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IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CP 16/94

BETWEEN BRADLEY WEST CLARKE LIST

First Plaintiff

A N D G J CLARKE

Second Plaintiff

A N D C KEEMAN and OTHERS

Defendants

A N D UNDERWRITERS AT LLOYDS and OTHERS

Third Parties

Hearing: 25 - 29 November and 10 December 1996

Counsel: M R Radford for First Plaintiff
D H Hicks for Second Plaintiff
A More and C A O'Connor for Defendants
M G Ring for Third Parties

Judgment: ~~12/3~~ 19/3/97

JUDGMENT OF PANCKHURST J

Introduction:

This proceeding is a sequel to ***Bradley West Nominee Co Limited v Keeman*** [1994] 2 NZLR 111. In that case the Plaintiff sought recovery of $80,000 and interest from the four guarantors of a private company mortgage.

The guarantors, two married couples, Mr and Mrs Keeman and Put, resisted liability upon various grounds including a plea of non est factum raised in relation to the variation of mortgage whereby they became guarantors. Tipping J found for the Nominee Company, but in doing so made certain observations concerning the advice given by the solicitor, Mr Clarke, who acted for all of the various parties in the relevant commercial transaction. In the present proceeding the guarantors seek an indemnity from Mr Clarke in relation to the judgment debt in favour of the Nominee Company, together with reimbursement of the legal costs incurred at the earlier hearing.

The relevant events occurred in late 1986. In fact the principal documents relevant to the commercial transaction were signed by Mr and Mrs Keeman and Mr and Mrs Put ("the purchasers"), on 28 November 1986. By chance the evidence in this proceeding was completed on the day of the tenth anniversary of the signing of the documents which consummated the ill-fated transaction. Not surprisingly therefore witnesses struggled to remember matters of detail, particularly the purchasers and to a lesser extent Mr Clarke as well.

Issues:

The pleadings are extensive. The principal claim is one by way of counterclaim by the Defendants in their capacities as the purchasers of the business at the heart of the commercial transaction. The First Plaintiff, Bradley West Clarke List ("BWCL") is a firm of Timaru solicitors. When the Second Plaintiff, Mr Clarke, performed the relevant legal services in November - December 1986, he was a principal in another practice, Campbell Clarke and

Young. Late the following year that firm was dissolved by amalgamation and BWCL formed. At the end of 1990 BWCL issued a default summons in the Timaru District Court to recover a balance of outstanding fees due from the purchasers on account of Mr Clarke's services. Subsequently the purchasers formulated a counterclaim for a sum considerably in excess of the outstanding legal fees. The counterclaim underwent refinement as successive statements of defence and counterclaim were filed. In August 1994 the District Court proceeding was transferred into the High Court as the amount of the counterclaim exceeded the then District Court jurisdictional limit.

The counterclaim in final form is in a fourth amended statement of defence and counterclaim dated 23 March 1995. It denies liability for professional fees of $3743.55 and asserts a detailed counterclaim against Mr Clarke. The purchasers retained Mr Clarke in relation to their acquisition of an existing business known as Spinwell Products Limited ("Spinwell"). The business activity was the manufacture and sale of fishing lures. It operated from a building owned by an associated company Robert Begg Limited ("RBL"). The acquisition was effected by a purchase of the shares in both Spinwell and RBL. The later company had a mortgage from the Nominee Company of Campbell Clarke and Young. As it transpired part of the purchase price was raised by increasing the Nominee Company advance to RBL from $31,650 to $80,000, an increase of $48,350. The Nominee Company required the personal guarantee of the four purchasers in respect of the full principal sum. During the amalgamation process the interest of Campbell Clarke and Youngs' Nominee Company in the

RBL mortgage was vested in Bradley West Nominee Company Limited. Hence it was that Nominee Company which became the Plaintiff in the earlier proceeding before Tipping J.

The counterclaim alleged detailed failings on the part of Mr Clarke. In broad terms it was alleged that he breached the contractual duty of care upon him by failing to adequately advise the purchasers concerning the effect and implications of the personal guarantee they signed in relation to the RBL mortgage. Alternatively, the claim alleged a breach of fiduciary obligation in that Mr Clarke was a director and solicitor of the Nominee Company when he acted for the purchasers, and that he was afflicted by conflict of interest when the guarantee was signed. The purchasers asserted that informed consent to acting was not given, nor that they were adequately advised as to the desirability of their obtaining independent legal representation.

The defence raised by Mr Clarke was four-fold. He denied : that his advice to the purchasers was inadequate, that he acted for mutiple parties without informed consent, and alternatively, that there was a causal connection between any relevant breach of fiduciary duty and the loss claimed. Lastly he challenged the counterclaim as time barred. The last matter was complicated by the history of the litigation. The purchasers contended the counterclaim was brought within time, in part on the footing that earlier versions of the statement of defence and counterclaim filed in the District Court sufficiently advanced the causes of action ultimately relied upon. It was not until after closing submissions were made on 10 December 1996 that the District Court file was located and

made available to this Court. It will be necessary to refer to its contents, in relation to the limitation arguments.

A further twist in the proceeding narrative occurred in September 1995 when Mr Clarke obtained leave to issue a third party notice, and at the same time joined himself as a Second Plaintiff. The Third Parties, whom for convenience I shall refer to as simply "Lloyds" are the underwriters of a professional indemnity insurance policy taken out post-amalgamation by BWCL. Under the policy Mr Clarke and his former partner were indemnified in respect of claims made against them by reason of professional error or omission in the period of five years prior to amalgamation. However, the underwriters deny liability to indemnify Mr Clarke, should the purchasers succeed in their claim against him. Mr Ring appeared on behalf of four underwriters who subscribed 95% of the insurance contract. He was not retained by Meadows Indemnity Company Limited which had gone into liquidation.

Lloyds' defence to the third party claim was two-fold: that cover was available only in respect of claims both made against the insured, and notified to the underwriters, before 1 December 1988 which did not occur; and that the insured was in breach of a policy condition precedent to give notice of any potential claim as soon as practicable, which condition was breached to the prejudice of the insurer. The question of prejudice arose by virtue of s9 of the Insurance Law Reform Act 1977 whereby, despite late notification, an insurer remained bound unless it be demonstrated that late notification so prejudiced its position that it would be inequitable if the insured were not held to the terms of

the contract. It will be convenient to turn to these matters at a later stage, after consideration of the counterclaim and Mr Clarke's defence of that aspect.

At the commencement of the hearing on 25 November Mr Radford appeared as Counsel for BWCL. It had discontinued the action to recover outstanding professional fees of $3743.55, and during the somewhat tortured history of this proceeding it had appeared likely that the purchasers' counterclaim would focus upon Mr Clarke alone, with discontinuance in relation to other partners of BWCL. However, in the final result that did not eventuate because the purchasers suggest they may be entitled to recover against all partners, rather than Mr Clarke alone, if upon amalgamation the new firm assumed responsibility for contingent liabilities of Campbell Clarke and Young. Counsel accepted this was a potential issue and a discrete issue, which would only become relevant in the event both the purchasers' counterclaim was successful and Mr Clarke was unsuccessful against Lloyds. In these circumstances I ordered that the issue of BWCL's liability as a firm to the purchasers, if any, be severed and tried at a later date if necessary. In light of that ruling Mr Radford withdrew from the hearing but in the knowledge that other Counsel would, if required, contend that the findings from this hearing were binding upon BWCL regardless of its election not to be represented.

<u>The Factual Background</u>:

The business of Spinwell Products Limited (Spinwell) operated from premises at 1 Heaton Street, Timaru. The building was owned by Robert Begg Limited (RBL). The shareholding in both companies was owned by

Wilhelmus Keeman, known as Bill, his wife Cornelia and Brian French and his wife Marilyn. Mr Bill Keeman is a cousin of Mr Cor Keeman one of the purchasers. Negotiations for the sale of Spinwell and RBL to the purchasers were conducted between the Keeman cousins in the first instance. As it happened Campbell Clarke and Young in one way or another acted for all of the individual parties, but one. Mr Clarke was solicitor to Spinwell, RBL, and to the shareholders and directors of the companies, who were also to become the vendors in an agreement for sale and purchase signed on 28 November 1988. Mr Clarke was also Cor Keeman's solicitor, while his partner Mr Young had previously acted for Mr and Mrs Put. The only individual outside the fold was Cor Keeman's then fiancee Barbara Jones. As at 1986 she was employed by another then firm of Timaru solicitors, Petrie Mayman Timpany & More as a data computer operator.

Mr Clarke gave the most detailed evidence concerning the steps which preceded settlement of the Spinwell sale and purchase on 23 December 1986. The following narrative is largely based upon his evidence. On 8 October 1986 Cor Keeman first advised Mr Clarke of his interest in the Spinwell business. He explained that in partnership with his fiancee and Mr and Mrs Put, the proposal was to acquire the Spinwell business as a going concern. Mr Cor Keeman had undertaken carpentry work at 1 Heaton Street and had also worked for Spinwell. He therefore knew something of the business and its proprietors. At the point of first contact on 8 October, Mr Clarke indicated that if the sale and purchase were to proceed it was unlikely he could act for both sides. However

Cor Keeman doubted this would pose any problem. Mr Clarke also made the point he could certainly not be involved in the bargaining process. He explained that although he acted for Spinwell he had no knowledge of its financial position. He suggested it would be sensible for Cor Keeman to obtain the books of the business and have them assessed by an accountant.

Over the ensuing weeks negotiations continued between Bill and Cor Keeman. The proposal underwent changes. It became clear that raising finance would not be easy, but that the way may be eased if Spinwell and RBL were both acquired. Ownership of the business premises would provide added security for the major borrowings which were required. Mr Bill Keeman apparently favoured a sale of the two Companies. There were a number of contacts with Mr Clarke, which culminated in a meeting on 26 November 1986 when the Keeman cousins jointly attended Mr Clarke and instructed him to prepare a sale and purchase agreement. The agreement provided for Cor Keeman, his then fiancee Barbara Jones, and Mr and Mrs Put to purchase the shares and assets of Spinwell and RBL for $335,200 and $200,000 respectively, a total purchase price of $535,200. The vendors were Bill Keeman, his wife, and Mr and Mrs French, as shareholders in the two Companies. The purchase price was payable as to $25,000 by cash deposit on signing, $375,000 at settlement on 23 December 1986, with the balance of $135,200 left owing to the vendors in defined shares. This balance was repayable over 5 years and was in the meantime to be secured by a debenture over the assets of Spinwell and a fourth mortgage over the Heaton Street property owned by RBL. The purchasers in

acquiring Spinwell as a going concern were also to be responsible for its liabilities and debtors. The Heaton Street property of RBL was subject to a number of tenancies. These were to continue. The agreement was conditional upon the purchasers obtaining finance suitable to themselves by 10 December, with the deposit refundable if the transaction did not proceed.

On 28 November the four purchasers jointly attended at Mr Clarke's office. The four vendors were also present. Two documents were to be signed, the agreement for sale and purchase and what was referred to in evidence as the "indemnity agreement". The latter was a simple one page document relevant to the sale and purchase of RBL. That company had borrowed monies from Trust Bank South Canterbury and from the Nominee Company of Campbell Clarke and Young, secured by first and second mortgages over Heaton Street respectively, with personal guarantees from the vendors as well. The indemnity agreement provided that the purchasers would indemnify the vendors against future claims in respect of their personal guarantees. As Mr Clarke explained, the indemnity agreement was prepared and signed on a "what if" basis. The main agreement provided that RBL would provide a transfer of the unencumbered freehold of the Heaton Street property. However, because finance was still to be arranged and as pre-contractual discussions between Bill and Cor Keeman had extended to the possibility that the purchasers might take over the existing RBL mortgages and receive a credit against the purchase price, the indemnity agreement was signed to cover that possibility. This background is significant in the assessment of events on 28 November in Mr Clarke's office. It will be necessary to return to that aspect shortly. For the moment it is

sufficient to note that the agreement for sale and purchase and the indemnity agreement were signed by all parties that day.

A flurry of activity followed in an endeavour to secure finance. Much earlier Cor Keeman had made an approach to the Bank of New Zealand seeking a finance package to cover the purchase transaction. In late October 1996 the Bank declined involvement in a letter to Mr Keeman at his home address. The letter included the following:

> *"We regret that, after full consideration we must decline to assist you in this venture because of the low level of cash input relevant to the total ingoing price of $500,000 and the consequent lack of security cover for the bank. A minimum cash input of $200,000 would have placed this proposition on a much sounder footing."*

Later an approach was made to the National Bank, which was prepared to assist but to a limited extent. In early November the Bank agreed to a loan of $80,000 secured by a debenture over the assets of Spinwell, an all obligations guarantee from the new directors, and a mortgage over Heaton Street. This meant it was more likely the purchasers would opt to take over the existing Trust Bank and Nominee Company mortgages over Heaton Street and increase the principal sums under each. In the final analysis the agreement was confirmed by 10 December. In round figures the transaction was financed as follows:

National Bank debenture	$80,000
Trust Bank first mortgage	140,000
Nominee Company second mortgage	80,000
Vendor third mortgage	135,200
RBL overdraft to BNZ taken over	16,674
Cash	80,000

As to the Trust Bank first mortgage $75,500 was the liability of the vendors at settlement date taken over by the purchasers, with the balance of the mortgage figure an additional advance. Likewise, the Nominee Company second mortgage was a takeover as to $31,650, with the balance increased borrowing. It will be necessary to return to a break-down of the $80,000 cash contribution figure.

On settlement date, 23 December 1986, the four purchasers again attended Mr Clarke's offices. All the funds required for the settlement were not to hand, but nevertheless the parties were on such terms that possession was given with various details left for resolution in the new year. There were a number of documents to be signed by the purchasers. These were a debenture over the assets of Spinwell in favour of the National Bank, a third mortgage to the Bank over Heaton Street, a variation of the Campbell Clarke and Young Nominee Company mortgage, and a fourth mortgage in favour of the vendors. The originals, and copies, of these documents were signed in the course of an attendance which occupied an appreciable period of time. Again, it shall be necessary to return to the detail of this day shortly, since the signing of the Nominee Company variation of mortgage is the event central to the purchasers' counterclaim against Mr Clarke.

Following settlement the four purchasers were personally involved in running the business, with three further employees. The business did not fare well. RBL proved to have liabilities which had not been anticipated. Its principal tenants had been understood by the purchasers to be long term, but this did not

prove to be so. In addition a difficult dispute developed with Messrs Bill Keeman and French concerning their current accounts with Spinwell and RBL, which were significantly in debit. The National Bank became nervous concerning the security of its investment, and seasonal finance soon posed a problem. The financial difficulties compounded to the point of mortgage default. Attempts were made to sell the Heaton Street building in an endeavour to obtain funds to reduce mortgage liabilities. A sale did not eventuate. In December 1988 Trust Bank, as mortgagee, auctioned Heaton Street but in the event purchased the building itself at the redemption price. In about January 1989 Mr and Mrs Put ceased their involvement with Spinwell. Later that year Bradley West Solicitors Nominee Co Limited commenced proceedings against the purchasers in reliance upon their personal guarantees of the original Nominee Company second mortgage. In late 1989 the assets of Spinwell which remained were offered for sale at auction. The Company ceased to trade. Spinwell's trading history and the reasons for its financial failure were not explored in evidence in any detail. This reflected the fact that the purchasers' claim was based upon the signing of the Nominee Company variation of mortgage, not upon the proposition that they were inadequately advised concerning the wisdom of the transaction itself. It was common ground Mr Clarke's retainer did not extend beyond implementing, and advising as to the effect and implications of, the arrangements which the purchasers had negotiated and agreed upon for themselves.

Negligence/Breach of Fiduciary Obligation:

The allegation of breach of a contractual duty of care to exercise proper professional skill in advising concerning the variation of mortgage guarantee was variously expressed. The essence of the allegation was a failure to adequately explain to the purchasers the full effect and implications of a personal guarantee. Both in contract and in support of the alternative allegation of breach of fiduciary obligation, it was alleged that Mr Clarke acted from a position of inter client conflict without informed consent and failed to advise the desirability of the purchasers obtaining independent legal advice.

This is a case of double engagement, indeed multiple engagement, in that Mr Clarke acted for all parties involved in a complicated transaction. That is to say the purchasers, the vendors, the National Bank, Trust Bank South Canterbury, his then firm's Nominee Company, and the two companies Spinwell and RBL. Mr More for the purchasers submitted that some parties had multiple interests as well, so that on his count Mr Clarke represented some thirteen different interests in all. There was no difference between Counsel as to the obligations which rest upon a solicitor who elects to act for more than one client, where the interests of clients diverge. ***Farrington v Rowe McBride & Partners*** [1985] 1 NZLR 83 (CA), remains perhaps the leading New Zealand authority. Since that case was decided there have been numerous decisions, variations on a common theme, which illustrate that a solicitor who acts for separate clients in a conveyancing transaction does so at his peril. That is not to say that

acceptance of multiple engagements is necessarily fatal if the solicitor acts with the fully informed consent of the particular clients.

Informed consent means consent given in the knowledge that there is a conflict between the parties which may result in the solicitor giving advice to one party which conflicts with the interests of another : *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC at 646). What is required to obtain informed consent depends upon the particular situation. The identity of the parties will be relevant, particularly their previous experience in relation to matters of business. It will be necessary to explain to the clients in a practical way that their interests, and those of other parties, are different. The constraints which may arise upon the solicitor, need to be pointed out. It is necessary to advise not only of the right but also of the desirability of taking independent advice. Finally, in this case it was essential to ensure that the clients appreciated the limits of the retainer. At the outset Mr Clarke had made it plain to Cor Keeman that he could not be involved in the contractual negotiations, nor advise as to the wisdom of the transaction. It was important that when he met the other parties the limits of his role, the extent of the retainer, were brought home to them. The informed consent of each individual purchaser was required, given the position of multiple engagement which Mr Clarke contemplated.

In relation to the practical advice required of a competent practitioner advising clients in the position of the purchasers, evidence was led from an experienced Christchurch solicitor Mr J L Woodward. He drew attention to a number of matters which he considered significant in the circumstances of

this particular case. He noted that there were four individual purchasers, whom Mr Clarke attended and advised at a joint meeting. Mr Woodward questioned the wisdom of that approach. In his opinion the better course was to advise individuals separately or at least to speak to individual couples separately, to lessen the chances of a client being inhibited from broaching concerns. I understood this opinion to be given against the particular background which existed here, that Cor Keeman alone was involved in the contacts with Mr Clarke prior to the meeting on 28 November. Only then, did Mr Clarke meet the other purchasers for the first time or for the first time as clients. Mr Woodward considered all of the purchasers were persons of limited business experience, the more so in the case of Miss Jones and Mrs Put. He assessed it as a situation where clearly it was necessary to ensure that all four purchasers understood the obligations they were about to assume, for in his experience there is always the possibility that a party is reluctantly involved on account of the enthusiasm of another, particularly a spouse. Mr Woodward also considered the extent of the personal exposure entailed in the transaction a highly relevant factor in the assessment of the advice required. The purchase involved an outlay in excess of $500,000, with the total contribution from the purchasers being only about $80,000. Although it was not for Mr Clarke to advise the parties as to the wisdom of the transaction generally, in explaining and advising them as to the effect and implications of a personal guarantee it was necessary to put that guarantee in a meaningful context. That involved pointing out the total extent of the borrowings and the extent to which such borrowings were subject to personal guarantees. Lastly, Mr Woodward stressed the importance

of corporate, personal, and several liability in the circumstances of this case. His evidence included:

> *"Particular care was required to explain to the clients the liability of the company and their separate liability as individuals. Many clients would be confused by the separation between the company and the individuals who set it up; then the legal relationship between them on the guarantee, particularly the personal liability to pay the money in the event the company failed to pay. Many clients believe that they are protected by a limited liability company, thus the need to explain how that is circumvented by a guarantee. Finally an explanation of joint and several liability was required."*

Generally I accept the evidence given by Mr Woodward as an appropriate description of what was required of a reasonably competent solicitor in the particular circumstances. His evidence also covered aspects of the transaction which in his opinion had not been competently handled by Mr Clarke. Some of these matters were probably beyond the ambit of the retainer, since Mr Clarke explained he was instructed not to concern himself with certain matters. Counsel for the purchasers argued that the suggested deficiencies were relevant in that if the transaction had been mishandled generally, it was more likely the advice tendered in relation to the personal guarantee was also inadequate. My preferred approach is to focus principally upon the evidence relevant to the Nominee Company personal guarantee, and to only have regard to general considerations thereafter.

As at November 1986 Mr Cor Keeman was about 30 years of age. His recent background was as a self employed builder. Mr Clarke had a basis to assess Mr Keeman's abilities. He was a past client and the two had been in contact as the Spinwell purchase proposal unfolded. In evidence Mr Clarke

described Mr Keeman as competent and optimistic of his ability to run the business. However, I do not accept there was a proper basis to treat Mr Keeman as experienced in commercial terms. As a builder he had traded in his own name. He had no experience of a limited liability company. The borrowings involved in the purchase transaction were on a scale beyond anything which Mr Keeman had previously experienced. In my view it was encumbent upon a solicitor in Mr Clarke's position to regard Mr Keeman as inexperienced in relation to business matters of the kind in hand.

At their first meeting on 28 November 1986 Miss Jones was known to Mr Clarke as an employee of another legal practice. Although a little older than her fiance, she was totally lacking in business experience. Miss Jones had not owned a house, nor signed documents in a solicitor's office previously. Had any inquiry been made, it would have been quite obvious that she required every assistance in order to have an adequate understanding of the documents which she was to sign on 28 November and 23 December. The same applied in the case of Mrs Put. In 1986 she was aged about 30 years. Her work experience was as a nurse and on farm properties as a married couple with her husband. Together they had purchased a home in Timaru, but otherwise she had no experience of contractual obligations. Speaking of the meeting on 28 November, Mrs Put said she learnt then that the total cost of the purchase exceeded $500,000. She continued that she "felt sick" as it was such a lot of money. Mr Put was also about 30 years at the relevant time. He had no previous business experience and described himself in evidence as "green as grass" and reliant upon Mr Keeman in relation to the purchase. This self description might be seen

as self serving, but having seen Mr Put in the witness box, albeit at a distance of ten years from the transaction, I have no doubt the description was apt.

The vulnerable situation of the purchasers at the time is further illustrated by reference to the sources of their cash contribution. The total contribution was about $80,000. Mr Keeman was the significant contributor. He raised about $47,000, being $12,000 from personal savings, $10,000 from the sale of a truck, and the balance borrowed from various sources including a building society, a finance company and by way of increase to the house mortgage which Mr Keeman had from Campbell Clarke and Young's Nominee Company. Miss Jones contributed $20,000, being $5,000 from a savings account and $15,000 from the sale of her car. Mr and Mrs Put could raise only about $12,500. This was sourced from the sale of two vehicles, by selling various chattels including Mr Put's sword collection, and to a lesser extent from savings. Mr Clarke did not inquire of his clients how the cash contribution was raised, but he knew at least of Mr Keeman's need to increase his house mortgage.

Events at the meetings at Mr Clarke's office on 28 November and 23 December are obviously crucial to an assessment of the counterclaim allegations and the defence of them. There are two aspects to the assessment: whether informed consent was extended to the solicitor acting for all entities in a multi-party transaction, and whether the purchasers were adequately advised as to the effect and implications of the personal guarantee contained in the variation of the nominee company mortgage. It was an odd feature of the

evidence in chief of each of the purchasers, other than Mr Keeman, that they had no recollection of separate meetings at which documents were signed. That there were two meetings at Mr Clarke's office almost four weeks apart was a matter of record. The documents alone established as much. Miss Jones and Mr and Mrs Put acknowledged the two meetings in cross examination, but they had at best a hazy recollection of the separate occasions. This no doubt reflected the passage of time but also indicated, in my view, something of the nature of the meetings themselves.

By contrast Mr Clarke gave comprehensive evidence concerning events on 28 November and 23 December. The advice he gave was entirely oral, but by reference to his diary and to the documents which were signed he detailed the course of the meetings. On 28 November there were eight persons assembled to sign the agreement for sale and purchase. After some preliminary discussions including introductions, the four vendors were asked to wait outside while Mr Clarke spoke to the purchasers alone. His evidence was in these terms:

> *"All the purchasers were sitting on chairs in front of my desk and I asked each of them in turn if they wanted me to act, if they wouldn't rather get independent advice or if they wanted further time to consider. I felt rather like a school teacher, asking them one by one. I remember saying to Miss Jones in particular that as she worked at Petrie Mayman Timpany & More, why didn't she ask them to advise her. They were aware of the reasons why seeking independent advice would be appropriate."*

He continued in evidence to explain that the purchasers were then asked to leave and he went through the same routine with the vendors. The purchasers'

recollections were somewhat different. Mr Keeman agreed that the topic of independent advice was raised. His recollection was that Mr Clarke inquired whether the purchasers were happy with his doing the work. Mr Keeman continued:

> *"I couldn't quite understand why he was even saying that because as far as we could see the work was nearly done, we were about to sign the agreement."*

Miss Jones accepted that reference was probably made to her seeking advice within the law firm by which she was employed, but said that the issue of independent advice was raised in a ho hum way, and that the purchasers were quite comfortable with Mr Clarke acting for all parties anyway. The evidence of Mr and Mrs Put was to similar effect. Mr Put said the purchasers were simply asked if they were happy for Mr Clarke to act, and his wife referred to a light-hearted comment by Mr Clarke that he should not be acting for everyone.

The resolution of credibility issues in this case is not easy because of the time lapse. Further, the case has a protracted history. All the parties gave evidence in the proceeding before Tipping J. Care is required in assessing the weight to be given to evidence against this background. My conclusion is that informed consent to acting for more than one client was not given. Even on the basis of Mr Clarke's own evidence it is not established that the purchasers gave informed consent. It was essential that they be told at the outset that Mr Clarke had a limited role, or retainer. It was not sufficient to assume that because the limited nature of the retainer had earlier been broached with Mr Keeman, the other purchasers appreciated the position. That

inadequacy aside, such steps as Mr Clarke did take were not sufficient. It was essential to bring home to the individual purchasers what a conflict of interest was, how in a practical sense that could affect someone in Mr Clarke's position, and to point out the desirability of independent advice. None of these steps was even attempted.

In any event, I do not accept Mr Clarke's evidence in this area in its entirety. I have no doubt that the delay and the circumstance of the previous hearing have coloured, perhaps unknowingly, the recollections of both the purchasers and Mr Clarke. I accept that steps to obtain informed consent were taken while the vendors were absent but in my judgment what then transpired probably lies somewhere in the middle between the divergent descriptions of the purchasers on the one hand and Mr Clarke on the other. It is not necessary to further analyse the matter, in view of the finding already made that on any view of it the steps taken were insufficient.

Once the eight clients had regrouped in the office Mr Clarke explained the terms of the sale and purchase agreement before it was signed. Again there was conflict in the evidence as to the extent of the advice given but it is not necessary to dwell upon the different versions. The so-called indemnity agreement was then signed whereby the purchasers agreed to indemnify the vendors in relation to their personal guarantees to Trust Bank South Canterbury and Mr Clarke's Nominee Company if there should be a takeover of the RBL mortgages. Concerning this aspect Mr Clarke gave evidence that he was careful to explain the nature of a personal guarantee; to

point out that the purchasers' homes, vehicles and chattels, would be in jeopardy in the event of default by RBL in meeting its mortgage obligations. By way of amplification of his written statement of evidence Mr Clarke added:

> *"I also pointed out to them that lending institutions would not lend money to a company without personal guarantees. I further explained to them that if something went wrong with the loans or repaying the loans the money they had borrowed and there were insufficient funds in either the assets of Spinwell Products or the property in Heaton Street owned by Robert Begg Limited if there was insufficient funds to repay the monies then they would be liable. I did say to them that there was joint and several liability and what the institution would do would be to pick them off one by one til they got their money."*

He went on to explain that the advice given was pitched at an appropriate level for people whom he regarded as largely unsophisticated in business matters.

Mr More was highly critical of this additional oral evidence. He described it as belated embellishment designed to meet the evidence previously given by Mr Woodward concerning proper practice. Without subscribing to that criticism, I do not accept that advice was given in such fulsome terms. The context in which the indemnity agreement was signed is significant. To use Mr Clarke's own words it was a "what if" document signed as a matter of convenience to be operative if the RBL mortgages were taken over by the purchasers. He therefore described the document as held by him in escrow. In that situation I consider it unlikely that clear and unequivocal advice was given in the terms which Mr Clarke now recalls. I am fortified in that view by the evidence of the purchasers. When cross examined they had no recollection of the clear advice contended for by Mr Clarke. At the conclusion

of the latter's case I ruled that the purchasers could be recalled in relation to this specific aspect since, given the way Mr Clarke's evidence had unfolded, the earlier cross examination of the purchasers was economical. In the event only Mr Keeman was recalled. Of the purchasers, he impressed me as having the best recollection of events. Mr Keeman denied that any detailed explanation of the indemnity agreement was given, certainly not in the ringing terms contended for by Mr Clarke. Again it is my view that the truth lies between the two extremes. It is also to be remembered there were eight persons present when the indemnity agreement was signed. The agreement was to the direct benefit of the vendors, but equally against the interests of the purchasers. The atmosphere was hardly conducive to advising in the terms suggested. It has been necessary to consider the evidence concerning the indemnity agreement in this detail, because of its carryover relevance to events on 23 December.

That day the four purchasers again saw Mr Clarke together, but in the absence of the vendors. The appointment commenced at 11.30 am in what was the last working day before Christmas. There were four documents to be signed. A debenture from Spinwell and mortgage over Heaton Street in favour of the National Bank, the mortgage back to the vendors for the amount left in, and a variation of the Nominee Company mortgage. To recap in relation to the later mortgage, the mortgagor was RBL, $31,650 represented principal taken over by the purchasers, with a sum of $48,350 by way of increased borrowing to produce the new principal figure of $80,000. The memorandum of variation

was a simple document. It identified the mortgagor, guarantors and mortgagee by name and particularised the mortgage by number, and then provided:

> *"The principal sum intended to be secured by the abovementioned mortgage is hereby increased as from 23 December 1986 to $80,000*
>
> *EXECUTED by Cornelius Keeman, Johannes Albertus Put, Felicity Anne Put and Barbara Jean Jones as guarantors in the presence of ....."*

There followed space for execution by the Nominee Company and by RBL as mortgagor. In the earlier proceeding Tipping J noted that the variation contained "no express covenants of a convenional kind for a guarantee". However although "economical in the extreme", even "skeletal" as he put it, the learned Judge found the document effective to create a guarantee.

In the present context these factors become highly relevant to the assessment whether the purchasers were properly advised. The four purchasers signed in their capacity as guarantors, although Mrs Put signed by way of initials rather than using her full surname. Mr Clarke witnessed their signatures. Mr Keeman and Mr Put also executed the variation of mortgage as directors of the mortgagor, RBL. Mr Clarke's evidence on the topic was short. He referred back to the purchasers having signed the indemnity agreement on 28 November. He pointed out that the purchasers had also been required by the National Bank to guarantee the $80,000 advance it made to Spinwell. Bank officers had attended to that aspect. Further, Mr Clarke mentioned that the purchasers also signed the mortgage from RBL to the vendors as guarantors of

that obligation. His evidence on the matter concluded in these terms:

> *"The defendants personally guaranteed two of the four mortgages on the Heaton Street property granted by RBL and indemnified the guarantors of the other two mortgages. I do not accept that they were unaware that they had become personally liable if the companies did not fulfil their obligations to each of the mortgagees."*

What is significant about this evidence is the extent to which Mr Clarke relied upon what had gone before. He did not trouble to advise the purchasers of the effect and implications of the security documents they were about to sign. It is only necessary to measure this evidence against that of Mr Woodward as to required good practice to see the extent of the deficiency. There was no endeavour to place the Nominee Company guarantee, nor the other guarantees, in context. Four relatively young persons, none experienced in commercial matters, were about to sign personal guarantees of a further sum of $215,000. The guarantees were secondary to the primary obligation of a limited liability company. None of the purchasers had relevant company experience. The fundamental point was to explain to the purchasers how their personal assets, including their homes, could be at risk albeit that the business they were to acquire operated through limited liability companies. The purchasers denied that the nature of the personal guarantee of RBL's obligations under the Nominee Company mortgage was brought home to them.

Mr Keeman described signing a number of documents on 23 December, but said he had no recollection or understanding that one of his signatures gave rise to this personal guarantee obligation. Miss Jones said that the various documents were introduced, with a short description of what

they were and then the purchasers signed in the presence of one another. Although Mrs Put had little recollection of the discussions at both meetings, she was clear that at the time she did not understand that personal, as opposed to business assets were to be put at risk. She understood the security documents meant the businesses would be taken if payments were not maintained.

I do not find that all the purchasers had no understanding of the concept of a personal guarantee. In the case of Mr Keeman, and to a lesser extent Mr Put, it is probable that a level of understanding existed. But the advice given was inadequate, and the guarantors' understanding of their obligations deficient. The document itself, the variation of mortgage was in most abbreviated form. The only indication of the personal guarantee obligation to be assumed was the use of the single word "guarantors". In the absence of adequate explanation of the effect of the document and in a situation where a number of documents, including disclosure copies and duplicates, were signed I accept the evidence of each of the purchasers that it was not brought home to them that their signature gave rise to a personal guarantee of the $80,000 Nominee Company mortgage, whereby personal assets could be at risk.

To my mind it is artificial to consider this aspect of the case divorced from the issue of informed consent. Put shortly this was a situation where a solicitor acted for all parties at his peril. A herculean effort was required to identify the multiple conflicting interests at stake and to meet the professional obligation owed to the different clients. Especially in relation to

the duty owed to the purchasers, Mr Clarke was in a difficult if not impossible position, acting as he did for the vendors, two banks, and the Nominee Company as well. The Nominee Company guarantee was required for the benefit of the contributories. Giving the guarantee was against the interests of the purchasers. A clear conflict between different clients existed. The problem was not confronted. As a result the purchasers did not appreciate the personal obligation, the exposure of personal assets, which was entailed in their signing the variation of mortgage.

Considerable time was devoted at the hearing to an examination of alleged more general failings on the part of Mr Clarke. For example, as a consequence of the way finance was raised it was an integral aspect of the transaction that RBL borrowed funds for the purchase of its own shares, in breach of s62 of the Companies Act. Mr Clarke frankly acknowledged that he was not even aware of the existence of s62 at the time. Likewise, the absence from the agreement for sale and purchase of provisions which dealt with the current accounts of the outgoing directors and with undisclosed liabilities of Spinwell and RBL, were raised and debated. I consider it unnecessary to delve into these matters in any detail. It is sufficient to say the examination of these wider issues did nothing to suggest Mr Clarke was in full command of a complicated commercial transaction while acting for all the parties involved in it.

Causation:

Mr Hicks argued on Mr Clarke's behalf that even if a breach of fiduciary obligation was established this was a case where the loss claimed would have occurred anyway. That is to say that even if the purchasers had been fully advised concerning the effect and implications of the Nominee Company mortgage guarantee, such guarantee would have been signed, with the result that in due course the same liability would have resulted. The essence of the argument was that it was standard commercial practice for lenders to require personal guarantees from the directors of private companies. As Mr Hicks put it in closing argument:

> *"The commonsense of it is that the two men were keen to acquire the shares and would have done so, whether or not they were required to guarantee. The two women would have followed their lead. The contrary suggestion they now make is no more than wishful thinking."*

At another point in his closing argument Counsel put the matter in this way:

> *"It is utterly naive for the (purchasers) to suggest that, but for the breaches complained of, they would never have exposed themselves and their personal assets to claims by the mortgagees."*

With respect, this proposition does not put the issue accurately as a matter of principle. It implies that the purchasers must establish the breaches by their solicitor caused them to enter the relevant personal guarantee and thereby to incur the loss.

The law remains as explained in ***Day v Mead*** [1987] 2 NZLR 443 (CA) at 461 where Somers J noted that equitable compensation is not fettered

by the normal common law requirements of foresight and remoteness. In his decision in ***Everist v McEvedy*** [1996] 3 NZLR 348 Tipping J traced more recent developments in this field and concluded that the onus upon a plaintiff was to establish no more than "loss arising out of a transactional circumstance to which the breach (of fiduciary obligation) was material" (p 355). However he then continued:

> *"The defendant (solicitor) may resist the plaintiff's claim by showing that the plaintiff's loss would have occurred in any event without any breach on the defendant's part. To establish this in a case involving a solicitor, it is necessary for the solicitor to show that even with appropriate independent advice or full information the plaintiff client would nevertheless have entered into the impugned transaction upon materially the same terms .... To establish (this) the errant fiduciary cannot invite speculation. There must be a proper evidentiary foundation for the conclusion which the Court is asked to draw .... the necessary conclusion should be cogent and should not be lightly reached."*

No doubt this passage was the basis of Mr Hicks' argument.

In practical terms for a fiduciary to establish an absence of causation, it is necessary for there to be persuasive evidence that the breach was not material. That is that if the purchasers had received independent and competent advice, they would nevertheless have assumed the same obligations and suffered the same loss : ***Haira v Burbery Mortgage Finance & Savings Ltd*** [1995] 3 NZLR 396 (CA). In my view the most telling breach on the part of Mr Clarke occurred early in the meeting of 28 November 1986, when he failed to address adequately the issue of conflict of interest and to advise the purchasers of the desirability of separate independent advice. In the

particular circumstances of this case that was a serious breach. One view must be that the only appropriate course was to decline to act for the purchasers as well as the other parties. Alternatively, Mr Clarke was bound to fully explore the issue of independent advice. Had that been done it is entirely possible that the purchasers would have understood the advantages of, and taken, independent advice.

In the hands of another solicitor it is quite possible that matters would have taken a different course. I accept the strength of Mr Hicks' argument that it was standard commercial practice for lenders to require the shareholders' personal guarantees of an advance to a company. The Nominee Company had earlier required that the vendors guarantee RBL's obligations. I also accept Mr Clarke's evidence that personal guarantees of the increased principal sum would likewise have been required from the purchasers. However, what cannot be said with any assurance is that the Spinwell transaction would have proceeded as it did if the purchasers had taken independent advice. The desirability of such advice should have been explored at the first meeting on 28 November 1986. At the same time it was essential for Mr Clarke to explain the limited nature of his retainer; that he was not in a position to advise on the wisdom of the transaction. Importantly, at that point the agreement for sale and purchase had not been signed. The purchasers were not bound to proceed until they signed the agreement on 28 November and subsequently confirmed finance on 10 December. In this respect the present case is distinguishable from ***Denholm v Mosby & Anor***

(1996) 3 NZ ConvC 192, 309; that case being an example of a situation where a breach of fiduciary obligation was not causative of loss. In the hands of a competent and independent practitioner it is not only possible, but likely, that the ambit of the retainer would have come under review. A proper explanation to the four purchasers that their solicitor would only give effect to the transaction, and not advise as to its wisdom, could in itself have produced a change of course. Mrs Put in particular held reservations concerning the extent of the commitment in buying two companies at a cost in excess of $500,000. A little prompting from a solicitor could so easily have caused the purchasers to pause and more fully consider the contractual obligation they were about to assume.

Alternatively, I am not persuaded that an adequate explanation of the personal guarantee obligations entailed in the transaction would not in itself have made a difference. Mr Woodward stressed in a context such as this the need for a practitioner to ensure the clients appreciate the distinction between corporate and personal liability, and appreciate the dollar extent of their potential personal liability as well. Again had that been done at the meeting on 28 November, it is quite possible that the course of events would have changed. By this route the wisdom of the transaction generally could well have been called in question. I accordingly conclude that causation is established. A conclusion that the involvement of another practitioner would not have made a material difference, would be in my view speculative indeed.

Damages:

The main relief sought by the purchasers was an order that Mr Clarke indemnify them in respect of the Nominee Company judgment, including the costs, disbursements and witness expenses ordered as part of the judgment. Further, the purchasers seek reimbursement of the legal costs incurred in defending the Nominee Company proceedings. The claim is for $24,280.37, inclusive of Counsel's fee and disbursements. It was submitted on Mr Clarke's behalf that in the event the purchasers were to succeed the claim for legal costs should not be allowed as the defence of the Nominee Company claim was always bound to fail. In other words the reasonableness of defending that proceeding was put in issue. Examples of cases where the costs incurred in mounting an unsuccessful defence have subsequently been disallowed as unreasonable in the context of a further action are gathered in McGregor on Damages (15th ed) para 694. Such cases were plainly decided on their particular facts. The principle to emerge is that where the defence raised in the original proceeding was untenable, the resultant legal costs have been viewed as unreasonably incurred. My reading of Tipping J's decision in ***Bradley West Solicitors Nominee Co Ltd v Keeman*** does not suggest to me that the raft of defences raised by the purchasers can be roundly characterised as untenable. The various defences failed, but their rejection required a detailed consideration of both fact and law. However, I do not see that as the end of the matter.

The proceeding was commenced in early 1969 as an application for summary judgment. It was not until about 4½ years later that the case

proceeded to trial on a fully defended basis. Despite that significant gestation period, no steps were taken for the joinder of Mr Clarke as a party. This point obviously disturbed Tipping J who at p 123 of his judgment observed:

> *"It is to be noted that in the present case Mr Clarke was not joined as a party. That, I am told, was a deliberate decision. It is not for me to pass judgment upon its wisdom."*

The matter was not explored in evidence before me. In that situation I can see no adequate basis for the decision not to join Mr Clarke in the earlier case. To the contrary that would seem to have been the only sensible course, since conflict of interest and the inadequacy of the advice received from Mr Clarke were the essential background to the defences raised against the Nominee Company claim. I am therefore driven to the conclusion that the costs were unreasonably incurred in that these further issues between the purchasers and Mr Clarke should have been explored as an aspect of the 1993 hearing. Had that been done the purchasers would have incurred one set of solicitor client costs rather than two. Further, had there been a joiner in the earlier proceeding the Plaintiffs would likely have recovered party and party costs against Mr Clarke, not solicitor and client costs which is the basis of the present claim. In all the circumstances I consider the appropriate course is to disallow this head of the claim both on principle, and because that course will enable a ruling on costs in the present matter upon an uncluttered basis.

Limitation Act:

The arguments of Counsel in this area were necessarily intricate. In the absence of findings of fact, they were required to cover a range of

alternatives and possibilities. I do not propose to cover all the matters which were raised in argument. The better course is to simply record my conclusions.

Mr More contended that the purchasers' counterclaim raised contractual and tortious causes of action, as well as breach of fiduciary obligation. Mr Hicks argued the pleadings did not extend to tort and I accept that submission. Both Counsel proceeded on the footing that the relevant limitation period for breach of contract and of fiduciary duty, was six years. S4(1)(a) of the Limitation Act 1950 (the Act)provides as much in relation to a cause of action in contract. The particular claim must be brought no later than six years from the date on which the cause of action accrued. In relation to breach of fiduciary obligation the New Zealand position is that the six year limitation period is to be applied by analogy under s4(9) of the Act : ***Matai Industries v Jenson*** [1989]1 NZLR 525 and ***Official Assignee of Collier v Creighton*** [1993] 2 NZLR 534.

It is necessary to consider the applicability of s28(a) of the Act. The relevant part of s28 provides:

> "**28. Postponement of limitation period in case of fraud or mistake -**
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either -
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; .....
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud .... or could with reasonable diligence have discovered it."

It was common ground that fraud in paragraph (a) extended to equitable fraud, which in turn included breach of fiduciary duty: *Inca Limited v Autoscript (NZ) Limited* [1979] 2 NZLR 700 and *Collier v Creighton*. But Counsel were at odds whether s28(a) applied in this case to the cause of action in contract. Mr Hicks argued that it did not. He relied upon a line of English cases : *Forster v Outred & Co* (1982) 2 All ER 753, *D W More & Co Limited v Ferrier* (1988) 1 All ER 400 and *Islander Trucking Limited v Hoggison & Gardner Mountain (Marine) Limited* (1990) 1 All ER 826. The first two cases concerned solicitors who were negligent in the drafting of documents subsequently signed by clients to their detriment. The third case was a claim against insurance brokers for effecting an insurance policy subsequently treated as voidable by the insurer to the detriment of the broker's client. In all three cases it was held that time ran from the date of execution of the defective document, not from when the defect was discovered by the client or damage accrued. On my reading of them these are what might be termed "defective document" cases. The judgments do not include reference to s32 of the English Limitation Act, 1980, the equivalent of s28(a) of the New Zealand Act. On this basis, and factually, I consider the English authorities distinguishable. The gist of the allegation in the present case is not that the document, the variation of mortgage, was defective in that it did not secure what was required. One client at least, the Nominee Company, certainly wanted a personal guarantee. Rather the allegation central to the counterclaim was that the purchasers were unaware of the personal guarantee obligation they assumed because of the fiduciary's failure to adequately advise them upon it.

In *Inca v Autoscript* Mahon J considered equitable fraud in depth. After a comprehensive consideration of the authorities he concluded:

> *"Where there was non disclosure in breach of a duty, and by reason of the non disclosure a plaintiff was unaware of his legal rights, and without his own fault did not discover his own injury until the expiration of the relevant period prescribed by the Statute of Limitations, a Court of Equity would intervene to prevent the plaintiff's claim being barred, even on a cause of action to which the Statute specifically applied."*

He was there speaking of non disclosure in the context of a breach of fiduciary duty, as well as certain situations of special duty which are not presently relevant. I regard the emphasis upon non disclosure by a fiduciary as of particular relevance. I have already found Mr Clarke was in breach of his fiduciary obligations to the purchasers, by acting for multiple parties without informed consent. The essence of the breach was based in non disclosure. He did not adequately disclose the conflict of interest which existed between the different clients he represented. Nor did he disclose how that conflict could work to the disadvantage of the purchasers and that the desirable course was to have separate representation. Likewise, in a contractual setting the essence of the breach was a failure to give such advice as would disclose to such purchaser the personal obligation which would flow from execution of the variation of mortgage as a guarantor. In my judgment this is a case to which s28(a) of the Limitation Act applies.

It follows that time commenced to run when the purchasers discovered the breach of fiduciary duty, and in relation to the contractual cause

of action, when the purchasers became aware of the guarantee obligation which they had shouldered by signing the variation of mortgage on 23 December 1986. This follows from the requirement that what must be discovered or known by a claimant are all the facts which together constitute the particular cause of action : *Inca Ltd v Autoscript* and *Collier v Creighton*.

The elements of the fiduciary cause of action may be described as the existence of the conflict of interest between different parties to the Spinwell transaction, the failure to obtain informed consent to a multiple engagement, and the act of representing all the various parties involved in the transaction. The purchasers were plainly aware of Mr Clarke's multiple engagement and of his acting on the transaction. The question is when did they become aware that he did so in a situation where the plaintiffs' interests were in conflict with those of other parties to the transaction? What is required is knowledge of the concept of conflict of interest. I am in no doubt the purchasers on the basis of what was said at the meeting on 28 November 1986 had no appreciation of what constituted a conflict of interest. Further there is no evidence to suggest they had the requisite knowledge until sometime in 1988. The picture unfolded as a result of other developments.

Fees rendered by Mr Clarke for his work on the Spinwell purchase were paid as to $2000 but a balance of $3743.55 remained owing throughout 1987 and into 1988. By letter from BWCL dated 26 April 1988 demand was made for payment. Mr Keeman, on behalf of the purchasers consulted Mr Wallace of Gresson Wallace Dorman & Co, another firm of Timaru solicitors.

On 6 May 1988 Mr Wallace responded to the demand by a letter for the attention of Mr Clarke. The letter included the following:

> *"As you are aware our clients have encountered serious problems in large measure, in our view, arising from the way in which the transaction was documented and completed. We are currently engaged in negotiations with the solicitors in Christchurch now acting for the vendors and litigation may be unavoidable."*

The letter then detailed what Mr Wallace described as shortcomings of the transaction. Seven items were listed including problems in relation to the registration of share transfers for RBL and Spinwell, the omission from the agreement for sale and purchase of provisions relevant to the current accounts of the vendors and the omission from the agreement of an indemnity provision for prior debts of RBL which had proved to be substantial. The letter concluded:

> *"In the meantime for the above reasons we have to advise our clients not to meet your fee account until we see how the problems that have arisen are resolved. We trust you accept this unfortunate situation. We appreciate you have been good enough to release papers to us but in the circumstances of potential conflict and problems which exist, feel you had no other option."*

Mr Wallace was not called as a witness, nor does the evidence make for precision as to when Mr Keeman, no doubt acting as agent for all the purchasers, learnt that Mr Clarke had acted in a situation of client conflict of interest. I infer he acquired that knowledge soon after receipt of the letter of 26 April 1988 and as a result of consulting Mr Wallace. It follows that time commenced to run in respect of the fiduciary obligation cause of action from about 26 April 1988.

With regard to the contractual cause of action the relevant evidence concerning when the purchasers became aware they had signed a personal guarantee of the Nominee Company mortgage, was also given by Mr Keeman. In cross examination he was expressly asked whether he knew by December 1988 that he had signed the variation of mortgage as a guarantor. He accepted he appreciated the situation "soon after that". In December 1988 Trust Bank South Canterbury purchased the Heaton Street building. In February 1989 Bradley West Solicitors Nominee Co Ltd commenced proceedings against the purchasers in reliance upon the personal guarantee. On the basis of this evidence the purchasers knew of the guarantee obligation by the end of 1988. There was no evidence to suggest that the advice received earlier that year from Mr Wallace extended to this aspect. The focus at that stage was upon complications as between the purchasers and the vendors, not any personal obligation owed to the Nominee Company. Thus time commenced to run for limitation purposes in relation to the contractual cause of action from December 1988.

The next issue is when was action taken : when were the relevant causes of action asserted so that time ceased to run? This too is not a straight forward issue. The counterclaim evolved over a period of time originally when the proceeding was before the District Court. But for present purposes it is sufficient to go direct to the third amended defence and counterclaim filed by Mr Wallace on behalf of Mr Keeman and Mr and Mrs Put in response to the claim for unpaid professional fees. For the first time the pleadings focused

Regardless, Mr Hicks argued that properly analysed the claim was at most one against Mr Clarke as a partner of BWCL, not in his capacity as an individual. In my view the suggested distinction is without foundation. As a matter of procedure, where persons are in partnership they may sue or be sued in the name of the firm : R79 of the High Court Rules and Rule 81 of the District Court Rules 1992. That approach was followed here. Campbell Clarke & Young sued, but somewhat inelegantly in the name of the firm into which the former partnership had merged. This procedural convenience cannot affect substantive liability. By virtue of the Partnership Act 1908, where loss is caused by the act or omission of a partner in the course of business the firm is answerable (s13). Liability extends to every partner of the firm at the relevant time (s12), and liability between co partners is joint and several (s15). The intitulment of a plaint note, and of subsequent documents, cannot override the principles of the Partnership Act.

Ex P ***Young, In Re Young*** (1881) 19ChD 124 and ***Equiticorp Finance Group v Russell McVeigh*** (1995) 8 PRNZ 583 are authorities for the proposition that where a firm is named in proceedings, it is the individuals who were partners at the relevant time who thereby become parties to the action. In the former case Brett LJ put the matter in this way:

> *"The rule, however, is not that a 'partnership' or that 'a firm' may be sued, but that persons liable as co partners may be sued, and therefore, as it seems to me, a partnership, though dissolved, is by the rule considered still to exist for the purposes of suing and being sued in respect of transactions which occurred whilst it was in full force."*

In *Equiticorp Finance* Henry J cited this passage with approval. I find that the February 1994 defence and counterclaim, read in its context and read as a whole, was a pleading directed to at least the former partners of Campbell Clarke & Young. Mr Clarke, albeit by a procedural shorthand, was thereby named as a party to the counterclaim. The position of other partners of the firm BWLC does not arise at this point.

Mr Hicks also relied on r150 of the High Court Rules which enables a defendant to file a counterclaim against the plaintiff and "any other person". Such must be done within the time allowed for filing a statement of defence and with a notice of proceeding attached. The newly joined person becomes a counterclaim defendant. The comparable District Court provision is r173. Counsel argued Mr Clarke should have been, but was not, joined as a counterclaim defendant. I do not accept that r150, or its equivalent, were applicable in the present instance. The counterclaim was not one against a plaintiff and "any other person". It was a counterclaim against existing parties : against those parties captured by the description Bradley West Clarke List (formerly Cambpell Clarke & Young). Accordingly r145 (R168 of the District Court Rules) was the relevant rule. It was permissible for the Defendants to file a statement of counterclaim with, or without, a statement of defence annexed. A notice of proceeding was not required. There was no procedural irregularity.

Alternatively, should I be wrong in the view that r145 applied, it would be necessary to consider whether any non-compliance should be treated as an irregularity only in terms of r5 of the High Court Rules. It is not

upon execution of the variation of mortgage and in that context advanced allegations of breach of contract and of fiduciary duty. Although undated, the defence and counterclaim was filed on 11 February 1994. That is to say about two and ten months respectively before expiry of the limitation periods which had commenced to run in April and December 1988. Provided therefore the third amended statement of defence and counterclaim constituted the commencement of the proceeding against Mr Clarke, the purchasers have answered the limitation point. Mr Hicks contended however that the counterclaim was not brought against his client by virtue of the February 1994 pleading.

The argument raised was both one of substance and procedural in nature. Mr Hicks' central point was that whereas the claim is now against Mr Clarke in person the third amended defence and counterclaim was a proceeding against the firm, BWCL. To return to the beginning, the first document filed, a default summons under Plaint No. 1133/90, described the Plaintiff as "Bradley West Clarke List (formerly Campbell Clarke and Young), solicitors suing as a firm". Thereafter the intitulement was abbreviated to a reference to the new firm alone. Moving to the February 1994 amendment Mr Clarke and the Spinwell transaction were clearly identified as the the focus of the counterclaim. The prayer for relief provided:

> *"WHEREFORE the defendants and each of them individually counterclaim against the plaintiff and the said Gary John Clarke ...."*

necessary to detail the convoluted history of the present proceeding at any length. But after transfer of the case to the High Court Mr Clark in his personal capacity complied with a discovery under, successfully sought review of a costs order made against him, obtained further particulars of the purchasers' counterclaim and, most significantly, in August 1995 applied for leave to issue a third party notice against Lloyds and to that end to be joined as a second plaintiff. In an affidavit sworn in support Mr Clarke deposed that the counterclaim allegations related to pre-merger events and as there had been differences in relation to the matter between himself and his former partners in BWCL, he wished to make an independent claim against the Third Party. He also noted that from about December 1994 he had effectively been treated as a separate party to the proceeding, anyway. Leave was granted and Mr Clarke, as Second Plaintiff, filed a Third Party notice against Lloyds.

Despite this background Mr Clarke did not file a statement of defence to the counterclaim prior to setting down. It was not until 21 November 1996, on the eve of trial, an application was filed for an order striking out the counterclaim, or in the alternative for leave to file a statement of defence to it. This tactic was obviously designed to preserve and enhance the substantive and procedural defects considered to exist. I have already considered and rejected the suggested issue of substance. If contrary to my view there was a procedural deficiency in relation to the counterclaim, I would consider this a clear case for the application of r5. In that context I should regard the steps

taken by Mr Clarke to obtain particulars of the counterclaim and to join himself as a second plaintiff, as of particular significance.

Third Party Claim:

As noted Lloyds resisted liability to indemnify on the dual basis that there was no contract of insurance in force when notification was eventually given, this being "a claims made and notified" policy; and alternatively that late notification so prejudiced the insurer that it would be inequitable if the notification breach were not to bind the insured, timely notification being a condition precedent to the right to indemnity. In the event the first issue does not require consideration. Following its joinder, Lloyds moved to strike out the third party notice. In that context whether notification after expiry of the term of the contract of insurance was fatal to the insured's rights was argued as a question of contractual interpretation. On 4 March 1996 Master Venning ruled that because the insured did become aware during the currency of the policy of circumstances which may give rise to a claim, the right to cover was triggered. The real issue became whether failure to give timely notification of those circumstances was fatal. Put another way, the Master found that an event which gave the right to seek indemnity had occurred during the insurance period, and accordingly the issue was whether late notification relieved the insurer of the obligation to indemnify.

Section 9 of the Insurance Law Reform Act 1977 provides the relevant test:

> *"9. Time limits on claims under contracts of insurance -*
>
> *(1) A provision of a contract of insurance prescribing any manner in which or limit of time within which notice of*

> *any claim by the insured under such contract must be given .... shall -*
>
> .....
>
> *(b) .... bind the insured only if in the opinion of the .... Court determining the claim the insurer has in the particular circumstances been so prejudiced by the failure of the insured to comply with such provision that it would be inequitable if such provision were not to bind the insured."*

It is necessary to refer to the relevant sequence of events.

Upon the formation of BWCL in late 1987 professional indemnity insurance was taken through C E Heath Underwriting Agencies (NZ) Limited ("Heaths"). The period of insurance was from 4 December 1987 to 1 December 1988. On 6 May 1988 Mr Wallace of Gresson Wallace Dorman & Co wrote the letter to Mr Clarke previously referred to in which he denied that the purchasers were liable to pay a balance of unpaid professional fees. His letter included reference to likely litigation between the Spinwell purchasers and vendors. Mr Wallace then listed seven specific "shortcomings of the transaction" in sufficient detail to identify each point of concern. It was Lloyds' case that the letter constituted advice of circumstances which may give rise to a claim. That construction was disputed by Mr Clarke.

That difference aside, in early 1989 Bradley West Nominee Co Ltd issued summary judgment proceedings which produced a notice of opposition in March and statement of defence in May on behalf of the purchasers in emphatic terms. Positive allegations were made : that the guarantee was not binding, that s62 of the Companies Act was breached, and that Mr Clarke had acted in a position of conflict such as to give rise to the

equitable defence of unconscionable bargain. At that point, on any view of it the insured was on notice of circumstances which may give rise to a claim.

By 1991 BWCL had taken professional indemnity cover with different underwriters. On 16 October 1991 notification of a claim was given to the new insurer. By then, in the context of the District Court fees action, a counterclaim had been pleaded on behalf of the purchasers seeking damages of $50,000 for negligence. Correspondence ensued with the New Zealand agents of the underwriters, but it was not until early 1995 that final confirmation was given of declinature of indemnity. At that point, by letter dated 29 March 1995, notice was given to Heaths in reliance upon the indemnity policy current in 1987-88. This notification was based upon Mr Wallace's letter of 6 May 1988 as the event during the currency of the earlier policy which gave rise to the right to indemnity. By letter dated 5 May 1995 the insurers denied liability.

The prejudice aspect of s9 of the Insurance Law Reform Act 1977 has received comparatively little judicial consideration. Most recently Tipping J considered it in ***Sinclair & Co v National Insurance*** [1992] 2 NZLR 706. In a portion of the judgment which was strictly obiter Tipping J nevertheless set out certain views. He held that the onus of proving prejudice rested on the insurer, and that the section required "specific prejudice to be shown rather than any concept of general prejudice" (p 716). Later he spoke of a requirement that the insurer demonstrate on balance that its position had been "materially disadvantaged in the particular case by the non or late notification" (p 717). This part of the judgment was not considered when the Court of Appeal

reversed the decision on other grounds : *Sinclair Horder O'Malley v National Insurance* [1995] 2 NZLR 257. However Counsel in the present case, accepted the observations of Tipping J as an accurate statement of the law.

To my mind the words of s9(1)(a) supply the test to be applied and little purpose is served by substituting other words for the clear words used in the subsection. The first point to note is that the section confers a discretion on the Court. Second, prejudice experienced by the insurer through late notification is to be assessed "in the particular circumstances". The inquiry is therefore one of fact and degree in relation to the circumstances of the specific case. An examination of conclusions reached in other cases is unlikely to be of much assistance. Third, the measure of prejudice must be such as to make it inequitable for the insured not to be held bound by the contractual consequence of the non-compliance. Here, notification to the underwriters in writing "as soon as practicable" of any claim or circumstances which may give rise thereto, was a condition precedent to the right to be indemnified under the policy. Mr Ring submitted that inequitable in this context meant nothing more than unfair or unjust. Mr Hicks argued inequitable was a strong word and implied substantial injustice arising out of the prejudice. I doubt that it is helpful to import a notion of substantial injustice. At the end of the day what is required is that the Court is satisfied that there is such prejudice that it would not be right for the insured to be relieved of the contractual consequence of his or her breach.

Whenever the issue of prejudice falls for consideration in terms of s9(b) of the Insurance Law Reform Act it is likely that the extent of the insured's delay in giving notification of circumstances, or of a claim, will be a highly important factor to be considered. Here the total delay was six years ten months, from May 1988 to March 1995. That is a dominant feature of the present case.

Extensive evidence was led by Lloyds concerning alleged prejudice. Pheasant Riordon gave evidence based on her nine year experience as a claims manager for two large New Zealand underwriters, including Heaths. She detailed the procedures followed in the assessment of notified claims and potential claims. She also ventured observations concerning how this particular matter would have been handled, including possible settlement of the claim, had there been a notification in 1988. Miss Riordon was the claims manager for Heaths from 1986 to 1994. Mr T C Weston, a Christchurch barrister, also gave evidence from the perspective of his experience as counsel retained to advise insurers in relation to professional negligence claims. His expertise in the field was not challenged.

The effect of this evidence may be summarised as follows. Both witnesses accepted that had there been a notification in May 1988 following Mr Clarke's receipt of the letter from Mr Wallace, such notification would have been treated as precautionary. Few steps would have been taken other than to advise the insured to keep Heaths informed of any further developments. However, Miss Riordon and Mr Weston indicated that more decisive action

would have been taken in about May 1989 when the defence to the Nominee Company summary judgment proceedings surfaced. At that point Mr Weston considered he would have reviewed Mr Clarke's files and discovered that Mr Clarke had acted for all parties in the Spinwell transaction. He thought the underwriters would have sought advice as to their potential exposure. Mr Weston said it was likely he would have formed the opinion that there was an exposure and that a reserve should be set of about $93,000 to cover principal and interest. Moreover, he was of the opinion that a recommendation to Heaths that the claim be promptly settled would have been made on account of the degree of exposure, the fact that interest was running at 21.5% per annum and given the circumstance that the Nominee Company and the purchasers faced the uncertainties of litigation which should have made it possible to broker a three way settlement. He suggested the likely cost of settlement at that time, with some contribution from the purchasers, may have been in the range $80,000 - $90,000 or even less.

Mr Weston next focused upon the situation in 1991. The filing of the District Court fees action prompted statements of defence and counterclaim from the purchasers in which Mr Keeman and Mr and Mrs Put separately claimed damages of $6,000 for alleged negligence. Mr Weston expressed the opinion that had he been retained at the time every effort would have been made to dissuade the insured from issuing a default summons for fees of $3,743, in the first place. He would have regarded debt collection action as

likely to inflame a delicate situation. The better course in his view, and one likely to be promoted by the underwriters, was waiver of the outstanding fees. Alternatively if the fee claim was issued and the counterclaims for $6,000 had eventuated, Mr Weston ventured that a possible course would have been to advise immediate settlement, as a deliberate tactic to prevent any escalation in the purchaser's claim against Mr Clarke. In closing submissions Mr Ring furthered this thesis by submitting that the full amount of the claim could have been paid into Court with a confession of claim. This tactic, he argued, would have left the purchasers cast with their rights against Mr Clarke spent, for an outlay of about $12,000. The availability of pleas of accord and satisfaction and res judicata, were canvassed. In my view this line of argument was more ingenious than real. I do not regard it as probable that such pre-emptive steps would have been taken on behalf of the insurers. In this regard it is also significant that an amended defence and counterclaim in the fees action was filed by Mr Keeman within a few months, in which he sought damages on the counterclaim of $50,000. There was therefore little time in which to make the contended for pre-emptive strike.

Finally Mr Weston considered the position after the issue of Tipping J's judgment in September 1993 in the Nominee Company proceeding. In his opinion from that point the die was probably cast. Any negotiating leverage which previously existed had largely disappeared, on account of the adverse findings against Mr Clarke. Thereafter Mr Weston considered the only sensible option was a negotiated settlement, in which the only room for

negotiation would have been in relation to the interest component of the judgment.

The obvious difficulty with evidence of this kind is the scope for hindsight to intrude, even unconsciously. The judgment of Tipping J was inevitably comprehensive as to both fact and law. After a consideration of that decision I think it difficult indeed for someone viewing matters from the perspective of the insurer, to shed the influence of the judgment and make an objective assessment uninfluenced by the adverse findings.

However I accept that certain features of the matter would have been highly persuasive in advising the insurer, even absent the Nominee Company decision. I see four general considerations of importance. First, any examination of the Spinwell transaction would quickly have revealed that Mr Clarke assumed a multiple engagement. He acted for everyone. There was nothing in writing from the purchasers to evidence their informed consent to his acting for them. An interview of Mr Clarke would likely have resulted in the opinion he had acted in a situation of clear client conflict. Second, from an early stage Mr Wallace identified several aspects of the transaction which he considered had been mishandled. I have not found it necessary to consider these matters in ay detail. Several of the criticisms were strongly resisted by Mr Clarke on the basis that, although the matter raised had not been completed or attended to at all, that was a reflection of his instructions rather than his inadequacy. Some matters, for example the Companies Act s62 breach, he conceded. Generally I have no doubt someone in Mr Weston's position would

have regarded the combination of conflict of interest and the deficiencies in effecting and completing the transaction, a potent combination. In short, warning bells would have sounded. Three, I accept that Counsel retained to advise the insurers would have been concerned to seriously consider the issue of out of court settlement prior to the hearing before Tipping J in mid September 1993. There was at least a very real risk of adverse findings against Mr Clarke. I also accept the point that the uncertainties of the litigation were such that a three way settlement may well have been an achievable and sensible solution. Some limited contribution from the purchasers could have been expected. They were the signatories to a document which at face value gave rise to a personal guarantee obligation. They were plainly at risk. The problem would have been their ability to contribute funds to any settlement. Had the contributories to the mortgage been canvassed I consider there was a realistic chance that the interest claim could have been negotiated down from the 21.5% per annum level. No doubt the insurer would have been the major contributor to any settlement. Lastly, the interest rate under the mortgage was an ever present incentive to early resolution of the case. It is noteworthy that about 4½ years elasped between issue of the Nominee Company claim and trial of that action. Accruing contractual interest would have been a considerable incentive to an insurer to both keep the case under close review and, more importantly, to confront the issue of settlement at an early stage.

Two further aspects of the evidence require mention. Mr Ring accepted that the reasons for an insured's notification or other default were

relevant to the assessment whether it would be inequitable if the contractual provision was not to bind the insured. I am not convinced that the reasons for the insured's breach are relevant to the s9(1)(b) inquiry. The focus is upon prejudice to the insurer from late or deficient notification. Upon an assessment of such prejudice it is for the Court to determine whether it would be inequitable to hold the insured not contractually bound by the consequences of his breach. This will involve a consideration of the terms of the contract of insurance, but I have difficulty in seeing that the reasons for the insured's failure are relevant, unless perhaps the insurer has in some way caused or contributed to the breach. In any event, the evidence here did not suggest good reason existed for Mr Clarke's failure to give a timely notification of circumstances likely to lead to a claim.

The further aspect of the evidence which requires consideration is testimony from Mr Clarke and Miss F L Burrowes. The latter was at all relevant times a solicitor with BWCL or its successor. Both witnesses gave anecdotal evidence to the effect that on the basis of their contacts with the contributories to the Nominee Company mortgage, there remained every prospect of a settlement, even now, at a figure significantly less than the full judgment sum. Their view was that full principal and a partial interest payment would probably be acceptable to the contributories. Accordingly, it was suggested, the insurer had not been prejudiced despite the passage of time. The problem with this evidence was that the contributories had not been separately advised as to their rights, nor formally told of the involvment of an insurer bound to indemnify

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Mr Clarke. The present assessment of prejudice must be made on the assumption that indemnity is available. In my view, on account of these deficiencies the evidence given by Mr Clarke and Miss Burrowes can be given little weight.

It is my conclusion that the insurer has in the particular circumstances established such prejudice from the late notification that it would be inequitable if the insured were not bound by the terms of the contract. The extent of the delay in notification, 6½ years, is a dominant feature. Delay alone may not be enough, but here I am persuaded that the insurer was denied a very real opportunity to assess and settle the claim at a much earlier stage. In particular, the non notification of the claim by late 1993 resulted in the hearing of the Nominee Company claim without any opportunity for the insurer to evaluate and fully explore the prospects of settlement before findings of the High Court were reached. The prejudice which the insurer has suffered is predominantly pecuniary, in that to indemnify the insured today would require a significantly greater outlay than the likely figure to have settled the claim in the early 1990s. Moreover, the degree of prejudice is substantial; so much so that it would be inequitable to not give effect to the clear terms of the contract. It follows the terms of the policy are binding on Mr Clarke. No right to indemnity is available.

S9(2) of the Insurance Law Reform Act 1977 enables apportionment where an insured's failure has increased the cost of "repairing, replacing, or reinstating any property". In such cases the insurer is still obliged to indemnify, but only for that sum which would have been due if notice of the

claim had been given at the proper time. The subsection does not apply to the present case. Rather, it is an all or nothing situation.

Judgment:

The purchasers are entitled to judgment against Mr Clarke in relation to their claim for indemnity in respect of the judgment debt. Lloyds is entitled to judgment against Mr Clarke in respect of the Third Party claim and judgment is entered accordingly.

Mr Hicks sought deferral of the entry of judgment on the counterclaim pending resolution of the severed issue as between the purchasers and the First Plaintiff firm. Mr More opposed that course on the sole basis that the purchasers are judgment debtors of the Nominee Company and should have the benefit of judgment against Mr Clarke without delay. It is significant that the Nominee Company, and its contributories, have awaited the hearing of the present proceeding without seeking to enforce the judgment against the purchasers. There can of course be no guarantee that position will continue to obtain. In all the circumstances it is my view that the proper course is to enter judgment in the normal way, leaving Mr Clarke to seek a stay of execution if that course should prove necessary and be justified at that time.

Costs are reserved to enable Counsel to file memoranda. The purchasers and the Third Party should do so within 21 days, with 14 days thereafter reserved to Mr Clarke in which to reply.

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