

**SUPPRESSION ORDER IN TERMS OF PARAGRAPHS [342], [344] AND
[368] OF THIS JUDGMENT**

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

CIV 2005 409 2833

BETWEEN	JOSEPH ROGER HESLOP AND JENNIFER ROBERTA HESLOP First Plaintiffs
AND	JENNIFER ROBERTA HESLOP AND LINDSAY DONALD SMITH AS TRUSTEES OF THE ROGER HESLOP FAMILY TRUST Second Plaintiffs
AND	CLIVE JOHN COUSINS Defendant

Hearing: 13, 14, 15, 16, 20, 21, 22, 23, 24 November 2006; 7, 8, 11, 12, 13, 14,
15 December 2006; 25, 26, 29, 30, 31 January 2007; 19, 20 March
2007

Appearances: DJS Parker and M Cooke for Plaintiffs
A J Forbes QC, B J Barclay (and G Slevin on 15, 16 and 20
November 2006) for Defendant

Judgment:

JUDGMENT OF CHISHOLM J

- A. Subject to any adjustment that might be made to reflect the BNZ settlement:**
- (i) Judgment for the first plaintiffs in the sum of \$106,491, being wasted legal expenses of \$6,491 plus general damages of \$100,000.**
 - (ii) Judgment for the second plaintiffs in the sum of \$1,409,000 being damages for the loss of the option to purchase the orchard lot.**

- B. Counsel are to file memoranda in relation to costs, interest, and any adjustment that might be necessary to reflect the BNZ settlement.

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PART I

INTRODUCTION

This Claim

[1] When they encountered financial difficulties the first plaintiffs entered into an agreement, which later became unconditional, to sell their home and an associated orchard block. The agreement included an option for the first plaintiffs or their nominee to purchase back the orchard block for \$1, and the second plaintiffs were subsequently nominated to hold that option. The defendant, who is a solicitor, was engaged by the plaintiffs to complete the transaction.

[2] Unfortunately the transaction was not completed. Instead the first plaintiffs' home and orchard block were sold by mortgagee's sale and Mr Heslop was subsequently adjudicated bankrupt. It is alleged by the plaintiffs that the defendant was responsible for the failure to complete the transaction and the events that followed. Four causes of action are pleaded:

- Breach of the contract of retainer.
- Negligence.
- Breach of fiduciary duty.
- Breach of trust.

Wasted legal expenses of \$14,049.83, general damages of \$200,000 and exemplary damages of \$15,000 are sought by the first plaintiffs. The second plaintiffs seek damages of \$2.5 million for the loss of the trust's option.

[3] When this proceeding was issued the Bank of New Zealand (BNZ) was named as second defendant. Subsequently the bank joined its solicitors, Duncan Cotterill, as a third party. However, before this hearing commenced settlement was reached between the plaintiffs and those two parties and the plaintiffs discontinued against BNZ which in turn discontinued against Duncan Cotterill.

Background

[4] Mr Heslop, a builder, commenced building on his own account in 1976. Later he expanded into property development which included purchasing properties, designing and building units and houses, and selling them. He estimates that over the years he would have built and sold approximately 400 units or houses. At the time of the hearing Mr Heslop was 51 years of age. Mr and Mrs Heslop have four children.

[5] In 1988 Mr Heslop purchased land at 68 Johns Road, Belfast (the Devondale property), which he later transferred into the names of himself and his wife. The land comprised a lifestyle lot of 5,639 square metres (the lifestyle lot) and a nearby lot comprising 4.4290 hectares (the orchard lot) together with a one twelfth share in other land which provided access. Both lots were held in one title and were zoned Rural 3. Under that zoning only one dwelling per title was permitted.

[6] The lifestyle and orchard lots formed part of a rural/residential development within a neighbourhood known as the "*Devondale Estate*". This estate, which is within Christchurch city, is adjacent to the Belfast urban area. After orcharding within the estate ceased in about 1997 the fruit trees were removed and 12 lifestyle lots, each with an associated orchard lot, were created. Over time houses were built on the lifestyle lots.

[7] Soon after purchasing the land Mr Heslop built a large house on the lifestyle lot. A granny flat for occupation by Mrs Heslop's mother was also built on the basis that it would be removed if the property was sold or Mrs Heslop's mother died. The obligation to remove the flat was supported by a caveat registered against the title by the Christchurch City Council.

[8] Mr Heslop's bankers, the Bank of New Zealand (BNZ), held a first mortgage over the Devondale property. By the year 2000 Mr Heslop had encountered serious financial problems. Apart from a substantial indebtedness to BNZ Mr Heslop's unsecured creditors were owed several hundred thousand dollars. After meeting with the bank in May 2000 Mr and Mrs Heslop accepted that they would have to sell

the lifestyle lot. But they wanted to retain the orchard lot because they believed that it offered long term opportunities for residential development. The bank agreed to give them time to sell. A registered valuer valued the Devondale property at \$880,000 as at 30 May 2000. Later the valuer reported that if a separate title was available for the orchard lot it would be worth \$385,000.

[9] On 6 August 2000 Mr and Mrs Heslop entered into a conditional agreement (the Moir agreement) for the sale of the Devondale property to the Moir family trust for \$600,001, subject, however, to an option that enabled Mr and Mrs Heslop or their nominee to re-purchase the orchard lot for \$1. It was anticipated that the option would be exercised once a separate title became available for the orchard lot. Thus the purchase price effectively represented the purchase price of the lifestyle lot. There was no time limit for the exercise of the option. Settlement under the Moir agreement was to be effected on 20 December 2000. Mr and Mrs Heslop's usual solicitor, Bruce Taylor, acted for them when they entered into this agreement.

[10] When BNZ was told about the sale it adopted a hard line and indicated that it would not provide a release of its mortgage unless its total indebtedness was cleared. On the bank's calculation, which was disputed by Mr Heslop, the indebtedness exceeded the anticipated net proceeds of sale by around \$159,000. Mr Heslop hoped that he would be able to negotiate a settlement with the bank. He asked his brother, Warwick Heslop, who lives in Europe, for financial assistance.

[11] On 18 August 2000 the Moir agreement became unconditional and the Moirs paid the deposit of \$60,000. After deduction of real estate commission and legal costs the balance of approximately \$39,000 was paid to BNZ in reduction of the Heslops' indebtedness to the bank. But the bank was still taking a hard line. Having made formal demand, it served a Property Law Act Notice claiming \$675,849 on 11 October 2000. According to Mr Heslop the actual amount due was considerably less.

[12] In the meantime one of Mr Heslop's trade creditors had obtained judgment against him and commenced bankruptcy proceedings. Mr Heslop responded by advancing a proposal under Part 15 of the Insolvency Act 1967 . After gaining the

support of the majority of creditors at a meeting on 14 November 2000 he made application for the approval of this Court. The bankruptcy proceedings were adjourned to enable his application to be considered.

[13] The dispute between Mr Heslop and BNZ about the amount required to secure a release of the mortgage persisted. On the recommendation of Wayne Bailey, a chartered accountant who was assisting Mr Heslop with the insolvency proposal, Clive Cousins, the defendant, was engaged by Mr and Mrs Heslop in November 2000 to negotiate with BNZ. Mr Cousins had been in practice for around 25 years and his primary field of practice involved conveyancing, including property development, investment and commercial work. He began negotiating with the bank in late November.

[14] In an effort to resolve the impasse with the bank, the Heslops, accompanied by Mr Bailey and Mr Cousins, met with bank representatives on 18 December 2000. Settlement was not achieved. However, after the meeting Mr Heslop told Mr Bailey and Mr Cousins that his brother was able to lend him \$90,000 but that only \$82,000 would be available to the bank because he needed \$8,000 for Mr Bailey's and Mr Cousins' fees. Mr Heslop maintains that he was told by Mr Bailey and Mr Cousins not to worry about fees in the meantime. This is disputed.

[15] Two days later, on 20 December 2000, which was also the settlement date under the Moir agreement, Mr Cousins wrote to the bank's solicitors (Duncan Cotterill) proposing a settlement that would effectively mean that the bank would receive a further \$630,000 on 22 January 2001 (which was to become the new settlement date under the Moir agreement). This payment was to come from settlement of the Moir agreement which would produce approximately \$540,000 plus \$90,000 from Warwick Heslop. The proposal was accepted by BNZ on 22 December 2000.

[16] Because settlement under the Moir agreement had not eventuated on 20 December 2000, the Moirs served a settlement notice requiring the Heslops to complete settlement within 12 working days. It is common ground that the

settlement notice required settlement by 5pm on 23 January 2001. The Moirs stated in their settlement notice that they were “*ready willing and able*” to settle.

[17] Up to this time Mr Cousins’ retainer had been confined to negotiating with BNZ. However, after the settlement notice was received on 22 December 2000 the Heslops and Mr Cousins decided that it would “*make sense*” for Mr Cousins to complete the settlement of the Devondale property instead of Mr Taylor. From that time Mr Cousins’ retainer included the conveyancing and associated attendances necessary to complete settlement of the Moir agreement which, of course, included completing settlement with BNZ.

[18] Things seemed to be on track for the Moir agreement to be settled on 22 January 2001 which was the day before the settlement notice would expire. The Moirs were ready, able and willing to settle and agreement had been reached with BNZ about the amount required to secure a release of its mortgage. Mr Heslop had also obtained confirmation from his brother that his brother’s \$90,000 would be available by 22 January.

[19] But there was a hitch. Instead of being able to provide the promised \$90,000, poor exchange rates meant that Warwick Heslop could only provide \$79,000. He indicated that he would not be able to provide the balance of \$11,000 until the first week of February 2001. After receiving this news from his brother on 17 January 2001 Mr Heslop made arrangements for Mrs Heslop’s brother and his wife (Mr and Mrs Smith) to provide the shortfall of \$11,000 on a short term basis until the balance of Warwick Heslop’s funds came through.

[20] As a result of these complications the \$90,000 required to complete the settlement was not in Mr Cousins’ trust account until 30 January 2001 and the proposal to settle on 22 January had to be abandoned. There was also a further problem. The Moirs had discovered that there were arrears of rates on the Devondale property amounting to \$8,909 and they required the arrears to be paid before settlement or a credit provided. Either way the Heslops had to find \$8,909.

[21] When settlement could not be completed on 22 January arrangements were made for the Moirs to take possession on 26 January. No undertakings to ensure that the Moirs would complete settlement without deduction as soon as the Heslops were ready to settle were obtained from the Moirs. The Heslops maintain that they sought Mr Cousins' advice about the wisdom of giving possession and hold him responsible for the events that followed. Mr Cousins maintains that arrangement for possession without settlement was made by the Heslops without his knowledge.

[22] The bank was growing impatient. On 31 January 2001 its solicitors wrote to Mr Cousins advising that its settlement offer would be withdrawn if the bank was not repaid by 4pm on 8 February 2001. So 8 February became the new date for settlement and the Heslops paid the outstanding rates at 12.16pm that day and sent a copy of the receipt to Mr Cousins. But settlement did not take place. According to the plaintiffs this was because Mr Cousins refused to settle unless his fees of \$6,057.88 were paid in full. By that time Mr Cousins had rendered three invoices totalling that amount, all of which remained unpaid.

[23] Mr Cousins contends that he was entitled to adopt the stance that he did. He also contends that regardless of the fees issue, other obstacles prevented settlement on 8 February or at any later time. In particular:

- The second mortgage required by the Moir agreement to secure the option had not been finalised;
- Issues about the time within which the option would have to be exercised (the option time limit) had not been resolved;
- The undertaking required by the Moirs' solicitors in relation to any outstanding rates had not been provided; and
- No agreement had been reached about the remedy that would be available to the Moirs if the Heslops breached any of their obligations under the option (the breach remedy clause).

In other words, it is Mr Cousins' case that the fees issue was not causative of any harm suffered by the Heslops. He also claims that over time other obstacles arose and that regardless of his actions it would not have been possible to settle the Moir agreement at any time before the BNZ cancelled its arrangement with the Heslops.

[24] Returning to events as they evolved, after the Heslops failed to pay his fees Mr Cousins wrote to them on 15 February 2001 advising that he was not prepared to undertake any further work until his fees were paid. The Heslops then consulted another solicitor, Markham Lee, who wrote to Mr Cousins on 16 February instructing Mr Cousins to forward the funds held in his trust account to Mr Lee's firm (Geoff Saunders & Associates). Mr Heslop countersigned the letter. By that time the funds in Mr Cousins' trust account stood at \$95,500 because a further payment of \$5,500 had been received from Warwick Heslop. Three days later Mr Cousins wrote to Mr Lee stating, amongst other things, that he took Mr Lee's letter as a repudiation of the contract of retainer "*which is accepted*". He also advised that he would be retaining the amount of his fees by way of set off. The funds remained in his trust account.

[25] Following negotiations the Heslops and Mr Cousins reached a compromise about Mr Cousins' fees. On 26 February 2001 the Heslops agreed to an immediate payment of \$3,000 and Mr Cousins agreed to proceed with, and effect, settlement. But time was passing and the bank was growing even more impatient. On 28 February its solicitors advised Mr Lee in writing that the bank was setting a final deadline for settlement of midday, 5 March 2001. Unfortunately that information was not passed on to Mr Cousins. Nevertheless on 2 March Mr Cousins was instructed by Mr Lee to settle the transaction immediately.

[26] The transaction did not settle. Again the plaintiffs hold Mr Cousins responsible while Mr Cousins maintains that there were obstacles preventing settlement including the Moirs insistence that there be a breach remedy clause and the Heslops refusal to accept such a clause. Thus Mr Cousins strenuously denies that his actions were causative of any harm suffered by the plaintiffs.

[27] When settlement was not effected on 5 March 2001 the bank had had enough and cancelled its agreement with the Heslops. This meant, of course, that the Heslops were no longer able to provide a release of the bank's mortgage over the Devondale property. Although the Moirs had resisted earlier overtures from the bank, they finally accepted that it was not going to be possible to settle the Moir agreement and cancelled on 28 March 2001.

[28] BNZ exercised its power of sale and sold the Devondale property to Latimer Holdings Limited for \$790,000. Because the agreement that had been reached between the Heslops and the bank on 22 December 2000 no longer applied, the amount paid to the bank following the mortgagee's sale was \$111,998 more than would have been the case if the agreement had still been in place.

[29] In the meantime Mr Heslop's debtors' proposal had been approved by this Court. But in April 2001 one of Mr Heslop's creditors made application to the Court to cancel the approval on the basis that the orchard lot would no longer be available to the creditors. Later that month Mr Heslop suffered a heart attack and underwent major surgery. On 5 July 2001 this Court cancelled its earlier approval of Mr Heslop's debtors' proposal and adjudicated him bankrupt.

[30] In November 2001 Latimer Holdings Limited obtained a resource consent from the Council which enabled the lifestyle lot to be split off from the orchard lot, subject to several covenants. Latimer Holdings Limited then sold the lifestyle lot to the Moirs, with a new certificate of title issuing to them in early 2002.

[31] Upon bankruptcy Mr Heslop's unsecured creditors amounted to \$599,787. There were no secured creditors because BNZ had recovered its debt as a result of the mortgagee's sale of the Devondale property. Ultimately in 2004 a dividend of 5.955 cents in the dollar (\$35,717) was paid to creditors. Thus unsecured creditors were out of pocket to the extent of \$564,070.

[32] During the administration of the estate there were ongoing discussions between the Official Assignee's office, Mr Heslop, and the trustees of the trust, about the possibility of a claim against Mr Cousins and BNZ. On 2 February 2004

the Official Assignee accepted that any claim against Mr Cousins arising from the loss of the option would belong to the trustees.

[33] Mr Heslop was discharged from bankruptcy on 5 July 2004. On 13 December 2005 the Official Assignee assigned to Mr Heslop any causes of action against Mr Cousins and BNZ that might have vested in the Official Assignee by virtue of Mr Heslop's bankruptcy.

[34] A letter of demand was sent by the plaintiffs' former counsel to Mr Cousins on 7 March 2005. This proceeding was issued on 15 December 2005.

Pleadings

[35] The amended statement of claim against Mr Cousins and BNZ contains 139 paragraphs. Of those 121 paragraphs relate to the claim against Mr Cousins.

First Cause Of Action – Breach Of Contract Of Retainer

[36] Paragraph 90 alleges that at all material times Mr Cousins was retained by the plaintiffs to: negotiate the settlement of issues with BNZ so that the mortgage over the Devondale land could be discharged; undertake the work necessary to complete settlement of the Moir agreement; undertake the work necessary to complete settlement of the BNZ agreement; and act for the trustees upon preparation of the mortgage and other documentation required to secure the option for the trust. Those allegations are admitted.

[37] It is alleged that the defendant breached the contract of retainer in the following ways:

“93. *In breach of the express and implied terms of the retainer Mr Cousins:*

(a) Insisted on the payment of outstanding fees in the absence of completion of settlement of the BNZ deed of settlement.

(b) Wrongfully claimed a lien over the trust account funds; and

- (c) *Refused to apply the funds advanced by Warwick Heslop and held by Mr Cousins in his trust account for the specific purpose for which they were lodged in his trust account – namely to facilitate settlement with the BNZ.*

94. *In breach of the implied term of the retainer:*

- (a) *Mr Cousins failed to settle the Moir agreement notwithstanding that Mr and Mrs Heslop and the Moir Family Trust were both ready to settle and failed to complete matters required to settle with the BNZ.*
- (b) *Mr Cousins failed to act with sufficient diligence and speed to complete matters necessary to effect settlement of the Moir agreement and the BNZ deed of settlement.*
- (c) *Mr Cousins failed to charge a reasonable fee for the work done.*
- (d) *Contrary to instructions from Mr and Mrs Heslop and the trustees, Mr Cousins refused to settle the Moir agreement unless paid contemporaneously with settlement of the Moir and BNZ agreement, and*
- (e) *Without instructions from Mr and Mrs Heslop and the trustees, Mr Cousins sent the letters of 7 February 2001 and 9 February 2001 pleaded at paragraphs 49 and 57 above to the BNZ thus breaching his obligations of confidentiality.*
- (f) *Mr Cousins insisted on payment of fees prior to settlement.*
- (g) *Mr Cousins purported to terminate the contract of retainer on the basis his fees were not paid without giving the first and second plaintiffs reasonable notice of his intention to do so.*
- (h) *Mr Cousins wrongfully claimed a lien over funds held by him on trust for the purpose of settlement with BNZ, and refused to release those funds when instructed to do so by the Heslops and the trustees.*
- (i) *Mr Cousins provided to the plaintiffs negligent advice in respect of allowing the Moirs into possession prior to settlement without appropriate undertakings and protection.*
- (j) *By wrongfully claiming a lien, and by the letter of 9 February 2001 pleaded at paragraph 57 above, Mr Cousins put his own interests ahead of those of Mr and Mrs Heslop and the trustees."*

All of these allegations are denied by the defendant.

Second Cause Of Action - Negligence

[38] It is alleged in paragraph 100 of the amended statement of claim that Mr Cousins owed the plaintiffs duties of care to:

- “(a) Exercise the care and skill to be expected of a reasonably competent solicitor in advising the plaintiffs and completing the work necessary to settle the Moir agreement and settlement of the BNZ agreement.*
- (b) Charge a reasonable fee for work done.*
- (c) Properly follow the instructions of Mr and Mrs Heslop and the trustees.*
- (d) Accept payment of his fees within a reasonable time.*
- (e) Not terminate the retainer without first giving reasonable notice.*
- (f) Not wrongfully claim a lien over funds held by him on trust.*
- (g) Not breach obligations of confidentiality.*
- (h) Act upon the instructions of Mr and Mrs Heslop and the trustees.*
- (i) Not act without reference to or instructions from Mr and Mrs Heslop and the trustees.*
- (j) Not place his own interests above those of his clients.*
- (k) Advise about important matters that came to his attention.*
- (l) Warn Mr and Mrs Heslop and the trustees about risks that the client may not appreciate but which had come to his notice.*

With the exception of the allegation that there was a duty of care to accept payment of fees within a reasonable time ((d) above), these duties are admitted.

[39] The plaintiffs allege that the defendant breached his duties of care. These allegations are contained in paragraph 102:

“102. Mr Cousins breached the duties of care pleaded in paragraph 100 above.

Particulars

- (a) Mr Cousins failed to settle the Moir agreement notwithstanding that Mr and Mrs Heslop and the Moir Family Trust were both ready to settle and failed to complete matters required to settle with the BNZ.*
- (b) Mr Cousins failed to act with sufficient diligence and speed to complete matters necessary to effect settlement of the Moir agreement and the BNZ deed of settlement.*
- (c) Mr Cousins failed to charge a reasonable fee for the work done.*

- (d) *Contrary to instructions from Mr and Mrs Heslop and the trustees, Mr Cousins refused to settle the Moir agreement unless paid contemporaneously with settlement of the Moir and BNZ agreements.*
- (e) *Without instructions from Mr and Mrs Heslop and the trustees, Mr Cousins sent the letters of 7 February 2001 and 9 February 2001 pleaded at paragraphs 49 and 57 above to the BNZ and thus breached his obligations of confidentiality.*
- (f) *Mr Cousins insisted on payment of fees prior to settlement.*
- (g) *Mr Cousins purported to terminate the contract of retainer/refused to act on the instructions of Mr and Mrs Heslop and the trustees without giving reasonable notice.*
- (h) *Between 16 February 2001 and 26 February 2001, Mr Cousins wrongfully claimed a lien over funds held by him on trust for the purpose of settlement with BNZ, and refused to pay out those funds when instructed to do so by the Heslops and the trustees.*
- (i) *Mr Cousins provided to the plaintiffs negligent advice in respect of allowing the Moirs into possession prior to settlement without appropriate undertakings and protection.*
- (j) *By wrongfully claiming a lien, and by the letter of 9 February 2001 pleaded at paragraph 57 above, Mr Cousins put his own interests ahead of those of Mr and Mrs Heslop and the trustees."*

All of these allegations are denied by the defendant.

Third Cause Of Action – Breach Of Fiduciary Duty

[40] At paragraph 107 of the amended statement of claim the plaintiffs allege that the relationship between the plaintiffs and the defendant was one of trust and confidence giving rise to fiduciary obligations on the part of Mr Cousins. The defendant admits that fiduciary obligations were owed.

[41] It is pleaded by the plaintiffs that the defendant breached his fiduciary duties in the following respects:

"109 ...

- (a) *refused to settle the Moir agreement unless paid contemporaneously with settlement of the Moir agreement and the BNZ deed of settlement.*
- (b) *refused to release funds held on trust for the purpose of settlement with BNZ and wrongfully claimed a lien over those funds.*

- (c) *failed to complete matters required to settle with the Moirs and BNZ.*
- (d) *failed to inform the Heslops and the trust that it was his intention to forward to the BNZ the letter pleaded at paragraph 57 above requesting further indulgence from the BNZ to enable payment of his fees.*
- (e) *acted without instructions in forwarding to the BNZ the letter pleaded at paragraph 57 above and requesting further indulgence from the BNZ to enable payment of his fees."*

All of these allegations are denied by the defendant.

Fourth Cause Of Action – Breach Of Trust

[42] To a large extent the allegations of breach of trust duplicate the allegations of breach of fiduciary duty. The essence of the breach of trust allegations is contained in the following paragraphs:

- "114. *Mr Cousins, as trustee of the trust account funds, was under an obligation to administer the funds in accordance with instructions from Mr and Mrs Heslop and the trustees.*
- 115. *The clear instructions from Mr and Mrs Heslop and the trustees were that the trust account funds were to be applied for the purposes of completing settlement of the BNZ deed of settlement and for no other purpose.*
- 116. *There was no authorisation from Mr and Mrs Heslop for Mr Cousins to use the trust account funds for any purpose other than completing settlement of the BNZ deed of settlement.*
- 117. *By letter dated 16 February 2001, Mr and Mrs Heslop and the trustees, through Geoff Saunders, instructed Mr Cousins to release the trust account funds for the express purpose of facilitating the completion of settlement of the BNZ agreement.*
- 118. *By letter dated 19 February 2001, Mr Cousins refused to release the trust account funds indicating that he was:*
 - "retaining by way of set-off the amount of my outstanding fees from the funds".*
- 119. *Mr Cousins' failure to release the trust account funds for the purposes for which they were lodged with him was a breach of trust ("the breach of trust").*

The defendant denies that there was a breach of trust in any of the respects alleged.

Damages

[43] During his opening Mr Parker signalled that it would probably be necessary for him to amend some of the amounts claimed by the plaintiffs. A formal application to amend was made during his closing address. I am satisfied that the defendant will not be prejudiced by the amendments sought by counsel for the plaintiffs and Mr Forbes QC did not seek to argue to the contrary. The amounts claimed are amended accordingly. Paragraph [2] of this judgment sets out the amounts claimed following amendment.

Notice To Admit Facts

[44] A notice to admit facts was filed and served by the plaintiffs. That notice and the defendant's response are before the Court. It is unnecessary to traverse those matters. Naturally they have been taken into account in arriving at the conclusions contained in this judgment.

Outline Of The Plaintiffs' Evidence

[45] Twenty-four witnesses presented evidence on behalf of the plaintiffs (the briefs of some witnesses were accepted into evidence by consent without the witness appearing). In many cases the witnesses supplemented their evidence by reference to the agreed bundle of documents and other exhibits which ran into several thousand pages. The following is only intended to provide the briefest of outlines because more detailed discussion of the evidence will appear later in this judgment with reference to particular issues.

The Plaintiffs

[46] *Roger Heslop* gave very extensive evidence. His first brief ran to 447 paragraphs. In addition he provided a supplementary brief as well as a brief in reply to the defendant's evidence. He was extensively cross-examined.

[47] After providing information about his background, Mr Heslop gave detailed evidence on numerous topics: the purchase of the Devondale property;

investigations regarding rezoning; factors underlying his financial problems; his financial situation when the decision was made to sell the Devondale property; the Moir agreement; issues surrounding the release of the BNZ mortgage and subsequent developments; events giving rise to the proposal under the Insolvency Act and subsequent developments in relation to that proposal; engagement of Mr Cousins; events surrounding the Moirs taking possession on 26 January 2001; the bank's requirement for settlement on 8 February 2001 and events surrounding the failure to settle on that date or on later dates; cancellation by the bank and the Moir trust; cancellation of the debtors' proposal under the Insolvency Act; bankruptcy and subsequent events; settlement of the claim with BNZ; and health and other issues.

[48] Apart from having been associated with her husband's building business for more than 25 years, *Jennifer Heslop* is also a trustee of the Roger Heslop Family Trust. Her evidence covered the purchase of the Devondale property and subsequent events during 2000 and 2001. She also traversed events following Mr Heslop's bankruptcy and the impact of those events on her husband, herself and their family. After the defendant's evidence had been presented Mrs Heslop was recalled to respond to the defendant's allegation that funds in her savings account could have been used to pay Mr Cousins' account on 8 February 2001.

[49] *Lindsay Smith* is Mrs Heslop's brother and a trustee of the Roger Heslop Family Trust. His evidence traversed the temporary loan of \$11,000, subsequent instructions to Mr Cousins about those funds, and the reasons why the trust was not in a position to issue proceedings until December 2005.

Others Involved With The Moir Agreement

[50] *Warwick Heslop's* brief related to his loan to Mr and Mrs Heslop which he said was to be used for the purpose of settlement with the BNZ. His brief was accepted into evidence.

[51] *Benjamin Moir* appeared under subpoena. His evidence covered events from the signing of the agreement, discussions about possession, his attitude towards

various issues including the breach remedy clause, and events leading to the ultimate cancellation of the Moir agreement.

[52] *Stephen Rennie*, a litigation partner in Rhodes & Co, also appeared under subpoena. He was instructed by the Moirs after they had become concerned about the progress of the Moir agreement in November 2000. Mr Rennie was assisted by Mr Schmidt, a conveyancing staff solicitor in his firm. Mr Rennie traversed his involvement in the transaction, particularly with reference to the correspondence. He produced and explained two file notes (exhibits 4 and 5) arising from telephone discussions between himself and Mr Cousins and confirmed that no undertakings were provided when his clients took possession on 26 January 2001.

[53] *Stephen Bensberg* is employed by the Christchurch City Council. Because his evidence relating to the withdrawal of the Council's caveat was not contentious his brief was admitted by consent.

[54] Initially *Markham Lee*, a solicitor, was involved in this matter in his capacity as a director of Sky Hi Roofing (Christchurch) Limited, one of Mr Heslop's creditors. Subsequently he acted for Mr Heslop in relation to the bankruptcy proceedings and later (after Mr Cousins said that he was not prepared to undertake any further work unless his fees were paid) Mr Lee acted for the Heslops in relation to their issues with Mr Cousins. Mr Lee discussed Mr Heslop's proposal under the Insolvency Act, exchanges with Mr Cousins about the release of funds held in Mr Cousins' trust account, and his dealings with the Official Assignee.

[55] *Richard Smith*, a partner in Duncan Cotterill, acted for the BNZ in relation to the Heslops' indebtedness to the bank. His evidence covered the history of the matter, particularly with reference to correspondence between his firm and others involved in the transaction.

Evidence From Creditors

[56] Reference has already been made to Mr Lee, a director of one of the creditors, who gave evidence in that capacity (as well as his capacity as a solicitor). Evidence was also given on behalf of other creditors by *Kenneth Jones* of

Placemakers, *Christopher Miller* of Precut Construction Limited, *John Morris* of Anthony Shearer Limited, and *Lyall Simpson* of Steel & Tube Roofing Products. In terms of value these companies comprised a large proportion of the creditors.

[57] All of these witnesses were supportive of Mr Heslop and the companies they represented had supported the debtor's proposal. They considered that Mr Heslop was open and honest and that he had kept creditors informed. Although they were unaware at the time of the debtors' meeting of some matters concerning Mr Heslop that emerged as a result of this litigation, they all confirmed that knowledge of those matters would not have made any difference to the way in which they voted at the creditors' meeting.

[58] *Dr William Olds* is a friend of Mr Heslop. Some months before the debtor's proposal he lent Mr Heslop a substantial sum of money. He considered that Mr Heslop was open about his financial problems and remained supportive of him. Dr Olds also made brief reference to depression suffered by Mr Heslop.

Health Aspects

[59] *Dr Bridget Williams*, a general practitioner, provided Mr Heslop with medical attention from May 2000. Her clinical notes are included in the agreed bundle. Dr Williams referred to the stress and low mood suffered by Mr Heslop at end of May 2000, his heart attack, and his referral to hospital. She also made brief reference to subsequent events.

[60] *Dr Harvey Williams*, psychiatrist, first saw Mr Heslop in September 2000 when Mr Heslop was referred for an insurance income protection assessment. The psychiatrist said that his diagnosis was that Mr Heslop was suffering from a major depressive disorder. Thereafter he saw Mr Heslop regularly until he suffered a heart attack. Dr Williams said that he did not see Mr Heslop again until after he had been adjudicated bankrupt.

[61] Mrs Heslop has been a patient of *Dr Andrew Manning's* practice since 1995. Dr Manning said that he was consulted by Mrs Heslop in June 2000 in relation to

stress and again in June 2002 and more recently about stress related concerns. Dr Manning referred her to John Dugdale, a clinical psychologist.

[62] *John Dugdale* gave evidence about his treatment of Mrs Heslop between August 2002 and December 2002. His evidence was that Mrs Heslop made good use of therapy.

Bankruptcy

[63] *David Parke* is a senior insolvency officer in the Official Assignee's office. He personally conducted the administration of Mr Heslop's bankruptcy from April 2003. With reference to the Official Assignee's records before he became involved, and from his own knowledge thereafter, Mr Park traversed the administration of Mr Heslop's estate through to discharge. He also discussed the Official Assignee's investigation of possible claims against Mr Cousins and the BNZ.

Expert Evidence

[64] *Gregory Dewe* is a resource management planner with Connell Wagner Limited. Currently he is providing expert advice to one of the parties involved in the Apple Fields Limited application for 93 hectares (which includes the orchard lots within the Devondale estate) to be rezoned for urban purposes. His evidence covered the history of the AFL application and the likelihood of rezoning.

[65] *Alan Stewart* is a registered valuer. During 2000 he provided valuation reports for the Heslops and BNZ (see [8] above). As a result of this litigation he has carried out further valuations which will be discussed in detail later.

[66] *Roger Taylor* is a chartered accountant and economist. Using a different method to Mr Stewart he arrived at values which are reasonably close to those arrived at by Mr Stewart. Mr Taylor's evidence will also be discussed in greater detail later. In addition, Mr Taylor gave evidence about Mr Heslop's ability to meet the obligations proposed in his debtor's proposal.

[67] Two very experienced solicitors also gave expert evidence: John Greenwood and Terence Nowland.

[68] *John Greenwood* discussed the practice of solicitors with reference to fees, the circumstances where they can refuse to act for non-payment, their ability to obtain a lien, steps that should be taken when possession is granted to a purchaser without settlement, and various issues concerning the option and mortgage. He also gave his opinion about what Mr Cousins should have done in this case.

[69] *Terence Nowland* addressed situations where it would be appropriate to refuse to settle a transaction because fees remain unpaid, when a lien can be asserted, drafting of the mortgage document in this case, and the advice and action that could be expected in situations where a purchaser takes possession prior to payment of the purchase price.

Outline Of Defendant's Evidence

[70] Again this is only a very brief outline and more detailed discussion will appear later in this judgment with reference to specific issues. Mr Cousins and seven other witnesses gave evidence for the defendant and, like many of the plaintiffs' witnesses, they made extensive reference to the agreed bundle and other exhibits.

The Defendant

[71] *Clive Cousins'* brief ran to 315 paragraphs. He also gave supplementary evidence and was cross-examined at length.

[72] The topics traversed by Mr Cousins can be summarised: his fields of practice and experience; his retainer by the Heslop entities; the Moir agreement; actions that he took to implement settlement with the Moirs and the BNZ; obstacles standing in the way of settlement at various stages; and notification of claims against him. He also provided a detailed response to the evidence of Mr and Mrs Heslop and other witnesses for the plaintiffs.

[73] *Wayne Bailey*, chartered accountant, gave evidence about his initial involvement with the Heslops in connection with the bankruptcy petition, his recommendation to refer the Heslops to Mr Cousins, the debtor's proposal (in respect of which he was to be trustee for the creditors), the meeting on 18 December 2000, and matters concerning the issue of his and Mr Cousins' fees.

[74] *Gary Still* is a former employee of Mr Heslop and also a creditor. He described Mr Heslop as a poor, slow and inconsistent payer of accounts. Mr Still was critical of the way Mr Heslop conducted his business and believed that Mr Heslop had downplayed the severity of his financial problems. He also discussed the creditors meeting at which Mr Heslop's proposal under the Insolvency Act was considered by creditors.

Expert Evidence

[75] Between 1991 and 2002 *Robert Nixon*, a resource management planner, was team leader of a Christchurch City Council team preparing a new district plan for Christchurch. Since that time he has been a planning consultant with Planit-R W Batty & Associates Limited. Mr Nixon traversed the AFL rezoning proposals and expressed views as to the likelihood of ultimate rezoning.

[76] *John Hardie*, a barrister, represented the Christchurch City Council in relation to the AFL rezoning proposals. On 21 December 2000 he swore an affidavit in connection with Mr Heslop's debtors' proposal. Amongst other things the affidavit addressed the prospects of the land covered by the AFL proposals being rezoned for urban purposes. In his evidence Mr Hardie updated developments since his affidavit was sworn and discussed the current prospects of the land being rezoned.

[77] *Christopher Barraclough* is registered valuer. He carried out valuations of the orchard lot at three various points in time (time of alleged breach, time by which the defendant maintained proceedings should have been issued, and September 2006). These valuations will be discussed in greater detail later.

[78] *Robert Eades*, a very experienced solicitor, gave expert evidence from a legal perspective. He analysed the various phases of the Moir sale and discussed the practices that might have been expected in relation to fees, liens, possession, and various other matters. Generally his evidence was supportive of Mr Cousins.

Some Observations About The Evidence Of Key Witnesses

[79] For the purposes of these observations I regard Mr and Mrs Heslop and Mr Cousins as the key witnesses. Given that there are significant conflicts between the evidence of the Heslops, on the one hand, and the evidence of Mr Cousins, on the other, their credibility as witnesses is one of the factors that I will have to take into account.

[80] Naturally I accept that it is difficult for any witness to accurately recall events that occurred several years previously. Some errors in recollection are to be expected. I also accept that with the benefit of hindsight some matters may appear much more straightforward than was actually the case at the time. However, despite those complications I cannot avoid resolving a number of significant conflicts of evidence in this case. When undertaking that task I will, wherever possible, endeavour to test the conflicting evidence against the documentary record and against the evidence of other witnesses.

Mr Heslop

[81] Mr Heslop was in the witness box for around three days. For much of that time he was subjected to a searching cross-examination by Mr Forbes. Thus I had a good deal of time to form an overall impression of him as a witness.

[82] Despite the searching cross-examination, it was rare for Mr Heslop to be forced into a position where he was obliged to recant. This probably reflects that significant parts of his evidence in chief were derived from a case history he had prepared from notes that he had taken at the time the events had occurred in 2000 and 2001. He collated those notes on his computer. This computer record, which covers the period from 3 November 2000 to 18 August 2002, runs into 88 pages.

[83] Under cross-examination Mr Heslop was challenged about his notes and the computer record. The suggestion seemed to be that the notes/computer record had not been compiled at the times alleged and that at least to some extent they had been concocted. During the trial I was called upon to address issues arising from a defence request for Mr Heslop's hard drive to be examined by a computer expert appointed by the defendant. Indications were that the expert might be called to give evidence on behalf of the defendant. That did not eventuate. In the end I was not left with any concerns about the accuracy of Mr Heslop's notes, which are before the Court. I accept his evidence about the method and timing of their compilation.

[84] Overall I found Mr Heslop to be a reasonably straightforward and reliable witness. That does not mean, of course, that I accept all of his evidence. For example, I do not accept that he was told by Mr Cousins on 18 December 2000 that there was no need for him to worry about paying the fees. Nor do I accept his assertion that he had not given instructions to Mr Lee about delaying settlement until the debtors' proposal had been approved by this Court. Both those matters will be mentioned again later.

Mrs Heslop

[85] Although Mrs Heslop was only in the witness box for about one day in November 2006 and for a much shorter time when she was recalled in January 2007, she was nevertheless skilfully cross-examined and I was able to gain some impressions about her as a witness. I was not conscious of any significant retreats from her evidence in chief and she generally impressed me as a sincere and reliable witness.

Mr Cousins

[86] Mr Cousins was in the witness box for around the same time as Mr Heslop and was also subjected to searching cross-examination. Again I had a good opportunity to assess him as a witness.

[87] I did not find Mr Cousins to be as impressive as Mr and Mrs Heslop. On occasions he was forced to retreat from his brief. Two examples will suffice. In his

brief he said: *"I have checked and I was in Auckland on clients' business"* on 26 and 27 February 2001. However, by the time he gave evidence Mr Cousins accepted that his brief was incorrect and that he was in fact in Christchurch on those days. The second example involves the breach remedy clause which is of particular importance in the context of causation. Mr Cousins' initial stance was that this clause was a live issue and a barrier to settlement on 8 February 2001. But under cross-examination he expressly accepted that it was not being put forward as an issue as at 8 February and that if it had been an issue it would have been referred to in the correspondence. Later, however, he returned to his original stance that it was a live issue, yet denied that he had changed his evidence despite the fact that this was patently the case.

[88] There was also another contrast with Mr Heslop. Whereas Mr Heslop had kept meticulous notes, Mr Cousins' file, which is before the Court, contains very few notes about meetings or telephone calls. While in some cases those meetings and telephone calls are covered by subsequent correspondence or documentation, that is often not the case. Had file notes existed Mr Cousins would have been able to refresh his memory from them rather than attempting to rely on his memory several years later.

PART II

LIABILITY

Introduction

[89] Issues involving liability will be addressed in chronological sequence. I will begin by considering the issue of possession following which I will consider the fees issue, the mortgage, failure to release funds and, finally, any remaining issues arising during the period from 8 February 2001 to cancellation. However, before considering those issues I need to briefly traverse three background matters: the Moir agreement, the retainer, and the standard of care required of Mr Cousins.

The Moir Agreement

[90] The Moir agreement has already been outlined at [9]. This litigation focuses on the provision granting the vendors (Heslops) or their nominee an option to repurchase the orchard lot for \$1, such option to be secured by a second mortgage.

[91] After specifying the purchase price of \$600,001 and providing for a deposit of \$60,000 to be paid, the agreement makes provision for the payment of the balance of the purchase price. This is to be by way of a payment of \$540,000 and by the purchaser executing a second mortgage in terms of clause 17. That clause provides:

"17.0 SECOND MORTGAGE

The second mortgage from the Purchaser to the Vendor shall secure the sum of \$1-00 (One dollar) repayable on demand at any time and with nil interest. The provision of subclause 8.3 shall apply to the mortgagor as if it were arranged pursuant to a financial condition. Such mortgage will be prepared by the Vendor's solicitor at the Vendor's expense and shall be in the standard form published by the Auckland District Law Society. The Purchaser shall have the right to renew or extend the first mortgage or to arrange a new first mortgage provided that the total of the first mortgage and second mortgage shall not exceed 70.00% of the purchase price or registered valuation of the property (The house lot only), by a registered valuer approved by the vendor, whichever is the lesser. The following shall be incorporated within the second mortgage :

- 17.1 *The purchaser accepts that the purchase price is the agreed value of the following lots: comprising part of the land in Certificate of Title 30F/277 (Canterbury Registry), (the house lot)*
- (a) 5639 m² Lot 23 DP 51887*
 - (b) an undivided 1/12th share in 2.5611 hectares being part Lot 20 DP 51346 (but excluding the hatched area shown on the attached diagram)*
 - (c) an undivided 1/12th share in 1544 m² being Lot 33 DP 51887 (the house lot)*
- 17.2 *The purchase price excludes the value of (The orchard lot):*
- (a) an undivided 1/12th share in 4985 m² being lot 13 DP 51346*
 - (b) 4.4290 hectares being Lot 3 DP 51346*
 - (c) an undivided 1/12th share in 2.5611 hectares being part Lot DP 51346 (the hatched area only) (the orchard lot)*
- 17.3 *In consideration of the vendor accepting the purchaser's offer and executing this agreement, the purchaser grants to the vendor or their nominee an option to purchase the orchard lot upon the following terms:*
- (a) the option will be exercised when the vendor demands repayment of the second mortgage*
 - (b) the purchase price shall be \$1.00*
 - (c) pending the exercise by the vendor or their nominee of the option, the purchaser shall:*
 - (i) sign any documents required by the vendor to apply for a resource consent and obtain a separate title(s) for the orchard lot and*
 - (d) pending the exercise of the option by the vendor or their nominee the vendor shall:*
 - (i) pay the rates for the orchard lot recorded in the Christchurch City Council's records as 68a Johns Road, Christchurch and;*
 - (ii) maintain the orchard lot and may use it or let it for grazing or other agricultural, horticultural or viticultural purposes*
 - (e) When the vendor or their nominee has exercised the option to purchase the orchard lot the purchaser is to be given the first option to purchase it at current market value should the vendor decide to offer it for sale.*
- 17.4 *In the event of the purchaser transferring or ceasing to be the registered proprietor of the land in Certificate of Title 30F/277 the purchaser will obtain the agreement of the transferee to the continued existence of the vendor's option to purchase and second mortgage and will hand the vendors a deed of covenant in a form approved of by the vendor's solicitor providing for such option and second mortgage and binding that transferee and covenanting to obtain similar agreements and deeds of covenant for all subsequent transferees."*

Although there are other special conditions, they are of no immediate relevance. In other respects the agreement contains standard provisions.

The Retainer

[92] It is common ground that the first meeting between the parties was at Mr Cousins' office on 24 November 2000 and that at that stage Mr Cousins was only instructed to negotiate with BNZ with a view to obtaining a release of the bank's mortgage. Mr Taylor was still acting for the Heslops on the conveyancing.

[93] There is a conflict of evidence about whether fees were discussed at the first meeting. According to Mr and Mrs Heslop there was no discussion on that topic. On the other hand, Mr Cousins maintains that he raised the issue of fees by telling the Heslops that he was unable to give any estimates, his hourly rate was \$220 plus GST and that he would invoice them monthly. His notes of that meeting do not make any reference to fees, but I do not think that that is of particular significance because it is not the sort of matter that one would expect to be recorded.

[94] Given that one of the critical issues in this litigation is whether Mr Cousins told the Heslops that he would require payment of all his accounts that had been rendered before he would settle, the conflict of evidence referred to in the previous paragraph is of little moment and does not need to be resolved. The important point is that there is absolutely no suggestion that Mr Cousins told the Heslops at the first meeting that he would require immediate payment of invoices. Nor was there any promise by the Heslops to do so.

[95] It became common ground that Mr Cousins' retainer was expanded to include the Moir agreement conveyancing on 22 December 2000 because the Heslops and Mr Cousins believed that it would make sense for Mr Cousins to handle that aspect as well as the negotiations with BNZ. By that time Mr Cousins had rendered one invoice for \$1,411 which remained unpaid. There is no suggestion that there was any mention of this unpaid account when the retainer was expanded.

[96] During cross-examination Mr Parker put it to Mr Cousins that Mr Cousins had not any stage verbally indicated to Mr Heslop that full payment of his fees would be required before he would settle. Mr Cousins' response was that there had in fact been discussions aimed at making arrangements for the payment of

outstanding accounts and that those discussions had been in late January or early February. This evidence came out of the blue. Up to that time there had been no suggestion in Mr Cousins' evidence that any such discussions had taken place. Moreover, this proposition had not been put to Mr Heslop when he was cross-examined by Mr Forbes and there is no reference to such discussions in the correspondence or in any other documentary evidence.

[97] I do not accept Mr Cousins' evidence. If there had been any such discussions it might be expected that they would have been included in Mr Cousins' brief, especially given that he is a solicitor and would have recognised the significance of such discussions. It might also be expected that his contention would have been put to Mr Heslop when he was cross-examined. I therefore find that the retainer did not include any term (express or implied) requiring outstanding fees to be paid prior to settlement on 8 February 2001.

[98] One further matter needs to be mentioned. In his evidence Mr Heslop claimed that after the meeting with BNZ representatives on 18 December 2000 Mr Bailey told him, in the presence of Mr Cousins, to forget about their fees in the meantime and that if settlement with BNZ was not completed no one would be paid. He claims that Mr Cousins agreed with Mr Bailey.

[99] In his evidence in chief Mr Bailey said that neither Mr Cousins nor himself said anything to the effect that their fees did not need to be paid before settlement of the Moir agreement. However, under cross-examination he acknowledged that he might have said something to the effect that there was no need to worry about paying fees right now. He also agreed that it would have been in his nature to say that the issue of fees could be worked out later. For his part Mr Cousins was adamant that nothing was said about his fees being "*forgotten about*" in the meantime or that they did not need to be paid before settlement of the Moir transaction.

[100] Given Mr Cousins' attitude towards fees, as reflected by later events and also by his evidence from the witness box, I do not think for a moment that he would have agreed to leave his fees outstanding until after settlement. Even if Mr Bailey said something that could have been construed as an indication that *his* fees could be

left in the meantime and Mr Heslop took that indication as also applying to Mr Cousins' fees, it could not bind Mr Cousins unless Mr Cousins agreed. I accept that he did not agree.

The Required Standard Of Care

[101] There is no dispute about the required standard of care. Mr Cousins was obliged to exercise the care and skill required of a reasonably competent solicitor. However, as Mr Forbes and Ms Barclay pointed out, that is not a guarantee against all mistakes or omissions. A solicitor is not guilty of negligence because he has committed an error of judgment, unless that error is gross, and peer professional opinion will be relevant in this regard: see *Dal Pont, Lawyers' Professional Responsibility* (3rd edition, 2006) at 5.95.

[102] I also accept that lawyers are often faced with finely balanced problems and the fact that a decision turns out to be wrong does not necessarily mean that there has been a failure to exercise the required standard of care. The standard of care expected of a professional who works in an environment where judgment calls have to be made within time constraints and under difficult circumstances must not be set at a level that is unrealistic and must be assessed in context: *Chamberlains v Lai* [2006] NZSC 70 (SC) per Elias CJ at [77] and [78]. Moreover, the actions of the lawyer should not be judged with the benefit of hindsight.

[103] Part of the context of this case is that Mr Cousins inherited an agreement for sale and purchase that had been entered into by the Heslops while another solicitor was acting for them. That agreement included provision for an option to purchase back the orchard lot and an associated second mortgage to secure that option. Moreover, when Mr Cousins inherited the agreement he was, as Mr Eades noted, faced with a mortgagee (BNZ) in a strong position and purchasers who were also anxious to preserve their negotiating position. As Mr Eades said, Mr Cousins was negotiating, if not from a position of weakness, at least from a position that was not particularly strong. However, by the time Mr Cousins took over the conveyancing role from Mr Taylor agreement had been, or was about to be, reached with BNZ.

[104] With the benefit of the foregoing I now turn to the alleged breaches.

The Possession Issue

[105] The most contentious aspect of the possession issue is the Heslops' allegation that Mr Cousins knew the Moirs were going to take possession on 26 January 2001 (without completing settlement) because that possibility had been discussed with him the previous day. On this matter the Heslops and Mr Cousins are diametrically opposed. Determination of this conflict will go a long way towards resolving the possession issue one way or other.

First Plaintiffs' Evidence

[106] Mr Heslop claims that he and Mrs Heslop discussed the issue of possession with Mr Cousins in Mr Cousins' office on 25 January 2001. It is important to place his evidence about that meeting in the context of earlier events, as described by Mr Heslop.

[107] In summary Mr Heslop's version of events was: he and Mrs Heslop vacated the Devondale property on 19 January and spent the next couple of days cleaning up; initially they believed that it would be possible to settle on 22 January; however, by that date they were aware, as was Mr Cousins, that it would be impossible to settle on that date because Warwick Heslop could only come up with \$79,000 and the balance required to make up the \$90,000 would not come through until the first week in February; consequently \$11,000 had to be found elsewhere; apart from that they were still hunting for \$8,909 to enable the rates to be paid; when they met with the Moirs on 23 January to show them how things worked the Moirs said that they would like to take possession on 26 January and Mr Heslop informed them that settlement could only take place once the balance of his brother's funds were available; nevertheless they were willing to accommodate the Moirs provided it was prudent to do so; on 24 January Mr Heslop spoke to Mr Cousins by telephone and told him the Moirs wished to take possession on 26 January; Mr Cousins said they would need to meet the next day to sign the transfer and BNZ settlement deed.

[108] Mr Heslop's description of the meeting in Mr Cousins' office at 11.30 am on 25 January 2001 was:

"... We once again told Mr Cousins that the Moirs wished to take possession on the 26th of January 2001. I asked him would this be wise. I was well aware from previous property dealings that possession was nine-tenth's of the law and that possession should not be given before payment. I was aware and told Mr Cousins that the \$79,000 from my brother would not be credited to Mr Cousins' account for probably one week due to delays in international transfers. Clive said everything had been put in place and that we should let the Moirs take possession as they have been messed around with enough, with settlement being delayed from 20 December 2000 and that they had to settle as per the sale and purchase agreement. The Moirs were not in possession at that time. Mr Cousins did not advise us of the need to obtain appropriate undertakings from the Moirs before letting them into possession prior to settlement. He said that it would show our good intentions to the Moirs and the bank to give possession."

Although Mr Heslop was cross-examined about the issue of possession generally he was not specifically cross-examined about this meeting.

[109] In broad terms Mrs Heslop supported her husband's evidence about events leading up to the meeting and about the meeting itself. With reference to the meeting on 25 January Mrs Heslop said:

"... I specifically remember the discussion with Mr Cousins about the Moirs' desire to take possession of the property the next day. We asked Clive Cousins whether giving possession to the Moirs would be wise. We were very wary about letting the Moirs have possession before settlement. Handing over the property went against everything we had learned in business. Mr Cousins advised us that we could give the Moirs possession of the property before settlement. I remember him making comments to the effect that the Moirs had been mucked around enough with the delays in settling the matter and that by giving possession it would show our good intent to the bank and the Moirs which would be to our favour. I do not remember Mr Cousins ever giving us advice of the need for undertakings or measures to protect us when giving possession before settlement. On the advice of Mr Cousins we agreed to let the Moirs into possession of the property on 26 January 2001."

Mrs Heslop was cross-examined at some length on this matter, but she did not resile from her evidence in chief.

Defendant's Evidence

[110] Mr Cousins denies that the issue of possession was discussed with Mr Heslop by telephone on 24 January or at the meeting with Mr and Mrs Heslop on 25 January. He said:

"The same day Mr and Mrs Heslop signed the deed of settlement with the BNZ at my office. Nothing was said at this meeting about the Moirs being let into possession without settlement having taken place. I recall we discussed the granny flat, as well as the BNZ deed."

According to Mr Cousins the first he knew about the Moirs taking possession was when he received a faxed letter from Rhodes & Co (the Moirs' solicitors) on 26 January advising that their respective clients had agreed directly that the Moirs could take possession that day.

[111] It was Mr Cousins' evidence that if he had been aware of the proposal for the Moirs to take possession he would have required specific undertakings from the Moirs and their solicitors. He said:

"These undertakings would have included an undertaking to settle in full without deduction. My invariable practice is to require this undertaking to be given by the purchaser's solicitors, which means that they need to ensure that they are in funds for the purpose of fulfilling the undertaking. I do not advise clients to accept an undertaking from the purchasers, rather from their solicitors. If, as is usually the case, this involved funds advanced under a mortgage, then the solicitors need to draw down on the mortgage before giving the undertaking or be in a position where they could do so."

He also detailed the other steps that he would have taken. He said that he has never advised a client to allow a purchaser to take possession without appropriate undertakings.

[112] Mr Cousins was extensively cross-examined about this topic. He said that from 23 January until he received Rhodes & Co faxed letter on 26 January he was proceeding in the expectation that settlement would take place on 26 January and that it would have only been on that morning that a member of his staff (Ms Fleck) would have reported to him that Warwick Heslop's funds had not arrived. He said that after becoming aware that the Moirs had taken possession he contacted both his clients and Rhodes & Co *"and advised them of his reservations in relation to this"* (possession without settlement). He also said that he attempted to extract undertakings from Rhodes & Co after the event, but without success.

The Documentary Record

[113] It is clear from the correspondence that the proposed settlement date of 22 January 2001 had to be abandoned for two reasons: first, because Warwick Heslop

could only provide \$79,000 with the balance required to make up the \$90,000 not being available until the first week in February (recorded in an email to Mr Heslop on 17 January 2001); and, second, because there were rates arrears (recorded in Rhodes & Co's letter to Mr Cousins of 19 January 2001). In his letter to Mr Heslop on 22 January Mr Cousins acknowledged that he was aware of these two problems.

[114] We know from the documentary record that while the \$11,000 from Mr and Mrs Smith was paid into Mr Cousins' trust account on 24 January, Warwick Heslop's \$79,000 did not arrive into the trust account until 30 January 2001. We also know that the rates arrears were not paid until 8 February 2001. Thus it was never going to be possible to settle on 26 January 2001. However, that does not necessarily mean that Mr Cousins did not genuinely believe right up to 26 January that settlement would be possible on that date. I will return to that matter.

[115] Two file notes on the file of the Moirs' solicitors, Rhodes & Co, are of particular significance. Both file notes were recorded by Mr Rennie. As I understand it, these file notes only came to light following belated third party discovery. Initially it appeared that privilege issues would be raised, but in the end the Moirs waived privilege (assuming that they were actually entitled to claim privilege).

[116] The first file note is dated 22 January 2001. After listing five matters requiring attention, which Mr Rennie described as a "*batting list*" of matters he needed to discuss with Mr Cousins, the file note records a telephone call to Mr Cousins:

<i>"TO¹. Cousins 22/01/01</i>	<i>3.40pm W.P.²</i>
<i>Difficulty</i>	<i>- all funds needed to make up shortfall not available until 1st week in February (rates etc)</i>
	<i>- Heslop has shifted out</i>
	<i>- Hunting around trying to find rates shortfall</i>
	<i>- Granny Flat – caveat can lift provided agreement from M.</i>
	<i>- Suggest access for purpose until 1/4.</i>
	<i>- No \$ to pay interest/costs."</i>

Mr Rennie said that his file note indicated to him that "*I rang Mr Cousins at 3.40pm and I have made notes of what Mr Cousins told me on a without prejudice basis. I*

¹ Mr Rennie said this means telephone call out.

² Mr Rennie said this stood for without prejudice.

can't think it can be anything else". At the bottom of the file note a telephone call from one of Mr Rennie's clients (he does not know whether it was Mr Moir, Mrs Moir or Mr Moir's brother) is recorded for the same date. It states "We are rolling on 26th". This was interpreted by Mr Rennie as an indication that the Moirs were moving into the Devondale property on 26 January.

[117] The other file note is undated. However, given the matters recorded in the file note it is likely that the telephone conversation covered by the file note took place on 23 January 2001. The file note records:

		"TO Clive Cousins W.P. We will take possession on <u>Friday</u> on following terms:
		(1) WP to right to cancel.
CCC officer is Stephen Bensberg 372-2466	(2)	Caveat position with CCC sorted out. - Suitable agr ⁴ to Moir. - H to have right of access to remove/regrassing upon 48 hours notification - If not removed by 1/4/00 remove M's property.
No rent – entitled to possession	(3)	<u>Rent free:</u> on a/c costs/interest. - Either side <u>21 days</u> to terminate possession.
Bank may not be happy if we take possession	(4)	<u>Options:</u> - Over orchard block only. - To be exercised by time certain <u>or</u> lapses. - To be expressed as only securing the option.
Estimated Ser ³ Date: = 1 st week from Feb. = Have to find \$90K	(5)	<u>Rates:</u>

TT Cousins
Solved shortfall apart from rates.

Mr Rennie said that the top of the page indicated to him that he had had a without prejudice discussion with Mr Cousins, but he was not sure that the body of the note iterated (1) to (5) is a record of a discussion he actually had with Mr Cousins. He thought it was possible that those items were a "batting list" of things he wanted to talk about. Leaving aside whether it was he or Mr Cousins who had stated the

³ Mr Rennie confirmed that this stood for settlement.

matters recorded in the left hand column under the arrow, Mr Rennie agreed that the file note indicated that the issue of possession had been discussed.

[118] These file notes tie in with events that had occurred and are corroborative of Mr Heslop's detailed account of events which was, of course, prepared without any knowledge that the file notes existed. In the case of the first file note: Warwick Heslop had advised that the whole \$90,000 would not be available until the first week in February; Mr and Mrs Heslop had shifted out on 19 January; the Heslops were hunting around trying to find the rates shortfall; and Mr Rennie had written to Mr Cousins on 17 January claiming interest for late settlement.

[119] Initially I wondered whether there was an incompatibility between the fact that Mr Rennie's note "*we are rolling on 26th*" is dated 22 January whereas Mr Heslop said that the discussion with the Moirs about possession took place the following day. However, having thought about the matter and having checked back to Mr Heslop's original notes, it seems to be clear that it was the Moirs, not the Heslops, who decided that possession should be taken on 26 January. I infer that the Moirs decided on 22 January that they wanted to move on 26 January and told Mr Rennie, but did not tell Mr Heslop until the following day. So I am satisfied that there is no incompatibility between the file note taken by Mr Rennie and the evidence given by Mr Heslop.

[120] In the case of the second file note: Stephen Bensberg was the City Council officer handling the release of the caveat; reference to the estimated settlement date and having to find \$90,000 is consistent with the fact that Warwick Heslop was not able to provide the full amount required to settle until the first week in February; and the reference at the bottom of the page to having solved the shortfall apart from the rates ties in with the fact that Mr and Mrs Smith had stepped into the breach and agreed to make a temporary advance of \$11,000 until the balance of Warwick Heslop's money came through.

[121] Several documents created on 25 January warrant mention. First, there is a letter from Mr Schmidt (the staff solicitor working with Mr Rennie) to Mr Cousins

⁴ Mr Rennie confirmed that this meant agreement.

recording advice from Mr Cousins that he was meeting with his client (the Heslops) that day, which again confirms that there was a meeting on that date. Second, there is a letter from Ms Fleck (Mr Cousins' legal executive) to the Council enclosing a withdrawal of caveat and recording that settlement "*is to be completed tomorrow*". Third, a settlement statement dated 25 January had been prepared on the basis that settlement would be effected on 26 January. Indications are, however, that it was not sent to the Moirs' solicitors. I will return to that matter.

[122] The next document is a letter sent by fax from Rhodes & Co to Mr Cousins at 10.55am on 26 January 2001:

"We refer to recent discussions and correspondence. Apparently our respective clients have agreed directly that our clients can take possession of the property on Friday 26 January 2001 notwithstanding that settlement of the transaction will not be completed on that date.

Possession is on the basis that our clients do not pay any rental pending settlement. Our clients are entering possession without prejudice to their rights under the Agreement for Sale and Purchase.

In relation to other outstanding issues and with a view to achieving settlement of the transaction:

- 1. Our clients will not require withdrawal of the Christchurch City Council caveat prior to settlement but will require your clients to obtain the Council's consent (in registerable form) to the transfer and mortgages.*
- 2. Your clients shall have the right to enter upon the property for the sole purpose of removing the granny flat and your clients shall, at their cost in all matters, be required to make good any damage caused to the property from removal of the granny flat. Your clients are also required to sow a lawn once the granny flat is removed as per the Agreement for Sale and Purchase.*
- 3. If the granny flat has not been removed by 1 April 2001 (time being strictly of the essence), property in the granny flat passes to our clients as if it were a chattel situated on the property and included in the sale under the original Agreement for Sale and Purchase. Your clients' rights to access to the property will of course terminate.*
- 4. Upon removal of the granny flat by your clients, your clients will take all steps that may be necessary to enable the withdrawal of the Christchurch City Council caveat.*
- 5. In relation to rates, our clients will be given a credit for the amount of rates arrears (and penalties) owing in respect of the entire property as at the actual date of settlement and our clients will arrange payment of the same.*
- 6. You need to prepare the second mortgage in terms of the Agreement for Sale and Purchase and let us have same for approval and execution.*

7. *The option granted by clause 17.3 of the Agreement for Sale and Purchase is amended such that if the option has not been exercised within a certain time (say two years) the option lapses.*
8. *If your clients default in observing the terms of the option (including payment of rates and maintenance) our clients may give fourteen (14) days written notice to your clients c/- your office requiring the breach to be remedied. If the breach is not remedied in that time (time being strictly of the essence) our clients may terminate that option.*
9. *We note that your clients are solely responsible for all subdivision costs and reserve contributions if they exercise the option to purchase the orchard lot.*

Would you kindly consider the above matters with your clients as a matter of urgency and confirm they record the correct position."

A copy of this letter was faxed by Mr Cousins to Mr Heslop on 26 January 2001 with a message on the cover sheet: *"Please find attached a copy of correspondence received from Rhodes & Co dated today for your info"*. No alarm or concern by Mr Cousins about the granting of possession is apparent.

[123] Also on 26 January Mr Cousins sent the following reply to Mr Schmidt:

"Further to your letter of 25 January 2001 I advise as follows:

1. *My client has been unable to progress the rates matter. The Bank of New Zealand's solicitor has been acquainted with the problem.*
2. *I am in the process of preparing an option and will arrange for it to be couriered to you.*
3. *The Council have agreed to consent to the registration of the transfer of the property to your clients and we are awaiting execution of the appropriate documentation.*

I am in receipt of your letter of 26 January 2001 which has been faxed to my client. I anticipate that some of the points will be unacceptable and will contact you further as soon as instructions are received."

Again, no alarm or concern about possession is expressed by Mr Cousins. Nor is there any request for undertakings after the event or indication that such undertakings had been requested verbally.

[124] The final letter of significance was sent by Mr Cousins to Mr Rennie on 29 January 2001:

"Thank you for your letter of 26 January 2001. I have now received instructions from my client. I understand that your clients have entered into possession.

In relation to the outstanding issues raised I advise as follows:

1. *Items 1, 2, 3, 4 and 9 are acceptable.*
2. *In relation to item 5 the position is still as previously related to you. My client does not have the funds to pay the rates and will not be in a position to give a credit for that amount unless an arrangement can be reached with BNZ or your client.*
3. *As far as item 7 is concerned my clients require the option to be that contemplated by the agreement for sale and purchase which was open ended as to time and without any suggestion of the option lapsing.*
4. *Item 8 is not acceptable. They require the position to remain as contemplated by the agreement for sale and purchase."*

Even though there is specific reference to the Moirs having entered into possession and to Mr Cousins having now received instructions, again no concern is expressed by Mr Cousins and again there is no reference to any undertakings having been sought after the event.

Other Evidence

[125] The other evidence that needs to be taken into account in relation to the possession issue comes from Mr Moir, Mr Rennie and Mr Lee. To a large extent Mr Rennie's evidence has been covered already.

[126] On the subject of possession Mr Moir said:

"27. Soon after 23 January 2001 I remember a meeting between Mr and Mrs Heslop and my wife and I at the property to show us how things worked. We were keen to take possession. Roger made it clear to me that he wanted to honour the deal with us. He was prepared to let us have possession even if settlement was not for a week or so. I can't remember exact details of our discussion at that time. I cannot specifically recall Mr Heslop saying that we could take possession but that this was subject to him discussing it with his solicitor. It is possible he did say something like that and I can't remember it – I can't be sure now looking back. I had the clear feeling that Roger was hanging off the words of a range of advisors."

He also said that he was not asked for any undertakings. Under cross-examination Mr Moir said he did not recall the arrangement for possession being subject to the approval of Mr Heslop's lawyer *"but I wouldn't put any credence on my memory on*

that subject". He also said, however, that if there had been any suggestion that arrangements for possession might change, he would have wanted to sort that issue out before arranging carriers.

[127] As far as Mr Rennie's evidence is concerned, it is only necessary to traverse his recollection about whether or not he had been asked to provide any undertakings. While he had no concrete recollection of having been asked to provide any such undertakings, Mr Rennie said the possibility that he might have been asked by Mr Cousins to take instructions notwithstanding that he (Mr Rennie) doubted very much that such undertakings would be provided "*rang a bell*". Mr Rennie also said that he would have expected the issue of undertakings to have been discussed by Mr Cousins if Mr Cousins knew that possession was going to be granted without settlement.

[128] Finally, brief reference needs to be made to Mr Lee's evidence. Mr Heslop said that he had rung Mr Lee and told him that he had given possession without settlement on Mr Cousins' advice. He thinks he rang Mr Lee immediately after meeting with Mr Cousins on 25 January. According to Mr Heslop, Mr Lee's response was that provided all safety measures were in place "*that was good*" because it would indicate to BNZ that they were serious about settling on time as per the agreement.

[129] Mr Lee's evidence was that he could remember discussing the issue of possession with Mr Heslop. However, he acknowledged under cross-examination that he could not recall details of what was said and he was not certain about the timing. Mr Lee also said that he remembered that Mr Heslop was very dependent on advice and was reluctant to take any steps without consulting his solicitors.

Discussion

[130] The first issue is whether the topic of possession was discussed on 25 January, as asserted by the Heslops but denied by Mr Cousins. Whose evidence is to be accepted? For the following reasons I have concluded that Mr and Mrs Heslop's evidence should be preferred.

[131] First, Mr Rennie's file notes give rise to an overwhelming inference that the possibility of possession without settlement was discussed between Mr Cousins and Mr Rennie on 22 and 23 January. The first file note refers to the fact that the funds needed to make up the shortfall would not be available until 1 February, the Heslops had moved out, they were hunting around trying to find rates, and someone associated with the purchaser (probably Mr Moir) had told Mr Rennie that they were moving in on 26 January. All of this points towards possession without settlement.

[132] The opening words of the second file note confirm that the Moirs were intending to move in on 26 January: *"We will take possession on Friday on the following terms"*. Obviously item (1), which states *"WP [without prejudice] to right to cancel"*, is only explicable on the basis that there would be no settlement. Similarly the reference in item (3) to *"Rent free: on a/c costs/interest – either side 21 days to terminate possession"* only makes sense on the basis that there would be possession without settlement.

[133] Some of the items listed under the arrow on the left hand side provide further verification that a discussion between Mr Rennie and Mr Cousins actually took place. Both Mr Rennie and Mr Cousins agreed that Stephen Bensberg's name and telephone number must have come from Mr Cousins and that the last notation

*"Estimated Set Date:
= 1st week from Feb.
= Have to find \$90K"*

must also have come from Mr Cousins. The items on the left hand side also indicate that the discussion was on the basis that there was going to be possession without settlement: the note *"No rent – entitled to possession"* could only mean possession without settlement; reference to the bank not being happy if the purchaser took possession indicates that the lawyers were conscious that the bank would not be happy if possession were given without the bank being repaid; and when the estimated settlement date of the first week of February is linked to *"possession on Friday"* the only plausible interpretation is that there was to be possession without settlement.

[134] Second, given that there had been direct discussions between both the lawyers and the parties about possession without settlement, I find it unbelievable

that the topic would not have arisen when Mr and Mrs Heslop saw Mr Cousins on 25 January. In this regard I found Mr and Mrs Heslop's evidence much more credible than the evidence of Mr Cousins. I also note that Mr Lee's evidence offers some support for Mr and Mrs Heslops' allegation that the question of possession was in fact discussed. It would be extremely odd if the matter was mentioned to Mr Lee but not Mr Cousins.

[135] Third, Mr Cousins' reaction to the fax from Rhodes & Co on 26 January adds to my scepticism about his evidence. He said Rhodes & Co's fax telling him that the Moirs were taking possession came as a complete surprise to him. But his response to that fax was to simply send a copy to Mr Heslop for his information and to write back to Rhodes & Co indicating that their letter had been faxed to his clients who he anticipated would find some of the points unacceptable. That is hardly the reaction that would have been expected if Mr Cousins had been genuinely surprised about possession having been given. I am afraid that I do not believe Mr Cousins when he says the letter came as a complete surprise.

[136] If Mr Cousins had really been unaware of the possession arrangement a strong remonstrance with Mr Heslop could have been expected, if for no other reason than to protect himself if things turned sour. And his response to Rhodes & Co would also have been quite different if, as he asserted, he had tried to extract an undertaking from the Moirs after the event. I cannot conceive that he would have failed to record in his letter that he had sought an undertaking. But there is no such record. Nor is there any file note. Although Mr Rennie thought that the request for an undertaking "*rang a bell*", he acknowledged on several occasions that he had little recollection of the transaction. Moreover, if there had been such a request I think it is likely that Mr Rennie would have made a note of it.

[137] Fourth, I do not accept that Mr Cousins genuinely believed right up to the last moment that it was going to be possible to settle on 26 January. While the letter of 25 January to the City Council indicating that settlement was to be "*completed tomorrow*" and the settlement statement on the file showing apportionments as at 26 January might point in that direction, it is significant that there is not a copy of a letter or fax forwarding the settlement statement to Rhodes & Co on Mr Cousins'

file, and the settlement statement is not included in the Rhodes & Co list of documents. I infer that the settlement statement was not sent to Rhodes & Co because Mr Cousins realised that settlement could not proceed on 26 January. Given that the settlement statement is dated 25 January and could have been expected to be sent that day, I believe that Mr Cousins was aware on 25 January that settlement would not proceed the following day.

[138] Fifth, even if I am wrong about the fourth point, Mr Cousins *should have* realised that it was not going to be possible to settle on 26 January: the mortgage had not been executed, let alone perused by the Moirs' solicitors; Warwick Heslop's funds had not come through (they did not arrive until 30 January); and the rates arrears had not been paid (they were not paid until 8 February). Mr Cousins knew, or should have known, that these impediments to settlement existed and that if possession was to be granted steps would have to be taken to protect the Heslops' interests.

[139] Sixth, the documentary evidence after 26 January further undermines Mr Cousins' version of events. On 29 January he wrote to Rhodes & Co specifically stating that he had now received instructions from the Heslops and that he understood that the Moirs had entered into possession. Yet again there is a complete absence of any reference to his concern about possession having been granted without settlement being completed.

[140] Seventh, naturally I have reflected on Mr Cousins' evidence that he always obtains undertakings before granting early settlement. I have no difficulty in accepting that up to January 2001 that had been the case. But lapses do occur, and when the evidence is taken as a whole I am quite satisfied that for whatever reason there has been a major lapse on Mr Cousins' part on this occasion.

[141] Thus I accept that Mr and Mrs Heslop raised the issue of possession without settlement with Mr Cousins on 25 January and sought his advice. Even if I had not reached that conclusion I would have still been satisfied that Mr Cousins knew from his telephone discussions with Mr Rennie that possession had been arranged for 26 January and that he knew, or should have known, that settlement could not be

achieved on that date. Either way it was incumbent on Mr Cousins to advise the Heslops about the need for appropriate undertakings.

[142] I accept that Mr Cousins failed to provide that advice. To the contrary, he left Mr and Mrs Heslop with the understanding that it would be safe to grant possession without settlement. I also accept that if Mr Cousins had advised Mr and Mrs Heslop about the need for appropriate undertakings they would have accepted his advice. The fact that Mr Heslop had considerable business experience cannot avail Mr Cousins. Mr and Mrs Heslop sought professional advice from him on this specific topic and were entitled to rely on the advice that he provided. Both Mr Moir and Mr Lee indicated that Mr Heslop was relying on advisors at the time.

[143] The final issue is whether Mr Cousins' conduct fell below the standard of care required of a reasonably competent solicitor. Even allowing for the complications in this particular case and the fact that Mr Cousins had inherited the Moir agreement, I have no doubt that his conduct fell well below the requisite standard. The expert witnesses from the legal profession were in agreement about the fundamental importance of undertakings when early possession is granted. Mr Cousins also acknowledged the importance of such undertakings.

[144] The breach pleaded in paragraph 102(i) of the amended statement of claim has been made out.

Fees Issue

[145] As earlier recorded Mr Cousins' retainer did not include any term that permitted Mr Cousins to refuse to settle the purchase transaction unless his fees had been paid in full. Moreover, there is no suggestion that on 8 February 2001 the Heslops were willing to release Mr Cousins from his retainer.

[146] Under those circumstances Mr Cousins was required to finish the work for which he had been retained unless he gave reasonable notice terminating the retainer for just cause. Non payment of fees, of course, would constitute just cause for

terminating. As was observed by Lord Esher MR in *Underwood Son Piper v Lewis* [1894] 2 QB 306 (CA) at 311:

"... a solicitor cannot throw his client over at the last moment, which might be ruin to the client, and, even though the solicitor may have good cause for declining to act further for the client, he must give him reasonable notice of his intention to do so."

This proposition is endorsed in *Dal Pont* at 3.155 and 3.160. The expert witnesses from the legal profession were also in agreement on this point and they accepted that it was important for the client not to be left in a vulnerable position.

[147] By the time closing submissions were presented counsel also appeared to be in agreement that the only issue was whether Mr Cousins gave the Heslops reasonable notice of his intention to refuse to settle the transaction unless his fees were paid in full. I accept Mr Forbes' submission that in considering this issue it is necessary to take into account all the surrounding circumstances, including the matters specifically mentioned by Mr Forbes.

Background

[148] The first invoice for \$1,411 covering services from 9 November 2000 to 30 November 2000 was rendered by Mr Cousins on 5 December 2000. In his letter accompanying the account Mr Cousins said that he hoped to be able to report further in the next few days and that he looked forward to further instructions.

[149] A second invoice for \$1,772.25 covering attendances from 1 December 2000 to 22 December 2000 was rendered by Mr Cousins on 16 January 2001. It was forwarded to the Heslops with a covering letter indicating that he would be advising BNZ's solicitor that settlement was scheduled for 23 January 2001 (I presume he meant to say 22 January 2001).

[150] The third invoice for \$2,874.63 covering attendances from 15 January 2001 to 30 January 2001 was rendered on 31 January 2001. The covering letter said:

"I am enclosing a note of my fee to date in relation to the above and look forward to your further instructions. Are you going to be able to meet legal fees independently or should this issue be raised along with the rates?"

As Mr Cousins acknowledged under cross-examination, this letter could not constitute notice to the Heslops that he would refuse to settle unless his fees were paid in full.

[151] On 1 February 2001 Mr Cousins sent a letter to the Heslops enclosing a fax from the bank setting 8 February 2001 as the deadline for settlement. Mr Cousins said in his letter:

"I am enclosing a copy of a facsimile received from Richard Smith [of Duncan Cotterill, the bank's solicitors] dated 31 January 2001. As you will notice, the Bank will withdraw its offer if settlement has not taken place by 4pm, Wednesday 8th of February 2001. The only impediments to settlement are rates and legal costs.

I suggest that I advise the solicitors acting for Moir Family Trust of the deadline. Would you please telephone to discuss this at your earliest convenience.

Please bear in mind that Waitangi day falls on Tuesday 6 February 2001 and I will be absent from the office on Monday 5 February 2001." (Underlining added)

It is the defendant's case that this letter conveyed to the Heslops that costs would have to be paid or provided for before Mr Cousins would proceed with settlement.

[152] Mr Heslop then sent a fax to Mr Cousins on 6 February 2001 which recorded, inter alia, that the Moirs wished to purchase the granny flat for \$30,000 with \$10,000 to be paid on settlement. The fax said that the \$10,000 was to be used to pay rates *"and part payment of C J Cousins' account"*. Mr Heslop also said in his fax that the BNZ Mastercard had been cancelled by the bank without notice even though it had always been paid on time by Mrs Heslop. Mr Cousins was asked whether the bank had the right to do this.

[153] The following day, 7 February 2001, Mr Cousins sent faxes to Rhodes & Co and Duncan Cotterill. The fax to Rhodes & Co asked for confirmation that the Moir trust would be purchasing the granny flat on the terms that had been indicated by Mr Heslop's fax (in the end the Moirs decided not to purchase the granny flat). The fax to Duncan Cotterill advised that the Heslops were unable to meet outstanding rates and fees amounting to \$14,966.88 and that the cancellation of the Mastercard had caused further difficulties for them. He also mentioned that the Moir trust may be purchasing the granny unit *"which would go some way towards solving this*

difficulty." (There is an allegation that this letter was sent without authority but even if that allegation was made out I do not think that in the overall context the letter was of any great significance. For that reason I do not consider the allegation any further).

[154] The same day Mr Cousins wrote to the Heslops enclosing copies of his faxes to Rhodes & Co and Duncan Cotterill. His letter also referred to outstanding costs:

"... As I understand it the shortfall is as follows:

<i>1. Rates, 68 Johns Road</i>	<i>\$7,466.80</i>
<i>Rates, 68a Johns Road</i>	<i>\$1,281.70</i>
<i>CJ Cousins Account 5/12/00</i>	<i>\$1,411.00</i>
<i>CJ Cousins Account 16/01/00 (for December)</i>	<i>\$1,772.25</i>
<i>CJ Cousins Account 31/01/01</i>	<i>\$2,874.63</i>

At present there is work in progress of \$301.00 plus GST.

In relation to the BNZ Mastercard I assume in the terms and conditions of its issue there is the right to cancel at any time. It is not unusual for a Bank to take that step. It has indicated that it does not wish to have a continuing relationship with you.

If the granny flat proposal is to proceed I will need an arrangement to meet my fee."

This letter was posted. It was not received by the Heslops until 8 February which was, of course, the date scheduled for settlement and the bank's deadline.

[155] Mr Heslop's evidence about developments on 8 February was:

"At 2.27pm I replied to a call from Clive Cousins. He told me that his fees must now be paid in full before he would allow settlement to take place. I told Mr Cousins I could probably arrange \$1,000 now and the balance over two months. He said he would need full payment of fees before settlement would proceed. I then reminded Mr Cousins that we had discussed his fees on 18 December 2000. I also said that we would pay all reasonable fees within a fair period of time and that we had paid all our accounts over the last 25 years. I asked him to provide a breakdown of his costs. I told him I was in shock at the fees he was charging. He said that if he didn't get paid he might never get paid.

At 2.38pm I rang Mr Cousins again. I begged him to settle and asked him to please take the bank seriously as I knew how unpredictable they could get."

He went on to say that he had no problem with the first and second invoices but the third invoice was much higher than he was expecting for that period. He wanted a breakdown of the work done and how the fees were calculated.

[156] Mr Cousins did not dispute that he had adopted a hard line on 8 February. Under cross-examination the following exchange took place:

“Q. And on 8 February Mr Heslop told you he would pay your reasonable fees within a fair period of time and he offered you \$1,000 that day.

A. He did but I, I told him those arrangements were not acceptable to me. I made it clear I required my fees to be accommodated in the settlement. I had had a number of unpaid invoices. There were no attempts to pay anything on account so the only way in which I could see I would be paid was to take a hard line and require payment before settlement otherwise I would be relegated as Mr Bailey as to the long queue of creditors.”

Thus there is no dispute that Mr Cousins required payment in full before he would complete settlement and that he rejected Mr Heslop’s offer of a payment of \$1,000 that day.

Discussion

[157] I am satisfied that Mr Cousins did not give reasonable notice to the Heslops of his intention to refuse to settle on 8 February unless his fees were paid in full. In reaching that conclusion I have taken into account all the surrounding circumstances mentioned by Mr Forbes.

[158] When Mr Cousins initially took on the retainer he was aware that the Heslops were in serious financial difficulty. By the time the retainer was expanded to include the conveyancing aspect on 22 December this would have been even more obvious to him. He would have also known by that time that the first invoice rendered around six weeks earlier was outstanding, but the issue was not raised.

[159] It was not until the third invoice was rendered on 31 January that any issue was raised by Mr Cousins about the Heslops’ ability to meet legal fees. As already mentioned, Mr Cousins accepted that this would not constitute reasonable notice of intention not to settle unless paid in full. His counsel did not attempt to argue otherwise, but rightly pointed out that the fact that Mr Cousins raised the issue of fees in his letter forms part of the surrounding circumstances that need to be taken into account.

[160] It is claimed by the defendant that the letter of 1 February indicating that legal costs were an impediment to settlement provided reasonable notice. I cannot accept that proposition for three reasons.

[161] First, by no stretch of the imagination could it be said that the notice was “*reasonable*” in the sense that it properly warned the Heslops that Mr Cousins would refuse to settle if his fees were not paid in full. Given the earlier history and potential consequences Mr Cousins was obliged to warn the Heslops in clear and unequivocal terms that he would not settle unless his fees were paid in full. That was certainly not the case here.

[162] Second, the notice could not be said to be “*reasonable*” in the sense of giving timely notice to the Heslops. It was sent only four working days before the deadline imposed by BNZ. Mr Cousins knew that the Heslops were already struggling to find outstanding rates. In all the circumstances, particularly the fact that the invoice for \$2,874.63 (which had almost doubled the outstanding fees) had only been rendered the day before, a much longer period of notice was required. The inevitable result was that the Heslops were left in an extremely vulnerable position, the very thing the experts agreed should not happen.

[163] Third, even if the letter of 1 February had represented reasonable notice, the effect of that notice might have been neutralised by Mr Cousins’ indication in his letter of 7 February that he would need “*an arrangement*” to meet his fee. To most people this would convey the impression that Mr Cousins was prepared to entertain some sort of plan for the payment of his fee. I acknowledge, however, that this point is not particularly strong because Mr Heslop might not have received the letter before being told by Mr Cousins over the telephone that he would not settle unless his fees were paid in full.

[164] One of the worst features of Mr Cousins’ conduct is that on Mr Heslop’s evidence, which I accept, it was not until the afternoon of 8 February that Mr Cousins told the Heslops that he would not settle unless his fees were paid in full. The bank’s deadline was 4pm. Mr Heslop said that he had spoken by telephone with Mr Cousins at 10.03am and 11.05am. Given the bank’s deadline and the fact that the

funds required to complete settlement were in his trust account, it was particularly callous of Mr Cousins to leave it so late before raising the fees issue with Mr Heslop.

[165] I conclude that Mr Cousins was required to give reasonable notice of his intention to refuse to settle if his fees were not paid in full, he failed to do so, and that the plaintiffs have proved the allegation in paragraph 94(d) of the first amended statement of claim. I could have equally easily found for the plaintiffs under paragraph 102(d).

Mortgage Issue

[166] It is alleged that Mr Cousins' handling of the second mortgage component of the transaction was incompetent and in breach of his duty of care. To a large extent this issue can be resolved on the documentary record.

Background

[167] In terms of clause 17.0 of the Moir agreement Mr Cousins, as the vendors' solicitor, was to prepare the second mortgage. It was expressly provided that clauses 17.1-17.4 were to be incorporated in the mortgage.

[168] Once he received instructions to act on the conveyancing Mr Cousins wrote to the Moirs' solicitors on 22 December 2000 advising that he had been instructed to act and that it would be necessary for their respective clients to agree to some "*variations*" to the contract: first, the change of the settlement date to 22 January and, second, that "*the interest in the orchard lot will be assigned by the Heslops to a trust ...*" which would hold the second mortgage. Strictly speaking neither of these required a variation to the Moir agreement. In terms of the settlement notice the Heslops had until 23 January to settle. And the option to purchase secured by the mortgage was to the Heslops "*or their nominee*". But in the overall context these are not matters of any particular significance.

[169] On 17 January 2001 Mr Rennie wrote to Mr Cousins noting that settlement was to be on 22 January and asking Mr Cousins to forward the second mortgage for perusal. Then settlement was put back to 26 January. When writing to Mr Cousins

on that date Mr Rennie again reminded Mr Cousins that he would need to provide the second mortgage for approval and execution.

[170] When settlement could not be effected on 26 January the next scheduled settlement date (as a result of the bank's deadline) was 8 February. Mr Cousins posted the second mortgage to Rhodes & Co that day. It is common ground that it did not arrive until the following day, 9 February.

[171] While the mortgage was, as required, on the standard form published by the Auckland District Law Society, it included the following special conditions:

"1. Notwithstanding any other provisions in this mortgage the mortgagor agrees that it will not transfer the said land without first obtaining the agreement of the transferee to be bound by the provisions of Clauses 17.0, 17.1, 17.2, 17.3 and 17.4 of an agreement for sale and purchase between the mortgagor and JR and JR Heslop dated 6 August 2000 ("the agreement").

2. Notwithstanding any other provisions in this mortgage the mortgagee shall not be required to discharge this mortgage until a separate certificate of title is available for the "orchard lot" as defined by Clause 17.2 of the agreement."

Special condition 2 was new. It had not been signalled in the Moir agreement or in any correspondence.

[172] On 12 February Rhodes & Co responded to the mortgage document and various other matters. In relation to the mortgage document they said:

"We comment in respect of your mortgage and in respect of the transaction generally as follows:

Mortgage

- (a) The mortgage incorrectly records all the land comprised in CT 30F/277 as being the secured property. Our letter dated 16 January 2001 records that the second mortgage is to be secured over the Orchard Lot only.*
- (b) Special condition 2 of the mortgage is unacceptable. That restriction is not included in the Agreement.*
- (c) There is no need to include special condition 1 of the mortgage. The Agreement records the position clearly enough.*

...".

Given that there was only one title for both the lifestyle and orchard lots, requirement (a) is difficult to understand and, it seems, was ultimately abandoned by Rhodes & Co.

[173] On the other hand, special conditions 1 and 2 led to further exchanges between the solicitors. In their letters of 21 and 28 February Rhodes & Co challenged the special conditions. On 2 March Ms Fleck dismissed those concerns. Rhodes & Co continued the debate in their fax of 5 March in which they required all outstanding matters to be resolved that day.

[174] In the end Mr Heslop intervened. On 6 March 2001 he instructed Mr Cousins by fax to accept the Rhodes & Co comments regarding the drafting of the second mortgage.

Discussion

[175] In essence the plaintiffs' allegations concerning the mortgage come down to accusations that Mr Cousins breached his contract of retainer and/or was negligent in two respects: first, by failing to act with sufficient speed in the preparation of the document and forwarding it for perusal; and, second, that the document itself was, as Mr Parker and Ms Cooke put it, "*woefully inadequate*".

[176] It must be beyond argument that the mortgage document should have been prepared and forwarded for perusal much earlier. The expert witnesses were in agreement that it was not satisfactory for a mortgage document to arrive at the mortgagor's solicitors the day after settlement. Given that the mortgage was securing an option and was thereby not entirely a standard form document, commonsense indicates that it should have been forwarded well before settlement date to enable any drafting issues to be resolved.

[177] To make matters worse, Mr Cousins had effectively ignored the requests from Rhodes & Co on 17 and 26 January for a mortgage to be sent for their perusal. By that time the Moirs' settlement notice had expired and the BNZ had imposed a deadline for settlement on 8 February 2001, which was effectively the third date

proposed for settlement. This made it doubly important for Mr Cousins to comply with the requests to supply a mortgage for perusal. The last thing this transaction needed was unresolved issues about the drafting of the mortgage. Under cross-examination Mr Cousins could not offer any satisfactory explanation for leaving it until 8 February before sending the mortgage for perusal.

[178] As to the contents of the mortgage, it was Mr Eades' view that the mortgage was at least a "*sufficient and workmanlike document*" having regard to the terms of the agreement. Neither Mr Greenwood nor Mr Nowland shared that view. As I see it, the problems that arose would have been avoided if Mr Cousins had simply followed the direction in the Moir agreement and inserted clauses 17.1 to 17.4. Instead he modified those clauses (in his special condition 1) and inserted a special condition 2 which was intended to guard against a risk that I believe was virtually non-existent.

[179] It is, however, easy to be critical of drafting after the event and I would not be prepared to categorise Mr Cousins' drafting of the mortgage as of such a standard that he either breached an implied term of his retainer or was negligent. On the other hand, the fact that there were drafting issues illustrates the importance of sending the mortgage for perusal well before settlement date. Had Mr Cousins done so the drafting issues could have been resolved and the mortgage would have been signed before 8 February.

[180] I am satisfied that in all the circumstances Mr Cousins failed to act with sufficient speed in relation to the mortgage and that this was a gross error of judgment falling well below the standard that could be expected of a reasonably competent solicitor. The allegation in clause 102(b) of the amended statement of claim has been made out.

Failure To Release Funds

[181] While this allegation is reflected in all the causes of action, the focus is on the third and fourth causes of action which allege breaches of fiduciary duties and trust

obligations. Again, the underlying factual issues are not in dispute. Rather, the issue is whether Mr Cousins was lawfully entitled to adopt the course that he did.

Background

[182] When Mr Cousins refused to settle on 8 February he was holding \$90,000 in his trust account. Later that figure grew to \$95,500 as a result of a further payment from Warwick Heslop.

[183] After Mr Cousins refused to settle the Heslops went to Mr Lee for advice. On 16 February 2001 Mr Lee wrote to Mr Cousins:

"We return to our telephone conversation of today. As you are aware, we are also acting for Mr Heslop.

It appears that the settlement with the Bank of New Zealand has come to an impasse due to the dispute over payment of your fees. We note your comment to the effect that you are not prepared to do further work for Mr Heslop until some satisfactory arrangement has been entered into.

Mr Heslop now requires you to forward to us no later than 5.00pm on Monday 19 February 2001 all funds currently being held in your Trust Account on Mr Heslop's behalf. Payment is to be made by way of bank cheque.

We understand that you have also received \$5,500 from Bates Edgar Polson (Michael Rattray). That money is to be returned to Bates Edgar Polson.

In terms of payment of your costs, Mr Heslop requires an itemised invoice. We will come back to you shortly thereafter with Mr Heslop's proposal as to payment of this.

You will note that Mr Heslop has signed at the foot of this letter, which authorises you to make the payment to us as set out above."

Mr Cousins replied on 19 February. He said that he took Mr Lee's letter as "*repudiation of the contract of retainer which is accepted*" and that prior to releasing any funds he needed "*authorities that would meet audit requirements*". He also said that he would be retaining by way of set off the amount of his outstanding fees.

[184] Two days later Mr Lee replied saying:

"Thank you for your letter of 19 February 2001 with trust account printouts attached.

With reference to Mr Heslop's fax to you of 19 February 2001, there is clearly a dispute with regard to your costs both in terms of quantum and in relation to the timing of payment.

You were at all times aware that the sums totalling \$95,500 were paid into your trust account specifically to enable the settlement with the Bank of New Zealand to proceed and for no other reason. For that reason alone, you are not entitled to deduct your costs from those funds without the appropriate authorities.

Further, you will be aware that the Canterbury District Law Society has received a written opinion from a Barrister which states quite clearly that the Law Practitioners Act does not entitle a practitioner to deduct costs without specific written authority from the client.

We refer you to paragraph 6.17 of the Solicitors' Trust Account Rules 1996 which states that in every case you have an obligation to pay trust money only as the client directs. In this case the client's instructions are quite clear and unequivocal, namely that the funds are to be paid in full across to ourselves.

You are correct that the appropriate authorities must be obtained and forwarded to you and we are currently attending to this.

We will require the funds to be forwarded to us as soon as the authorities are ready. If you fail to make payment to us in full without deduction of your costs, we will regard you as being in breach of the Solicitors' Trust Account Rules 1996 and Rule 5.01 of the Rules of Professional conduct. The matter would then be referred to the Law Society."

The following day (22 February) an authority to send the funds to Mr Lee (signed by the Heslops, the trustees of the trust, Mr and Mrs Smith and Warwick Heslop) was faxed to Mr Cousins. The authority stated that he was not authorised to deduct any costs.

[185] Mr Cousins replied the same day saying that he did not intend to deduct any costs, but was only holding the funds by way of set-off. He also said that he had a lien. The funds remained in his trust account.

[186] With assistance from Mr Bailey the impasse about fees was resolved on 26 February. It was agreed that Mr Cousins would deduct \$3,000 for costs and that he would proceed to settle the Moir agreement. After payment of the agreed amount towards his fees the sum held in Mr Cousins' trust account was reduced to \$92,500. On 27 February 2001 Mr Lee asked Mr Cousins to send the sum of \$2,500 that would not be required for settlement to Mr and Mrs Smith's solicitors. This was not actioned.

[187] When settlement of the Moir agreement did not eventuate Mr Cousins was instructed by Mr Lee on 26 March 2001 to send to Mr Lee the funds that he was holding in his trust account, less the agreed deduction of \$3,000 for fees. However, instead of complying with this instruction Mr Cousins sent the funds held *less all his fees* totalling \$10,356.86 (which included two further accounts that had been rendered on 26 and 30 March 2001).

Liens/Set Off

[188] The defendant claims that he had a right of lien and/or set off over the funds in his trust account. He relies on paragraph 69 of the *Law Practitioners* chapter of *The Laws of New Zealand* and on paragraphs 57 and 72 of the *Set-Off and Counterclaim* chapter of the same publication. Reliance is also placed on *Loescher v Dean* [1950] 1 Ch 491, *Atkinson v Pengelly* [1995] 3 NZLR 104, *Dal Pont* (1st edition) at p332 and Mr Eades' evidence that the funds received into Mr Cousins' trust account were not necessarily earmarked for payment only to BNZ.

[189] Those propositions are rejected by the plaintiffs. They claim that the defendant's arguments overlook the well established principle that there is no right of lien or set off in respect of monies paid into a trust account for a particular purpose (in this case, repayment of BNZ). They rely on *Cordery on Solicitors* at paragraph E692 and on various authorities. Their argument is that the law of set off is consistent with the law relating to liens. *Skeggs v Guest & Anor* (High Court, Dunedin Registry, CP6/99, 16 June 1999, Master Venning) is cited to support that proposition. They claim that the authorities cited by the defendant are distinguishable.

[190] In my view the plaintiffs are right. A solicitor has no lien or right of set off if funds have been deposited into the solicitor's trust account for a *particular purpose*. In that situation the solicitor is obliged to use the funds for the particular purpose for which the funds have been entrusted to the solicitor. That proposition is expressly recognised in *Dal Pont* at 16.40. In *Re Wright* (1984) 1 FCR 51 Beaumont J expressed the matter in this way:

"Where a money is paid to a solicitor for a particular purpose so that the solicitor becomes a trustee of that money, the solicitor's lien will not attach to the money unless it is allowed to remain in the solicitor's hands for general purposes with the client's express or implied consent after the particular purpose has been fulfilled or has failed ...thus in such cases, a threshold question, essentially one of fact, arises as to whether the moneys were paid to the solicitor of a specially designated purpose on the one hand or were merely paid to him "in the ordinary course of his business as solicitor for the client" on the other."

Young J expressed similar views in *WFM Motors Pty Ltd v Maydwell* [1994] ANZ Conv R 454 at 459.

[191] On the other hand, there does not appear to be any authority for the wider statement in *The Laws of New Zealand* which seems to indicate that a lien or set off is available whether or not the funds are held in the trust account for a particular purpose. That text relies on *Loesher v Dean* to support its proposition. However, in that case Harman J specifically recorded at 495:

"... here the money was not entrusted to the solicitor for any specific purpose : it was paid to him in the ordinary course of his business as solicitor for the client. He receives it as the client's agent, as does any other solicitor, and he pays it into the client account as he is bound to do."

It was also suggested by counsel for the defendant that *Atkinson v Pengelly* supports the wider statement in the *Laws of New Zealand*. But that case involved a contest between a solicitor and a barrister for money held in a trust account. There was no suggestion that the money had been received into the trust account for a specific purpose. Moreover, when Tipping J commented that a solicitor has a lien over money in his trust account, he relied on *Loescher v Dean* as authority.

[192] So the issue in this case is whether or not the \$95,500 was held for a particular purpose. If so, a lien and/or set off was not available. If not, a lien and/or set off was available. Before resolving that factual issue another matter of law requires brief consideration.

Deduction Of Costs

[193] The issue is whether a solicitor who has rendered an account is entitled to deduct his or her fees from funds held on behalf of the client in the trust account even though the client directs that this is not to happen. The relevant provisions are

s89 of the Law Practitioners' Act 1982 and Regulation 8 of the Solicitors' Trust Account Regulations 1998.

[194] Section 89 of the Law Practitioners' Act relevantly provides:

"Solicitor to pay client's money into trust account at bank - (1) All money received for or on behalf of any person by a solicitor shall be held by him exclusively for that person, to be paid to that person or as he directs and until so paid all such money shall be paid into a bank account in New Zealand to a general or separate trust account of that solicitor.

The underlining has been added to highlight the words that are of particular relevance in the context under consideration.

[195] Regulation 8 of the Solicitors' Trust Account Regulations provides:

"8. Restriction on debiting trust accounts with fees- (1) No trust account may be debited with any fees of a solicitor (except commission properly chargeable on the collection of money and disbursements), unless-

- (a) A dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or*
- (b) An authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.*

2. If fees are debited under subclause (1) (a) before an invoice is delivered or posted to the person liable for payment or to that person's solicitor, an invoice must be delivered or posted to that person or to that person's solicitor immediately after the fees are debited."

As I understand it, the defendant considers that this regulation effectively provides a code which enables fees to be deducted once an account has been rendered regardless of the client's directions.

[196] In my view the defendant's proposition is untenable. It is clear from s89 that a client's direction is fundamental and must be obeyed. Regulation 8 is subordinate to that requirement and cannot override it. Thus even if an account is rendered a solicitor is not entitled to deduct his or her costs from funds held in the trust account if the deduction would be contrary to the client's direction. This is consistent with guidelines issued by the New Zealand Law Society in 1998. Clause 6.16 of these guidelines provides that solicitors' fees may be transferred from trust funds once an

invoice has been issued *but* clause 6.17 makes it clear that in every case a solicitor is still obliged to comply with the client's directions.

Conclusions

[197] The whole purpose of obtaining \$90,000 from Warwick Heslop was to bridge the gap between the settlement proceeds of the Moir agreement and the amount required to repay the BNZ mortgage. Without these additional funds BNZ would not release its mortgage and the Moir agreement could not be settled. Every cent was required. Indeed, when Warwick Heslop could only supply \$79,000 it was necessary for the Smiths to make up the shortfall on a temporary basis until the balance of Warwick Heslop's funds came through. All of this was known to Mr Cousins when he received the funds into his trust account.

[198] In my view this is a clear case of trust monies being held in the trust account for a particular purpose, namely, to pay BNZ so that its mortgage could be released and the Moir agreement settled. It is not disputed that Mr Cousins owed his clients a fiduciary duty. The urgency of the situation was known to Mr Cousins. By withholding the funds despite clear directions from Mr Lee on 21 February 2001 (those directions having been supported by appropriate client authorities the following day) Mr Cousins breached his fiduciary obligations.

[199] As to the deduction of costs from funds held in his trust account, there can be no doubt that Mr Cousins was entitled to deduct the \$3,000 because that was part of the agreement with the Heslops. He was not, however, entitled to deduct any other costs because the authority from his clients specifically stated that he was not entitled to do so. While this also constituted a breach of Mr Cousins' fiduciary obligations, I am not sure that it has been pleaded and in any event I do not think it resulted in any loss because by that time the damage had already been done and the Moir agreement had been lost.

[200] The third cause of action has been made out. I do not find it necessary to consider the fourth cause of action.

Remaining Issues

[201] The remaining allegations revolve around two matters. First, a letter that Mr Cousins sent to the bank's solicitors on 9 February, it being alleged that this was sent by Mr Cousins without authority. Second, Mr Cousins' failure after 8 February to proceed towards a settlement of the Moir agreement with sufficient diligence and speed before BNZ withdrew and the agreement was ultimately cancelled by the Moirs.

Background

[202] I begin with the letter written by Mr Cousins to the bank's solicitors on 9 February:

"I refer to my telephone conversation with Mr Smith of yesterday in which I requested an extension to complete settlement. As advised, I am holding the funds that Mr and Mrs Heslop needed to contribute in my trust account. However, in terms of my letter of 7 February 2001 there is now a \$6,000.00 shortfall. It is proposed that this amount will remain due and owing by Mr and Mrs Heslop to be repaid within 12 months. Please advise if this is acceptable to the Bank."

Although a copy of the letter was sent to the Heslops, they allege that it was written without their knowledge or authority.

[203] Mr Cousins rejects that allegation. He said that he had discussed the matter with Mr Heslop who had earlier agreed to putting a similar proposal to the bank in relation to the rates arrears and that Mr Heslop had agreed to this letter being sent. He also said that Mr Heslop had not raised any query about the letter after a copy had been sent to him.

[204] After receiving a copy of the letter Mr Heslop sent a fax direct to Duncan Cotterill, the bank's solicitors, on 11 February. In that fax he advised that the funds needed to settle had been in Mr Cousins' trust account since 30 January 2001, outstanding rates had been paid, the purchaser was ready to settle by 2pm on 8 February 2001, Mr Cousins had been advised that any reasonable fee would be paid within a fair period of time, and Mr Cousins had been asked for a breakdown of costs.

[205] I will return to the issue of whether the letter of 9 February was sent without authority. From this point the background covers matters that are relevant to whether Mr Cousins failed to proceed towards settlement of the Moir agreement with sufficient diligence and speed.

[206] For present purposes the next significant development was Mr Cousins' letter to the Heslops of 15 February advising them:

"I am not prepared to undertake any further work (apart from forwarding to you any correspondence received) until the fees which have been rendered are paid."

Apart from sending a settlement statement and corresponding with Mr Lee about the fees issue, Mr Cousins effectively acted as a mail box from that time until agreement about fees was reached on or about 26 February.

[207] On 27 February Mr Lee sent a fax to Mr Cousins saying that the Heslops and himself would like to try and delay settlement with the bank until the debtor's proposal had been approved by Master Venning. The fax said that the approval was expected *"any day now"*. The same day Mr Lee also sent a fax to Duncan Cotterill with a similar proposal. While I reject Mr Heslop's assertion that these letters were not authorised, I accept that they did not in fact assume any particular significance because, as we will see, the proposal to delay settlement was summarily rejected by the bank through Duncan Cotterill the following day.

[208] Duncan Cotterill's response was that the bank was most concerned about the ongoing delays and that they had been instructed to set a final deadline for settlement of the transaction for midday 5 March 2001. Unfortunately Mr Lee did not pass this notification on to Mr Cousins. In the end result, however, this was not a critical omission because, as will be mentioned in a moment, a specific deadline was given to Mr Cousins by Mr Lee coupled with an instruction to liase with Mr Smith of Duncan Cotterill. If Mr Cousins had followed that instruction and liased with Mr Smith he would have become aware of the deadline.

[209] The same day Rhodes & Co faxed Mr Cousins:

"We refer to our letter dated 21 February 2001.

We have not received a response to that letter. In addition, the writer has attempted to telephone you to discuss and has left messages on 26th and 27th February 2001. Those telephone calls have not been returned.

Would you please advise as soon as possible when you consider settlement will be able to take place. We note that only a few matters remain outstanding.

We have heard some suggestion that you may no longer be acting. If that is the case, please advise urgently and let us having details of Mr Heslop's new solicitor if that information is known to you."

In their letter of 21 February Rhodes & Co had listed six matters that they considered were preventing settlement of the Moir agreement. As mentioned earlier (para [87], Mr Cousins originally claimed that he was in Auckland on 26 and 27 February but subsequently acknowledged that he was in fact in Christchurch on those days.

[210] Like the Moirs and the bank, the Heslops were also growing extremely anxious about the delays, especially given the deadline of 5 March imposed by the bank for settlement. On 2 March Mr Lee sent a fax to Mr Cousins conveying that:

"Roger's instructions are to settle with BNZ without delay. Please liase with Richard Smith of D.C. and ensure settlement occurs today.

In a letter written to the Heslops the same day Mr Cousins said that he had been in contact with Rhodes & Co in an endeavour to achieve settlement but that three obstacles were preventing settlement: arrears of rates of \$176.50; terms of the mortgage; and the breach remedy clause. The letter concluded by saying that Mr Cousins was awaiting advice from the Moirs' solicitors as to their clients' position and that as soon as they were ready to settle he would approach the bank's solicitors.

[211] Early on the morning of 5 March Mr Heslop faxed Mr Cousins with the rates receipt and advised that they were prepared to accept 45 days notice to remedy any rates breach (the Moirs' proposal was 14 days) and that *"Both the Moirs & Heslops would like to see Devondale settlement today"*. Later that morning Mr Cousins received a fax from the Moirs' solicitors saying that the Moirs understood that the Heslops had agreed to a default period of 28 days for any rates breach to be

remedied. They also raised an issue about a “*cluster deed*” and continued the debate about the terms of the mortgage. The fax concluded:

“All outstanding matters must be resolved by 4.00p.m. today 5 March 2001. If not, our clients intend to make alternative arrangements to complete the purchase, including, if necessary, dealing direct with the BNZ.”

After receiving that fax Mr Cousins’ office made three unsuccessful attempts to fax to the Heslops a copy of the Rhodes & Co fax (and a covering letter from Mr Cousins to the Heslops). These attempts were unsuccessful because Mr Cousins’ office was using an obsolete fax number even though it had used Mr Heslop’s current number on previous occasions. Eventually the fax and Mr Cousins’ covering letter were posted to the Heslops. There does not appear to have been any attempt to telephone the Heslops.

[212] In his covering letter Mr Cousins said that he had been rung by Mr Lee that morning “*to check progress*” and that Mr Lee was going to let him know about the cluster deed. At 12.42pm on 5 March Mr Lee advised that the cluster deed had not operated for some years. Five minutes later Duncan Cotterill sent a fax to Mr Lee advising that the bank’s deadline had passed and that the bank now considered itself free to sell the property.

[213] The following morning Mr Heslop confirmed to Mr Cousins by fax that there was in fact agreement about the 28 day period for the breach remedy clause. He also instructed Mr Cousins that they accepted Rhodes & Co’s comments regarding the second mortgage. There is also a file note by Mr Smith on the Duncan Cotterill file recording that Mr Cousins had rung and advised that he was not aware of the deadline. The file note records that Mr Cousins had asked “*what if could settle today, would BNZ agree*” and that Mr Smith had responded “*I can only ask*”. Mr Smith had also noted that Mr Cousins had indicated “*don’t do anything until he gets back to me confirming can settle*”. For some inexplicable reason Mr Cousins did not come back to Mr Smith.

[214] It was not until 4.59pm on 7 March that Mr Cousins faxed Rhodes & Co and advised that a 28 day default period and the Rhodes & Co provisions as to the

mortgage were accepted. An amended settlement statement was also included. But still there was no settlement.

[215] In a fax sent on the afternoon of 8 March Rhodes & Co said that they were concerned that there was no rates undertaking in the settlement statement. They also indicated that they required written confirmation that the trustees of the trust agreed to be bound by the time limit for the exercise of the option and the default remedy period of 28 days. Fresh mortgage documents were also requested. The fax set a new deadline of 4pm that day for all matters to be resolved. Mr Cousins' legal executive responded that day indicating that Mr Cousins' firm was not prepared to give the undertaking and suggesting that Rhodes & Co might like to verify that the rates had been paid for themselves. A signed document confirming the trustees' agreement was faxed to Rhodes & Co on 12 March.

[216] Behind the scenes there were discussions and correspondence between the bank's solicitors and the Moirs' solicitors. The bank's solicitors expressed concern that they had not heard from the Heslops or their solicitors and noted that the deadline had expired. They indicated that the bank was prepared to sell the entire property to the Moirs for \$750,000. However, in a fax of 13 March the Moirs' solicitors said it *"remains the strong desire of our clients to complete the transaction with the Heslops"*. They said their clients had sympathy for the Heslops' position and were hopeful that the Heslops would be able to complete settlement. The response from the bank's solicitors was that the arrangements with the Heslops were at an end and unless the Heslops were able to repay their mortgage in full prior to the bank selling the property the bank intended to proceed with a sale of the property.

[217] So even at this late stage there was still a glimmer of hope that the situation could be retrieved. But an issue about whether rates should be apportioned as at the date of settlement or the date of possession had cropped up. In his settlement statement Mr Cousins had shown apportionments as at the date of possession. Rhodes & Co claimed that rates should be apportioned at the date of settlement. According to the Heslops, Mr Cousins had no authority to pursue this issue. They had already paid the rates to 31 March 2001, the amount involved was only around \$590, and they were desperate to settle. Although Mr Cousins disputes this, I accept

the Heslops' evidence. At this stage there was no need for the rates apportionment issue to be debated and Mr Heslop's evidence is entirely consistent with documentary evidence showing that he desperately wanted the transaction to be settled.

[218] Even as late as 14 March 2001 Rhodes & Co were obviously still contemplating that it might be possible to complete settlement. In a fax on that date they said they were in funds and required advice as to when settlement could take place. Two days later Mr Cousins wrote to the bank's solicitors and confirmed that the Heslops "*stand ready, willing and able to settle*". But the bank had had enough and it was not prepared to entertain any proposals. And on 28 March 2001 the Moirs cancelled the Moir agreement. The end had come.

Discussion

[219] The first issue is whether the letter of 9 February was sent without the Heslops' knowledge or authority. There is little in the way of documentary evidence that is capable of resolving the conflict of evidence about whether the Heslops gave prior approval to the letter. There do not appear to be any file notes. All we have is the correspondence. The issue is finely balanced.

[220] The Heslops are able to point to the fax sent by Mr Heslop to Duncan Cotterill as an indication that they did not agree with the contents of Mr Cousins' letter and felt compelled to write direct to the bank's solicitors for the purpose of putting the record straight. They can also point to their extremely vulnerable position vis a vis the bank and to their concern that it would be dangerous to rock the boat by asking the bank to fund Mr Cousins' fees.

[221] For his part Mr Cousins can point to the fact that there was no written response by Mr Heslop to him, or to anyone else, asserting that the letter had been sent without authority. His position is that if the letter had been written without authority it is inconceivable that there would not have been some form of response, either written or verbally, from Mr Heslop complaining that he had acted without authority.

[222] Having considered these arguments I have concluded that the plaintiffs have failed to prove their allegation. I reject it accordingly.

[223] Now I turn to the allegation that Mr Cousins failed to act with sufficient diligence and speed post 8 February 2001. This allegation needs to be placed in context. From the time that Mr Cousins had become involved there had been a series of deadlines. With the exception of the bank's deadline of 5 March 2001, all the deadlines were known to Mr Cousins: a settlement notice requiring settlement by 23 January 2001; the BNZ deadline of 8 February; the direction from the Heslops through Mr Lee to settle on 2 March; Mr Heslop's email on 5 March saying that the Moirs and Heslops would like to settlement that day; and the Moirs' solicitor's advice that all outstanding matters had to be resolved by 4pm on 5 March. As each deadline passed it became even more imperative to act with speed.

[224] Under different circumstances the delays that arose might not have assumed the importance that they did in this case. In this case every delay post 8 February was critical. From 8 February Mr Cousins adopted a hard line about his fees and declined to settle or to take further steps until he was paid. Between 8 and 26 February there was virtually no progress towards settlement because the Heslops and Mr Cousins were distracted by the fees issue. To make matters worse Mr Cousins failed to release the funds to Mr Lee so that Mr Lee could complete settlement and Mr Cousins' actions effectively forced the Heslops into a position where they had little option other than to negotiate an arrangement with Mr Cousins.

[225] By the time the fees issue was resolved vital time had been lost and it was even more critical for there to be no further delays. But there were. Rhodes & Co complained about Mr Cousins' failure to respond to one of their letters and his failure to respond to messages that had been left for him. Even as late as 5 March the issues standing in the way of settlement could have been resolved by urgent action on the part of Mr Cousins (provided, of course, the mortgage had been sent for perusal at the proper time). But Mr Cousins failed to respond to the urgency of the situation and even became involved in a debate about rates apportionment.

[226] In all the circumstances the accumulated delays from 8 February 2001 were unforgivable and Mr Cousins' failure to act with the requisite speed constituted a further breach of his duty towards his clients. The allegation in clause 102(b) of the amended statement of claim has been made out.

Summary

[227] I am satisfied that the plaintiffs have proved that the defendant:

- Being aware that the Moirs were going to take early possession, failed to properly advise the Heslops about the need for an undertaking that would ensure that the Moirs would settle once the Heslops were able to settle.
- Wrongly refused to settle the Moir agreement on 8 February 2001 unless his fees were paid in full.
- Failed to act with appropriate diligence and speed in the preparation of the mortgage securing the option over the orchard lot.
- Wrongly claimed a lien/set off over funds held in his trust account.
- Refused to release the funds held in his trust account after he had been instructed to do so and provided with appropriate authorities.
- Failed after 8 February 2001 to act with appropriate diligence and speed to complete all matters necessary to effect settlement of the Moir agreement.

PART III

CAUSATION

Introduction

[228] It is Mr Cousins' case that even if one or more of the causes of action are made out his actions or omissions were not causative of any of the losses that are alleged to have been suffered by the plaintiffs. Three main reasons were advanced: first, at all relevant times there were other obstacles to settlement of the Moir agreement; second, Mrs Heslop was in a financial position to pay Mr Cousins' fees on 8 February 2001; and, third, Mr Heslop would have been adjudicated bankrupt even if the Moir agreement had not been cancelled.

[229] I will begin by briefly traversing relevant causation principles. Then I will address the three arguments referred to above.

Principles

[230] The plaintiffs are, of course, required to prove on the balance of probabilities that the defendant's breaches were causative of their loss. Where multiple causes arise it is a question of whether the defendant's conduct was a contributing cause in the sense that it materially contributed to the plaintiff's harm. These propositions are well established: see *Todd, Law of Torts in New Zealand* (4th edition, 2005) at Chapter 21 and *Dal Pont* at 4.130 – 4.140.

[231] As observed by Tipping J when delivering the judgment of the Court of Appeal in *Price Waterhouse v Kwan* [2000] 3 NZLR 39 at [28]:

[28] There is a material, indeed a crucial difference between causing a loss and providing the opportunity for its occurrence. The line between these concepts can often be difficult to draw but the distinction is vital. The point was addressed in the judgments delivered in this Court in Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Coopers & Lybrand [1996] 1 NZLR 392. Plaintiffs in this field must show that the defendant's act or omission constituted a material and substantial cause of their loss. It is not enough that such act or omission simply provided the opportunity for the occurrence of the loss. The concept of materiality denotes that the act or omission must have had a real influence on the occurrence of the loss. The concept of substantiality denotes that the act or

omission must have made a more than de minimis or trivial contribution to the occurrence of the loss. Looking at the question in this dual way is both a reminder of the difference between opportunity and cause, and a touchstone for distinguishing between them. In some instances the words used have been material or (as opposed to and) substantial. It is preferable, for the reasons just mentioned, to focus on both concepts for they are each relevant to causation issues. No form of words will ultimately provide an automatic answer to what is essentially a question of commonsense judgment."

The importance of the distinction between providing an opportunity for a loss to occur and actually causing the loss was emphasised by counsel for the defendant. They contend that at worst the defendant's actions only provided an opportunity for a loss to arise and did not actually cause any loss.

[232] If it is established that the defendant's actions or omissions caused the plaintiffs' loss it is still necessary to consider whether the loss is too remote. *Todd* at 21.4 puts the matter on the basis that the objective is to ascertain whether the link between the defendant's conduct and the ensuing damage is such that it is reasonable as a matter of policy that the defendant should pay. Given Mr Cousins' role and the information available to him from the outset, remoteness is unlikely to be an issue in this case.

[233] Up to this point I have been considering causation in the context of contract and tort. However, I have also found that Mr Cousins breached fiduciary obligations owed to the plaintiffs in relation to funds held in his trust account.

[234] Causation principles that are to be applied where a breach of fiduciary duty is established were discussed by Tipping J in *Bank of New Zealand v New Zealand Guardian Trust Co Limited* [1999] 1 NZLR 664 (CA). With reference to a situation where a fiduciary has committed a breach of duty which involves an element of infidelity or disloyalty engaging the fiduciary's conscience (which Tipping J described as "*a true breach of fiduciary duty*") he said at 687:

"In this situation, the law applies the approach recently outlined by this Court in Gilbert v Shanahan [1998] 3 NZLR 528. In short, in such a case once the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, ie without any breach on the fiduciary's part. Questions of foreseeability and remoteness do not arise in this kind of case either. Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach."

Given the circumstances surrounding Mr Cousins' breach of fiduciary duty, particularly his willingness to put his own interests ahead of those of his client, I have no doubt that his breach qualifies as a "*true breach of fiduciary duty*".

Alleged Obstacles

[235] When Mr Cousins took over the conveyancing on 22 December 2000 the Moirs were ready, able and willing to settle and that situation prevailed until the arrears of rates issue surfaced on 19 January 2001. Thereafter other issues arose. The question is whether, in the absence of the defendant's breaches, any of those issues would have prevented settlement of the Moir agreement before it was cancelled. Put another way, did any of those issues break the causal nexus between the defendant's breaches and any losses suffered by the plaintiffs?

[236] The following matters need to be considered:

- Arrears of rates.
- Mortgage issues.
- Option time limit.
- Breach remedy clause.
- Undertaking as to rates.
- Cluster deed.
- Rates apportionment.

Apart from those matters, the Moirs also raised issues concerning the sowing of a lawn, shelving, and payment of interest for late settlement. However, each of those issues was abandoned within a short time and I do not find it necessary to spend any time addressing them.

[237] Before considering whether any of the listed matters would have prevented settlement, it is helpful to supply a brief context for each of them.

Arrears Of Rates

[238] The fact that rates of \$8,909 were outstanding was raised in a fax from Rhodes & Co to Mr Cousins on 19 January 2001. The rates were eventually paid by the Heslops on 8 February 2001.

Mortgage Issues

[239] Mr Cousins was first requested by Rhodes & Co to send a mortgage for perusal on 17 January 2001. It was not posted to that firm until 8 February. Thereafter the terms of the mortgage were debated between Mr Cousins and Rhodes & Co until 6 March when Mr Heslop instructed Mr Cousins to accept the matters raised by Rhodes & Co.

Option Time Limit

[240] Rhodes & Co first asked for a limit on the period during which the option to repurchase the orchard lot could be exercised in their fax to Mr Cousins of 26 January 2001. A period of two years was suggested. When the Heslops rejected this proposal Rhodes & Co responded that their client was "*flexible*" about the time limit.

[241] Mr Heslop said that he rang Mr Moir on 3 February 2001 and told him that he would accept a 40 year time limit. In a fax dated 6 February Mr Heslop instructed Mr Cousins that 40 years was acceptable and the following day Mr Cousins confirmed this to Rhodes & Co by fax. On 8 February Mr Cousins sent another fax to Rhodes & Co seeking confirmation that this was the case. Two ticks on the bottom of the Rhodes & Co copy of Mr Cousins' fax indicate that the Moirs were in agreement and written confirmation was provided in a letter dated 12 February from Rhodes & Co to Mr Cousins.

Breach Remedy Clause

[242] In their fax of 26 January 2001 Rhodes & Co said:

"If your clients default in observing the terms of the option (including payment of rates and maintenance) our clients may give fourteen (14) days written notice to your clients care of your office requiring the breach to be remedied. If the breach is not remedied in that time (time being strictly of the essence) our client may terminate the option."

That proposal was rejected by the Heslops on the basis that the Moir agreement specified the option provisions that were to apply and if the Moirs required any further remedies they would have to rely on the common law.

[243] Rhodes & Co responded on 31 January to the effect that there had to be some remedy for breach and Mr Cousins was asked to suggest an alternative. Mr Heslop claims that he rang Mr Moir at 11.21am on 8 February 2001 and was told by Mr Moir that *"they had accepted all clauses"* but that he (Mr Moir) believed *"Clive Cousins had heaps of work to do and they couldn't possibly complete settlement today"*.

[244] In their letter of 12 February to Mr Cousins, Rhodes & Co said that they understood that Mr Heslop had accepted the breach remedy clause. However, on 25 February there is a fax from Mr Heslop to Mr Cousins indicating that Mr Heslop did not agree with the clause. On 5 March Rhodes & Co said in a fax to Mr Cousins that they understood that the Heslops had agreed to 28 days and the following day Mr Heslop confirmed to Mr Cousins that the 28 day period was acceptable.

[245] Then a further issue arose. On 8 March Rhodes & Co said that they required written confirmation from the trustees that they accepted the breach remedy clause. That confirmation was supplied to Rhodes & Co on 12 March.

Undertaking As To Rates

[246] On 21 February Rhodes & Co said that the settlement statement forwarded by Mr Cousins was unsatisfactory because it did not include the usual undertaking as to rates. On 5 March Mr Heslop sent Mr Cousins a receipt confirming that the rates had been paid through to 31 March 2001. However, the issue was raised again by

Rhodes & Co in a fax to Mr Cousins on 8 March. Ms Fleck responded the same day to the effect that the requested undertaking would not be given, that rates had been paid to 31 March, and that Rhodes & Co may wish to verify this for themselves.

Cluster Deed

[247] This issue was raised by Rhodes & Co on 5 March. The same day Mr Lee confirmed to Mr Cousins by fax that the cluster arrangement had not operated for a number of years. A copy of Mr Lee's confirmation was faxed by Mr Cousins' office to Rhodes & Co on 6 March.

Rates Apportionment

[248] A settlement statement dated 7 March prepared by Mr Cousins showed apportionment of rates as at the date of possession. On 14 March Rhodes & Co objected to this apportionment on the basis that the apportionment should be as at the date of settlement. Mr Cousins replied that he could see no reason for any departure from the normal rules. I have already held that Mr Cousins had no instructions to make this an issue. In any event it seems to have been resolved by 16 March when Mr Cousins wrote to the bank's solicitors saying that the Heslops were ready, able and willing to settle.

Impact Of These Matters

[249] Under this heading I will determine whether any of these matters would have prevented settlement of the Moir agreement in the absence of the defendant's breaches. Each matter will be considered in the context of the breaches that I have found to have been established.

Failure To Obtain Undertakings Before Possession Was Given

[250] When this breach occurred there were only two issues on the table: arrears of rates and the absence of a signed mortgage.

[251] If an appropriate undertaking to settle without deduction had been signed by the Moirs and Mr Cousins had provided the mortgage for perusal and execution at the proper time there would have been no obstacles to settlement on 8 February 2001. This is because the arrears of rates would have been paid that day and the undertaking to settle without deduction would have prevented the Moirs from raising any other issues. Thus there was a direct causative nexus between Mr Cousins' failure to secure the necessary undertaking (coupled with his failure to provide the mortgage for perusal and execution at the proper time) and the cancellation of the Moir agreement which resulted in loss to the plaintiffs.

[252] The only possible argument to the contrary is that the Moirs might have declined to sign the undertaking to settle without deduction. In my view that would have been very unlikely. The evidence indicates that immediately prior to 26 January the Moirs were keen to resolve the matter as quickly as possible. They had already made arrangements to move to the Devondale property and were worried that the bank might pull out of the arrangement. Mr Moir also mentioned that they were concerned about the possibility of losing their deposit. Moreover, until they found out about the rates arrears, the Moirs were clearly ready, able and willing to settle and indeed worked towards settlement on 22 and then towards settlement on 26 January.

[253] Nevertheless, despite my conclusion that the Moirs would probably have signed an undertaking to settle without deduction, I will take the precaution of considering the situation that would have arisen if they had declined to do so. In other words, I will consider the other issues raised by the Moirs in the context of Mr Cousins' later breaches.

Mr Cousins' Refusal To Settle On 8 February 2001 Because Fees Had Not Been Paid

[254] Before 8 February 2001 Rhodes & Co had raised two further issues: time limit for the option and a default remedy clause. Although arrears of rates remained an issue, that issue disappeared when the arrears were paid at 12.16pm on 8 February. The only other outstanding matter was the absence of a mortgage, but that was wholly attributable to a breach on Mr Cousins' part.

[255] The duration of the option issue can be quickly eliminated as a possible obstacle to settlement on 8 February. I accept Mr Heslop's evidence that he discussed the matter with Mr Moir on 3 February and told him that a 40 year period was acceptable. This is recorded in Mr Heslop's notes. Although Mr Moir could not remember exactly when agreement was reached, he accepted that Mr Heslop's timing "*may be right*". Confirmation that agreement had been reached is provided by the ticks on the fax sent by Mr Cousins on 8 February and the confirmation in Rhodes & Co's letter to Mr Cousins. I am satisfied that the duration of the option was not an obstacle to settlement on 8 February 2001.

[256] Whether the breach remedy clause was still a live issue on 8 February 2001 is more difficult. On this issue there is a sharp conflict of evidence between Mr Heslop and Mr Cousins.

[257] Mr Heslop claims that he spoke to Mr Moir by telephone on 8 February and that Mr Moir confirmed to him that all the clauses had been accepted. His notes record that at 11.21am on 8 February he had rung Mr Moir and that they had accepted all clauses. His fax of 11 February 2001 to Duncan Cotterill records that "*The purchaser was ready to settle on the property by 2pm on 08.02.01.*" On the other hand, there is no evidence that Mr Heslop complained about Mr Moir going back on his word when the default remedy clause cropped up again in the letter from Rhodes & Co to Mr Cousins on 12 February 2001.

[258] Mrs Heslop's evidence was that it should have been possible to settle on 8 February through negotiation and that if they had not been in possession the Moirs may have been prepared to drop their requirements on 8 February. This suggests that Mrs Heslop believed the default remedy clause was still a live issue as at 8 February. But there is no indication that Mrs Heslop was directly involved in the discussions with Mr Moir and I take this into account when considering the weight that can be placed on her evidence.

[259] In his evidence in chief Mr Moir said that around 7 or 8 February there were a lot of discussions between himself and Mr Heslop but he could not remember the specifics of what was said. He said they both wanted to settle and they were both

concerned about the bank's deadline. Significantly Mr Moir said that he could not remember what was or was not discussed about the breach remedy clause but *"looking back on it now I don't think having this clause would have been a deal breaker for me"*. However, under cross-examination he said that what he meant was that he was not concerned whether the default period was 14 days or some longer period. Although I accept Mr Moir was a completely honest witness, it is not particularly easy to reconcile this response with his evidence in chief. Clearly Mr Moir was having difficulty in recalling events many years later, especially in the absence of his file (which had been destroyed).

[260] Mr Rennie was asked about whether or not the breach remedy clause would have been a deal breaker. His response:

"It was one matter on a shopping list of matters that we wanted tidied before settlement. Whether ultimately Ben [Moir] would have given ground on that I don't know ... if it was the difference between the settlement or not I doubt that it would have been a deal breaker ..."

He also said that from his experience Mr Moir was a reasonable man who would be prepared to make reasonable concessions. Overall Mr Rennie's evidence seemed to support Mr Moir's initial statement that the breach remedy clause would not have been a deal breaker.

[261] As mentioned earlier in this judgment, Mr Cousins' evidence on this topic went full circle. He started off on the basis that the option breach remedy was a live issue on 8 February. After lengthy cross-examination he changed his stance:

"Q. And this letter, 457, makes no mention of the breach remedy provision does it.

A. No, it does not.

Q. And this was because that breach remedy provision was not a live issue at that time, wasn't it.

B. It was not being put forward as an issue at that stage.

Q. Because if it had been a live issue you would have raised it in the two letters you sent to Rhodes & Co on 8 February so that it would not be a live issue and settlement could proceed that day, correct.

A. Yes if it had been an issue it would have been referred to in correspondence."

Later he reverted to his original stance that it was a live issue but, for reasons that I do not understand, denied that he had changed his evidence.

[262] I accept that it is perfectly plausible that Mr Moir might have been prepared to drop the breach remedy clause at 11.21am on 8 February if he thought that it would make the difference between settling and not settling that day. Moreover, it would not be at all surprising if Mr Moir changed his mind and reinstated the issue after the Heslops failed to settle on 8 February. The issue is whether the breach remedy clause was in fact still a live issue by the afternoon of 8 February.

[263] In the end the factor that tips the balance for me is Mr Cousins' concession under cross-examination that the default remedy clause was not a live issue as at 8 February. His concession at that point was unequivocal and there was no indication that he was confused. My belief is that he made the concession because it represented the truth of the matter. In his letter to Rhodes & Co on 8 February (document 457) Mr Cousins sent the mortgage for perusal, indicated that the Heslop trust was to be the option holder under the agreement, and confirmed that the Heslops consented to a 40 year period for the option. He asked Rhodes & Co to confirm by return that the agreement was varied accordingly. If there had been an issue about the breach remedy clause it would surely have been mentioned in that letter, as Mr Cousins conceded. Having followed Mr Cousins' cross-examination up to the exchanges quoted in [261], it came as no surprise to me that Mr Cousins made the concession that the breach remedy clause was no longer a live issue.

[264] My conclusion is that on 8 February the Moirs were prepared to drop their requirement for a breach remedy clause and would have settled if Mr Cousins had not refused to settle because his fees had not been paid (and had provided the mortgage in sufficient time for it to be perused and executed). In other words, the failure to settle on 8 February was directly attributable to Mr Cousins' breaches.

Breaches Arising From Post 8 February Delays

[265] Vital time was lost as a result of Mr Cousins' stance about his fees which meant that there was effectively no progress towards settlement between 8 and 26

February. Instead of devoting their energies towards settling the Moir agreement, the Heslops and Mr Cousins were locked in a debate about the fees issue. This delay was critical. The bank had already signalled that its patience was running out by imposing the 8 February deadline.

[266] When he refused to settle on 8 February Mr Cousins must have realised the seriousness of the situation and that any further delays were likely to antagonise the bank and jeopardise the Moir agreement. Indeed, on 28 February the bank finally lost patience and advised Mr Lee that the final deadline was noon on 5 March 2001. Although this information was not passed on to Mr Cousins, I do not think this failure carried any consequences in terms of causation. Mr Cousins knew, or should have known, that after the Moir agreement did not settle on 8 February the utmost urgency was required. Indeed, he was specifically directed by the Heslops (through Mr Lee) to settle on 2 March, but failed to do so. Mr Cousins was also directed to liaise with the bank's solicitors but does not appear to have done so until 6 March.

[267] I am satisfied that if progress towards settlement had not stalled between 8 and 26 February and if Mr Cousins had displayed greater urgency thereafter it would have been possible to settle the Moir agreement well before the bank's final deadline expired on 5 March. By 25 February Mr Heslop had accepted everything except the breach remedy clause and the documentary record indicates that agreement was reached about that clause on 5 or 6 March. By 5 March rates had been paid through to 31 March and a receipt had been provided. And by 6 March the issue surrounding the cluster agreement had been resolved. That leaves the issue of rates apportionment. Given the enormous importance of the settlement to the Heslops and the urgency of the situation it is surprising that there was a debate about this. In any event, the problem seems to have been resolved within a couple of days.

[268] It follows that delays on the part of Mr Cousins after 8 February were also directly causative of the loss of the Moir agreement and the consequences that followed.

Availability Of Funds To Pay Mr Cousins' Account

[269] Late in the hearing it emerged that on 8 February 2001 Mrs Heslop had some funds in her accounts and the relevant bank statements were provided as exhibits by consent. After payment of rates on 8 February 2001 Mrs Heslop's Westpac savings account stood at \$6,787.04, her Westpac cheque account at \$411.80 and her National Bank cheque account at \$4,039.59.

[270] According to the defendant Mrs Heslop should have used those funds to pay Mr Cousins' account on 8 February. It was also suggested that both she and Mr Heslop had misled the Court by indicating in their earlier evidence that they were unable to pay Mr Cousins' account on 8 February. Leave was granted for Mrs Heslop to be recalled.

[271] Mrs Heslop said that the money in her savings account was money that she had been putting aside over the years as an emergency fund. She said that she was very reluctant to use the funds in the account to pay the rates because it was very important to preserve what was left. Apart from income protection insurance payments the family did not have an income and before Mr Heslop's heart attack those payments were sporadic. Mrs Heslop said she was not working because she was caring full-time for her four children (aged between seven and 17) and her mother. They had just moved into rented accommodation and their household expenses were approximately \$5,000 per month without extras or luxuries. School fees were between \$1,300 and \$1,400 a year and they wanted to avoid disruption to the children by moving schools. Mrs Heslop explained that she was also conscious of the money they had borrowed within the family. In all the circumstances, she said, it did not seem sensible or appropriate to use "*the last money we had in the world*" to pay Mr Cousins.

[272] Despite cross-examination Mrs Heslop remained staunch that she and her husband were not in a position to pay Mr Cousins' account in full on 8 February 2001 and that their proposal to pay \$1,000 with the balance over two months was appropriate in all the circumstances. I accept her evidence. Given the financial predicament facing the family, the funds in Mrs Heslop's savings account were very

modest and it is easy to understand why Mrs Heslop wanted to preserve what little there was: there was very little in the Westpac cheque account; by the end of February 2001 the amount in the National bank cheque account was less than \$1,000; and payment of Mr Cousins' fees from the Westpac savings account would have virtually eliminated that account.

[273] I also reject any suggestion that Mrs Heslop attempted to mislead the Court. In her first brief Mrs Heslop said that when she first learned on 8 February 2001 that Mr Cousins would not complete settlement unless his fees were paid:

"We had used all our available resources to pay the rates that day. I had used funds from an investment account and had agreed with Lindsay [Smith] that he would make his funds available when Warwick's further funds came through."

In other words, there was no secret about the investment account and, as Mrs Heslop saw it, there were no "*available resources*" to pay Mr Cousins' accounts. The fact that it took from 19 January until 8 February before Mrs Heslop was prepared to use her savings to pay the rates reflects her reluctance to dip into this account. In all the circumstances, especially the heavy borrowing that had already taken place within the family, I find Mrs Heslop's stance entirely understandable.

[274] My conclusion is that the existence of modest funds in Mrs Heslop's accounts is irrelevant. The Heslops' proposal for payment of \$1,000 and the balance over two months was reasonable. If Mr Cousins was determined to obtain full payment of all his accounts before settling the Moir agreement he should have given proper notice of that intention so that the Heslops had a proper opportunity to address the situation.

Would Mr Heslop Have Been Adjudicated Bankrupt Anyway?

[275] In essence the defendant's argument is that even if the orchard lot had remained available to creditors as part of Mr Heslop's proposal under the Insolvency Act, the Court would still have cancelled its earlier approval of the proposal. This is based on the proposition that there had been significant non disclosure to creditors and the Court prior to the approval of the proposal by the Court on 12 March 2001. It is also based on various findings made by Master Venning when he cancelled the

approval, it being alleged that the Heslops are now unable to challenge those findings because they did not appeal his judgment.

[276] In my view the defendant's argument is fundamentally flawed. Outside the circumstances of autrefois acquit/conviction, cause of action estoppel or issue estoppel, there is no general rule of law that the opinion of a Court expressed in a judgment cannot be questioned in different proceedings: *Chamberlains v Lai* at [61] per Gault J. See also *McLachlan v Vector Ltd* (CA157/05, 28 February 2006) at [281]. I do not accept that I am bound by Master Venning's decision.

[277] In any event I have had the benefit of extensive evidence about Mr Heslop's proposal to his creditors both from the witness box and in the form of documentary evidence. Creditors who commanded significant influence in terms of number and value have given evidence in support of Mr Heslop. They have confirmed that even though they were unaware of some of the information provided to the Court in this litigation, that information would not have made any difference to their support for the proposal.

[278] It is also significant that Mr Heslop had suffered his heart attack by the time Kaiapoi Aluminium Joinery's application to set aside the Court's approval was heard by Master Venning. I accept that this had a direct impact on his ability to effectively oppose the application. Moreover, the situation had completely changed. When the proposal was approved security over the orchard lot was going to be available. By the time application was made to set aside the proposal, the Moir agreement had been cancelled and the orchard lot was no longer available to creditors.

[279] Undoubtedly Kaiapoi's application to set aside the debtors' approval was a direct result of the collapse of the Moir agreement. The application was expressly advanced on the basis that the settlement with BNZ had not eventuated. And the affidavit in support makes it clear that the application was made because Kaiapoi had discovered that Mr Heslop had not settled with BNZ which the company considered was prejudicial to it and other creditors. Furthermore, Master Venning expressly found that the mortgagee's sale and the loss of the orchard lot to creditors was significant.

[280] I do not accept that Mr Heslop's bankruptcy was inevitable. The Moir agreement provided the opportunity for the major creditor (BNZ) to be repaid in full, which would have been a huge step forward. Although Mr Heslop's proposed repayment programme was onerous, he had demonstrated over many years that he was a capable and respected builder and that he could make substantial profits. Between 1996 and 1999 his profit ranged between \$218,645 and \$585,400. I also accept that settlement of the Moir agreement would have been the turning point for Mr Heslop's health. In addition, he had the goodwill and support of a large proportion of creditors (88.03% by value and 82.86% in number had supported his proposal at the meeting on 14 November 2000). In terms of the proposal he would have been able to negotiate with, and pay out, any creditors who were strongly opposed to the proposal. Finally, the creditors had the orchard lot as a backstop. I do not think for a moment Mr Heslop would have been adjudicated bankrupt if the Moir agreement had been settled.

[281] I therefore reject the defendant's argument that bankruptcy was inevitable. To the contrary the bankruptcy was a direct result of Mr Cousins' breaches.

Summary

[282] Mr Cousins' argument that his breaches did not cause the plaintiffs' losses is effectively destroyed by my finding that he failed to advise the Heslops about the importance of obtaining an undertaking to settle without deduction before the Moirs were given possession. If there had been such an undertaking the Moirs would have been obliged to settle on 8 February or as soon thereafter as the second mortgage had been executed. The Moirs would not have been able to raise new issues.

[283] Even if the Moirs had not been prepared to give an undertaking I am satisfied that Mr Cousins' breaches were nevertheless causative of the plaintiffs' loss because:

- On 8 February the rates arrears were paid, the duration of option issue was resolved and the breach remedy clause was no longer a live issue.

- Thus settlement of the Moir agreement could have proceeded on 8 February if Mr Cousins had not refused to settle and if he had prepared the mortgage at the proper time.
- Between 8 and 26 February progress towards settlement was effectively stalled by Mr Cousins' refusal to settle coupled with his unjustifiable claim that he was entitled to a lien or set off for his fees and his refusal to release the funds to Mr Lee to enable Mr Lee to complete settlement.
- After 26 February there were further unnecessary delays for which I have found Mr Cousins responsible.
- But for these post 8 February delays it would have been possible to settle the Moir agreement well before the bank withdrew on 5 March.

[284] All of this, and the events that followed, was entirely foreseeable and no issues of remoteness can arise. Under cross-examination Mr Cousins acknowledged that from the outset he was aware of the plaintiffs' vulnerable position, the importance of the transaction, that if settlement was not achieved Mr Heslop's proposal to his creditors would fail and Mr Heslop would be bankrupted, and that the trust was taking an option over land with rezoning potential.

PART IV

DAMAGES

Introduction

[285] In this Part the various claims for damages will be addressed. I will begin by considering the first plaintiffs' claims for wasted legal expenses, general damages and exemplary damages. Then the second plaintiffs' claim for damages arising from the loss of the option to purchase the orchard lot will be addressed. Finally, I will consider whether any award of damages should be reduced by reason of Mr Heslop's bankruptcy or the settlement with BNZ.

Wasted Legal Expenses

[286] Under this head the first plaintiffs claim \$14,049.83. That claim is rejected in its entirety by the defendant on the basis that there have been no wasted legal expenses because the plaintiffs' goal of settling the Moir agreement could not have been achieved without incurring the costs in dispute.

[287] The plaintiffs accept that as a matter of principle legitimate costs to obtain a benefit cannot be claimed as wasted costs. However, they maintain that all of Mr Cousins' costs amounting to \$10,356.86 plus all of Mr Lee's costs of \$3,692.97 incurred from February 2001 (after Mr Cousins refused to settle and later in opposing the Kaiapoi application to set aside the debtors' approval) were entirely wasted. Hence the claim for \$14,049.83.

[288] I accept that the second plaintiffs cannot have damages for the loss of the option to purchase the orchard lot without making proper allowance for the costs that would have been properly incurred if the Moir agreement had been settled. As Lord Denning observed in *Haywood v Wellers* [1976] QB 446 (CA) at 458, some reduction will need to be made for the fact that if the solicitors had done their duty it would have cost the plaintiff something. While technically any deduction should probably be made against the amount awarded to the second plaintiffs, the parties

seem to have adopted the approach that any deduction should be set off against the first plaintiffs' claim for wasted legal expenses and I will approach the matter on the same basis.

[289] Mr Cousins' first three invoices covered attendances up to 30 January 2001. Apart from his failure to advise about the need for an undertaking from the Moirs before they took possession on 26 January, there can be no criticism of Mr Cousins' actions up to the end of January and I accept that all his fees up to that time would have been properly incurred if the Moir agreement had been settled. Moreover, further attendances on his part would have been required to accomplish settlement, including the preparation of the mortgage and attending on settlement.

[290] I have allowed \$1,500 (including GST) for attendances after 30 January 2001. Thus the first plaintiffs' claim needs to be reduced by:

Mr Cousins' fees up to 30 January	\$6,058.13
Allowance for subsequent attendances	<u>\$1,500.00</u>
TOTAL	\$7,558.13

That reduction means that the first plaintiffs are only entitled to recover \$2,798.13 by way of wasted legal expenses in relation to Mr Cousins' fees.

[291] I accept that Mr Lee's fees of \$3,692.97 were directly attributable to Mr Cousins' breaches and are recoverable as wasted legal expenses. They were incurred because Mr Cousins refused to settle on 8 February 2001, claimed a lien/set off, refused to release funds, and also by virtue of the application to set aside Mr Heslop's arrangement with creditors.

[292] The first plaintiffs are therefore entitled to \$6,491 (rounded figure) by way of compensation for wasted legal expenses (\$2,798.13 plus \$3,692.97).

General Damages

[293] The first plaintiffs seek \$200,000 by way of general damages (\$100,000 each). The defendant maintains that they are not entitled to anything.

Plaintiffs' Claim

[294] Given Mr Cousins' flagrant and contemptuous behaviour and the mental distress, humiliation and anxiety suffered by them, Mr and Mrs Heslop contend that it would be difficult to conceive a stronger case for general damages. They maintain that it was entirely foreseeable that Mr Cousins' refusal to settle would result in the mortgagee's sale, failure of the debtors' proposal, bankruptcy and the loss of the option over the orchard lot. Their claim for general damages is advanced under two main heads: first, that Mr Cousins' conduct caused the plaintiffs foreseeable distress, humiliation and anxiety; second, that distress, humiliation and anxiety was aggravated by the defendant's conduct of this litigation.

[295] In relation to the first head of claim the first plaintiffs allege: from the outset Mr Cousins knew that they were financially and emotionally vulnerable; he also knew that the bank's deadline and the expiry of the settlement notice rendered the Moir agreement extremely vulnerable; despite those matters he refused to consider the Heslops' proposal for payment of his account and refused to settle; thereafter he refused to return money in his trust account, claimed a lien/set off without authority, purported to accept a repudiation of his retainer, threatened to instruct counsel, made the mortgage terms a barrier to settlement, was slow and unresponsive despite the urgency of the situation, made rates a barrier to settlement without instruction, failed to go back to the bank, suggested that there be a meeting at the bank without the Heslops which was contemptuous of them and was reluctant to release his file.

[296] For his part Mr Heslop alleges that the defendant's actions gave rise to his heart attack, his inability to honour promises he had made to creditors, the stigma of bankruptcy and the impact upon his family. In the case of Mrs Heslop it is alleged that she underwent the humiliation of her husband's bankruptcy, stress, panic attacks

and depression, as well as seeing the impact on her children. Like her husband she relies on the medical evidence to verify the impact of these matters on her.

[297] As far as the conduct of the litigation is concerned, reference is made to:

- the delay of over two months before the defendant (through Duncan Cotterill) responded to the letter of claim sent by Mr Lester on 9 May 2005;
- the late and unsuccessful application for security for costs;
- serious but unsubstantiated allegations of improper behaviour relating to the issue of Mr Heslop's notes in his computer;
- late statement from the witness, Gary Still, after the plaintiffs' case had closed and resultant stress for Mr Heslop in wondering whether he would have to be recalled to rebut the Still evidence;
- failed application by the defendant to call the Heslop's previous solicitor;
- late request for Mrs Heslop's bank statements and the need for Mrs Heslop to be recalled to face further cross-examination while her mother was ill in hospital two months after completing her evidence.

It is accepted, however, that the stress related damages associated with the litigation are "*dwarfed*" by the first head of claim.

[298] The first plaintiffs contend that this case can be distinguished from similar cases by reason of the seriousness of the loss, the immense stress that the Mr and Mrs Heslop and their family were placed under, the contemptuous attitude of Mr Cousins towards his own clients, and the conduct of the litigation. They stress that bankruptcy was one of Mr Heslop's worst fears and that all their efforts to avoid that outcome were nullified by Mr Cousins' breaches. In addition, they suffered the pain of seeing the family's one remaining asset (option to repurchase the orchard lot) lost. They also note that the stress and anxiety arising from Mr Cousins' breaches has

subsisted for over six years and that the humiliation of Mr Heslop's bankruptcy will always be with them.

Defendant's Response

[299] With reference to para 26.3.02(2) of *Todd, The Law of Torts in New Zealand* (4th edition 2005) the defendant notes that general damages should be seen as an adjunct to special damages in cases of damage to property. Two awards of \$15,000 for prolonged stress and anxiety arising out of negligence in the construction of houses are noted. It is also noted that an award of \$25,000 for a breach of fiduciary duty by a solicitor resulting in the loss of the plaintiff's house to a creditor was seen by Cooke P as being on the high side in *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) at 569. With reference to para 26.3.02(3) of *Todd* the Court is also reminded that damages for distress and anxiety are not normally permitted in a business context and it is submitted that the first plaintiffs' claim for general damages arises out of a business context.

[300] The defendant also highlights the importance of assessing both the extent to which the defendant has caused the claimants stress and anxiety and the extent to which this has occurred independently. It is noted that the medical evidence supports the view that both Heslops suffered depression, stress and related symptoms before Mr Cousins commenced to act for them. The defendant also maintains that the evidence indicates that Mr Heslop had an existing heart condition. It is noted that the Heslops were facing substantial default to their bank, default under the Moir agreement, litigation by other creditors, and a firm stand by the Moirs on a large number of issues. The defendant emphasises that none of these factors were caused by him.

[301] Any suggestion that the first plaintiffs are entitled to damages for stress arising out of subsequent litigation is rejected by the defendant, primarily with reference to *Mouat v Clark Boyce (No. 2)* (1992) 2 NZConvC 191,188 and *X v Attorney-General* [1997] 2 NZLR 623. The defendant's position is that even if it is within the power of the Court to award such damages, there is nothing about the conduct of this case that would justify such an award.

Discussion

[302] At the outset two matters can be resolved relatively briefly.

[303] First, I do not accept that the claim for general damages should be rejected on the basis that the Moir agreement was effectively a business transaction. While I accept that there is a reluctance to award damages for stress and anxiety in a business context because, as Cooke P observed in *Mouat v Clark Boyce* at 569 “*Stress is an ordinary incidence of commercial or professional life*”, I do not accept that the sale of the Heslops’ home falls into that category. In my view the stress and anxiety that arose from Mr Cousins’ breaches could not be regarded as an ordinary incidence of this type of transaction. In any event, there is no hard and fast rule and general damages have been awarded in a commercial context. See, for example, *Tak & Co Inc v AEL Corporation Ltd* (1995) 5 NZBLC 103,887 and *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454.

[304] Second, I have not been persuaded that the conduct of litigation head can get off the ground. In *Mouat v Clark Boyce (No.2)* at and *X v Attorney-General* this Court expressed the view that damages arising from the conduct of litigation are unlikely to be awarded. As a general proposition I think that must be right. In the normal course of events any unsatisfactory aspects of the conduct of litigation can be reflected in an award of costs. In this case both sides litigated with considerable vigour and I have not been persuaded that there is any justification for spending any more time on whether there should be an award of damages on account of the conduct of the litigation.

[305] Now I consider whether general damages should be awarded and, if so, the amount. In broad terms I accept the submissions advanced on behalf of the plaintiffs. As I see it, the Heslops have been subjected to enormous anxiety, distress, humiliation, pain and suffering as a direct consequence of Mr Cousins’ breaches.

[306] It is not disputed that Mr and Mrs Heslop were suffering from depression, stress and related symptoms before Mr Cousins started to act for them and they are not entitled to any compensation for this pre-existing condition. On the other hand,

Mr Cousins was obliged to take his victims as he found them (*Page v Smith* [1996] AC 155 at 189) and I accept Mr and Mrs Heslops' evidence that by Christmas 2000 they were both feeling better because they could see light at the end of the tunnel. It is not hard to understand why their spirits would have lifted: BNZ had agreed to provide a discharge of its mortgage; the creditors had accepted Mr Heslop's proposal; there was an unconditional sale to the Moirs; the trust had an option to repurchase the orchard lot for \$1; they expected the land would be very valuable within the next ten to 15 years; the Bartercard credits would pay some of the creditors; Mr Heslop expected to substantially repay all his creditors from income over the next five years; and all that was now required was the final settlement of the Moir agreement.

[307] Obviously the Heslops were totally devastated by Mr Cousins' refusal to settle on 8 February. They could see the likely implications: an already impatient bank would grow more impatient; the Moirs would become more apprehensive; and if the sale collapsed, bankruptcy was virtually inevitable. If these implications were not obvious to Mr Cousins, they should have been. It is hardly surprising that Mr Heslop "*begged*" Mr Cousins to settle and reminded him that the bank could be unpredictable. Despite all of that, to use his own words, Mr Cousins decided to take "*a hard line*" and effectively maintained that line until 26 February. I accept that Mr and Mrs Heslop suffered enormous stress and anxiety during this period.

[308] In the end, despite the best efforts of Mr and Mrs Heslop, the battle to avoid bankruptcy was lost. I accept Mr Heslop's evidence that throughout his life in business the most important thing for him had been to pay his debts and honour his promises, and that his word had always been his bond. That is why he and his wife were prepared to sell their home, borrow within the family and advance a proposal to creditors under the Insolvency Act. I also accept that the stigma and humiliation associated with the bankruptcy was immense and that to a greater or lesser extent it will remain with them indefinitely. Apart from anything else Mr Heslop was unable to honour his promises within a building community that had been part of his life for a quarter of a century. I have no difficulty in accepting Mr Heslop's evidence about the 16 different ways his bankruptcy impacted upon him and his family.

[309] Although I do not think that the evidence would entitle me to hold Mr Cousins' breaches were responsible for Mr Heslop's heart attack, I am satisfied that Mr Heslop's later health problems were to a significant extent attributable to stress arising from Mr Cousins' breaches. Moreover, I accept that the effect on Mr Heslop's children has, as he stated in his evidence, been extremely upsetting for him.

[310] I am also satisfied that there was an immense impact on Mrs Heslop. Having been associated with her husband's building business over 25 years she willingly supported him when he encountered a financial crisis and associated health problems. She was willing to see the family home sold to enable creditors to be paid and bankruptcy avoided. There is no reason to believe that Mrs Heslop's distress, anxiety and humiliation was any less than her husband's. Her doctor, Dr Manning, said that it was clear to him that the events of 2001 put Mrs Heslop and her family through a particularly hard time. He said that throughout she seemed to be something of a "*rock for her family, holding them together throughout this difficult period*".

[311] As Jeffries J commented in *McKaskell v Benseman* [1989] 3 NZLR 75 at 91, there is no definite method of calculating pain and suffering of this type. I have considered the following decisions which involve awards ranging from \$15,000 to \$70,000: *Arthur Anderson & Co v Gibson* (High Court, Auckland Registry, CP1633/91, 10 June 2002); *Smith v Copeland Fitzpatrick & Co* (High Court, Auckland Registry, CP No. 2007/91, 25 August 1993); *Snodgrass v Hammington* (1995) 10 PRNZ 672 (CA); *Chase v de Groot* [1994] 1 NZLR 613; *Battersby v Foundation Engineering Ltd & Ors* (High Court, Auckland Registry, CP 26/97, 5 July 1999, Randerson J). Unlike Mr Heslop, the plaintiffs in those cases had not been adjudicated bankrupt. In that respect it seems to me that the impact upon Mr and Mrs Heslop has been greater and is likely to be much more prolonged than in any of those cases. I also agree with counsel for the plaintiffs that the corroborative medical evidence as to the impact on Mr and Mrs Heslops' health distinguishes this case from most of those cases.

[312] I have considered whether there should be different awards for Mr and Mrs Heslop. However, in the end I have decided that there is no basis on which a

distinction could be made. In my view the appropriate award is \$50,000 to each of the first plaintiffs, making a total of \$100,000.

Exemplary Damages

[313] The first plaintiffs seek \$15,000 by way of exemplary damages. It is alleged that the defendant abused the trust and confidence placed in him, treated his client's funds as his own, and placed his interests before those of his clients. Under those circumstances, it is submitted, this is one of those rare cases where punishment and deterrence by way of a modest award of exemplary damages is required.

[314] In *R v Bottrill* [2003] 2 NZLR 721 (PC) their Lordships observed at 64:

"... their Lordships cannot over-emphasise what has already been indicated more than once. The cases where it is appropriate to make an award of exemplary damages are exceptional. The cases where it is appropriate to make an award of exemplary damages in the absence of intentional wrongdoing or conscious recklessness will be exceptional and rare indeed. It must always be kept in mind that compensation is not the purpose of exemplary damages. A perceived need for compensation, or further compensation is not a proper basis for making an award of exemplary damages."

Cases in which exemplary damages have been awarded in New Zealand are very few and far between.

[315] I have not been persuaded that exemplary damages are required in this case. While Mr Cousins' conduct was deplorable, I believe it reflected poor judgment rather than intentional wrongdoing or conscious recklessness. Given that the award of general damages is at the higher end of the spectrum, I do not think that there is any need to punish or deter Mr Cousins by an award of exemplary damages.

Second Plaintiffs' Claim For Loss Of Option

[316] This claim will be considered under several sub-headings: history of the orchard lot; time at which damages should be assessed; and value of the option as at the chosen time.

[317] When the Heslops purchased the orchard lot it was zoned Rural 3 under the Proposed Christchurch City Plan which was notified on 24 June 1995. That zoning required a minimum lot size of four hectares and only permitted one dwelling per title.

[318] After the Proposed Plan was opened for submissions, Apple Fields Limited (AFL), a significant land owner in the Belfast area, lodged a submission seeking to have 93 hectares (including the orchard lot) rezoned as a horticultural sub-zone which would permit subdivision down to two hectares. When the City Council declined to adopt its submission AFL lodged a reference with the Environment Court.

[319] AFL's reference gave rise to a lengthy hearing in the Environment Court during the latter part of 2000 and into 2001. On 27 June 2002 the Environment Court issued an interim decision in which it concluded that the real choice was between Rural zoning and a Living (residential) zoning and that it should consider utilising its powers under s293 of the Resource Management Act to enable the question of a Living zoning to be investigated. At the request of the parties the matter was then adjourned so that submissions could be provided about the application of s293.

[320] At the resumed hearing Canterbury Regional Council and Christchurch City Council opposed the use of s293 for the purpose of determining whether the AFL land should become a Living zone. However, in its decision delivered on 11 October 2002 the Court held that it had the jurisdiction under s293 and that in all the circumstances it was appropriate to invoke that jurisdiction in that case. The Court directed that if AFL wished to pursue the Living zone it was to lodge various documents, including a draft concept plan, by 28 March 2003.

[321] Following an unsuccessful appeal to this Court by the Regional Council, AFL lodged its draft concept plan and other documentation so that a Living zoning could

be considered by the Environment Court. That application for rezoning was publicly notified. Submissions closed at the end of February 2005.

[322] Submissions opposing urbanisation were lodged by the Christchurch City Council, Christchurch Regional Council, Transit New Zealand, LTNZ and some other parties. The primary objection was that rezoning should not take place until major State Highway improvements had been completed.

[323] In September 2006, on the eve of the Environment Court hearing, the parties agreed that the hearing should not include roading and transport issues. Instead the parties would continue to explore a solution in relation to those issues. The Court proceeded to hear the other matters with a view to issuing an interim decision. By the time the claim against Mr Cousins came before this Court the Environment Court's decision had not been delivered and the parties were still negotiating roading and traffic issues.

[324] Mr Dewe considered that rezoning to allow urban development is now a matter of when, not if. Although both Mr Hardie and Mr Nixon were slightly more guarded, they both acknowledged that rezoning is likely to occur.

Time At Which Damages Should Be Assessed

[325] According to the second plaintiffs justice requires that their loss be assessed as at the date of trial. On the other hand, the defendant's primary submission is that any loss should be assessed as at the date of breach. If that submission is not accepted the defendant contends that damages should be assessed at July 2004, being the time by which this proceeding would have been heard if it had been pursued with proper diligence and speed.

[326] Counsel are in agreement about the relevant principles. Generally damages arising from property transactions are assessed at the date of the wrong on the basis that the injured party ought to mitigate by going into the market and buying a substitute property. Nevertheless there will be cases where that general rule will not achieve justice and in those cases damages can be assessed at a later date provided

the plaintiff has brought the claim as soon as reasonably possible. In *Smaill v Buller District Council* [1998] 1 NZLR 190 Panckhurst J put it this way at 220:

"The first consideration must be that damages are compensatory: the aim is to secure to the successful party a sum which will place that party, so far as money can, in the same position as if the wrong or breach had not occurred. Second, as a general rule damages are to be assessed as at the date of the loss. But this is not an immutable rule. Rather a pragmatic approach is required if upon analysis of the particular facts of the case it should prove reasonable to assess the loss at some other date up to the date of hearing: McElroy Milne v Commercial Electronics [1993] 1 NZLR 39."

See also *New Zealand Land Development Co Limited v Porter* [1992] 2 NZLR 462 at 470.

[327] There can be no argument that an injustice would arise if damages in relation to the loss of the option were assessed as at the date of Mr Cousins' breaches. Once the option had been lost to the trust there was absolutely no prospect of a substitute property being acquired. There were none. Nor was there any possibility of the trust suing for specific performance. Thus the only available remedy was a claim for damages. The issue is whether the trust pursued its remedy in damages as soon as reasonably possible.

[328] According to the second plaintiffs they took all steps reasonably open to them in liaison with the Official Assignee to gather information, ascertain their legal rights against the defendant, and to commence this proceeding. They maintain that it was not open to them to independently commence proceedings until the Official Assignee declared his position in relation to those potential causes of action in February 2004. Their position is that from that time they diligently sought legal advice, made demand, obtained an assignment from the Official Assignee, commenced proceedings in December 2005 and pursued those proceedings to trial.

[329] I accept that after he was adjudicated bankrupt Mr Heslop and the trustees took reasonable steps to investigate the possibility of a claim against Mr Cousins. Mr Parke confirmed that it was not until 2 February 2004 that the Official Assignee finally accepted that any claim against Mr Cousins would lie with the trust. Mr Parke said:

"It would be fair to say that, throughout the bankruptcy, there was a significant amount of confusion as to causes of action, possible defendants and possible remedies ... it took approximately two and a half years with the OA engaged in the process to gain any clarity as to the position.

With the benefit of hindsight that might seem to be a long time and Mr Heslop was clearly frustrated by the slow progress. But I accept that the plaintiffs were doing their best to progress the matter and that in all the circumstances it was not realistic for the trust to proceed with a claim until the Official Assignee had reached his decision.

[330] In their closing submissions counsel for the defendant submitted:

"If the justice of the situation is to be assessed by reference to both the plaintiff and the defendant, it does not matter that it may be that part or even or a good part of this delay can be said to be able to be laid at the door of the Official Assignee, insofar as the Heslops are concerned."

I cannot accept that submission. Mr Heslop's bankruptcy only arose because of Mr Cousins' breaches. If justice is to be achieved, Mr Cousins should carry responsibility for the consequences of the situation that he created.

[331] Once the Official Assignee's decision had been made it was not until April 2004 that the Official Assignee's files were released to Mr Heslop. Given the complexity of the matter it was inevitable that after that there would be a lapse of time before proceedings could be issued. In my view a fair and reasonable period for the issue of proceedings would have been six months. Thus proceedings should have been issued by October 2004. Counsel for the defendant accepted that a period of around 12 months from the issue of proceedings to trial would be reasonable and this is in line with the actual delay between the issue of proceedings and trial. On that basis the trial should have been commencing by October 2005.

[332] I therefore conclude that the appropriate time for assessing damages is October 2005.

Value of Orchard Lot

[333] Expert evidence as to the value of the orchard lot at various points in time was given by Mr Stewart and Mr Taylor, for the plaintiffs, and Mr Barraclough for the defendant. The following table summarises their valuations:

VALUER	AT TIME OF BREACH	JULY 2004	JUNE/SEPTEMBER 2006	IF LAND REZONED
Stewart	\$385,000 ⁵	\$1,250,000	\$1,679,000	\$3,358,000 - \$4,197,500
Taylor	-	\$1,356,000	\$1,815,000	\$2,400,000
Barraclough	\$240,000	\$ 600,000	\$1,665,000	-

A valuation as at the date of breach was also provided to the Official Assignee by Fright Aubrey on 17 April 2003. Fright Aubrey valued the orchard lot at \$305,000. However, I do not need to make any further reference to that valuation.

[334] Different methods were used by the three valuers. Mr Stewart assessed market evidence and undertook a hypothetical subdivision as well as a discounted cash flow analysis. Mr Taylor adopted the approach that he would use to value an investment that would be realised sometime in the future. For the purposes of the hypothetical subdivision he adopted Mr Stewart's sale price for sections. Mr Barraclough adopted a sales comparison approach. In his view the uncertainty about the ultimate zoning outcome (both in respect of timing and the nature of development controls) ruled out any other approach. Each valuer commented on the other valuations. At the end of the day all the valuers stood by their own valuations.

[335] Given that the value of the orchard lot needs to be assessed as at October 2005, it is necessary to focus on the valuations as at July 2004 and June/September 2006. With the exception of Mr Barraclough's \$600,000 as at July 2004, there is a consistency between the valuations at those points in time. Mr Barraclough explained that as at July 2004 he thought that the probability of a zoning change to

⁵ On the basis that a separate title was available for the orchard lot.

residential was subject to a moderate to high level of risk and for that reason he had applied a probability of 50%. However, he considered that the probability was higher by September 2006 and applied a probability of 75% at that time. Mr Stewart considered Mr Barraclough's 50% probability as at July 2004 was too low and that a more appropriate percentage at that time would have been 70%.

[336] As at July 2004 the only indicators of a rezoning were the two decisions of the Environment Court. Nevertheless they provided a relatively strong signal to the market place about the possibility of rezoning in the future.

[337] In its interim decision of 27 June 2002 the Court quoted Mr Nixon's evidence:

"There is a very strong case for ultimate urbanisation of the land at Belfast subject to the Apple Fields reference, when regard is had to the agreed objectives and policies of the Proposed Plan. Indeed, I believe that it has an even stronger case for urbanisation in policy terms than the Northwood development already rezoned by the City Council further to the south, and for that matter some land at Masham already zoned by the City Council, which the CRC has opposed. There is not currently sewer capacity to service urban development of the subject land, but this is a timing issue associated with the planned northern relief sewer."

The Court then went on to discuss specific factors applying to the AFL land including the stop bank at the north western edge (which represented a potential urban boundary) the strip of houses already adjacent to the AFL land, the fact that protection of the land for agricultural use was a very minor issue overall, and that part of the AFL land was only one row of houses from the major transport corridor comprising the Main North Road.

[338] After hearing submissions about the application of s293, the Court said in its decision of 11 October 2002 that it was satisfied that in terms of that section "*a reasonable case has been presented*" for the Court to consider a Living rezoning of the AFL land. Significantly Judge Jackson said:

"In summary, I consider the jurisdictional test in s293 is simply whether the proposed remedy outside the scope is, objectively, potentially the best option for achieving the purpose of the Act which is open to the Court on the evidence it has read and heard."

He was satisfied that as a matter of jurisdiction the Court was entitled to invoke s293 in this case. And when it came to exercising the Court's discretion Judge Jackson

said he had particularly taken into account that the expert witnesses for all three parties considered that the AFL land should sooner or later probably be zoned Living and that questions of unfairness caused by delay had been an issue in all the urban growth references.

[339] As I have said, these decisions gave a relatively strong signal about the future rezoning of the AFL land (including the orchard lot). In probability terms I believe that Mr Stewart's 70% is closer to the mark as at July 2004 than Mr Barraclough's 50%. Although the values arrived at by Mr Stewart and Mr Taylor as at July 2004 might be a little high, I believe they are much closer than Mr Barraclough's \$600,000 to the actual value of the orchard lot at that time.

[340] By September 2006 Mr Barraclough had lifted his figure to \$1,665,000 which was very close to Mr Stewart's figure. In his valuation report of 26 September 2006 Mr Barraclough explained:

"I consider as at September 2006, given the knowledge in the public domain in relation to an application for zoning change to a more intensive residential use, that \$1,665,000 is a fair reflection of the market value."

This reflects that AFL had lodged its rezoning application with the Environment Court, the application had been publicly notified, and submissions had closed.

[341] Almost a year earlier there had been an article in The Press on 18 October 2004 about premium prices being paid for rural land on the outskirts of Christchurch. This article discussed "*land banking*" arising from a predicted shortage of land available for residential, industrial and business development due to an unprecedented consumption of zoned land. There was also reference to investors trying to predict where rezoning might occur which was lifting values.

[342] Another event having particular relevance to the matter under consideration was the announcement by Trans Tasman Properties Limited on 13 July 2005 that it had purchased 27.2 hectares (which included the orchard lot) from Latimer Holdings Limited for \$9.52 million. Mr Barraclough said that that purchase, by reason of the identical location and zoning characteristics, was "*our best evidence of market value*". The Trans Tasman purchase represented \$350,000 per hectare. There was,

however, provision in the purchase agreement

(I have been asked to

suppress this information .

[343] Given that I am endeavouring to arrive at a value as at October 2005, the Trans Tasman transaction must be highly relevant. It was transacted only three months earlier and I accept Mr Barraclough's view that it provides the best evidence of market value. Furthermore all the events that Mr Barraclough saw as important in lifting his probability to 75% had taken place by October 2005. Consequently I believe that the value of the orchard lot as at October 2005 must have been close to the value indicated by the Trans Tasman transaction. Logically it should also fall somewhere between the value arrived at by Mr Stewart/Mr Taylor in July 2004 and the value arrived at by all three valuers in June/September 2006.

Conclusion

[344] Having reflected on the matter I have decided that the second plaintiffs will be properly compensated if damages are awarded on the basis that the orchard lot was worth \$1,457,000 as at October 2005.

I have approached the matter on this basis to reflect the uncertainty about whether rezoning will actually occur by the middle of this year. In my view that approach will be fair to both the second plaintiffs and the defendant.

[345] The second plaintiffs accept that there should be a deduction of \$48,000 being the amount received after the mortgagee's sale. That brings the amount that the second plaintiffs are entitled to recover down to \$1,409,000.

[346] Initially it was the defendant's case that there should also be a credit of \$250,000 to reflect the notional value of the orchard lot that was included in the mortgagee's sale. However, Mr Forbes ultimately accepted that there were problems

with this argument. I agree with the plaintiffs that the notional amount paid by Latimer Holdings Limited for the orchard block is irrelevant. Except for the sum of \$48,000 already taken into account, the trust did not receive any benefit from that transaction.

Implications Of Mr Heslop's Bankruptcy

[347] The defendant argued that there should be a credit of \$564,070 on the basis that the plaintiffs would have had to pay creditors that amount if there had been no bankruptcy. It is claimed that if there is no deduction the plaintiffs will receive a windfall benefit. It is also noted that the plaintiffs' claim was originally formulated along those lines. The defendant was not specific about whether the amount should be deducted from the amount recovered by the first plaintiffs, the second plaintiffs, or both.

[348] The plaintiffs deny that there should be any such deduction. They maintain that Mr Heslop's bankruptcy and its consequential effects cannot be undone and that the income he lost during a boom period, which he would have applied towards creditors, cannot be replaced. In any event, they note that Mr Heslop has given evidence that he hopes to be able to make some voluntary payments to his creditors. The plaintiffs' position is that any deduction would represent a windfall to Mr Cousins which would be unjust. They claim that the plaintiffs should be fully compensated for their losses and that it is important to take into account that apart from providing the orchard lot as security the trustees were under no obligation to the creditors.

[349] It is convenient to begin by examining Mr Heslop's proposal to his creditors dated 24 October 2000. In summary Mr Heslop proposed that he would pay a dividend of 25% of his gross income for the next five years with those payments to be overseen and administered by the trustee (Mr Bailey). Mr and Mrs Heslops' interest in the orchard lot was to be transferred or assigned to the trustee. Upon the land being rezoned all efforts were to be made to borrow sufficient money against the land so that any creditors who remained unpaid could be paid in full.

Notwithstanding the above, Mr Heslop was to remain free to negotiate with any creditor so that a full and final settlement of that creditor's debt could be achieved.

[350] There was considerable debate about whether this proposal was realistic. Obviously this Court thought it was when the proposal was approved on 12 March 2001. Mr Taylor also gave expert evidence on this topic. He noted that tax credits of \$378,900 would result in Mr Heslop's after tax income being equal to his gross income for the five year period under consideration. Thus Mr Heslop would have been in a position to commit a higher proportion of income to his creditors than would have otherwise been the case. Moreover, repayment of the BNZ debt would have removed a substantial outgoing.

[351] It is worth recording the profits earned by Mr Heslop between 1992 and 1999 and his loss for the year 2000:

1992	\$ 124,800
1993	\$ 103,100
1994	\$ 97,200
1995	\$ 68,800
1996	\$ 329,900
1997	\$ 218,645
1998	\$ 341,300
1999	\$ 585,400
2000	\$(487,300)

Mr Taylor averaged the profits and loss over those years and deduced that Mr Heslop could have paid \$192,000 to his creditors over the five year period. There was no serious challenge to that evidence.

[352] I accept that if the Moir agreement had been settled and Mr Heslop had not been adjudicated bankrupt he would have been able to pay at least \$200,000 to his creditors during the five years following the Court's approval of his proposal, possibly considerably more. It seems to me that by averaging Mr Heslop's earnings over a period of nine years and including the year 2000 loss, Mr Taylor has taken a relatively conservative approach. I accept Mr Heslop's evidence that he had received approaches from people who were interested in participating in land development projects once the Court approval was obtained. For reasons already given I also accept that Mr Heslop's health would have improved once the disastrous 2000/2001 period was behind him. Finally, I note that Mr Heslop demonstrated a capacity to rebound by his performance after his discharge from bankruptcy.

[353] In my view, it is perfectly plausible that the amount owing to creditors could have been reduced to \$300,000 or less by March 2006 (five years after the approval by the Court). That figure assumes that unsecured creditors would have totalled around \$500,000 when the proposal was implemented. Amongst other things, this reflects that, in contrast to the bankruptcy situation, there would have been a continuing business and an ability to maximise Bartercard credits. Indeed, the figure of \$500,000 is probably too high.

[354] Given Mr Heslop's ability to generate substantial income there should not have been any difficulty in raising a mortgage over the orchard lot in or about March 2006 to repay creditors in full, or at least those unpaid creditors who wished to be paid out. A separate certificate of title would have been available and the valuation evidence discussed earlier suggests that the orchard lot would have offered an ample security margin even without having to wait for the rezoning.

[355] Put another way, if Mr Cousins' breaches had not caused the loss of the Moir agreement and the setting aside of the debtor's proposal, the trust would ultimately have enjoyed beneficial ownership of an unencumbered orchard lot. Although the orchard lot would have been made available to the creditors in terms of the proposal and would probably have been ultimately used as security for a mortgage to pay off creditors, the trust would not have been required to make any payments towards

creditors. That responsibility would have rested with Mr Heslop and I am satisfied that over time he would have discharged that responsibility.

[356] Under those circumstances I cannot accept that there should be any further deduction from the damages awarded to the trust. Apart from the \$48,000 already taken into account, the trust has received absolutely no benefit or advantage from the setting aside of the debtor's proposal or from Mr Heslop's bankruptcy. Nor is there any justification for somehow treating the trust as the alter ego of Mr and Mrs Heslop. At all relevant times it was an independent and legitimate entity in its own right, no argument to the contrary having been advanced.

[357] Finally, I cannot see any reason to reduce the damages awarded to the first plaintiffs by virtue of the fact that Mr Heslop's bankruptcy released him from any legal obligation to pay the debts owed to creditors. There are several reasons. First, once loss of income and Mr Heslop's intention to make some payment to creditors is taken into account, it is debatable whether there has been any advantage or benefit to Mr Heslop. Second, given that Mrs Heslop was not under any legal obligation towards creditors and was not working, it is even more difficult to see how any advantage or benefit could have accrued to her. Third, if it is a matter of conferring a windfall benefit on either the first plaintiffs or the defendant, I have no hesitation in conferring that benefit on the first plaintiffs. The defendant was entirely responsible for the bankruptcy and its consequences. Fourth, I cannot conceive that it would be either logical or just for the first plaintiffs to be deprived of proper compensation, which I have placed at \$100,000, for their immense pain, suffering and humiliation.

Settlement With BNZ

[358] Although the parties to that settlement agreed that the terms of the settlement should remain confidential, it became apparent towards the end of the hearing that the Court would have to be informed about the terms of the settlement and the deed of settlement was made available accordingly. However, the hope was expressed that the Court would honour the confidentiality accorded by the parties to the deed.

[359] Unfortunately it is unrealistic to accede to the request for confidentiality. Any impact of the settlement on the awards made in this judgment cannot be discussed in any meaningful way without disclosing the amount paid. I also keep in mind that all the parties to the settlement were initially parties to this litigation. There is no sound justification for suppressing this information.

[360] The plaintiffs received \$100,000, with liability being denied by the bank and the third party. The defendant maintains that there will be double recovery unless there is a credit for the amount paid.

[361] While the plaintiffs acknowledge that they should not be entitled to double compensation, they deny that the settlement with the bank gives rise to that situation. Mr Parker also noted that once fees attributable to the claim against the bank (around \$53,000) are taken into account the amount actually received by the plaintiffs was only around \$47,000.

[362] During closing submissions I realised that it was difficult for either party to effectively address the implications of the BNZ settlement without knowing the outcome of the claims against Mr Cousins and the underlying reasoning. I therefore indicated to counsel that they would be provided with a further opportunity to present submissions after the substantive decision was released. Those submissions will need to address whether there should be a credit and, if so, the amount, and the award/s against which the credit should be levied.

Outcome

[363] Subject to any reduction that might be made to reflect the BNZ settlement there will be judgment for:

- (a) the first plaintiffs in the sum of \$106,491, being wasted legal expenses of \$6,491 plus \$100,000 by way of general damages; and
- (b) the second plaintiffs in the sum of \$1,409,000 being damages for the loss of the option to purchase the orchard lot.

[364] I am prepared to receive memoranda on the question of interest in relation to either or both of the above awards. In terms of wasted legal expenses there might be an entitlement to interest from the date of the expenditure to the date of judgment. And in the case of the award in favour of the second plaintiffs there might be an entitlement to interest from October 2005 to the date of judgment. Any memoranda that are submitted should also address the rate of interest that should apply if interest is awarded.

[365] The plaintiffs are entitled to costs, disbursements and witnesses expenses. If agreement cannot be reached on those matters counsel will need to submit memoranda so that the matter can be determined by the Court.

[366] Finally, counsel will need to submit memoranda as to the implications, if any, of the BNZ settlement. Their memoranda will need to address the matters referred to in [362].

[367] Any memoranda that the plaintiff wishes to submit in relation to the above matters is to be filed and served by 15 July 2007 and the defendant's response is to be filed and served by 27 July 2007. Any reply is to be filed and served by 31 July 2007.

[368] There are suppression orders in terms of paragraphs [342] and [344] of this judgment. Leave is reserved to any party to apply further should the need arise.

Solicitors: Parker & Associates, Wellington, for Plaintiffs
 Grant Cameron Associates, Christchurch for Defendant