed for David Morgan, Phil Chronican, and Ann Sherry in response to plaintiffs' request that separate lists be filed.
9 July 2007	Defendants file statement of defence to amended pleading. Detailed pleading denying the 1995 oral agreement, asserting terms implied by common law, detailed pleading of terms of 2000 RFP and 2003 STCs, including quarterly certification. Also in response to allegation that Westpac's decision was procedurally unfair, the pleading quoted from all the correspondence between November 2004 and February 2005 that showed the inappropriate manner in which the plaintiffs had acted.

10 July 2007	Plaintiffs request for Sherry, Morgan and Chronican to answer prolix and grossly inappropriate interrogatories. Drip fed in. Were to have been served by 18 June 2007. First (Sherry only) version served 10 July. Objection taken to content and an amended (shortened) version served on 1 August 2007. Nothing received for Morgan and Chronican until 6 August 2007.
16 July 2007	Notice to give further particulars of statement of claim.
25 July 2007	Fourth supplementary affidavit of documents of the defendants providing the additional discovery required at the 23 April hearing.
15 August 2007	Detailed memorandum of counsel for defendants in relation to judicial teleconference on 17 August 2007. Dealt at length with the problems with the plaintiffs' amended pleading, particularly as to quantum and mitigation, discovery issues and why the proposed interrogatories were objectionable.
17 August 2007	Fourth case management conference. Court made directions concerning pleadings and the inappropriate interrogatories. Westpac suggests that it provides advance briefs as a substitute for interrogatories.
20 September 2007	The plaintiffs counsel had been reviewing the commercially sensitive documents electronically, but requested that all 3,229 pages be printed for his inspection and sent to Auckland. These were available for inspection from 28 September 2007.
24 September 2007	Joint memorandum of counsel drafted by defendants' counsel as to adjournment of teleconference and timetable to hearing.
9 Oct-12 Oct 2007	Filing of advance briefs of evidence (in substitution for interrogatories) for: Philip Chronican; David Morgan; Paul Gregory; Ann Sherry.
12 October 2007	Further detailed memorandum of counsel for defendants for telephone conference on 16 October 2007 explaining the nature of the advance briefs filed and seeking directions that the plaintiffs should now decide whether they intend pursuing any conspiracy, defamation or other intentional tort allegations in light of those briefs.
16 October 2007	Fifth case management conference. Court accepted that conspiracy allegations were analogous to allegations of fraud and that plaintiffs' counsel now had a duty to satisfy themselves that it was still appropriate to pursue the allegations. Warned that unless amended pleading filed by 26 October 2007 (dealing with quantum and conspiracy allegations) there was a risk that the claim would be struck out.

26 October 2007	Plaintiffs file their briefs of evidence (Bradbury, Curtis and Barker only). Plaintiffs also file second amended statement of claim, just before deadline. Conspiracy allegations withdrawn but new defamation pleading added and substantial repleading of all other intentional torts.
29 October 2007	Memorandum of counsel for defendants for telephone conference on 30 October 2007 noting that the new defamation pleading is statute barred and seeking further particulars of defamation causes of action and noting problems still with plaintiffs' discovery.
30 October 2007	Sixth case management conference. Plaintiffs seek leave to file further amended statement of claim to correct errors in earlier pleading. Other issues of discovery and particulars dealt with.
October-November 2007	The plaintiffs subpoena Harry Price and Peter Wilson to give evidence at trial.
5 November 2007	Third amended statement of claim filed.
3 December 2007	Statement of defence to third amended statement of claim filed.
3 December 2007	Briefs of evidence filed on behalf of defendants for: Richard Willcock; Justin Moses; Simon Jensen; Ann Sherry; Paul Gregory; John Hagen; John Waller; Peter Wilson; Harry Price.
6 December 2007	Memorandum of counsel for defendants concerning preparation for trial and in particular noting concern over the plaintiffs' apparent attempts to continue briefing evidence and a detailed request for further discovery concerning details of financial loss, mitigation and dissolution of Bradbury & Muir.
12 December 2007	Memorandum of counsel for defendants recording plaintiffs' agreement to provide the additional discovery sought.
21 December 2007	Plaintiffs file memorandum indicating that (a) they intend calling further evidence (and that day serve additional briefs of Carter and Stiassney); (b) foreshadowing application to subpoena Morgan, Chronican and Lynch and (c) seeking discovery of Isaac's report.
14 January 2008	Memorandum of counsel for defendants in response objecting to (a) the process followed by the plaintiffs with additional briefs; (b) production of Isaac's report; (c) the subpoenaing of overseas witnesses and (d) noting the continuing failure of the plaintiffs to provide the additional discovery sought.

18 January 2008	Seventh case management conference.
24 January 2008	Memorandum of counsel concerning discontinuance against third defendant and discontinuance of sixth (defamation) cause of action. Only done following demand by defendants that they discontinue given the lack of any evidence. Costs reserved.
2 and 3 February 2008	The plaintiffs attempt to subpoena Alan Isaac over the course of the weekend.
4-5, 7-8, 11-13 February 2008	Trial. Plaintiffs abandon all causes of action during closing argument.
8 February 2008	Although their case has closed the plaintiffs suggest that they may still subpoena Morgan, Chronican and Sherry.