The Fletcher Home Case – W.D. Gosper and T. N. Olsson and ORS versus Re Licensing (NZ) Limited and ORS. (High Court 17/8/1998, CP 255/96). *New Zealand Valuers' Journal*, November 1999, pp.42-69.

Headnote

The Fletcher Homes disputes in the mid 90's gave the Valuing Profession a lot of unwarranted, unwanted adverse publicity. They caused a lot of stress and cost to individual Valuers who found themselves caught in the storm generated by Politicians, The Commerce Commission, and the Media. In the long run the Legal Profession was the only one to benefit.

*The following case is a **Summary** of a Fletcher Homes Ltd (FHL) case which gives an excellent background to the cases, and explains clearly the situation Valuers found themselves in when valuing New houses, "Off Plans".*

*The full case is **recommended** reading for all Valuers.*

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP225/96

BETWEEN W D GOSPER AND T N OLSSON AND ORS
Plaintiff s

AND RE LICENSING (NZ) LIMITED AND ORS
Defendants

Hearing 18-22, 25-29 May; 2-5, 8-12, 22-26, 29-30 June; 1-3 July 1998

Counsel J J Delany and D R Ferrier for First and Second Plaintiffs
EJM Rawnsley and RDA Williams for Third Plaintiffs
B A Gibson for First Defendant
C R Carruthers QC, D S Alderslade and S J Mills for Second and Third Defendants
J R Billington QC and J A Porter for Fourth Defendant

Decision 17 August 1998

RESERVED DECISION OF McGECHAN J

Solicitors
Hanning Connor, Wellington, for Plaintiffs
B A Gibson, Wellington, for First Defendant
Chapman Tripp Sheffield Young, Auckland, for Second and Third Defendants
Sievwrights, Wellington, for Fourth Defendant

Introduction

These are claims by three couples for whom Fletcher Homes Ltd ("FHL") built houses in 1989, 1992, and 1993.

In each case, the purchases were financed by high ratio first mortgage advances procured and managed by an associated company Residential Mortgages Ltd ("RML").

The funding involved was from outside banks operating through a so-called Residential Mortgage Trust ("RMT"), the trustee of which was AMP Perpetual Trustee Company NZ Limited ("AMP").

The mortgage advances were guaranteed in case of the Davies by Housing Corporation of New Zealand ("HCNZ"), and in case of Satterthwaites and Gosper and Olsson by a private mortgage insurer "CUAMIC".

The houses were built off plans prepared by FHL. FHL also provided or assisted with the acquisition of the sections involved. The mortgages were advanced on the strength of valuations obtained at the instance of FHL from outside valuers.

I will term the First Defendant valuer "BKF", and the Fourth Defendant valuer "Fords". Lending exceeded **90%** of such valuations.

When the properties were resold, or in one case re-valued at current date, realisations were well below previous valuation and contract prices.

The Plaintiff purchasers now contend the valuations were excessive; advances and purchase prices so facilitated were too high; and that they were lured into overpriced houses and unsuitable borrowings. They contend this came about through a scheme under which they were invited to trust Fletchers, were misled by advertisements and promotions, and were the victims of improper and otherwise negligent conduct.

In that light, the Plaintiff purchasers claim against the valuers concerned in negligence, and in contract. They claim against FHL, the vendor, on the basis of asserted breach of fiduciary duty, negligence, contract, and misrepresentation. They claim against RML, the mortgage manager, in negligence and under the Credit Contracts Act 1981.

One couple, the Davies, claim against the relevant valuer, FHL, and RML in deceit. Damages are claimed on the basis of total outlay involved in the acquisition of the property and since, less estimated occupation rentals and sale price recovered or revaluation recoverable. Alternatively, there is a claim for loss and consequential loss of a somewhat more orthodox character. There are associated claims for distress and exemplary damages.

These three claims have come to furnish something of a **test case**, although their utility in that regard remains to be seen. There are a large number of somewhat similar claims by other disappointed purchasers filed in both the High Court and District Court in various centres, at various stages of progress or inertia meantime. More claims are being filed as time passes and limitation periods near expiry. With that in mind, I set out the background and facts involved in some detail. There may be a need for careful comparisons. I have not, however, gone beyond findings essential to this particular case. While that might have been desirable on some points, time simply has not permitted.

Background

The Fletcher organisation has played a major role in the New Zealand construction industry for many years. It has developed and retains a considerable reputation. On the residential side, it has had a traditional involvement in low-cost "affordable" housing. Originally, this comprised both State Housing and housing constructed on State finance. From the mid 1980's this world altered. Government progressively withdrew, leaving residential building to the private sector on private finance. Private sector practice restricted lending to approximately two-thirds of valuation, requiring a **20%-30%** deposit. This deposit requirement was beyond the means of many caught in rental accommodation (the "rental trap"). With this in mind, Government targeted assistance through an HCNZ Guarantee Scheme. HCNZ would guarantee private mortgage advances up to **90%** of valuation, significantly reducing the deposit gap. This opened up a considerable market amongst those with low assets but significant basic incomes, able to afford considerable mortgage outgoings.

Fletchers was in the residential building market through FHL (then "Fletcher Residential Limited"). It responded by setting up a finance company RML which raised external finance. As a matter of machinery this was done through advances by external financiers, typically banks, to AMP as trustee for the purpose of onward lending to be supported by HCNZ guarantees and proposed and managed by RML. Fletchers then marketed low-cost houses on a "one stop shop" basis; offering the prospective purchasers plans, construction (on a fixed price), and finance as needed within one organised package. It was attractive, particularly to the novice. There was considerable competition from other low-cost builders, and FHL houses were towards the top of the low-cost range, but it was a quality product and FHL did well. The timing was fortunate. The madcap boom conditions which prevailed from the middle 1980's until somewhat after the October 1987 sharemarket crash no doubt played their part. Some 10,000 houses were built on this basis before FHL exited in the mid 1990's.

By 1989 a further stage of Governmental withdrawal was in the air. With a **90%** finance market established, Government elected to withdraw HCNZ guarantees, looking instead to private mortgage insurers. Legislative amendments to trust legislation were passed to facilitate. Two insurers in particular took up positions –MGICA and CUAMIC.

Alongside this reorientation was another development. By 1989-90 the property boom was over, and recessionary conditions were developing. The business community, in retrospect, was somewhat slow to appreciate the scale of what was happening. The New Zealand house-buying public, brought up under inflationary conditions and ever-increasing property values, were slower still. The deeply ingrained desire for private home ownership remained. However, for the first time in decades property prices became static and in some areas receded. The Fletchers marketing and lending system, with its high gearing previously protected by inflationary movements and full employment, began to wobble. Lenders, and the newly entered mortgage insurers, began to focus more intensively upon risk limitation.

Within that focus, a debate developed – from at latest September 1991 - on appropriate valuation methodology. The debate amongst present parties paralleled a debate and refinement of standards within the wider valuation profession itself. At the heart of the debate was a single question: **was current market value of a newly constructed house to be determined by reference to the market for building such newly constructed houses, or by a (lower) so-called "resale value" obtainable once occupied and passed on?** The three houses in issue in this proceeding, and their related valuations, span a period before and through that debate and its spin-offs.

By 1992, mortgagees sales were occurring. The Davies property is an example. By late 1992, when the Satterthwaite property was settling, FHL made a strategic decision to exit low-cost housing in favour of higher value work funded away from RML. Indeed, a decision was made in principle to sell RML. By April 1993, at which stage the Gosper and Olsson transaction was in its formative stages, RML's business was in decline. RML ultimately was sold in 1996.

Davies: A History

Mr Davies was a young builder and a family man. The Davies were not first home owners. In 1987 they had purchased and in 1989 resold a small Fielding property, which had become unsuitable, ending up with an equity($11,418) in the process .They were living with Mrs Davies' mother, saving as best they could for the approximately 30% deposit required for a further home purchase. They had a strong desire to own their own home, and were anxious to build as soon as possible.

Early in 1989 they visited the FHL show home between Palmerston North and Fielding. They picked up the available brochures. They were thinking in terms of a three bedroomed house on a quarter acre section, a very conventional family home. They were given to understand 90% finance would be available, provided outgoings did not exceed 35% of income. Blackboard interest rates seemed low in comparison to prevailing bank rates.

Editors Note

The Davies, bought a section in Fielding and built a one bedroom house on it. The house was built as a "mirror image" to the plans shown to the valuer who based the mortgage valuation on the plans. The Davies moved in during December 1989.

It was not long before the Davies fell into financial difficulties. Mortgage interest payments were missed on 15 July and 15 September 1990. At the end of 1990 Mr Davies chose to terminate his employment. There were considerable delays in his receiving an unemployment benefit, although ultimately he was found to have been entitled. As from 16 December 1990 interest rates rose. The Davies could not pay. Despite well meaning intervention by others, and a degree of negotiation with and concession by RML, it increasingly emerged through 1991 that their position was hopeless. Naturally, they looked at resale. A real estate agent's prediction on the then depressed market was $68,000. The level of their borrowing was such that they could not refinance. Due in part to the unwise "mirror" location of the house on the section, it was difficult to subdivide. In due course a Property Law Act notice was served, with RML demanding vacant possession on 7 October 1991. Mr Davies finished the interior work, and gave up possession. An independent valuation dated 7 November 1991 was at $68,000, with a forced sale prediction of $60,000-65,000. Ford's, on the scene again, assessed $70-73,000 on 8 November 1991. The property was sold, with settlement 3 April 1992, for $67,500 (net $62,997).

The Davies owed a balance of $29,604.92. RML claimed on the Housing Corporation on 16 April 1992. The Davies have never heard from the Housing Corporation under subrogation. Their financial position may well have been such as to make any claim pointless. They heard no more about this personal disaster until general publicity in 1996.

Mrs Davies developed myalgic encephalomyelitis (M.E.) around the time of the departure from the house. Mr Davies ascribes it to stress. While, undoubtedly, all would have been stressed, there is no medical evidence. Mrs Davies did not give evidence herself.

Satterthwaites: A History

Mr Satterthwaite was a young plumber and family man living in Palmerston North. He had not previously owned a home. They lived in rental accommodation. At the time in question he was working for his father's company.

Prior to Christmas 1991 they noticed advertisements on television promoting Fletcher Homes. It seemed an attractive proposition. He was aware of FHL's size and reputation. He trusted what he heard.

Editors Note.
The Satterthwaites found a section in Fielding. FHL estimated the Section and Dwelling cost at $146,822.

A Valuation as at 23 April 1992 – including Garage – was $145,000, with Mortgage Recommendation of $96,000.

While the application was under RML consideration a peripheral problem emerged. On 12 May RML applied to CUAMIC, still on the $145,000 valuation, for mortgage insurance. On 13 May CUAMIC declined cover, Satterthwaites' income ratio being below guidelines. RML protested, but on 20 May1992 CUAMIC confirmed that the refusal stood. That meant, of course, that a necessary loan criterion could not be met.

Matters proceeded nevertheless. On 8 June 1992 RML issued its first loan offer. The cost of land and house was put at $146,822, plus additional expenses for the Satterthwaites now estimated at $4342, total $151,164. It offered loan "A" $122,562 and "B" $13,746, total $136,308. The balance was to come from:

Deposit paid	$1000
Builders gift	3500
Credit decorating	2646
"cash in bank"	2500
Further savings	**5210**
	14,856

Loan "A" would be at fixed interest for two years.

On 12 June 1992 the Satterthwaites accepted a loan offer. They did so after advice from the legal executive in an appointment which lasted an hour. They were unhappy at the building cost, and thought the mortgage was about $10,000 light. They may well have been right, as savings were somewhat **fictional.** Mr Satterthwaite preferred living to saving. There had been discussions between Mr Satterthwaite and Mr Marshall of FHL regarding the availability of the "PYR" promotion now being advertised. The same day, the legal executive wrote to FHL advising the building contract was unconditional, and noting that confirmation was on a basis that the "rent refund (being your current promotion)" was available.

On 17 June 1992 the Satterthwaites' legal executive returned the loan agreement and solicitors certificate to RML. There is no explanation for this delay. It might reflect something else. The Satterthwaites, as mentioned, were unhappy at the cost and a perceived mortgage deficit. In Mr Satterthwaite's words, they developed "cold feet". They spoke further to a Mrs Rule.(A FHL employee) She saw a possible solution through use of a builders gift, construction credits, and deletion of the garage. Very properly, she suggested they re-approach Fletchers and assisted them with preparation of an appropriate letter. On 18 June 1992 they wrote requesting changeover to a **95%** loan to reduce outgoings. Mr Satterthwaite expressed a desire to do his own plumbing and drain laying. They would delete the garage, fences and landscape work. FHL were amenable

On 7 January 1993 the Satterthwaites' solicitors wrote to FHL requesting a copy of the valuation. The legal executive had noticed the debit item, and so suggested. Mr Satterthwaite was interested. Matrimonial difficulties had developed, and perhaps he foresaw possible disposal. On 18 January 1993 FHL responded that only a completion certificate existed. This of course was incorrect. In due course Fletchers did send the $135,000 valuation, which found its way to Mr Satterthwaite. He was delighted at the figure, seeing it as confirming availability of some cash to split in event of sale.

Mr and Mrs Satterthwaite did separate in March or April of 1993.

Matters deteriorated. In January 1994 interest rates were increased. In March 1994 Mr Satterthwaite's employment with his father's company was terminated. He started a business with others, but had no free funds for quite some time. A claim on his redundancy insurance was declined on a (correct) basis that he was in employment, and had previously been employed by a company controlled by a parent, an exception to policy conditions. Defaults and some acrimony followed. Mr Satterthwaite made considerable efforts to save the house. He was afforded some concessions by RML in the early stages. Mr Satterthwaite considered selling, but was met with laughter when instructing real estate agents at the $130,000 level, despite the earlier Ford's valuation. There was no interest at that figure. Agents recommended between $95,000 and $115,000 asking price. On 4 May 1995 a valuation obtained, at RML's suggestion, was only $86,000, but "on completion" $100,400. Another agent as at 27 June 1995 recommended between $93,000 and $98,000. The property was sold on 11 December 1995 for $86,000. Mr Satterthwaite was concerned for family and business reasons to avoid bankruptcy. He executed an acknowledgement of debt to the mortgagee in the sum of $55,674, representing the deficit.

Gosper and Olsson: A History

Mr Gosper and Ms Olsson were first home purchasers. They did not come from a tradition of home ownership. He was a cabinetmaker. He had a minority interest in a small manufacturing company, but I am satisfied he was not financially sophisticated. She was an office worker. The same applies. They lived in the Hutt Valley in rental accommodation. They had little available for a house deposit.

Editors Note

They inspected and chose a lot at Totara Park , Upper Hutt.

The estimated cost of house and section was $130,017.

The property was valued , and a report produced on 15 February 1993, gave a total valuation of $125,000.

The report recorded notification of the contract price of $130,978.

(A further complication in this particular case was a foot bridge which was planned to be built over the Hutt River, close to the Gosper and Olssons Section. It seems that none of the parties were aware of this proposal).

However there was a $3576 funding shortfall on a contract price of $130,978, so Fletchers set out to reduce price. They did so by a reduction not in the proposed house construction item, but in land price. The Land Manager was persuaded to reduce section price from $37,500 to $33,924, taking contract price down to $127,402. Available funding of $131,900 would cover that sum, plus Gosper and Olsson's estimated own expenses of $3300, plus a required loan establishment fee of $1198. The mechanics of this reduction were not revealed to Gosper and Olsson.

It was an RML or insurer's requirement that valuations state the contract price for the house concerned. The previous $130,978 could not stand. Mr Hyder, on request, obliged by retyping the $125,000 valuation showing a new contract **price** $127,402. He considered the alteration in contract price immaterial for valuation purposes.

On 2 March 1993 the RML mortgage interviewer, a Mr Collins, met Gosper and Olsson in the early evening at FHL's Lower Hutt premises. An RML mortgage assessment form prepared by Mr Neubauer (an FHL Salesperson) set out the proposed price and financing. They were well prepared, taking with them the necessary income certificates and verifications. Mr Collins was thorough. A good deal of attention was paid to income and expenditure, and checking ability to cover mortgage outgoings. The interview took some 90 minutes. In the course of the interview reference was made to the valuation of $125,000, but neither Gosper nor Olsson remember that. Evidently it did not assume prominence. At interview end some insurance matters were dealt with, and they were given an RML "What you need to Know" pamphlet which they took home

On 3 March 1993 Gosper and Olsson met a Mr Montague for well over an hour. Mr Montague is an experienced residential conveyancing solicitor. He followed a standard interview format under which he explained the Building Agreement and Occupation Licence, cross-checked accuracy of detail, and then discussed obligations and risks. He pointed out the risks of low equity. Specifically, he warned them that if they separated or sought to sell within five or six years they may have to sell at a loss, although general experience seemed to indicate risk after that was less. He knew nothing of the makeup of the price, and had not seen the valuation. His experience has been that buyers by this stage are mentally committed, and consider the documentation a formality. Most go ahead. I am satisfied the pair were properly advised. I am also satisfied they were not receptive. They already had decided to buy. They regarded Mr Montague essentially as FHL's lawyer, and the signature meeting as something which they were required to undertake. They signed the two documents, no doubt still operating on an assumption FHL was to be trusted.

Late in 1994 the first of regular interest rate increases took effect. (It is interesting to note that increases as from 16 January 1995 to **11.95%** and 16 April 1996 to **11.95%** both exceeded the CUAMIC maximum permissible rate of 11.75%). Gosper and Olsson did not find the going easy, but in contrast to the Davies and Satterthwaites did manage to hold on to their property. They have been unable to sell, or refinance due to limited equity.

The Cases Pleaded

The statement of claim is long and detailed. I am not critical. Particularisation was required. A severely summarised version must suffice. The claims by each pair of Plaintiffs against the relevant valuer, and against FHL and RML, are very similar (except for unique claims by Davies based on deceit). For purposes of this brief description, claims by all Plaintiffs can be merged. Quantum aspects can be deferred.

(1) <u>Valuers</u>

As against the respective valuers, all Plaintiffs claim in negligence, and in contract.

(A) *Negligence*

Valuers were requested by FHL to value for mortgage purposes; and knew or ought to have known the valuation would be relied on by purchasers. Valuers knew the valuations would be forwarded by purchasers, through the agency of FHL, to support applications to RML for mortgage finance. Valuers knew or ought to have known mortgage finance would be advanced on the strength of the valuation, and up to its amount. Valuers knew or ought to have known that if valuations were incorrect, it was likely to cause loss to purchasers. Valuers owed purchasers a duty to take reasonable care. The valuations substantially overestimated current market value on a modal house and comparable basis. Further, valuers were influenced by and partial to FHL; and failed to have proper regard to purchasers' obligations and interests. The incorrect valuations caused excessive borrowing and enabled purchases, with resulting losses.

(B) *Contract*

Purchasers entered into partly oral and partly written contracts with valuers, through the purchasers' agent FHL and/or RML, under which valuers would value for mortgage finance. The contracts included implied terms requiring care, skill and professional manner. There were similar substantial overestimates. Implied terms were breached in a similar manner, with resulting losses.

Davies (alone) also claim in deceit. The relevant valuer is Ford's.

(C) *Deceit*

Valuations were representations as to value; were false; were made without actual and honest' belief in their truth, or were known or believed to be false; were substantial overestimates of value, induced the purchases and borrowings, and caused resulting losses.

(2) FHL

As against FHL, all Plaintiffs claim under asserted fiduciary duty, negligence, contract, and misrepresentation (Contractual Remedies Act 1979).

(A) *Fiduciary Duty*

Purchasers placed trust, confidence and reliance on FHL to arrange for their benefit whatever was necessary to purchase the properties concerned. Because of that relationship, FHL assumed fiduciary obligations. These included obligations

(i) to act in purchasers' interests

(ii) to act in accordance with instructions, or otherwise so as to benefit purchasers

(iii) not to misuse control to gain advantage

(iv) to avoid conflict of interest

(v) to disclose all information likely to influence decisions to purchase

(vi) to act with skill and care in obtaining finance

(vii) to act with skill and care in obtaining valuations (to be current market value)

(viii) to ensure valuations were accurate and independently assessed

(ix) to arrange whatever was necessary for purchasers' benefit to enable purchase.

FHL breached fiduciary obligations by

(i) failing to act in purchasers' interests (particularly in the obtaining of accurate valuations)

(ii) using its position to gain advantage (benefits from sales and mortgages)

(iii) allowing conflicts of interest (overpricing of property and financial disadvantages to purchasers)

(iv) failing to disclose all background information as to sale and mortgage transactions, and excessive valuations

(v) using valuers known to be likely to provide incorrect valuations; providing those valuers with contract prices, and suggesting correlation with those and other selling prices; passing on to mortgagees valuations known to be incorrect

(vi) failing to arrange accurate independent current market valuations for mortgage purposes

(vii) failing to act with skill and care in obtaining mortgage finance. Breaches caused losses incurred.

(B) *Negligence*

FHL assumed responsibility for arranging and did arrange valuations for purchasers.

FHL knew or ought to have known valuations would be relied on by purchasers as purchasers and mortgagors. FHL knew or ought to have known purchasers were likely to borrow up to valuation level.

FHL owed a duty of care

(i) to act in purchasers' interests (particularly to ensure correct valuations, avoid over-borrowing, and to obtain benefit of promotions)

(ii) to act in accordance with purchasers' instructions and otherwise to purchasers' benefit

(iii) to act with care and skill in obtaining current market valuations

(iv) not to sell a property likely to cause loss

(v) to arrange an appropriate mortgage

(vi) not to allow obligations in excess of security value.

FHL breached such duty by using valuers known to be likely to give an incorrect valuation; revealing contract prices to valuers; suggesting correlation; not obtaining accurate and independent current market valuations; passing valuations to mortgagees when known to be incorrect; allowing entry into transactions likely to cause loss; failing to disclose the non-beneficial nature of promotions; and generally failing to act in purchasers' best interests. Breaches caused purchases and resulting losses.

(C) *Contract*

Purchasers entered into partly oral and partly written contracts with FHL, incorporated in the written building contracts. There were implied terms identical to fiduciary obligations (as previously alleged). Breaches of implied terms resulted in loss.

(D) *Misrepresentation*

FHL represented (by advertisements, brochures and orally) that

(i) purchasers could place confidence and trust in FHL

(ii) mortgages would be on the best terms available and would be appropriate

(iii) prices payable were at or close to current market value

(iv) FHL would arrange a current market value

(v) "live rent free" and redundancy insurance promotions were free and would benefit purchasers

(vi) builders gifts would be genuine gratuities and would benefit purchasers

(vii) purchasers could afford the house and mortgage

(viii) packages were appropriate, fair and beneficial

(ix) (Individual additional matters, eg. for Gosper and Olsson matters relating to the bridge). The representations were wrong. Purchasers were induced to enter purchase contracts in reliance on those representations. Their effect was to substantially reduce benefits of the contracts.

Davies (alone) also claim in deceit.

(E) *Deceit*

FHL made the misrepresentations (above) without actual or honest belief in truth, and/or knowing or believing such were false. The representations were false, and resulted in loss.

(3) **RML**

As against RML, all Plaintiffs claim in negligence, and under the Credit Contracts Act 1981.

(A) *Negligence*

RML was aware of FHL's relevant business operations. RML was asked by FHL to arrange mortgage funds for purchasers. RML assumed that responsibility. RML knew or ought to have known purchasers had limited means. RML knew or ought to have known the valuers provided inaccurate excessive valuations. RML owed purchasers a duty to ensure valuations received from FHL were correct and independent.

RML owed a duty to purchasers not to allow excessive indebtedness on incorrect valuations. RML utilised the valuations concerned, breaching specified duties, resulting in purchases and **loss.**

(B) *Credit Contracts Act*

Purchasers entered credit contracts comprised in the loan agreements and memoranda of mortgage. Terms contained were oppressive *et al* in that

(i) repayments were based on mortgage advances made on the strength of incorrect valuations

(ii) repayment levels were excessive in relation to means and value

(iii) interest rate increases were excessive

(iv) RML failed to disclose adverse background elements of the sales and valuations

(v) the advances contravened provisions of the Residential Mortgage Trust

(vi) interest rates exceeded insurer's maxima. Further, RML exercised rights in an oppressive manner by requiring payment, in those circumstances, of full principal and interest.

Davies (alone) also claims in deceit.

(C) *Deceit*

RML represented the sale, valuation, and mortgage were completely in order. The representation was false, given inflated price, incorrect valuation, and advances in excess of value. RML did not actually and honestly believe the representations to be true, and/or knew and believed in falsity. The representations induced purchase and borrowing, and resulted in loss.

There are some associated affirmative defences.

BKF plead

(a) contributory negligence through failing to obtain a copy of the relevant valuation or to make enquiry as to its content, failing to obtain a second valuation, and borrowing in excess of recommended maxima

(b) disclaimer provisions in the relevant valuation limiting responsibility to the mortgagee (RML) and mortgage insurers.

Ford's plead contributory negligence in like respects, plus failure to obtain adequate prior advice, and to maintain the property, and to mitigate damage. Fords also plead the Limitation Act.

FHL/RML plead contributory negligence (equitable reduction) against all Plaintiffs, asserting

(a) failure to notify unwillingness to proceed unless contract price equated resale market value

(b) failure to obtain resale valuation advice; and imprudent assumptions contract price equated current resale value.

FHL/RML plead the Limitation Act against Davies, except as to deceit.

FHL pleads an "entire agreement" clause contained in the building agreements expressly against Satterthwaites and Davies (except as to deceit). The heading to this final plea does not include reference to claims by Gosper and Olsson, but content, and enumeration in the following subheading, make an inclusive intention clear.

I treat the plea as including the Gosper and Olsson claim.

The Valuations: The "Scheme": Contentions

A central element to most claims is the assertion that the valuations obtained by Fletchers were improperly above current market value. There is an associated assertion, advanced mainly on the strength of evidence given by a former FHL salesman Mr D R Marshall, that FHL knew the valuations were unsatisfactory, and were engaged in an improper sales and financing scheme which followed on. It is convenient to look at these points immediately, as they can be dispositive.

The Plaintiffs point to the considerable difference between valuation levels and ultimate sale levels (or revaluation level) only a few years onward; a proximity of correlation between contract prices advised to valuers and valuations which followed. Apparent selection by FHL of valuers who gave favourable results; asserted pressures extended by FHL upon valuers to increase valuations; aspects of treatment of modal house prices and selection and use of comparables; an asserted lack of attention to resale values; and various other factors. The accumulation is put as telling its own error and influence story.

The Defendants retort that valuation is not an exact science, but contains major elements of judgment and opinion. They assert that determination of current market value was (and is) an exercise governed largely by prevailing professional practice at the time concerned. That practice at that time recognised the approaches taken; and the figures which resulted were not predictions of future trends. It is said that realisations below valuation figures resulted from subsequent market decline and from forced sales. Defendants contest any deliberate correlation, susceptibility to pressure, or error in approach to modal costs, comparables, resale values or otherwise. The Defendant valuers point to the terms of instructions received. All hotly contest allegations of knowing overestimation.

This is not an area for quick and simplistic comparisons between figures contained in valuations and figures obtained later on forced sale. Nor is it an area for sweeping generalisations, or allegations of conspiracies in dark corners. I must look at the state of the art as it actually existed at the time; at precisely what was asked of the valuers; and at precisely what they did. I must look also at other factors which might have played a part in the reduced realisations obtained. I must evaluate the evidence of the asserted "scheme".

Valuation Approaches: "New" and "Resale" Controversies

Plaintiffs attack valuations involved in the three properties at issue insofar as these rest on "new" comparables as opposed to "resale" comparables. The distinction is between value as between new unoccupied homes, and recent but previously occupied homes up for resale. Put in market terms, it is a distinction between values in the sector comprising builders and new home buyers, and values in the sector comprising recent but previously occupied homes and open market buyers. There is a difference. It is recognised new homes attract a "premium". More will be paid for a brand new unoccupied house than its recent second-hand counterpart.

This attack is somewhat oversimplified. As will be seen, the three valuations involved all appear to have paid at least some attention to both categories, but so far as a focus is placed on "new" comparables it raises a considerable debate.

All agree that value is not simply cost. Just because an article cost X dollars does not mean it was worth X dollars. That X dollars may be above or below prevailing market. That applies, as ever, in relation to the value of a new home.

However, should one evaluate that new home by reference to prices paid for comparables within the field of builders and new (unoccupied) home buyers, carrying a premium, or within the field of owners of recent but previously occupied homes and used home buyers, not carrying that premium? Advocates of the first view urge that approach reflects the reality of what is being bought and sold. The item under assessment is a new unoccupied house. There is an established market for such, and it is false to look away to the quite different resale market for used homes. This is new. It is not used. Advocates of the second view maintain something is worth whatever you can get for it; no more – and the reality is the purchaser will have lived in and will be reselling a used home. With the advantage of hindsight, I have some intellectual impatience with this dispute. It ignores the important purposive element. Is the purpose of the valuation in question to test a brand new home against the levels others are paying, a matter of interest to a prospective new home owner? Is it, instead, to estimate what the property might fetch on resale in the event of an early default, a matter of interest to many prospective mortgagees?

However, despite the unreality of divorce from context, there is no denying the fact of a professional difference and debate which developed and carried on through the 1989- 1993 time span in question in these proceedings. (Indeed, on the evidence in this case, it continues). Through the 1980's growth period, the debate was somewhat academic. With inflation and rapidly rising house prices, new house prices soon were overtaken by higher resale prices in any event, and the latter were the more relevant concern. With the slowdown from 1989 and onward, the point assumed increasing relevance. I will refer to the RML and lender groups' perceptions and responses at a later point. For the moment, the question is one of development of professional standards.

As to the profession's position, I accept the history narrated by Mr Horsley. Prior to 1990 there were no NZIV standards directed specifically at residential housing. The NZIV Code of Ethics, para 17A both in its original form and as amended in 1989 was general in nature. Standards prescribed for financial statements were in the same category. Practice Standards issued in the 1990's which did relate to residential valuations, and indeed related to valuations off plans, did not assist. Practice Standard No. 1 issued in draft in mid 1990, and adopted in January 1992 stated:

"4.1 Market value is the estimated amount for which the property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction, after proper marketing, wherein the parties had each acted knowledgeably, prudently, and without compulsion.

3.9 In the case of new properties, proposed additions, or alterations where the valuer is obliged to base the valuation upon plans and specifications supplied this fact is to be stated in the report. The valuation should be specifically conditional upon the building work being completed in a sound, tradesmanlike manner in accordance with the plans and specifications, and conditional upon compliance with the local government approval".

Practice Standard No. 2, contained nothing of direct relevance, but clause 4.6 directed, interestingly, that:

> "It is not appropriate to value property to be used as security on a forced sale basis".

As Mr Horsley commented in evidence, while these Standards dealt with the valuers' role, inspection, report content, and the definition of market value:

> "They are essentially silent on the valuation process itself'.

The dilemma was not addressed until 1 May 1996, when the exposure draft of Guidance Note No. 7

"Valuation of houses under construction, and houses to be built as previously unoccupied new houses" emerged. (It was revised 1 March 1998). It provides:

"5.0 Valuation of Previously Unoccupied New Houses

5.1 Valuers should be aware that it is essential when valuing previously unoccupied new houses - either those completed or to be built - that consideration of comparable sales evidence should include not only similar new houses but also re-sales of similar properties.

5.2 Some new houses are offered for sale on finance terms favourable to the initial purchaser and this is often reflected in the initial purchase price. In addition the initial purchase price may reflect the building cost. The valuer should have regard to all such factors in determining the final value estimate.

5.3 The re-sale value of a house - particularly a previously unoccupied new property - can be adversely affected by incomplete development of the property, whether the house itself or the site development.

5.4 Where the valuer considers that there is likely to be a significant difference between the value of a new house and its re-sale value in its same condition then this should be stated clearly in the valuation report, showing both value as a previously unoccupied new property and the re-sale value. The valuer should always comment on any differential between the purchase price new where known, and the assessed market value as a new house.

5.5 Where mortgage recommendations are provided the valuer should base such recommendation on the re-sale value of the property".

The 1996 professional solution was a compromise: "not only similar new houses but also re-sales of similar property", with warnings as to problems inherent in both, and a requirement to comment on a difference. This 1996 solution fits conveniently with recent developments in the UK (RICS Guidance Note 3 at 3.4.8) which states:

> "(a)The valuation of a brand new property being sold by a developer should be approached in the same manner as any other valuation ... It is the property as new which is to be valued, but comparable evidence can be drawn from both sales and re-sales on the development. Where there has been a satisfactory number of recent sales of adjacent similar new properties as the property being valued, this evidence is likely to be of greater importance. However, where the Valuer is not satisfied that this situation exists, greater emphasis can be placed on prices realised recently for new property on comparable new developments and from within the second-hand market. Adjustments are of course necessary to reflect any improvements in the design or layout of the subject property, the case of maintenance during the early years and other factors which influence the decisions of purchasers..
>
> (c) It should be appreciated that the valuation provided is of the property (excluding any element of value attributable to furnishings, removable fittings and sales incentives) as new. It is possible that the valuation figure may not be subsequently attainable on resale as a 'second-hand' property, especially if comparable new property is on offer at the same time."

It fits also with a recent exposure draft issued by the Australian Institute of Valuers and Land Economists.

However, the 1996 and overseas Standards were well in the future as at 1989-1993.

They are of some importance in that they verify that there is and was room for valuation by reference to "new" as opposed to "re-sale" values, but what is more important is the debate which lay behind. As Mr Horsley said (italics added):

> "The NZIV *over the six years* that followed the promulgation of the first residential valuation

exposure draft in 1990 *had within its committees debated the two value concept for new houses* i.e. market value *as a new house* and market (or mortgage) value *as a re-sale house* at some later date. The eventual outcome of this debate was the 1996 Guidance Note which provided for the valuation to be as a new house but where the valuer believes the re-sale value might be at a lesser figure this should be noted in the report by way of comment."

The two valuers defending these proceedings valued amidst that growing debate. They were untrammelled by Guide Note No. 7, not yet issued. There was an accepted school of thought that one could, indeed should, value on a "new" basis. Mr Horsley stated one "key determinant" of process affecting valuations at the time was that:

> "A primary emphasis on sales evidence of new homes is a legitimate basis of valuation since the valuer was accurately modelling the market in which the (new) property would ordinarily trade in a certain sector of the open market".

Mr Horsley went on to state:

> "Even after all the debate and development of Standards between 1992 and 1998, there is still an accepted distinction between the sub-markets for new and near new housing and back in the 1980's, and early 1990's, the primary focus was on the sub-market for new homes. I can find no basis for professional criticism of valuers who approached their valuation in this way at that time".

I accept Mr Horsley's evidence in this regard. I prefer it to the evidence of Mr Gordon and (so far as a general concurrence extended) Mr Kirkcaldie. Mr Gordon projected back an undue emphasis on resale approaches which I am satisfied did not exist, and was not regarded as called for, at the time (if even now).

It follows that the valuers concerned did not err through attention, even primary attention, to comparable "new" sales as opposed to re-sales 1989-1993.

There is also a subsidiary matter. Was it appropriate, when assessing "new" comparables, for the valuers to use FHL comparables? Mr Gordon thought not, as such might contain sales and financing concessions, artificially inflating their price.

Mr Horsley thought differently.

> "I disagree with this. If those Fletcher new house sales were arms-length transactions between willing buyers and willing sellers that went through an appropriate transaction period and the prices that they transacted at were determined as being part of the housing package, then these are the best comparable sales that can be used to value a home which is also transacting in an arms-length fashion between willing parties who negotiate the price in an acceptable fashion."

I prefer the evidence of Mr Horsley in principle. FHL sales were part of an overall "new" market, and were not to be ignored. As the 1996 Guidance Note later suggested, allowances can be made for concessions if thought warranted. However, there is a common-sense qualification. Any valuer, in any valuation, should aim for the widest spread of comparables practicable. It reduces risk. While FHL sales can be taken into account, they should not be the sole point of reference if a wider perspective is open. I doubt if the Valuation Registration Board approaches raised in evidence come to very much more.

It follows that it was open for the valuers to refer to "new" FHL houses as comparables if thought fit, preferably of course as part of a wider range.

Finally, it is convenient to note at this point Mr Horsley's further opinion as to the acceptability of process involved in the three valuations themselves:

"230 From a professional valuation perspective, the issues which arise from the valuations are:

(i) Of greatest importance, were the valuations undertaken in a professionally competent way having regard to the relevant Institute Standards?

That is, was the methodology and base data appropriate and was that market information interpreted appropriate in accord[ance] with current practice?

This issue focuses on the valuation *process*.

I believe these valuations were completed in a professionally competent way, having regard to the standards of the time.

(ii) As an indicator to the appropriateness , of the valuation process , was the estimated value reasonably consistent with comparable sales outcomes at the time?

(iii) Were Fletcher Homes and RML entitled to rely upon the valuations that is, in addition to the presumption that the valuers were professionally competent by virtue of their registration and membership of the panel, was there any thing on the face of the valuation reports to suggest that they were materially negligent?

I have not seen any documentation that indicates to me that at the time these transactions took place, the valuations could not be relied upon by Fletcher Homes or RML, or should have put them on notice of error. Quite the contrary."

I accept that assessment as far as it goes. Further consideration will be needed as to the actual content of the valuations concerned.

The Lender Group Debate and Valuation Instructions.

At times , one might have thought this case concerned valuations ordered by the Plaintiff purchasers (and for that matter directed towards future resale values) Not so.

Valuations were ordered, per medium of FHL, for the Trustee AMP, routed through the Mortgage Manager RML. That is the way ordered, and that is the way they were perceived. None of the lending group, FHL, or purchasers regarded them as obtained for the purchasers' own evaluation purposes. It appears that in the Davies day they were routinely passed on as a matter of interest, at least by Mrs Fearn (FHL) to purchasers or solicitors, and in the Satterthwaites case a copy was supplied following a specific request, but I accept the valuers and other evidence that such was not envisaged at valuation level. Indeed a directive issued in due course from FHL that copies were not to be supplied to purchasers.

The lender group, for whom valuations were intended, were not engaged in routine lending within comfortable margins. RML led the way on low-deposit/high mortgage advances. Lending to **90%, 95%** or even **100%** levels was at the higher-risk end of the market. RML was there because mortgage insurers were there: originally HCNZ, and later the private mortgage insurers such as CUAMIC. I accept there was a corresponding emphasis upon the concerns and requirements of those insurers. It was the insurers, increasingly, who came to dominate terms upon which advances would be made and valuations were to be obtained, with RML exercising a restraining influence, but not a great deal more. FHL, or RML, did not call the entire tune. There was an associated strong focus on full level of valuations, as opposed to concentration on more routine mortgage recommendation levels. Valuers were required, under the Code of Ethics, to give a mortgage recommendation, at whatever level they saw appropriate. They did so. The lending group, however, did not operate on those recommendations. It looked onward to the full value assessed, and also at contract price, looking to lend **90%** or more of whichever of the two was lower. Contract price was a real factor, and indeed at one point during 1992 the lender group was prepared to lend on contract price as opposed to valuation. While I think it is too simple to say that the valuations were looked upon as a cap upon lending on contract price, that attitude existed to some degree.

The lending group, for whom the valuations were obtained, were not amateurs. They were very well aware of the so-called "mortgage gap" which existed between "new" and "resale" values for a particular new house. They knew the risk element in event of default. As times tightened through the early 1990's the insurers sought greater protection against that gap by various manoeuvres, one of which was to tighten "new" house valuation approaches by insistence upon a greater spread of comparables, including some resale elements. RML (and no doubt from the sideline FHL) were anxious, on the one hand, not to see valuations (and with that mortgages and sales) unduly inhibited in an increasingly difficult market, and on the other hand not to lose the established funding lines. The insurers and fund providers while seeking the greater protection mentioned, did not wish to kill the goose that laid the golden egg. There was a protracted and at times tense debate through 1990-1993 and beyond which paralleled the associated professional debate. It resulted in increasingly detailed RML instructions to valuers, and valuation formats, as the years passed. The matter was explored in considerable detail in evidence, which I need not review. Suffice it to say that the valuation requirements developed and issued as a result of a range of commercial tensions, and were not dictated by RML or even less by FHL alone. The valuers, of course, were required to follow the instructions and formats so far as they extended. They did so.

I do not propose to set out the shifting instructions and formats applicable to these three properties at this point. They are dealt with so far as necessary, and more conveniently, in conjunction with later consideration of the three valuation exercises involved.

Modal Rate Valuation Approaches

Modal rate assessments operate on a m^2 rate for construction of a theoretical standard house. The definition of that house expanded in February 1992 in conjunction with a change in the source of modal rate information, but the essential character remained. The information on which the modal rate was based derived from statistical information as to actual building costs obtained on its contracts by the HCNZ, and passed on to NZIV on a regular ongoing basis. The rate so obtained was of course applied to the area of the house to be built, adjusted as considered necessary to allow for particular features. Naturally, modal rates varied between regions, and generally increased over time. Traditionally, modal rate assessments were considered particularly appropriate for standard low-cost housing, comparable to the projects from which the figures involved had originated, provided allowances were made for variables in construction and location. On an older house, a depreciation element may be needed (the "replacement" approach).

Net rate assessments derived from a different source. The valuer, from general recent sales evidence obtained through the NZIV, and from the valuer's personal local records, identified properties as closely comparable to the subject property as was practicable, removed the land and "other improvements" cost, and divided the resulting house price by area. (Areas were known within $10m^2$ bands). The rate so derived was then applied to the subject house area, with any further adjustments as considered appropriate.

By at latest the end of 1989, the modal house approach was in difficulties. With HCNZ withdrawing from large-scale residential construction, the supply of reliable data declined. By the end of 1989 NZIV saw a need to produce its own "Statscom", drawn from the "New Zealand Building Economist", which periodically stated broader regional costs. In January 1991 the HCNZ modal cost information ceased entirely. In February 1992 an attempt to publish modal rates resumed on a quarterly basis, on information obtained from an industry source. FHL itself played some part in that regard. This did not prove entirely satisfactory. Information difficulties continued, and there were increasing doubts through the 1990's amongst many valuers as to reliability. Larger private valuation firms began collecting their own in-house versions. There was a corresponding trend towards reliance on the net rate alternative. Mr Horsley saw that as appropriate. I accept that view, although modal rates were not without their place if used with care.

Editors Note

The Judge then discussed the analysis of the building price, and moved on to comment on the valuers and values.

I do not accept allegations Fords or BKF were selected as being "friendly" valuers, whether before or after the mortgage insurer-driven valuation panel was established, in any sense that they were valuers who could be improperly influenced. I have no doubt FHL did prefer to use valuers at the highest end of a range of opinion as known at the time. That is natural enough. Many solicitors or accountants would do the same, and always have. As long as the valuer was within a range professionally open, that was normal and sensible business. Fords also were used because they gave (at least over the period in question) prompt and convenient service, and personal relationships were satisfactory. Continuation like this of established practice, and convenience, are powerful factors in most businesses. I see nothing sinister. From the Fords' end, the FHL work was regular, but was only a small percentage of total turnover. It was some **12%** of valuation turnover. While Mr Tregonning in particular no doubt enjoyed the commissions involved, Fords and he were in no sense dependent on FHL work. BKF, or more particularly Mr Hyder, were used from a little before November 1992 as part of an effort by the lending group to spread valuations more widely for prudential reasons. He was a valuer known to the Lower Hutt branch manager Mr Kenna through previous FHL employment. There is, however, no suggestion of any close friendship or anything improper. There were not very many valuations involved. Mr Hyder was aware other valuers were engaged likewise, and FHL was not an important component of his professional work. He, likewise, in no sense was dependent on FHL work. The valuers were selected by FHL, both before and after the panel, but were not "tame".

I do not place much weight, either way, on FHL's practice of stating section and construction prices on the information sheets supplied to valuers. The practice was not unique to FHL. While Mr Gordon was emphatically against it, Mr Kirkcaldie was not; and Mr Horsley, noting views differed, described the practice as "not unusual". There is indeed some overseas authority in its favour: ***Baxter v Gapp* dc *Co*** (1938) 4 All ER 457, 462; ***Inez Investments Pty Ltd v Dodd, "The Valuer"***, April 1981, p502 (Sup. Ct. NSW). Arguably, it provided some incentive to valuers to push figures upward to stated levels, though at least in theory it could have resulted in a converse effect. I consider it did have the effect of moving figures upward in one specific but limited way. Where there was room to round up calculated figures from slightly below advised contract levels, this appears to have occurred. It occurred twice in the case of Davies. FHL were not naive. I accept FHL personnel would have been aware of that potential for upward movement and would be gratified if it occurred. However, I am not persuaded that potential was the sole or even a dominant purpose of supplying price information. There was, and **still is,** a range of viewpoints as to the relevance of actual construction price figures in the valuation of new houses, demonstrated by the range of views amongst valuers called in this case. Subsequent 1996 and 1998 standards and English practice recognise without adverse comment a possibility that such prices will be known. There was, and is, room for a view that valuers asked to value a proposition can be assisted by knowing actual negotiated prices. As Mr Horsley observed, it is "a valid piece of information that is derived from the market place." It is one factor amongst others which can be given some weight according to particular circumstances. Testing the point by common-sense, was not a valuer asked to value a proposition entitled to enquire "what actually are you paying for it?". Cost is not value, but it is one factor. I consider contract price was advised for relevant purposes, alongside any more tactical considerations that might also have been in mind. It is interesting in that connection that mortgage insurers and RML **required** its inclusion. I am satisfied those organisations were not looking for overvaluation. To the contrary, particularly the insurers, they were looking towards security.

Moreover, purposes perhaps are less important than effects. Did the communication of contract prices in fact act as a significant pressure upon valuers to move figures upward? It appears to have encouraged a rounding upward process already mentioned. However, it is not shown effects went further so as to induce serious valuation excesses. A frequent proximity between contract prices and valuation figures is not surprising in itself; a point which I explore subsequently. Overall, I am not persuaded the FHL practice of advising prices to valuers had either a predominant purpose or substantial effect of in fact exerting significant pressure on the valuers concerned. Professional practice remained a dominant control.

While FHL's considerable buying power and expertise may have facilitated lower labour and materials input costs; there is no evidence ultimate product price (whether aerated or solid) was above prevailing market. Indeed, evidence from an independent quantity surveyor Mr Beddeck was to the contrary. So is common-sense. FHL would not have lasted long against competition, even given its finance packages and reputation, if **its prices** were significantly above the market line. The valuation approach, or a principal component of the valuation approach being adopted was the "new house" as opposed to "resale" concept. It is not surprising in light of those matters that prices stated on information sheets often approximated those subsequently reached by valuers. The prices were **genuine prices** in a market. The valuations were strongly orientated towards that market. At extremes, indeed, they utilised actual comparative sales in that market which included FHL or other group housing as built and sold, knowingly or otherwise. I do not regard correlations as inferential evidence of pressure brought to bear on valuers; apart from the relatively insignificant aspect of rounding up, which could explain a number of exact concurrences.

I stand back. One must of course avoid the error of assigning only slight significance to a number of components, and then ignoring a totality which will be somewhat greater. One must take all the components which have any weight at all, and consider the result. There is the utility of using valuers at the higher end of the valuation ranges; the potential for pressure inherent in stated contract prices; the fact of requests by some FHL staff for upward review, and some upward revision not uncommonly resulting; and the common proximity between contract prices and valuations obtained. However, when these points and their totality are weighed in context, it does not come near to establishing a situation in which pressure was brought to bear by FHL suffcient to produce artificially high valuations, with over-valuations resulting. The picture painted by Mr Marshall is a mirage.

The Valuations: Certificates of Independence

Each of the three valuations in question in this case contains a certificate as to its independence. The wording varied, reflecting developing standard formats. Ford's valuation relating to Davies, 3 June 1989, stated:

> "We certify that we have acted independently of any owners of this property..."

Ford's valuation in respect of Satterthwaites 23 April 1992 stated:

> "I further certify that I have acted independently of any vendor or owner of this property..."

BKF's valuation in respect of Gosper and Olsson 15 February 1993 stated:

> "We have been instructed and employed and have acted independently of any vendor or owner of this property...".

There is no doubt as to actualities. FHL, serving the needs of RML, ordered and paid for the valuations. In one case – Davies – the FHL customer owned the section, but with that exception FHL was owner (outright or under conditional purchase contracts) of the land and vendor of the building. An argument could be constructed that as valuations were addressed to AMP as trustee of the RMT (or in Gosper and Olsson's case, that formula plus RML as manager), FHL was acting merely as agent for AMP/RML which were neither owner nor vendor, taking the valuation request outside the owner/ vendor category. That is somewhat unreal. Questions of professional independence, the conceptual opposite of dependence, should be judged by substance not form. In reality, FHL was the valuer's client, ordering and obtaining the valuation, and technically the certificates were wrong.

I am not persuaded, however, that this in fact made any difference or operated adversely to the Plaintiffs in the present case. The lending group comprising RML, AMP, originally HCNZ and later the mortgage insurers, were well aware of the fact of ordering and payment in first instance at least by FHL. FHL sent the valuations to RML. There were considerable ongoing discussions amongst all in the lending group in relation to valuations and formats. I am satisfied the fact of (strictly) erroneous certificates of independence on the valuations involved did not in any way affect the substance of the valuations or mislead lenders concerned, or alter the course of the transactions in issue.

Market Decline 1989-1997

Econometrics evidence was called as to movements in the New Zealand, and in particular the Feilding and Upper Hutt residential property markets, 1989-1997. The particular periods of interest, of course, are from dates of purchase to dates of resale for Davies (August 1989 to April 1992) and Satterthwaites (July 1992 to December 1995); and for Gosper and Olsson from February 1993 to date. The evidence given was consistent with valuation evidence and general historical knowledge, and I accept it as far as it goes.

Home ownership has been a traditional aspiration of New Zealand households at least since the last war. It has been an aspiration fostered by post war Government policies, including ownership within lower income groups. It reflects more than a desire for security, or acquisitiveness. There is an equally traditional belief that house prices keep rising and are the ordinary person's best protection against inflation. Generally, that has been true. Housing has risen in real (inflation adjusted) terms at the rate of **1.5%** per annum since records began in the 1930's, although most growth has been concentrated into relatively brief boom periods, and there are significant regional variations. However, with economic restructuring and economic difficulties, conditions in more recent years have varied. Commencing in 1989, nominal house prices actually dropped. (With continuing inflation, the decline in real prices was of course even greater). This was the first ever such occurrence. This decline was particularly acute in some regions, including both Feilding and Upper Hutt .

The Retrospective Valuations: Reliability?

Retrospective valuation exercises are by no means unknown. They are an acknowledged practice, even at Valuation Registration Board level. **However, they have acknowledged difficulties. I accept the evidence of Mr Horsley in that regard. It is difficult to recreate a valuation environment once significant time has passed, as is the case here.** Greater attention to detail and conscious recapture of social and economic changes are required. It is difficult, as in all exercises of human judgment, to avoid influences from hindsight, bringing into play matters which would not have been known or which would not have been prominent to practitioners at the time, or which would not then have been recognised as appropriate practice. The difficulties compound when the retrospective valuation is at a location where the retrospective valuer does not have local knowledge. The outsider can, of course, obtain the standard statutory information including recent sales and modal rates information, just like any other, but cannot hope to have the judgmental familiarity or alertness to potential local problems or advantages vested in an experienced local.

Mr Horsley carried out some initial steps towards retrospective valuations, to the point of gathering the statutory information and even making roadside inspections of comparables. Given the difficulties, however, he was not prepared to proceed further without local help.

Mr Gordon has widespread valuation experience, but did not have any special experience in the Totara Park area of Upper Hutt. While he had valued in that locality previously, he had not valued an FHL home there. As at date of hearing, he had not valued there this year. He did not have local experience in Feilding. However, he did not feel inhibited to the same degree. He spent a day in Feilding. He made the standard enquiries. There was no evidence he consulted local valuation advice in any depth, beyond perhaps some routine rental enquiries.

There are also some methodology problems.

As noted, over 1989-1993 (and beyond) there were differing schools of thought within the valuation world as to the proper approach to valuation of new homes: the "new" and "resale" method dispute. Mr Gordon is a strong "re-sale" man. He consciously avoided selecting new unoccupied group builder houses (and particularly FHL houses) as comparables. In principle, he looked first for newly built spec or private houses, and second for early re-sales. The preference for re-sales fell within a range from six months prior to one or two years after. He cross-checked by reference to modal rates. His belief was that group housing costs, including FHL costs, were excluded from the published modal rates. Mr Gordon consciously avoided any reference to the actual FHL prices involved.

There are dangers inherent in all of this. As at 1989-1993 it was open, as a matter of valuation practice, to refer to sales of new unoccupied houses (including FHL sales) as opposed to re-sales. New houses were one aspect of the market. Determination by re-sales was not the only, or only suitable, approach. An exclusively resale orientation could artificially depress. There were also developing reliability problems over published modal rates particularly through 1992-1993. (I leave open the question whether published modal rates excluded group housing cost inputs: Mr Horsley believed they were included, and exclusion might seem surprising in light of FHL's role through 1992. Perhaps it is a question of timing). Further, it was not necessary to exclude information as to contract prices, these having a possible relevance when taken along with all other information. For these reasons also, the retrospective valuations need to be approached with caution. Other approaches and views were open.

There is a danger, also, in unthinking comparisons between original and retrospective valuation figures. Comparisons are tempting but simplistic. Valuation is a matter of opinion. Mr Horsley referred to a "widespread belief" that valuations should fall within a 5-10% range of the mean, anything outside being excessive. He regarded that belief as arbitrary and unresearched. He had in fact directed a study based on VRB materials which pointed to the existence of a much wider range of opinion as between valuers. An analysis relating to residential properties from 1988-1998 indicated an average difference between experts of **19.89%**, with a maximum difference of **88.89%**. If the two highest differences were excluded, figures averaged **10.86%** difference, but with a maximum of **31.67%**. It might well be thought with straightforward designs, such as the present group building houses, valuations should fall within relatively narrower bands of opinion. That is so to a degree, but interestingly in a controlled set of four cross-check valuations over three properties commissioned by RML in early 1993, variations ranged on Mr Horsley's calculations from **6.58%** on one property to **19.04%** on another – and there was no agreement as to which house carried the highest value. Given all this, it is not at all surprising if two valuers are some 20% apart under ideal conditions; or significantly further apart if one valuation is an attempted retrospective, with all the difficulties which that involves. There is room for wide margins, even around **30%**, without one valuation necessarily being wrong.

Plaintiffs sought to make a point that Defendants did not call opposing retrospective valuation evidence. Defendants sought to make a point that Plaintiffs did not call a range of retrospective valuation evidence, when arguably a range would exist. I give **little** weight to either contention, and decide matters on what is in fact before me, for whatever it may be worth.

I do not dismiss the retrospective valuations out of hand. However, when the time comes for their utilisation, the retrospective valuations must be approached with considerable caution.

The Davies Valuation

As noted, a little before 3 June 1989 Mrs Fern of FHL ordered a valuation from Mr Tregonning of Fords.

At the time concerned, May 1989, lending operated under HCNZ guarantees. There was not yet a sophisticated debate about valuation instructions and requirements. The HCNZ scheme, and indeed AMP trust requirements, did not call for any specific approach. Directions and a format issued by RML on 21 July 1986 were cursory. There was no settled "new" or "re-sale" professional practice. I accept Mr Jones' evidence that while he was aware in theoretical terms of a difference between new house and replacement values, that was not seen as relevant. FHL's practice at that time, satisfactory to RML, was simply to order a "valuation". I accept from the terminology of reports delivered that such was taken to mean a "market" valuation, and indeed a "current" market valuation. So much was implicit.

That is what happened here. There was no written instruction; but merely a telephone request for a valuation, followed by an information sheet giving details of home and section contract prices, some construction details relevant to standard specifications, and a plan. The valuation obviously was for mortgage purposes. It was so addressed.

Fords (Mr Tregonning) did not consciously approach valuation at that time in terms of a new house/re-sale price debate. They simply proceeded as on all group housing matters.

The bulk of the work was carried out by Mr Tregonning. He was not yet a registered valuer, but was experienced in the work. As he was not registered, Mr Ford countersigned, but there is no evidence Mr Ford played any significant supervising role or devoted much if any attention to detail. I accept Mr Tregonning's evidence as to the mechanics of the process, although where documentation is available I adopt it as the preferable first point of reference.

Mr Tregonning valued Davies property. Eventually he delivered a revised valuation at $91,000. The two-thirds mortgage recommendation became $60,000.

Editors Note

The next part of the Judgement

concerned the analysis of Modal Rates and retrospective valuations.

The Davies house then had to be sold.

As matters turned out, of course, the property did not realise anything like $91,000.

It was sold, and I accept realistically under then applicable conditions, for $67,500. Context, however, is important. There were a number of matters which did not help. The property as built had been **reversed,** with adverse impacts on sun, view and subdivisibility. **It was not located in manner envisaged on the plans valued.** After the Davies left, the property was vacant, and presentation and grounds were less than satisfactory. It was sold on a depressed market. While the sale was not a mortgagees sale as such, it was **a forced sale**, and a situation had developed where the fact of sale was more important than price. The Tregonning valuation had been in large part on an unoccupied new house basis, not on a resale basis. The $67,500 figure **is a** classical resale outcome. The comparison is not between apples and apples. Last but not least, the realisation was at **74%** of valuation, and was above the recommendation of $60,600.

I accept Mr Horsley's evidence the valuation was acceptable as to process at the time made. I accept also that content was up to professional standards of the time. It follows the $91,000 valuation was within acceptable valuation practice at the time it was made, and could not then be said to be "incorrect", let alone "a substantial over- estimate". Hindsight is to be avoided. Nor could it be said Mr Tregonning knew or should have known it was unsatisfactory. I am likewise satisfied FHL and RML staff saw nothing improper in the $91,000 valuation which emerged, or in the request to reconsider the section-price. In those relatively unsophisticated days, the ultimate result was a valuation from a recognised valuer, to be accepted on its face as such. The same can be said for AMP, which received a copy, and HCNZ.

The Satterthwaites' Valuation

As noted, at some point shortly before 23 April 1992 the Satterthwaites signed an authority to RML to obtain a valuation on their behalf, and Mrs Shaw (Rule) contacted and forwarded an information sheet to Mr Tregonning at Fords.

By April 1992, mortgage insurers had entered the picture, and discussions were developing over valuation instructions and requirements. The existence of a mortgage "gap" between "new" and "resale" values had surfaced very clearly. Shortly before the valuation was ordered a contretemps had occurred between RML and AMP over the varying wording of various valuations obtained nation-wide, including indeed two from Fords. On 13 April 1992 RML had faxed Fords and others requesting a specific letter relating to the valuations concerned, and also a general letter which would state:

> "This is to confirm that Valuations that I/We have prepared or will prepare for the AMP Perpetual Trustee Co NZ Ltd, on behalf of Residential Mortgage Trust, are Market Valuations i.e. a valuation estimating a sale price on the basis of a willing purchaser and willing vendor and not based on replacement cost or the cost of construction.
>
> The value of the property may change in the future due to market conditions and changes in the state of the property itself."

That request had drawn a reply from Fords on or about 14 April 1992 which did not entirely oblige on the topic of "replacement cost":

> "This is to confirm that Valuations that we have prepared or will prepare for the AMP Perpetual Trustee Co NZ Ltd, on behalf of Residential Mortgage Trust, are Market Valuations.
>
> Our valuations have been based on a willing buyer/willing seller concept, having regard to sales of comparable properties, and we have had regard to the replacement cost valuation method as well.
>
> We consider it legitimate to look at both methods of valuation, but place most emphasis on the comparable sales approach.
>
> The value of the property may change in the future due to market conditions and changes in the state of the property itself."

RML, CUAMIC and AMP were in the process of drafting a revised agreed form of valuation instruction. (It eventually issued in August 1992). The written requirements at the time the Satterthwaites' valuation was ordered were the exchange of correspondence which had just occurred, and the standard format supplied to valuers and **still** in use. The latter was still relatively simple in its terms. Valuation sought was "for market value", and a "valuation of the property for mortgage security purposes". It was to be directed to AMP as trustee of the RMT. There was to be a mortgage recommendation; list of comparables; confirmation of professional status and compliance with the Code of Ethics "and with the Standard on the valuation of Residential Properties as recommended by them" (i.e. Practice Standard No. 1); certificate of independence; and confirmation that insurers could rely on the report. The report format contained no directions as to methodology to be used, beyond reference to comparables.

Likewise by April 1992 there had been a degree of publication of the professional controversy over the approach to be taken to valuation of newly built residential property of this character, represented for example by an item in "Valuers Newsline" of February 1992 publishing a cautionary letter from the VRB. I am satisfied, however, that as at the date the Satterthwaites' valuation was ordered and undertaken there was no conscious thought on the part either of FHL staff or Fords directed towards the propriety or otherwise of using new homes as comparables. Both sides were simply proceeding in accordance with previous practice, under which such had occurred.

Editors Note
The property was originally valued at $135,000.

As matters turned out, the property was sold on 11 December 1995, some three years later, for only $86,000. To some extent that can be ascribed to a declining market in Feilding, but I am not persuaded the overall decline between these two points in time was so large. Likewise, some of the drop can be ascribed to deterioration and poor presentation. In a buyers' market, presentation can be very important. A principal factor, however, would have been the forced sale. A scattering of statistics and opinion came into evidence as to percentages by which properties are reduced on forced sales, but I have little faith in small samples. All will depend very much upon particular time and circumstances. I prefer to take guidance from the provisions of the Trustee Act in relation to mortgage recommendations. Trustees should not lend beyond two-thirds. That reflects wisdom gained over a very long period of time. It recognises experience that lenders might well lose up to around one-third of a previous valuation under forced sale conditions. The percentage loss here was **36%**. It is in the range. It is not a figure which surprises, or which compels a view that the original valuation must have been excessive.

I accept Mr Horsley's evidence the valuation was acceptable as to process at the time made. I accept also that content was up to professional standards of the time. The Satterthwaites valuation was toward the upper end of a professionally credible range, but it was within that range. I regard it as within acceptable valuation practice at the time it was made. Hindsight is to be avoided. It cannot be labelled "incorrect", let alone "a substantial overestimate". Nor can it be said Fords staff knew or should have known it was unsatisfactory. I am satisfied FHL nor RML staff did not **see** anything improper in the $135,000 figure. The ultimate result was in the required form, was regular on its face, and was consistent with previous practice. The same can be said for AMP and the insurers.

The Gosper and Olsson Valuation

As noted, in late January or early February 1993 Gosper and Olsson paid a deposit referenced in part to valuation, and signed an authority to value addressed to RML.

On 5 February 1993 Mr Woodman of FHL requested Mr Hyder of BKF to carry out the valuation concerned, and on 6 February 1993 sent the usual information sheet and plans.

There is something of a mystery whether BKF had received and agreed to the lending group's standing valuation instructions as at that date. Intended instructions had been largely settled within the lending group at latest by an AMP approval letter dated 15 September 1992. The intended instruction was to value "on a current market value basis" and in accordance with "an enclosed specimen format". There was to be a specific direction as to methodology (italics added):

> "Current Market Value is intended to mean the price at which the property might reasonably be expected to be sold at the date of valuation assuming:
>
> 1 A willing but not anxious vendor and a willing but not anxious purchaser.
>
> 2 A reasonable period within which to negotiate the sale, taking into account the nature of the property and the state of the market.
>
> 3 That values will remain static throughout the period of marketing.
>
> 4. That the property will be freely exposed to the market with reasonable publicity.
>
> In determining Current Market Value comparison is to be made with open market sales of both new and existing houses in the locality. Care is to be exercised in using comparative sales of new housing as the contract price may incorporate financing and/or sales concessions. *You will also be provided with details of the contract price of the subject property, however this too may incorporate financing and/or sales concessions. In arriving at your assessment of Current Market Value you are to assume that the subject property is to be sold on an open market basis without financing and/or sales concessions.*
>
> Where there is a significant

discrepancy between your assessment of Current Market Value and the comparative sales, a full explanation of the reason for the difference should be made.

(There may have been a later AMP driven change from the words "in the locality" to the words "in the general area"). It appears to have been the lending group's intention this letter be sent to all on the approved panel of valuers. On 30 September 1992 RML (Mr Bond) wrote requesting CUAMIC's agreement to BKF being added to the panel. CUAMIC's approval was given 6 November 1992. It is known BKF began valuation work in November. Mr Bond's evidence was that a standard letter in those terms (subject to one change I note shortly) was sent to all on the panel of valuers. He referred, as an example, to a letter sent to a Palmerston North valuer on 11 November 1992. The intention was to obtain the valuers' written acceptances. Two doubts arise. First, the example letter referred to omits the sentence as to provision of contract price and warning as to concessions italicised, supra. There is no explanation of the omission. Second, there is no evidence beyond Mr Bond's expansive "went to all the valuers" remark which establishes such a letter of instruction actually went to BKF. Mr Hyder, who was the first and continuing point of contact between the two organisations indeed stated somewhat inconsistently:

"They wanted a current market valuation. However no method of arriving at a current market valuation was ever specified by Fletchers. That was up to the valuer".

The instructions which Mr Hyder received did in fact include the purchase price. Whatever the position, the standard format which he clearly did receive and use covered much of the intended instruction area in any event. He was required to state:

> "This valuation has been undertaken for the purpose of ascertaining our opinion of the market value for which the property might be reasonably well expected to be sold at the date of valuation assuming:
>
> 1. A willing but not anxious vendor and a willing but not anxious purchaser.
> 2. A reasonable period within which to negotiate the sale, taking into account the nature of the property and the state of the market.
> 3. That values will remain static throughout the period of marketing.
> 4. That the property will be freely exposed to the market with reasonable publicity.
> 5. That the subject property is to be sold on an open market basis without financing and/or sales concessions.
>
> We have been advised that the contract price for the subject property is approximately [figure] and we are aware that this contract price may incorporate financing and/or sales concessions."

I am not prepared on the evidence before me to assume the letter of instruction was received by BKF. Special terms on which BKF were to proceed were in accordance with this latter format certificate.

BKF were also expected, as at that date, to comply with the NZIV Code of Ethics (generally), and with Practice Valuation Standard No. 1 "The valuation of residential properties" and Practice Valuation Standard No. 2 "The valuation of residential properties for mortgage purposes". The obligation was twofold. As to the Code of Ethics it was a matter of professional obligation, and as to the Practice Standards it was at least a matter of recommended best practice. Practice Standard No. 1 had been formally adopted in January 1992. Practice Standard No. 2 had been adopted only a matter of days before in January 1993. It was also a matter of contractual obligation. The BKF format required certification inter alia that:

> "(b) The valuation has been completed with regard to and fully complies with the NZ Institute of Valuers Code of Ethics and with the Practice Valuation Standard No. 1 and the Practice Valuation Standard No. 2 of the Residential Properties."

Editors Note

The mechanics of Mr Hydes valuation then followed, and was criticised by Mr Gordon (Valuer for the Plaintiffs).

The first criticism raises, of course, the "new" and "re-sale" debate, unresolved in 1993. At risk of repetition, one accepted school of thought considered comparisons with "new" unoccupied houses, including those by the builder concerned, were valid. The 1996 requirements for testing "new" by reference also to "re-sales" were still in the future. However, the matter does not rest there. I accept Mr Hyder's evidence that he in fact had regard to further properties, including in particular an existing 1980's non-FHL house (11 Tulsa Grove), which depressed the net rate he otherwise would have applied. I consider, also, that he had some passing regard to modal rates. I see no reason to believe Mr Hyder did not make some suffcient allowances for the relatively larger land area of 30 Delaware Grove. It was assigned the lowest rate of the three new comparables quoted. The measurement question as to the true depth of the 34 Delaware Grove section cannot be resolved on materials before me, but if in fact Mr Hyder viewed the section as smaller than was the case, logically that would point towards some increase rather than decrease in his valuation. I leave the point open.

Mr Gordon's retrospective valuation was $95,000.

As noted, there are difficulties in retrospective approaches, methodology used, and simplistic comparisons. Although problems arising from time lapse are relatively less for 1993 than 1989 or even 1992, real caution is needed.

There are also some problems in detail. Once again Mr Gordon was unable to locate any of his preferred categories of comparables. Excluding, as he chose, new FHL comparables, he found himself forced into a range of re-sales which was less than ideal. Six were chosen. One, 2 Delaware Grove, sold in March 1993 for $108,000; but at 110 m^2 was larger, and was a mortgagee sale. As a mortgagee sale, it should be dismissed from contention. Even Mr Kirkcaldie would have avoided it. Another, 65 Hartfort Grove, was of **similar size, selling** in February 1993 for $82,500; but due to date of sale it might not have been known to Valuers at that time.

Mr Gordon also invoked modal rate analysis. He took the land price concerned at an assumed $30,500, not knowing actual price. (That figure is slightly under the ultimate transfer **price** of $33,924). He used the Wellington modal rate as at November 1992, *$743*, rounded down for some reason to $740 ($835.88 including GST). He did not use the higher regional rate of $856, treating Upper Hutt as cheaper than regional. He did not take account of an increase in the Wellington modal rate to $780 soon afterwards in May 1993, occasioned by sharply rising prices. Nor did he adjust by increase for the difference in modal house size (92.9 m^2) down to actual size (87.2 m^2), regarding this difference (and increased cost) as somehow "built into" his calculation. He derived a figure of $80,356, then adding fences and improvements $2114, a total taken as $82,500. Land, buildings, and improvements totalled (it is said) $113,500. (There is a $500 discrepancy).

Mr Gordon then weighed both the net rate and modal rate in some unspecified way, reaching a valuation of $95,000.

I am obliged to say the evidence is unsatisfactory. I am not inclined to give exclusive weight to old re-sale comparables, particularly without disclosure of the derivation of the resulting net rate. It is an approach as extreme, in the opposite direction, as the criticised use by Mr Hyder only of FHL new house sales. The modal rate approach by 1993 was somewhat unreliable; but as far as it goes it tends to produce a rather higher sum. Indeed, the m^2 rate "established" on a modal rate analysis ($80,356/87.2 m^2, or even $74,731/87.2 m^2) is not very far from Mr Hyder's adopted rate of $925 per m. It is of passing interest that Mr Kirkcaldie, although only off the cuff, was prepared to adjust Mr Gordon's valuation on a corrected modal rate basis up to $100,000-$105,000. On what is before me, I am unable to accept Mr Gordon's $95,000 retrospective valuation as reliable.

It remains to be said, however, that even if a different view were taken of the $95,000 figure, the increment from that figure to Mr Hyder's valuation of $125,000 is **32%.** That is a major difference, but not entirely beyond the extremes of valuation divergence which can occur. **Given the caution needed in respect of retrospective valuations**, that divergence would not necessarily in itself compel a conclusion of over- valuation.

The present Government valuation for 34 Delaware Grove is $110,000. Some indeterminable allowances should be made for post acquisition improvements by Gosper and Qlsson now reflected in price potential, but given an evident trend towards sales above Government Valuation levels perhaps rather more could be expected than Mr Gordon's somewhat cryptic $115,000. Doing the best I can on unconvincing evidence, I put the present value of 34 Delaware Grove at a midpoint of $120,000 (excluding chattels).

I do not know that there is much to be gained through a comparison of **that present** $120,000 value with the $125,000 February 1993 valuation in question, particularly given a declining market meantime. To the extent there is any valid comparison, the discrepancy is one which does not startle. It is not obviously, in itself, an indication of erroneous prior valuation.

I accept Mr Horsley's evidence the valuation was acceptable as to process at the time made. I accept also that content was up to professional standards of the time. I consider the Gosper and Olsson valuation lay towards the upper end of the professionally credible range at the time it was given, but that it was within that range. I regard it as within acceptable valuation practice at the time it was made. The dangers of hindsight must be avoided. It cannot be labelled "incorrect", let alone a "substantial overestimate". Nor can it be said Mr Hyde or BKF knew or should have known the figure was unsatisfactory. I am satisfied neither FHL nor RML saw anything improper in the $125,000 figure. The valuation was regular on its face, was consistent with previous practice, and with previous contract and valuation levels. The same can be said for AMP and for Mortgage Insurers, given the state of thinking at the time.

Consequences of Finding as to Viability of Valuations

The conclusion that valuations were not incorrect or substantial overestimates under the circumstances of their time, and were viable and appropriate, effectively determines a considerable proportion of the various causes of action pleaded. It disposes of all proceedings against the two valuers, whether in negligence or contract, or in the case of Davies in deceit. It disposes of the cause of action against RML based on negligence, and by Davies in deceit. It disposes of most heads of breach of fiduciary duty, negligence, and contract, and some heads of misrepresentation (and corresponding heads of deceit) against FHL.

The residual issues which remain can be summarised as follows:

(A) FHL

(1) Breach of fiduciary duty

- (i) Failing to act in (purchasers') interests, those interests including all things beneficial to (purchasers) in relation to purchase of the property from FHL and providing finance through RML.
- (ii) Using its own position to gain advantage (i.e. benefits and profits) at the expense of the (purchasers).
- (iii) Failing to disclose all information likely to influence (purchasers) in their decision to purchase.
- (iv) (Davies only) failing to provide a free Countrywide Banking Construction facility.
- (v) (Davies only) failing to provide a low and fixed interest rate mortgage.

(2) Negligence

Breach of duty of care in:

- (i) Allowing (purchasers) to enter into a transaction likely to cause them loss.
- (ii) (Gosper/Olsson and Satterthwaites only) failing to disclose that "live rent free" and redundancy insurance promotions would not benefit, but would penalise, (purchasers), and (Satterthwaites) ineligibility for redundancy insurance.
- (iii) (Davies only) arranging for RML to provide a Completion Certificate when the property as valued had not been completed.
- (iv) (Davies only) failing to arrange a free Countrywide Banking Construction facility.
- (v) (Davies only) failing to arrange a low and fixed interest rate mortgage.

(3) Contract

Breach of implied terms equivalent to breaches of fiduciary duty, supra.

(4) Misrepresentation (Contractual Remedies Act 1979)

Misrepresenting that:

- (i) (Purchasers) could place confidence and trust in FHL when purchasing.
- (ii) (Gosper/Olsson and Satterthwaites only) the live rent free and redundancy insurance promotions were free and would benefit purchasers.
- (iii) (Gosper/Olsson and Satterthwaites only) the builders gift would be a genuine gratuity, and would benefit purchasers.
- (iv) Purchasers could afford the house plus section and repayments on the RML mortgage, having regard to income and asset position and deposit.
- (v) The FHL package (house and RML mortgage) was appropriate for (a fair deal for) and would benefit purchasers.
- (vi) (Gosper/Olsson only) the section would ensure privacy.

(vii) (Davies only) the Countrywide Banking Construction facility was free.

(viii) (Davies only) FHL would arrange a low fixed interest rate mortgage.

(5) Deceit (Davies only)

Representations, not believed, or known to be false, in terms of misrepresentations in (4)(i)(v)(vii) and (viii) above.

(B) RML

Credit Contracts Act

(1) Oppressive *(et al)* terms:

(i) Requiring excessively high levels of repayment having regard to known and likely income.

(ii) Excessive increases in interest rates provided for and imposed.

(iii) Failure to disclose "what it knew" of the sale transaction in order to allow a proper opportunity to purchasers to avail themselves of rights under the mortgage.

(iv) The mortgage advance contravened provisions of the RMT.

(v) (Gosper/Olsson only) interest rate rose above the maximum **level** of **11.75%** stipulated by CUAMIC.

(2) Exercise of rights and powers in an oppressive manner by requiring repayment of full principal and interest in the circumstances.

FHL: Breach of fiduciary duty

I am not persuaded the relationship between FHL and these purchasers carried fiduciary duties.

I will not add to the general dissertations upon criteria for fiduciary relationships, Reference to Finn "Fiduciary Obligations" (1997); recent analysis by Fisher J in ***BNZ v NZ Guardian Trust*** (unreported, HC Auckland, 22 April 1998, CP431/94); and reference to the latest Court of Appeal consideration in ***Gilbert v Shanahan Partners*** (unreported, 30 June 1998 CA 246/97) will suffice. The Courts have resisted any finite close definition of situations which do or do not carry fiduciary consequences. I have little doubt that ultimately reflects a policy decision to keep the category adaptable to meet new and developing needs; and, equally important, to be able to impose restraints where necessary. Authorities which go in search of precise criteria are to be read with corresponding caution. Having said that, the imposition of fiduciary obligations tends to occur in situations – some situations only – where one party is vulnerable to the other, and conscience requires that other should not take advantage of the situation. I say "some" situations, as there are pragmatic limits. Equity finds no difficulty in imposing fiduciary obligations on professionals in whom utter confidence must be placed – e.g. lawyers and spiritual advisors – with corresponding high vulnerability. It is common enough for fiduciary obligations to be imposed in situations involving trusted agents, or close and trusted family members such as elderly mothers and businessmen sons. It has been known with accountants and bank managers. A frequent characteristic within these instances is the "acting in the affairs" of another. However, lines are drawn. While fiduciary obligations can be additional to contract, it would be rare indeed for a fiduciary obligation to be imposed between a plumber and a householder in a matter of trade. The householder may have to, and may in fact, place complete confidence in the plumber as to what should be done and how and as to pricing. The plumber knows, and the householder does not. The law, however, steers away from such interference in routine commercial situations: cp. ***DHL International (NZ) Ltd v Richmond Ltd*** (1993) 3 NZLR 10,22; ***Bowkett v Action Finance Ltd*** (1992) 1 NZLR 449, 462; ***Hospital Products v US Surgical Corporation*** *(1984) 156 CLR 41, 73. The law leaves the relationship governed by the standard rules of contract, misrepresentation, and deceit, or by any relevant consumer protection legislation. Mere vulnerability is not enough:* ***Ligget v Kensington*** *(1993) 1 NZLR 257, per McKay J (dissentient);* ***Goldcorp Exchange Ltd : Kensington v Liggett*** *(1994) 3 NZLR 385, 399-400. The reason for the distinction is not mystical. It is pragmatic. Ordinary commerce should be dealt with in the ordinary way. It is not in the public interest it be constrained by the more extreme requirements which follow fiduciary duties. The latter are for exceptional relationships, where conscience will so demand.*

The relationships in this case essentially were vendor and purchaser. Purchasers wished to buy a house. FHL wished to sell one, and had put itself in a position to offer finance (through RML) which would facilitate. Purchasers did not know how to go about the organisational steps required, or did not care to take the trouble. FHL was willing to undertake all arrangements required. There is no doubt "Fletchers" had a strong and trusted name, on which purchasers could set considerable store. I accept also that FHL staff set out to reinforce that marketing advantage by assuring purchasers they could indeed trust Fletchers, and FHL would attend to all that was necessary. I accept that all Plaintiffs did trust FHL and did expect FHL to do all that was necessary. Plaintiffs argued this was the equivalent to "acting in the affairs" of another carrying fiduciary duties. However, I do not see the situation as going past a good commercial name and salesmanship, or as pushing into the special equitable territory of fiduciary relationship. If there is to be a fiduciary relationship here, there must be one in very many commercial situations where there is a significant degree of organisation reliance and trust. That goes too far. If there are to be further protections, they should lie in the field of consumer protection legislation, such as the Fair Trading Act 1986, with whatever limitation periods Parliament on consideration (or further consideration) sees fit to prescribe.

Causes of action based on fiduciary obligation cannot succeed.

FHL: Contract

Relationships between the various purchasers and FHL were refined into detailed written building agreements, which incorporated or carried associated agreements for sale and purchase of land. There is no doubt the agreements were intended to define the contractual relationships. They contain indeed, for what they may be worth, common form "entire contract" provisions.

The restrictive tests for implication of unexpressed contractual terms are well enough known for me to dispense with citations beyond ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1997) 16 ALR 363, 376. The putative term must be necessary for business efficacy; and be so obvious as to go without saying. Merely being "reasonable" does not suffice. The putative term must not be inconsistent with any existing express terms.

The existence of a detailed written contract and the restrictive approach to be taken to implied terms make it quite impossible to imply the terms pleaded. They might be "reasonable" in a Utopian world, where all contracts were sensitive to individual benefits and fair play. New Zealand is not Utopia. They are not necessary to make the contract work. The contractual causes of action cannot succeed.

Negligence: Duty of care?

I refrain from adding to the numerous dissertations on the topic of concurrent duties in contract and tort. Strictly speaking, the Courts at first instance remain bound by ***McLaren Maycroft v Fletcher Development*** [1973] 2 NZLR 100, and contract displaces tort. That is unsatisfactory. One school of thought ***Port v NZ Dairy Board*** (1982) 2 NZLR 282 confines ***McLaren Maycroft*** to professional relationships. That would allow concurrent duties in this case. It is a useful but illogical distinction. Another school of thought ***(Rowlands v Collow*** [1992] 1 NZLR 178; ***Dairy Containers Ltd v NZI Bank*** [1995] 2 NZLR 30, 74) simply declares ***McLaren Maycroft*** to be bad law. With respect, that should not have happened at first instance level. Irritating as outdated or insupportable appellate precedents may be, it is a recipe for chaos for lower courts to rebel. However, having said that, in the rather unique situation already created I propose to join the rebellion. ***Rowlands v Collow*** has stood now for some years. The Court of Appeal might be expected to have promptly disowned it, if disapproving. That has not happened. While I am not minded to place undue weight on mention, along with other authority, by the House of Lords in ***Henderson v Merrett Syndicates*** (1994) 3 All ER 506, 531, the approach is in line with current English trends at highest level. It is the way the wind is blowing. I proceed on the basis concurrent duties can exist in both tort (negligence) and contract, unless on a proper construction the contract is intended by the parties to displace tort and to be the sole governing entity. I do not read the present contracts as going to that length. They certainly do not include clear exclusion clauses.

Having said that, I do not accept that concurrent duties of care could extend to a requirement not to allow the purchaser to enter into a transaction likely to cause loss. That imposes an obligation of a remarkable character for a relationship of vendor and purchaser, even in a situation where the vendor is trusted by the purchaser. It is a duty more appropriate to fiduciaries, indeed a duty having some guardianship characteristics. Applying standard approaches to determination of duty, there is indeed reasonable foreseeability and proximity, but policy and analogy to precedent point quite the other way. It is more appropriate that obligations and liablities arising from contractual arrangements be regulated - if at all - by the contract concerned than by an unnegotiated warranty that there will be a satisfactory outcome. I am unaware of any precedent to the asserted effect from which an incremental movement of this magnitude might be made.

It is convenient also to deal with the (Davies only) Completion Certificate by RML given despite non-completion. Assuming without deciding that a duty of care could exist to that effect, I am not satisfied it was breached; of if breached ;played any significant causative role. Davies, wisely or otherwise, had signed a Completion Certificate themselves, although through their solicitor they later sought to resile from that document. It is a little difficult for the

Davies to contend FHL acted improperly in procuring the RML certificate, if that indeed occurred, when the Davies had given exactly the equivalent. I am also satisfied Davies, who were "desperate" to gain occupation, were entirely content for FHL to do whatever would expedite release of the RML money necessary for that purpose at that point in time. It is not a point which carries any conviction.

The remaining heads of asserted duties of care (and breach) relate to the so-called "promotions". They lie at the heart of the misrepresentation (Contractual Remedies Act) cause of action, and what is left of deceit. It is convenient to defer analysis to that point.

Misrepresentation: Contractual Remedies Act 1979

The Contractual Remedies Act 1979 s6 provides that a party "induced" to enter a contract by a "misrepresentation" (whether innocent or fraudulent) made by or on behalf of another party, is entitled to damages as if the representation were a term of the contract which had been broken.

Common law requirements as to "inducement" and "representation" remain applicable. They are decisive of two heads raised in this case. First, the Gosper and Olsson representation as to privacy. If this was a representation at all, rather than a polite concurrence, it did not "induce" entry into the contract. Gosper and Olsson already had decided upon the section they would take, with privacy an important consideration. That was all done before Mr Neubauer made his "good choice" or equivalent remark. I accept that a misrepresentation need not be the sole cause of entry into a contract, but this remark had no significant causative role whatsoever. Second, the alleged representations that purchasers could place confidence and trust in FHL. This type of encouraging sales talk is not uncommon: "we're the best agency in the city", "you just leave it all to us, we've been in the game for years", and the like ring around the country every day. It is something traditionally labelled a mere "puff': exaggerated talk of a character too general and obvious to distil into a representational or contractual quality. To be a representation, what is said must be rather more factual and precise.

There are likewise some mixed legal or factual problems with the representations as to "affordability" and as to "appropriateness, fairness and affordability".

To be a "representation", a statement must relate to fact not to opinion. There is, of course, the qualification that a statement of opinion may be read as including a tacit affirmation that facts exist which justify that opinion. That is the more likely to be so where the speaker has inside or special knowledge, not shared by the listener.

FHL salesmen involved here obtained information as to income, outgoings, and net asset position at outset. I accept the salespersons, in making the initial selection of homes or a range of homes which purchasers could afford, and in recommending those homes (and/or sections) tacitly expressed an opinion that purchasers could afford the proposition. It was a representation at least to the effect that on that revealed net income position, and that available deposit, the situation was one in which the purchasers should find the proposition affordable. However, these were not unlimited representations. First, statements were based on and conditional upon the accuracy of the information supplied, including personal income information. Both Mr Davies and Mr Satterthwaite **overstated** their incomes. A condition upon which the representations were made to them was not satisfied. Second, the representation obviously assumed continuation of existing conditions, and matters foreseen and provided for. The representations were not made on a "come what may" basis. They did not assume, for example, that Mr Davies would become voluntarily unemployed, or required to become a caregiver for a sick spouse. They did not allow for marital breakdown, and the resulting increased expenses of two households. I am not persuaded "affordability" representations extended to the situations which developed.

I accept also that FHL salespersons, over a course of words and conduct, did communicate along the lines that proposed purchase transactions were appropriate, fair, and beneficial for the purchasers. I am satisfied Mrs Fern and Mrs Shaw (Rule) genuinely so believed. I did not hear from Mr Neubauer, and the conditions in 1993 were declining, but I extend the benefit of the doubt in that regard to him also. Clearly, such communications were expressions of opinion. There were facts on which such opinions could be based. There had been a large number of successful FHL transactions, saved by inflation and growth. The same limitations as to accuracy of information supplied, and continuation of foreseen circumstances applied. I am not persuaded these representations as to factual basis for opinion, given obvious limitations, could be said to be erroneous.

Editors Note

The Judgement then analysed the "Promotions" and accepted that there were some inducements to enter into the building contract. The Judge then stated:

> *"In making those findings I do not ignore the "entire contract"*

provisions contained in the various building agreements. They vary slightly, and one contains a printer's omission, but the Gosper and Olssen provisions can be taken as typical."

"B27. NO WARRANTY

It is acknowledged and agreed by and between the parties this Agreement constitutes the whole of the arrangement between the parties and the Client does not rely on any warranty or representation made by the Builder or any of its agents whether express or implied except to the extent that any such warranty or representation has been embodied in this Agreement."

One is not induced by a representation if one does not rely on it; and the clause is a common form of disavowal of reliance. The clauses are raised on the pleadings, although not prominently pressed in argument. The problem for Defendants, of course, in invoking these clauses lies in s4(1) Contractual Remedies Act 1979. Section 4(1) provides that a Court is not precluded from enquiring into and determining any such question unless it considers it "fair and reasonable" that the provision should be "conclusive". In determining that latter point, the Court is directed to have regard to all circumstances, specifically including the subject matter, value of the transaction, respective bargaining strengths, and legal representation and advice. The authorities, such as they are, are collected conveniently in Gault, *Commercial Law* CR 4.04-4.06, and Burrowes Finn & Todd *Law of Contract in New Zealand* (1997) para 6.5.4(f3. As evident from, example, ***Herbison v Papakura Video Ltd*** [1987] 2 NZLR 527, Henry J, it is a balancing exercise. I need not enlarge further for present purposes. The sums involved in the limited issues raised by these particular representations are not large, but given the relative bargaining strengths of the purchasers on the one side and the Fletcher organisation on the other, and the purchaser's anxiety to contract, and confidence induced, I do not think it would be fair and reasonable to allow such clauses to stand in the way of the truth. I do not give much weight to legal advice having been available to the purchasers. Legal advice on a point is only as useful as information known to the solicitor, or reasonably obtainable. The solicitors had no knowledge, and it is not an area in which solicitors normally would enquire. I do not treat these clauses as conclusive.

No questions of contributory negligence arise in this area.

It follows the misrepresentations which I have found to exist give the purchasers entitlements to damages "as if the representation were a term of the contract that had been broken".

That entitlement is relatively limited. These are not cancellation situations. The breaches provide compensation for breach of that hypothetical term; not compensation for all losses somehow suffered through the transaction taken as a whole. On that basis, the various purchasers are entitled to recover damages for the equivalent of the charges in fact wrongly imposed for the reduced interest rate or "free" or "gift" items concerned. Those losses are what followed from breach of those limited terms: nothing more. I do not see this limited area as giving rise in itself to distress damages, or (given current approaches to exemplary damages and subsequent findings regarding deceit) to any real question of exemplary damages. The charges for which recovery can be made will include elements of margin and GST which came to be added, as best those can be identified.

FHL: Negligence: Promotions Representations

I return to the question of duty of care and negligence in relation to promotions representation matters. The duty would be to take reasonable care in representing interest rates were "low", the Countrywide Construction Facility was "free", the "PYR" or "live rent free" was "free", or a builders gift was indeed a "gift", when such might not be the case and might cause representees to enter disadvantageous contracts. There is a case for reasonable foreseeability, and proximity, but there are opposed policy elements. The proposed duty of care and extended negligence field would be co-extensive with the field of actionable misrepresentation quite deliberately covered within recent years by the Contractual Remedies Act 1979. It is wrong in principle to extend negligence into fields where it will cut across and indeed may confound existing law: ***Bell Booth Group v A.G.*** [1989] 3 NZLR 148; ***South Pacific Manufacturing Co v IVZ Security Consultants*** [1992] 2 NZLR 282, per Cooke P 298; (although cp. ***Spring v Guardian Assurance*** (1995) 2 AC 296). That principle would suffice. However, there is more. Section 6(1)(b) of the Contractual Remedies Act 1979 specifically provides that a party induced to enter a contract by a misrepresentation, whether fraudulent or "an innocent misrepresentation made negligently", is not entitled to damages for deceit "or negligence" in respect of that misrepresentation. The party must live with the s6(1) notional contract term. There is no room for an action in tortious negligence in relation to the representations alleged.

RML: Credit Contracts Act 1981

There can be no dispute the loan agreements and mortgages constituted a "credit contract" within the Act. The lender was AMP, not RML, but no point arises in that regard. Sections 10-14 apply accordingly. Where the Court considers such a credit contract, or any term, is "oppressive", or that a lender has exercised a right or power in an "oppressive" manner, the Court may re-open the contract. The word "oppressive" is defined as "oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice". The existence of oppression is to be judged by standards and circumstances prevailing at the time the contract was made or the act occurred. In deciding whether to re-open, the Court is to have regard to all the circumstances relating to the making of the contract or exercise of the right or power. It also is to have regard (where applicable) to the finance rate or any amount payable, and time given to remedy default having regard to likelihood of loss to the creditor. Those are not exclusive. The Court also has regard to such other matters as it thinks fit. Upon re-opening, the Court may make such remedial orders as it thinks necessary. The principles under which the Act operates have become well known. Reference to ***Italia Holdings (Properties) Ltd v Lonsdale Holdings (Auckland) Ltd*** [1984] 2 NZLR 1 will suffice. Other authority cited, as usually is the case in this area, does little more than illustrate outcomes on particular facts.

The three purchasers claim both oppressive terms and oppressive exercise of rights and powers. Their claims run to a similar pattern.

As to oppressive terms, all claim under six heads. The first head, which turns upon alleged incorrect valuation and advances in excess of value cannot stand in view of valuation findings made previously. The other five heads can be summarised as follows:

(i) excessively high repayment levels required, having regard to purchasers' known and likely income (and actual property value).

(ii) excessive increases in interest rates provided for and imposed.

(iii) failure to **disclose** to purchasers "what it knew of the sale transaction and valuation" in order to allow purchasers opportunity to avail themselves of rights in relation to their mortgages.

(iv) contravention by the mortgagors of provisions of the RMT.

(v) (Gosper/Olsson only) the interest rate exceeded the maximum **11.75%** per annum stipulated by the CUAMIC cover note.

I take these in succession.

Head (i) (excessive repayment levels) is not made out on the facts. There is no doubt repayment levels were high in an absolute sense: up to **35%** of income is a considerable burden. However, those repayment levels were achievable if circumstances continued as anticipated. They were not lightly imposed by RML: the company insisted on income verification, as best it could, and a thorough independent mortgage interview and assessment before agreeing to lend. Purchasers were not rushed into transactions. There were intervals before commitment. There was an insistence upon independent legal advice, in the course of which the burdens being undertaken and attendant risks would be explained. Provision was made for life and disability cover, and redundancy insurance. Those foreseeable accident and employment eventualities were covered so far as practicable. Where all went reasonably well, as with Gosper and Olsson, there were no repayment problems. Where there were personal misfortunes, such as the Satterthwaites matrimonial break-up, or the Davies voluntary unemployment, there were strains; but high ratio lending cannot be expected to cater for all the vicissitudes of life. Repayment levels were not "oppressive" in the circumstances.

Head (ii) (excessive interest rate increases) likewise is not made out in fact. The community's memory is fading as to the high interest levels which were commonplace over the late 1980's to mid 1990's, and I think it an advisable perspective to set out a Reserve Bank table produced in evidence. It reflects bank first mortgage average floating rates. RML was not a bank. It was lending at the higher risk end of the market, even with the benefit of mortgage insurance, and at rather a percentage point or so above the average bank rate. That is only to be expected:

> Market rates are not pinpoints. They are a range.

The Davies' interest rate never varied greatly from the Reserve Bank table (in brackets). The starting rate as at December 1989 nominally was **12.5%** **(14.8%)**. I say "nominally", as there was a hidden buydown of some $4000 built into the total purchase price. In December 1990 that increased to **16.25% (15.2%).** (It was deferred and capitalised). In July 1991 interest was revised downwards **12.95% (12.4%).** The position was complicated throughout by "interest only" periods extended to assist the Davies, and related negotiations, but it can hardly be said the Davies were sharply above market on a difficult loan.

Satterthwaites' rates likewise never varied markedly from the table. Opening interest in December 1992 was **9.5% (8.9%).** This rose in January 1994 to **9.9% (7.65%)**: however this was re-negotiated downward to a fixed one year **8.25%** rate **(7.65%).** An increase proposed for August 1994 to **10.95% (8.75%)** appears not to have been implemented. Interest rose in November 1994 to **11.4% (10.19%)** and May 1995 to **11.95% (11%).** Mr Satterthwaite's position likewise was complicated by interest only periods and other negotiations, but again it cannot be said rate differentials on a difficult loan were at all startling.

Gosper and Olsson, who have managed to maintain payments and retain their property experienced interest rate variations.

From March 1996 Gosper and Olsson voluntarily increased monthly payments. I do not regard these differences on a high ratio loan as oppressive.

Head (iii) (failure to disclose information) does not easily categorise as an oppressive "term". It was an action, not a term. Perhaps it might be made to fit within s10(1)(c) as an oppressive inducement to enter the credit contract, although not advanced in that fashion. Those complications aside, the particulars given are not made out. I see nothing of an oppressive nature in non-disclosure of the RML/Fletcher association or as to arrangements, recourse agreements, and indemnities. It would not be normal for a residential lender to explain its business operation and funding lines to an ordinary home loan borrower. Such persons come to borrow not to be bored. The remaining particulars predicate knowing valuation fabrications, which I have already dismissed. In the end, the point developed as a contention RML should have bared its soul to its mortgagors to the extent not only of disclosing its lending structures but recommending them to take legal advice regarding the Fair Trading Act 1986. I do not see that as called for.

Head (iv) (contravention of the RMT) likewise does not easily categorise as a "term". That apart, it raises the detailed requirements of the RMT and alleges the present mortgages do not comply in certain respects. I will refrain from an audit comparison of requirement and compliance. The difficulty for this head is more fundamental. I do not see how it could be oppressive in relation to the borrowers if RML in fact did not so comply. I see no repercussions disadvantaging the borrowers. Bluntly, it was not the borrower's business: it was an internal matter for the lending group, if such situations arose at all.

The same is to be said for the final Gosper and Olsson complaint as to interest rates exceeding the CUAMIC maximum. That does appear to have happened on one or two occasions. It did not disadvantage Gosper and Olsson. RML hardly could have called in the mortgage on a basis it had become uninsured, when it was RML's own action which was responsible for that situation.

I turn to the alternative allegation of exercise of rights and powers in an oppressive manner. The oppression pleaded is the requirement to repay full principal and interest in the circumstances.

I have found there was nothing improper in the approach adopted, in those days, to valuation and advance levels. Likewise, as just noted, there was nothing improper in the level of payments, whether of principal or interest, required from borrowers. The only other basis on which requirements for a full **payment might perhaps be labelled** "oppressive" would be a failure to allow for financial or personal difficulties encountered by the borrowers. As equity has appreciated over the years, sometimes even lenders must have a heart. I am constrained to say that despite the bitterness felt by at least Mr Satterthwaite and to a degree Mr Davies, there was nothing unduly harsh by commercial standards about the default treatment meted out to them. To the contrary. RML extended interest-only breathing spaces, and allowances and time were made for individual efforts towards sale before RML stepped in. Re-sales were at low figures, but that is in the nature of forced sales, and the levels concerned have independent verification. There was no oppressive exercise of lender's rights or powers, however unfortunate the situations which existed.

Claims under the Credit Contracts Act against RML cannot succeed.

Limitations: Davies: Contractual Remedies Act 1979

FHL pleads the Limitation Act. It alleges Davies' proceeding was not commenced within six years of accrual of the cause of action as required by s4(1)(a), and recovery is barred accordingly. The question is a different one from that considered in relation to limitations imposed under the Fair Trading Act 1986 in ***Gosper and Olsson v Re Licensing (NZ) Ltd***

(1997) 8 TCL R72; afffd on appeal CA 225/97, 9 April 1998. I regard Davies' cause of action under the Contractual Remedies Act 1979 as having accrued following the totality of (a) misrepresentation (b) inducement to enter the contract with FHL (c) signature, plus notification of signature, on the FHL contract. The Contractual Remedies Act 1979 s6(1)(a) allows remedy in such cases as if the misrepresentation were a contractual term. Actual damage is not an essential element for recovery in respect of breach of contractual term. I need not concern myself with the vexed question of time of occurrence of damage, and the potential for delay in accrual of a cause of action under so-called reasonable discoverability doctrine. The last essential step constituting the cause of action took place when Davies signed and returned the FHL contract on 18 August 1989. The six year limitation period expired on 18 August 1995. This proceeding did not issue until 5 September 1996, more than 12 months later. It was argued for Davies that the claim was one "effectively claiming fraudulent misrepresentation", so s28(a) Limitation Act applied. I do not accept that approach. If it claims fraudulent misrepresentation, it is barred by s6 Contractual Remedies Act 1979. I see no other basis in the circumstances for application of s28. The Davies' claim is statute barred.

Conclusion

The points at which the Plaintiffs fail on their principal claim are the nature of the valuations and the allegations of a "scheme". Plaintiffs have assumed the valuations should have been carried out on a "re-sale" basis: i.e. as representing the sum the proud new owner could expect if required to sell on the open market. That was not so. The valuations were sought and prepared principally on a "new house" basis, meeting requirements of the lenders for whom they were designed. That was an acceptable valuation methodology at the time, although as time passed a need was perceived for a re-sale cross check. It was not negligent. It was not "incorrect". The valuers, FHL, and RML were not part of some improper "scheme" to produce and act on inflated valuations, taking advantage of unsuspecting purchasers. FHL certainly projected itself as trustworthy, as most businesses are inclined to do; but did not cross the boundaries into the special category of fiduciary relationship, creating obligations to protect purchasers from possible pitfalls. Nor did FHL or RML owe duties of care, and nor did FHL contract as alleged. FHL did fall into one collateral error, overselling certain promotions as "reduced" or "free" when in reality that was not the case. There are unsatisfactory elements to that collateral matter, but I am satisfied it was not done fraudulently.

That apart, FHL and RML are not in law to blame for the unfortunate situations which have arisen. Purchasers, having entered into transactions which were considered normal enough at the time, became caught in an economic downturn with over-geared properties, a declining market, personal difficulties in meeting mortgage indebtedness, and difficulties in refinancing on reducing values. Problems followed. With one limited exception, liability does not.

Judgment

(1) First Plaintiffs Gosper and Olsson will have judgment against Second Defendant FHL for $2214 in damages for misrepresentation as to promotions together with interest at 11% per annum thereon under s87 Judicature Act 1908 from 5 March 1993 to date.

(2) Satterthwaites will have judgment against Second Defendant FHL for $5900 for damages for misrepresentation as to promotions together with interest at 11% per annum thereon under s87 Judicature Act 1908 from 7 July 1992 to date.

(3) Judgment otherwise is for Defendants on all causes of action.

(4) Costs are reserved. That is not to be taken as encouraging applications.

R A McGechan J