

**IN THE HIGH COURT OF NEW ZEALAND  
PALMERSTON NORTH REGISTRY**

**CIV: 2004-454-756**

BETWEEN	CHRISTINE ELIZABETH BARBER Plaintiff
AND	SUZANNE LYNNE COTTLE First Defendant
AND	ROBIN STEWART COTTLE Second Defendant
AND	ALAN MERVYN HERBERT Third Defendant
AND	SUSAN VILORA HERBERT Fourth Defendant
AND	PAPAITONGA SPRINGS LIMITED Fifth Defendant
AND	PETER THOMAS FAHEY Sixth Defendant
AND	QUOTABLE VALUE LIMITED Seventh Defendant

Hearing: 31 October 2006 - 3 November 2006  
5 March 2007 (evidence taken before Registrar)  
19 - 21 March 2007

Appearances: Mr Upton QC with Ms Strachan for Plaintiff  
Mr Reardon with Ms Wrattton for 1st, 2nd, 3rd, 4th, 5th & 6th  
Defendants  
Mr Hunter for 7th Defendant

Judgment: 13 March 2008 at 3.30 pm

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**JUDGMENT OF MALLON J**

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## Introduction

[1] This claim arises out of a property sale in 1998 in the Ohau district. The property was owned by Mrs Barber (the plaintiff). Mrs Barber had bought the property in 1995. The property was gently rolling in nature and divided to some extent by three long gullies sloping down to Lake Papaitonga. It comprised just over 57 hectares. On the property Mrs Barber and her husband ran thoroughbred horses and grazed other stock. The property had a good soil type, was well located and had a good climate. The sheds, fences and other improvements were run-down and in need of work.

[2] The property had subdivision potential and Mr and Mrs Barber had obtained subdivision approval from the Horowhenua District Council. The consent was for a 16 lot subdivision (made up of 14 residential lots, a road and a car park), although the Barbers had also been giving consideration to a subdivision with a greater number of lots.

[3] Part of the attraction of the property was its outlook to Lake Papaitonga. The lake is said to be one of only seven wetlands of international importance in New Zealand. The Department of Conservation (“DOC”) were interested in acquiring the three gullies as part of protecting this important wetland. The gullies had a total area of 16 or 17 hectares. DOC had been in discussion with the Barbers from 1996. DOC’s proposal at this time was to pay for the cost of fencing off the gullies and maintain the land as a reserve under a covenant. The Barbers would remain owners of the land. By 1998 no agreement had been reached between the Barbers and DOC. The Barbers had also had some discussion about buying neighbouring land (at the south west corner) from Mr Prince, but had failed to reach an agreement on price.

[4] On 30 November 1998 the property was sold, on Mrs Barber’s behalf, by Mrs Cottle, a recently qualified real estate agent, for \$700,000 excl of GST. The purchaser was Papaitonga Springs Limited (“PSL”) which, at the time the sale was settled, had six shareholders. Those shareholders were Mrs Cottle and her husband, Mr Herbert and his wife and Mr Puklowski and his wife. Because Mrs Cottle was also the agent for Mrs Barber, Mrs Cottle was required under the Real Estate Agents Act 1976 to obtain an independent registered market valuation within 14 days. A valuation was obtained from Quotable Value Limited (“Quotable Value”) for this purpose, but outside the 14 day time period. This valuation was for \$700,000 excl of GST.

[5] Mrs Barber says she understood that the purchasers were buying the property to run as a farm and that they did not intend to subdivide the property. Mrs Barber now believes that the purchasers always intended to subdivide the property. She believes that Mrs Cottle falsely represented that the property had been properly marketed, that no one was interested in the property for subdivision purposes, and that a rapid response was needed. She says that, as a result of what she was told by Mrs Cottle, she sold the property at a significant undervalue.

[6] The claim is made against PSL and its six shareholders (together referred to as “the purchasers”) and Quotable Value. (The claim against the sixth defendant was discontinued.) The causes of actions are for breach of fiduciary duty, deceit, breach of trust, failure to comply with the requirements of the Real Estate Agents Act and,

in relation to Quotable Value, breach of duty of care. Each cause of action claims \$373,800 (plus GST), being the alleged undervalue at which the property was sold, and \$18,000 (incl GST), being the real estate commission paid by Mrs Barber.

[7] For the purchasers it is said that their intention was to purchase the property as a farm. The only subdivision immediately contemplated at the time of their purchase was the sale of three gullies on the property to DOC. They say that the Barbers knew about that. They say that Mr Herbert may have had the other ideas he was considering but they were not firm plans and he did not convey the ideas that he was considering to Mrs Cottle.

[8] They accept that under the Real Estate Agents Act Mrs Cottle was required to obtain a valuation within 14 days and that she did not do so. The purchasers say that beyond the obligations under the Real Estate Agents Act there were no other obligations of disclosure on Mrs Cottle and none of the representations relied on by Mrs Barber in support of her claims were made.

[9] They say that, even if the causes of action were established, Mrs Barber suffered no loss. They say the property was purchased at market value. They say that the only remedy now available to Mrs Barber for non-compliance with the Real Estate Agents Act is the return of the commission from the sixth defendant.

[10] Quotable Value says it was under no duty of care to Mrs Barber because its valuation report was addressed to Mrs Cottle and it contained a disclaimer excluding liability to any other party that sought to rely on it. It also says its valuation “was within range” and so was not negligent, and that it was not relied on by Mrs Barber in any event. It also says that Mrs Barber suffered no loss because she purchased the property at market value.

## **The evidence**

### *Listing agreement*

[11] Mr and Mrs Barber were contemplating selling the property at some point. They were, however, under no financial pressure, and had no immediate plans to sell the land. In May 1998 they were approached by Mrs Cottle to see if they were interested in selling the property. Mrs Cottle was a sales agent working as an independent contractor with Fahey Real Estate Limited (which later changed its name and is referred to in this judgment as “Castle Realty”). Mrs Cottle had recently qualified as a real estate agent and had been working as an agent for just a few months.

[12] There is a dispute as to what was said at the time of Mrs Cottle’s approach although in the event only some of this is material (see [111] to [158] below). I nevertheless set out the different accounts in detail because they set the scene for some of the other different accounts about what later transpired.

[13] Mrs Barber gives this account. Mrs Cottle telephoned Mrs Barber saying that she had heard they had 40 acres of land for sale. Mrs Barber said they had 150 acres but it was not for sale. After discussing it further with her husband, however, they agreed to meet with Mrs Cottle. The meeting took place a day or two later. The Barbers walked over the property with Mrs Cottle. They discussed that they had an approved subdivision plan, that they had approached Mr Prince and that DOC wanted covenants over the gullies. The walk around the property took about an hour. Back at the house the discussions continued for about another hour. The Barbers showed Mrs Cottle the subdivision plans and approval. On the basis of the plans Mrs Cottle worked out Mrs Barber would get about \$930,000 plus GST for the property. Mrs Barber thought she would sell at that price.

[14] Mrs Barber says that they discussed the marketing arrangements. Mrs Barber did not want an advertising sign at the property but agreed for the property to be advertised, both as a whole and as sections. No fee or commission was discussed or agreed. Nor did they discuss money for advertising. They placed significance on this because they did not have the experience to know what the usual arrangements were. Mrs Cottle said she would have the place sold within a week for \$930,000 plus GST.

[15] Mrs Barber's daughter, Leigh Drew, was present for part of this meeting. Her account is consistent with that of her mother's. She arrived home from school to see her mother and Mrs Cottle sitting in the lounge. Her recollection is that Mrs Cottle said she would not be surprised if there was an offer within the week. She also says that Mrs Cottle told Mrs Barber that she believed she would be able to sell the farm for more than \$1 million.

[16] Ms Drew recalls that Mr Barber came into the room and Mrs Cottle asked them if they wanted a "for sale" sign outside the property. She says that they said "no", but that the farm could still be advertised in the real estate newspapers and in the window display at the agency where she worked. Ms Drew recalls Mrs Cottle saying that she and her husband owned a dairy farm and that the real estate agent had mucked up the sale and so she sold it herself. She says that Mrs Cottle said she had decided to go into real estate because she did not want others to go through what they had.

[17] Mrs Cottle's evidence gives this account. She had learned from a stock agent that the Barbers were thinking of selling off about 40 acres from their 140 acre property. When she visited them they confirmed that was the case. However, they also said they would be prepared to sell the whole of their farm if someone came up with the right sort of money. They told her that they had Council approval to a 14 lot subdivision. She was given a copy of the plan to show to prospects. She was also told that Mr Barber had been negotiating with DOC to see if they would buy the gullies but no agreement had been reached.

[18] Mrs Cottle says that Mr Barber expressed the view that the property must be worth at least \$1 million. Mrs Cottle said in reply that nothing in the district had ever gone for that sort of price. She suggested they lower their sights below \$1 million. She disputes that she looked at the plans and from them calculated prices and a value. She had insufficient experience to be able to do this and she had no comparisons to go on. After some discussion, Mrs Barber settled on an asking price of \$930,000 plus GST. Mr and Mrs Barber were anxious that neighbours and people

driving past should not know the farm was for sale, as Mr Barber did not want people to think he had gone broke. They said they did not want any signs erected on the property. Mr Barber asked Mrs Cottle to instead use her database contacts to see if she could identify a buyer.

[19] Regardless of whose version of this meeting is correct, as a result of their discussions, it was agreed that the property would be listed for sale. A Castle Realty listing agreement was signed on Friday 22 May 1998 with a listed selling price of \$930,000 (excl of GST). The 1996 government valuation was stated to be \$779,000. Under the general comments in the listing agreement it was noted: “proposed subdivision of 18 lots. Will sell as going concern or sell off blocks as required. Vendors have option to sell privately.” At the end of the listing agreement there was provision for the vendor to authorise and instruct the real estate agent to spend up to a specified dollar amount on “advertising, flagging and promoting” the property. This dollar amount was left blank.

### *Marketing*

[20] Mrs Barber’s evidence is that she delivered a copy of the subdivision plan into Castle Realty in Levin. This was about the week after 22 May 1998. Mrs Barber said that this was not the same as the approved plan because changes had been made between 1996 and 1998. The plan she dropped in was a plan with 25 sections. While she was there she was interested in looking at the advertising material for her property but was surprised to see that there was no mention of it in the display. She says that she thought at that time that it might have been too early to have the property included in the display material. She says that over the next two or three weeks Mrs Barber looked for marketing advertisements and again saw nothing. Mrs Barber thinks she raised this with Mrs Cottle but is not certain about that. She says that she trusted Mrs Cottle to handle the sale correctly.

[21] Ms Drew’s evidence is consistent with her mother’s evidence about this. She says that about a week after her mother had agreed to list the property for sale she and her mother started looking for advertisements. They looked at the Levin Chronicle, the Manawatu Standard and the Property Press. One day they decided to

check the agency. The agency was closed, but they could see no advertisements in the window. They checked the agency at other times but never saw an advertisement. Ms Drew does not know if her mother raised this with Mrs Cottle.

[22] Mrs Cottle says that she was disappointed that the Barbers did not want to advertise the property. She thought the exposure would have been advantageous to her as she was just starting real estate. She carried out the Barbers' wishes and used her database and informed other agents. She says that at no stage did Mrs Barber tell her that she was concerned about the lack of advertising.

[23] Mrs Cottle says that between 24 May 1998 and 30 July 1993 she discussed the property with six prospects. One of these was Mr Puklowski. Another was Mr Herbert. Of the other four prospective purchasers, only one was a developer and he viewed the price as too high. None of these other prospects were interested in putting in an offer.

[24] Mr Puklowski had sold his farm in November 1997. He was interested in purchasing a smaller farm. Mr Puklowski first inspected the farm with Mrs Cottle. A diary note indicates that this visit may have been on 24 June 1998. Mr Puklowski was impressed with the position and lie of the farm, the soil type, and that it adjoined a DOC reserve. He says that he was very interested in the property but not at the asking price. He thought this was "way too high" in view of the improvements which he considered to be in very poor condition. Because of this, he did not put in an offer. Mr Puklowski recalls that Mrs Cottle showed him a subdivision plan for the property, but that this was of no interest to him.

[25] Mr Herbert was a real estate agent with Property Brokers in Palmerston North and an ex-sheep farmer from Hawke's Bay. Mrs Cottle knew Mr Herbert because he was one of the agents who had acted for the Cottles when the Cottles had sold their own farm. Mr Herbert's evidence is that he was looking for a small sheep farm. Although Mrs Cottle had showed him Mrs Barber's 14 lot subdivision he was not interested in it. Mr Herbert could see, however, that it made a lot of sense to sell the gullies, which were unfarmable, to DOC.

[26] Mr Herbert visited the property on 26 June 1998. It is not clear who else was present. A diary note for 26 June 1998 merely records "Herbert-Barber". Mr Puklowski believes he was present at this meeting and that Mr Shand, a surveyor, was also there. He does not recall whether Mrs Cottle was present. Mr Puklowski does not say why Mr Shand was present, but he says his interest at this point was on a small property on which he could breed pure-bred cattle. Mr Herbert does not distinctly remember the meeting but accepts that he may well have met with Mr Puklowski, Mr Shand and Mrs Cottle that day. Mrs Cottle recalls that she was present with Mr Herbert, Mr Puklowski and Mr Shand, and that Mr Shand was present to discuss subdividing off the gullies.

[27] Mrs Barber's evidence is that Mr Herbert and Mrs Cottle turned up at the property within days of it being listed with Castle Realty. She recalls that their focus was very much on the land and not on the house or buildings behind the house. Mrs Barber's evidence is that she understood Mr Herbert was a farmer or a retired farmer living in Palmerston North. Over the following weeks she recalls him visiting frequently. Mrs Barber recalls that Mr Herbert would arrive, without prior arrangement, in a large four wheel drive with other people in the vehicle. Apart from Mr Herbert, there were a couple of other people who showed an interest in the property. Mrs Barber does not recall whether they actually visited the property as opposed to simply expressing an interest in it.

[28] Ms Drew recalls cleaning up the house in advance of a visit to be made by a prospective purchaser. She recalls that Mrs Cottle arrived with Mr Herbert and they went driving over the farm. They did not look at the house and she and her mother discussed that there had been no point cleaning it up. She recalls a number of other visits by Mrs Cottle with others, but these visits were made without appointment and they would not come to the house.

[29] Mr Barber's son, Craig Barber, recalls being with his father on a number of occasions when his father asked Mrs Cottle what Mr Herbert's intentions were. He recalls that Mrs Cottle told Mr Barber that Mr Herbert was a farmer from over the ranges who wanted to retire to a warmer climate and did not want to develop the property.

[30] Mrs Cottle's evidence is that Mrs Barber never asked her what Mr Herbert's occupation was. She says that Mrs Barber asked what Mr Herbert was going to do, and that Mrs Cottle said that she believed he was going to get back into farming. Had she been asked, she would not have hidden that he was a real estate agent. His name and photograph were in numerous advertisements in the Horowhenua and Manawatu districts at that time. She says she is sure that when she introduced Mr Herbert to Mrs Barber she told her that he was an agent in Palmerston North.

*First offer*

[31] The first offer for the property came about six weeks after the initial listing of the property. Mrs Cottle came out with a draft agreement for sale and purchase with an offer price of \$600,000. The purchasers were listed as Mr and Mrs Herbert or nominees. The settlement date was 23 September 1998.

[32] Ms Drew was present when Mrs Cottle arrived with the offer of \$600,000. She recalls that they were all shocked at the price. Mrs Cottle said the property was only good enough for dairy run off. She recalls that her parents counter-offered, but does not know at what price. It is clear, however, from the marked up amendments to the agreement, confirmed by Mrs Barber's and Mrs Cottle's evidence, that there followed much to-ing and fro-ing over the price and settlement date. This occurred over the course of a few days.

[33] Mrs Cottle says that Mrs Barber counter-offered initially at \$800,000. Mrs Barber does not discuss this initial counter-offer. She says that she changed the price from \$600,000 to \$720,000 at Mrs Cottle's suggestion because Mrs Cottle said they would not get \$930,000 for the property and that nobody was interested. The Herberts changed the price to \$650,000, then to \$665,000, and then to \$685,000. Each time Mrs Barber counter-signed at \$720,000.

[34] The upshot was that an agreement dated 29 July 1998 was finally signed for a purchase price of \$720,000. Settlement was to be on 1 February 1999 or earlier by mutual agreement. The contract was conditional on the Herberts arranging finance by 2 September 1998.

[35] Mr Herbert explains why the change from his proposed September settlement date to the February date was made. He says that having been pushed up to \$720,000, which was a little more than he intended to pay, he required a later settlement date.

[36] For the purposes of arranging finance Mr Herbert approached two people to see if they were interested in coming in with him in the purchase. One was not interested. The other, Mr Puklowski, was interested but wanted time to think about it. Mr Puklowski confirms Mr Herbert's evidence on this. He says that in July 1998 he was invited to join a syndicate with Mr and Mrs Herbert to buy the property. He said that the idea was that they would farm the property, put some money into the improvements and generally tidy it up.

[37] On 30 July 1998 an urgent fax from the Barbers' lawyers (Mr Shue of Innes Dean) to Mr Herbert's solicitors (Cooper Rapley) was sent. This letter referred to the original asking price and that this included the subdivisional plans. The letter said that the offer to sell was withdrawn because:

Your clients indicated to our client that they did not wish to purchase the property for subdivisional purposes and only wished to use the property as a sheep farm. However, our client now believes that the proposed nominee or nominees of your clients propose to use the property for subdivisional purposes.

[38] On that same day there is a response from Cooper Rapley. That response said that a valid contract existed. This letter does not say anything as to what the purchasers' intentions were.

[39] There is a difference of view between the parties about what led to the 30 July 1998 letter from Innes Dean and what the Barbers knew about Mr Herbert's plans. At some stage Mr Barber's son, Craig Barber, told Mrs Barber (his step-mother) that Mr Herbert was a land agent. Mrs Barber did not initially believe this. Craig Barber recalls raising this with Mrs Barber but Mrs Barber thought he was interfering so he dropped the subject. Mrs Barber says that at some point they saw advertising in a newspaper which referred to Mr Herbert as a real estate agent. Mrs Barber's evidence is that when she found out that Mr Herbert was a real estate agent she became concerned that Mr Herbert was buying the property for subdivision

and that she tried to withdraw the offer to sell. As a result of this Mrs Barber says that Mr Shue was instructed to write the 30 July 1998 letter. Ms Drew says that at some point they all started to lose confidence in Mrs Cottle. They had lots of discussions about taking the property off the market. Craig Barber recalls Mr and Mrs Barber were considering pulling out of the contract but he does not know when this was.

[40] Mrs Barber's evidence about becoming concerned that Mr Herbert was intending to subdivide the property is consistent with Mr Shue's file note of 30 July 1998. This records instructions from Mr Barber. It records that the Barbers wanted to withdraw from the contract for the sale of the property. This is because the purchasers said they only wanted it as a sheep farm but the Barbers "believe they now want to buy for subdivision – approached by Roger Truebridge". It records Mr Barber informing Mr Shue that Mr Herbert was a real estate agent who worked for Property Brokers.

[41] Mr Herbert acknowledges that he gave the Barbers' plan to Foster & Co. He says that DOC was responsible for the survey costs and that they were going to instruct Foster & Co. Mr Herbert says that he wanted the surveyor to understand where the gully boundaries were from his point of view. Mrs Barber's subdivision plan showed clearly where the edge of the gullies were.

[42] Mr Herbert recalls receiving the letter from Innes Dean and also meeting with Mr Shue at Mr Herbert's real estate office in Palmerston North. Mr Herbert says that he learned the Barbers were aware he was intending to subdivide the farm and sell the gullies to DOC. Mr Herbert told Mr Shue that he could not see what was objectionable about his intention to cut off the gullies and sell them to DOC to reduce the borrowing on the purchase price. Mr Herbert says he instructed Cooper Rapley to respond to Innes Dean that a valid contract existed.

[43] There is no file note of the meeting between Mr Herbert and Mr Shue, but Innes Dean's note to the Barbers of Mr Shue's attendances for billing purposes ("the billing note") records the following:

... receiving instructions from Mr Dave Barber that you had signed contract for the sale of your farm property, ***but that you did not wish to proceed with the sale because you had discovered that a group of businessmen intended to buy the property to subdivide and resell***; preparing letter notifying the Purchaser that as you had not received any notification that the Purchaser had signed the Agreement accepting the terms and conditions offered by you, you were withdrawing the offer to sell and that there was no agreement between the parties; faxing letter of withdrawal to the purchaser's solicitor and also ***personally hand delivering the letter to Mr Herbert; receiving advice from Mr Herbert that the Agreement had been accepted and signed*** and had been sent back to the real estate agent, Suzanne Cottle, two days before; receiving letter of advice from the Purchaser's Solicitor advising that the Purchaser had communicated acceptance to your agent Castle Fahey Real Estate and that ***therefore a valid binding contract existed and reporting the same to you***;... (my emphasis)

[44] In the evidence there are some typewritten notes by Mrs Barber ("Mrs Barber's typewritten notes"). The date of Mrs Barber's typewritten notes is not in evidence but they pre-date Mrs Barber's oral evidence. Mrs Barber's typewritten notes refer to the meeting between Mr Shue and Mr Herbert as follows:

Mrs Herbert had not counter-signed the final figure (A2), (we were told she was in Australia for a week). Two weeks went past and during that time ***we saw Alan Herbert's photo in one of the rural newspapers***, he was the rural manager at Property Brokers real estate. ***Michael went to see him at Property Brokers, as we wished to withdraw from the contract.*** Alan Herbert had counter-signed on his wife's behalf and said he had returned the contract to Cottle (see A8) and ***that we could not withdraw from the sale*** and there was the possibility of us facing costs and damages. David then again asked Cottle what Alan Herbert did for a living, she still denied that she knew him and what his profession was.

***We also found out from our surveyor that our subdivision plan was being worked upon by Foster & Co, Levin.*** David checked this with the firm and they said "Yes, they were working on the subdivision and that he should contact Suzanne Cottle for details". (Our surveyor only found out by chance, as he visited Foster & Co and they told him they had the plans in their office). (my emphasis)

[45] Mr Herbert says that his approach to DOC was in early August. DOC confirmed its interest by letter dated 12 August 1998. A negotiation followed. DOC considered the gullies were worth no more than \$50,000. Mr Herbert wanted \$150,000 which he calculated as being what he had paid for this area treating each acre as having equal value. DOC told Mr Herbert that there had been discussions with Mr Barber but no agreement had been reached. Mr Herbert's proposal was different from the Barbers' – the Barbers' plan traversed the midpoint of one of the gullies with a road into the subdivision. Mr Herbert's discussions with DOC involved keeping the gullies intact.

[46] In the course of the negotiations between Mr Herbert and DOC, DOC wanted a registered market valuation. On 13 August 1998 DOC wrote to Quotable Value and asked Quotable Value to provide a current market value for the gully systems. DOC advised Quotable Value that Mrs Cottle was to be contacted to arrange access to the property.

[47] Mr Langley of Quotable Value then inspected the gully areas on 20 August 1998. His inspection note records he inspected the property with Mrs Cottle. His data sheet dated 20 August 1998 records the following:

Info ex Suzanne Cottle Castle Realty vendor originally asking \$925,000 [sic] purchaser Alan Herbert intends creating 14 lot lifestyle subdivision. Good deal of interest as run off block but not able to compete at this level.

[48] Mrs Cottle has a vague recollection of a conversation with Mr Langley. She thinks that Mr Langley must have rung her to arrange a time to view the property. (Quotable Valuation correspondence confirms that this was how inspection of the property was arranged.) She thinks she would have told him that Mrs Barber had approval for a 14 lot subdivision. She gave this information to everyone she spoke to about the Barbers' property. She said she certainly would not have said that Mr Herbert intended to create a 14-lot lifestyle subdivision because Mr Herbert was not buying the plan from Mr Barber and Mr Herbert intended to farm the property.

[49] Mr Langley reported to DOC by letter dated 26 August 1998. He gave a market value for the gullies at \$80,000 plus GST. He recorded that the property was the subject of a sale to Mr Herbert, which at that stage was unconfirmed, but which nevertheless was seen as useful in establishing a guide to price. The report also concluded that the property was the subject of "impending subdivision by Mr Herbert". At the end of the report there are marked up handwritten notes as follows:

Valuer comments

Highest or best use is a lifestyle subdivision. Sheep & cattle run off purchaser would never have purchased at \$715,010. Herbert has effectively "written off" a lot of the farm improvement value as a consequence.

[50] The negotiations between DOC and Mr Herbert continued. There was a meeting between DOC and Mr Herbert at Palmerston North on 9 September 1998.

A filenote kept by DOC records that Mr Herbert confirmed the offer of the gully systems to the Crown. In this note, under the heading “Intention”, it is said that Mr Herbert “[s]aid he proposed to subdivide the balance of the property into 14-18 blocks”. There are a number of other references in the note consistent with this. In relation to “fencing” there is a note that “new owners could not insist on a half share two metre post and rail fence”. In relation to “revegetation” there is a note that “proposing to have covenant/conditions on the block titles to ensure and require suitable trees are planted”. In relation to “Water Take/House Discharges” there is a note that “Herbert acknowledges DoC concern at potential for block owners to undertake minor horticultural activities and possibility of bores being required to supplement supply”. Under “Legal Access to Gully Head” there is a note, “Not sure at this stage whether this will be a public road or a private right of way in favour of the block owners”.

[51] Mr Herbert was cross-examined about this filenote. He maintained that the discussion was about subdivision of the gullies and that the “new owners” referred to were the Herberts. He says he was not intending a 14 lot subdivision and that DOC have made a mistake about that. He says that DOC had the Barber subdivision plan, because it was useful in defining the gully boundaries. He says that DOC wanted to protect their position in respect of issues they foresaw with the proposed Barber subdivision.

[52] A number of extensions of time to the contract with the Barbers were sought on Mr Herbert’s behalf. Mrs Barber recalls there being two and one of them she understood was to arrange a mortgage. She accepts that she granted both of them and says that, having taken advice from Mr Shue, it was felt that they should take “the bird in the hand”. Mrs Cottle believes there were about four extensions requested and granted. Mr Herbert says the extensions were necessary because he did not have any firm agreement from DOC nor a firm commitment from Mr Puklowski.

[53] One of the extensions was sought by Mrs Cottle by letter dated 8 September 1998. In this letter Mrs Cottle advised Innes Dean that further time was needed “due to the time it is taking to get an answer from DOC as to what their intended action is,

if any, regarding the three gullies on Barbers property". The letter did not specifically state that Mr Herbert and DOC were negotiating for the sale of the gully systems.

[54] From the Barbers' previous negotiations with DOC, they understood that DOC was not interested in buying the gully areas. All that DOC had been proposing in their discussions was to pay for the cost of fencing off the gully areas to a maximum of \$20,000-\$25,000. Following the 8 September 1998 letter from Mrs Cottle Innes Dean wrote to DOC on 10 September 1998:

You will be aware that our clients have a conditional contract for the sale of their property at present. Whether the sale proceeds or not, our clients are interested in your Department's future plans in respect of the three gullies concerned so that our clients have some certainty as to the future of their property.

[55] DOC's letter in reply dated 11 September 1998 made no mention of the negotiations between DOC and Mr Herbert over buying the gully systems. The letter stated the importance of the wetlands and its consequent interest in maintaining the water quantity and quality from the gullies. The letter stated that DOC was keen to work with the landowner to see whether any negotiated agreement on management could be reached. DOC advised Innes Dean that it was copying the letter to Mr Herbert. There is no evidence that, having received a copy of this letter, Mr Herbert sought to volunteer to Innes Dean that the extension was sought because of negotiations over the sale of the gullies, rather than what DOC's interest in them was from a conservation perspective.

[56] On 23 September 1998 DOC sent Mr Herbert a purchase agreement for perusal at a figure of \$85,000 (including a set contribution to the cost of fencing) plus GST. A revised agreement with various additions, but still at a price of \$85,000, was sent by fax dated 25 September 1998. These draft agreements included a clause providing that:

The Buyer [the Herberts] agrees to consult with the Minister on the location of house sites, the design of stormwater and sewerage systems for the house sites and roadways and the planting programme for the property. The Minister acknowledges this consultation will be in an advisory non binding capacity with the aim of adding value to any subdivision and protecting the ecological and landscape environment of the property and the Lake Papaitonga Scenic Reserve.

[57] In addition to the negotiations with DOC, in about August or September 1998 Mr Herbert was also discussing with Mr Shand of Foster & Co (Surveyors) (“Foster & Co”) whether there were some areas that could be subdivided off easily to raise capital. Mr Herbert said he saw this as a fall back position if he “got into a corner”. Mr Herbert said that these were “lines on a piece of paper. That’s all” and that he had not discussed this with anyone else.

[58] On 25 September 1998 a letter was sent from Innes Dean for Mrs Barber to Cooper Rapley for the purchasers. This letter set out variations to the first contract which Innes Dean said they understood had been agreed between their respective clients. Those variations were that:

- a) Settlement would be 30 September 1998;
- b) The purchase price would be reduced to \$700,000 (plus GST);
- c) The Barbers could stay in the property rent free until 14 December 1998;
- d) The purchaser was to be permitted to use approximately 50 acres to plant in barley from 30 October 1998 onwards; and
- e) The Barbers would be permitted to take a full truck and trailer unit load of trees from the property free of charge.

[59] The variations were said to be on the basis that Castle Realty agreed to reduce their commission to \$16,000 plus GST. The letter sought confirmation that the Herberts had agreed to the variations and requested advice by 5 pm that day as to whether the finance condition was satisfied.

[60] According to Mr Herbert the background to this proposal was that he had worked out that on the basis of the Quotable Value valuation he had paid too much. He worked out that he had effectively paid about \$6,400 per acre for the farm excluding the gullies, when he viewed the standard rate in the district to be about \$5,000 to \$5,500 per acre for a fully developed dairy farm. In his view the Barbers’

farm was quite run down and so he should not have paid above the standard rate. Mr Herbert approached the Barbers seeking their agreement to a reduction in the purchase price. He says that the Barbers were agreeable to this in return for some concessions. It appears that this discussion was with Mr Barber (see [62] below) and Mrs Barber's evidence is that she was not aware of this at the time.

[61] Later on 25 September 1998 Innes Dean advised Cooper Rapley that an extension of time for the arranging of finance was granted until 5 pm on Monday 28 September 1998 and that the variation set out at [58](e) above was to be deleted.

[62] The sequence of events between the 30 July 1998 letter from Innes Dean (in which Mrs Barber had sought to withdraw from the contract) to the variation agreed on 25 September 1998 is covered in Mr Shue's billing note. Immediately after the description set out above (refer [43] above) the billing note goes on as follows:

*... receiving faxed copy of signed Agreement for Sale and Purchase at \$720,000 from Suzanne Cottle; researching Real Estate Agent's [sic] Act and Real Estate Agent's [sic] Regulations and advising you that Sections 63 and 64 of the Real Estate Agent's [sic] Act had not been complied with; receiving original signed copy of the Agreement for Sale and Purchase; various telephone discussions with Mr Dave Barber regarding the potential of the property for subdivision and development and your concerns that the Purchaser intended to complete the subdivision for resale; advising you that if you sell the farm property in accordance with the terms and conditions contained in the Agreement you cannot prevent the Purchaser from completing the subdivision and reselling; various telephone attendances and correspondence from Suzanne Cottle of Castle Fahey Realty requesting extension of time for satisfaction of the finance condition and liaising with you in respect of the same; granting the Purchaser extensions of time to 25 September 1998 in order to satisfy the finance condition; receiving your instructions to liaise with the Department of Conservation to find out the involvement and interest of the Department in the land; various telephone attendances and correspondence with Mr Adrian Griffiths of the Department of Conservation to ascertain the Department's interest in the land; receiving letter of reply from Mr Adrian Griffiths of the Department of Conservation and reporting to you; receiving further instructions from Mr Dave Barber that the Agreement had been varied to \$700,000 plus GST with settlement to take place on 30 October 1998; various telephone attendances and correspondence with the Purchaser's solicitor regarding the variation of the terms of the Agreement; receiving request from the Purchaser's solicitor requesting extension of time until 28 October 1998 to allow sufficient time for confirmation of the Agreement, and receiving your instructions to grant the extension of time requested;... (my emphasis)*

[63] Mr Herbert says that immediately after agreeing to the 25 September 1998 variation Mr Puklowski told him that he was not prepared to commit to the purchase. Consistent with this Mr Puklowski says that after giving the matter some thought he declined the invitation to join a syndicate with Mr and Mrs Herbert. Mr Herbert says

that when Mr Puklowski pulled out, he desperately needed another purchaser. He approached Mr Cottle. Mr Cottle was interested in becoming a purchaser providing it was not for dairy farming. Mr Herbert wanted a firm commitment from the Cottles. Accordingly he prepared, and Mr and Mrs Cottle signed, a paper stating that they agreed to purchase a half share in the property for \$350,000 plus GST and costs.

[64] Mr Herbert says he did not tell the Cottles about the Buller Road idea or any other subdivision proposal. He says it was obvious to anybody that the property had subdivision potential – the Barbers approved plan was available to anyone from the Council. He also says he did tell the Cottles about the negotiations with DOC but that he did not share with them the price that was being discussed with DOC. Mrs Cottle cannot remember whether Mr Herbert told them about the subdivision ideas he had. She says that from their perspective they were interested in using the property to graze stock. They wanted a dry stock unit (something with a lower level of commitment than their previous dairy farm). She says that she would not have considered the subdivision potential important. She confirms that Mr Herbert advised them that he was confident of achieving a sale of the gullies to DOC but she does not recall whether she knew the detail of the DOC negotiations. She viewed the DOC sale as unimportant because, although the money would be used to reduce the mortgage, she did not consider it to be a significant amount of money.

#### *Second offer*

[65] On 28 September 1998 Mrs Barber was told by Innes Dean that the contract had fallen through. That evening, Mrs Cottle turned up at her house with a second offer drawn up. This time the purchasers were shown as Mr and Mrs Herbert and Mr and Mrs Cottle, the purchase price was \$700,000 plus GST and the agreement was dated 28 September 1998. The settlement date was 30 October 1998 or earlier by mutual agreement. The offer was not subject to finance. Special conditions included that:

- a) The Barbers could remain in occupation rent free until 14 December 1998;

- b) From acceptance of the offer the purchaser was permitted to use 20 acres of land as outlined on an attached map; and
- c) Castle Realty's commission was to be \$16,000 plus GST.

[66] Again there is a difference in view about the discussion that then took place. Mrs Barber gives this account. Mrs Cottle said that the Herberts needed a quick response. This was because their daughter had become associated with undesirable people and the Herberts needed to relocate quickly. Mrs Cottle said that no one else wanted the property. Although it had been properly marketed there was no interest in it as a subdivision. Mrs Barber insisted it had subdivision opportunity but Mrs Cottle said it was only saleable as a "run off". The Herberts were intending to purchase the land with the Puklowskis but the Puklowskis had pulled out. The Cottles had replaced the Puklowskis so that the sale could go through. The Cottles and the Herberts would not be subdividing the property. They intended to grow barley and graze heifers. Mrs Cottle had spoken to John Page, a Levin valuer for whom Mrs Barber had done some office work, and he had indicated that the property was only worth \$700,000.

[67] Mrs Barber says she told Mrs Cottle that she wanted to discuss it with her solicitor. She felt under pressure. She says Mrs Cottle was very assertive. Mrs Cottle said that the Herberts were waiting at the Cottles' place and that she did not know what they would do if Mrs Barber did not sign. Mrs Barber understood that to mean that the Herberts would pull out if she did not sign there and then. To persuade Mrs Barber to sign, Mrs Cottle offered the Barbers the opportunity to live in the house rent free until 14 December 1998. (This is not correct in that this was already part of the 28 September 1998 variation.) She also agreed to provide the Barbers with a valuation within 14 days. Mrs Barber signed a document under which Mrs Cottle was to provide this valuation. She also signed the agreement for sale and purchase. The settlement date was amended to 30 November 1998 or earlier by mutual agreement.

[68] Ms Drew says she was present for most of the discussion between her mother and Mrs Cottle. She gives an account similar to Mrs Barber's account. She says that

when Mrs Cottle told her mother that she had another agreement for Mrs Barber to sign, Mrs Barber told her she had decided to take the property off the market. She thinks that Mrs Cottle explained that the nominees referred to in the first offer had not been able to fund the purchase but that she and her husband had decided to fund it. Ms Drew said that her mother said she wanted to discuss the matter with her solicitor first. She says that Mrs Cottle kept saying that nobody wanted to buy the farm as they only saw it as a run off. She says that Mrs Cottle said she had the Herberts sitting at home and did not know what they would do if they did not buy the farm. She says that Mrs Cottle would not leave the house and in the end she could see that her mother felt forced to sign. Ms Drew also recalls separately from this that, on a number of occasions when she had visited the property, Mrs Cottle told them a “sob story” about the Herberts moving to Palmerston North to get their daughter away from a bad crowd.

[69] Mrs Cottle gives this account. She took the offer to Mrs Barber in the evening. Mr Barber was present and made comments but entered and left the room on a regular basis. The meeting lasted about one and a half hours but it was the lengthy discussions between Mr and Mrs Barber that took the time. Mrs Barber seemed keen to sign, but Mr Barber wanted to add various conditions. Mrs Cottle says that a new clause 20 was added in handwriting, giving Mrs Barber the right to sell 25 acres of silage, as Mr Barber had promised it to a neighbour and wanted to fulfil that agreement. The settlement date was altered to 30 November 1998 but Mrs Cottle cannot now remember who asked for this change.

[70] Mrs Cottle says that there was a lot of discussion about Mrs Barber wanting to go to England as her father was very sick. She acknowledges that she said that the Herberts wanted to get their children back into a country environment. She acknowledges that this was one of the reasons the Herberts wanted to get the agreement signed up. She also acknowledges that Mrs Barber may have indicated that she wanted to discuss the contract with her lawyer but Mrs Cottle said that the offer was, in her view, no different from the proposed agreement set out in Mr Shue’s letter of 25 September 1998. She also says that she had been instructed by Mr Herbert that he did not see this new offer as an opportunity for the Barbers to reopen negotiations.

[71] Mrs Cottle says that she explained to Mrs Barber that she was required under the Real Estate Agents Act to notify Mrs Barber of Mrs Cottle's obligation to supply her with a valuation within 14 days, because she was Mrs Barber's agent. Mrs Cottle says that Mrs Barber said she was happy with the purchase price, that she had had discussions with Mr Page who worked for her employer (and who was a registered valuer), that she was happy with Mr Page's verbal valuation and that she did not need a valuation from Mrs Cottle. Mrs Cottle says that she could see that Mr Barber was not entirely happy with the agreement. She therefore said to Mrs Barber that she should sleep on it and discuss it with her husband. She said she would call in to see her at her place of work in the morning and if Mrs Barber was not happy with the agreement, she would rip it up.

[72] In any event it is clear that, after a lengthy meeting, Mrs Barber signed the contract and signed the consent form that evening. Before signing this agreement the settlement date was changed to 30 November 1998 or earlier by mutual agreement. Additionally a new special condition was added under which the Barbers were able to honour an agreement to sell silage to a third party.

[73] The consent form signed by Mrs Barber was a standard form (headed "form 14") and was stated to be pursuant to ss 63(1) and 64 of the Real Estate Agents Act 1976. Under the form Mrs Barber consented to Mr and Mrs Cottle purchasing the property. It declared that before signing the agreement for sale and purchase Mrs Barber agreed to Mrs Cottle supplying within 14 days: "a valuation of the said property made by a registered and independent valuer at the expense of the above real estate agent. The property is provisionally valued at \$720,000".

[74] After leaving the house Mrs Cottle says that she called John Page because she wanted to reassure herself that Mrs Barber was happy with the figure. Although she does not recall the precise details of the conversation she understood from Mr Page that Mrs Barber had discussed values with Mr Page. Mrs Cottle says that she visited Mrs Barber the following morning. She says that Mrs Barber told her to go ahead with the contract. Mrs Barber does not accept that this occurred.

[75] Mrs Cottle also says that on that morning she informed Mr Fahey, her manager at Castle Realty, of the agreement. She says that she told Mr Fahey that Mrs Barber had signed the s 63 consent form and that Mrs Barber had a verbal valuation from a valuer that she had worked with. She says that Mr Fahey did not tell her that she was obliged to get another valuation. Mr Fahey recalls Mrs Cottle told him about a conditional contract for the Barber property where the purchaser was a retired farmer and his financing arrangements had fallen through. Mr Fahey recalls Mrs Cottle telling him that she and her husband were going to assist the retired farmer by becoming joint purchasers. Mr Fahey, who was responsible for staff training, believes that he would have told Mrs Cottle that it was a legal requirement to obtain an independent valuation. Mrs Cottle says Mr Fahey did not tell her to do that.

[76] Mr Herbert continued negotiations with DOC. An agreement in final form was reached with DOC on about 20 October 1998. (The signed agreement is dated 9 October 1998 but Mr Herbert says it was not in fact finalised until about 20 October.) This agreement was now between Mr and Mrs Herbert, Mr and Mrs Cottle, or nominee (collectively referred to as the Buyer) and DOC. Mrs Cottle was one of the signatories to the agreement. The agreement contained a clause in identical terms to that set out at [56] above. On the letter from DOC to Cooper Rapley dated 13 October 1998, which enclosed the agreement, there is a handwritten notation that appears to have been made by DOC, stating: “meet Herbert and others on site 16.10.98. Willing to co-operate in subdivision design of property. Will consult with Robin Gay initially”.

[77] In October 1998 Foster & Co produced a draft plan for Mr Herbert for a subdivision of five sections facing Buller Road. This followed the discussion Mr Herbert had with Mr Shand about what areas could be sold off easily (refer [57] above).

[78] Also in October 1998 Mr Puklowski says that Mr Herbert came back to him. By this stage Mr Herbert had an agreement in place and was offering Mr Puklowski a smaller investment. He and his wife agreed to each take a one sixth share. They became two of the six shareholders in PSL at about the time that the purchase price

had to be paid in November 1989. Mr Herbert confirms this. Each shareholder put up \$50,000, making a total capital contribution of \$300,000. They borrowed \$430,000 from ASB to complete the purchase. The \$72,500 coming to the purchasers from the sale to DOC was not payable until May 1999.

[79] On 30 October 1998 Quotable Value records that Mrs Cottle discussed obtaining a valuation. Mrs Cottle advised Quotable Value that the sale price was reduced to \$700,000 in view of an earlier settlement date at 30 November 1998. Mrs Cottle says that the reason she approached Quotable Value for a valuation was that she had been studying real estate law part time and that she needed to get a valuation even though Mrs Barber had said she did not need one.

[80] It seems that the Barbers became uncertain about their decision to enter into the second contract or at least wanted to investigate further the price at which they had agreed to sell. While Mrs Cottle was obtaining a valuation from Quotable Value, Mr and Mrs Barber instructed Nichols Valuation Services Ltd (“Nichols”) to value the property. The date of the Barbers’ instructions to Nichols is not clear, but it must have been on or before 2 November 1998 because on that day the valuer inspected the property.

[81] On 5 November 1998 an anonymous complaint, said to be from a friend of Mr Barber, was made with the Real Estate Institute. (When questioned in cross-examination about this, Mrs Barber was adamant that this complaint was not made by her or her husband.) The complaint referred to the purchase price of \$700,000 when Castle Realty had valued and listed it at \$930,000 and that Mr Barber had been led to believe that Mr Herbert was a sheep farmer. The complaint was dated 1 October 1998 but was not delivered to the Institute until 5 November 1998. The Institute posted this to Castle Realty that day advising that the matter would not be investigated because the complaint had been made anonymously. Mrs Cottle says that receiving this was the first inkling she had of a problem with the sale.

[82] By letter dated 9 November 1998 Mrs Cottle wrote to DOC. She explained that she needed a valuation of the property “urgently”. She said that Mr Langley could value the property without a site visit if DOC were prepared to release the

information on the original valuation it commissioned. Mrs Cottle also telephoned DOC about this request. DOC in turn advised Quotable Value that it had no objection to Quotable Value using the information from the valuation prepared for it to produce any report that may be required.

[83] Meanwhile, on 9 November, Nichols provided its report to the Barbers. This valuation provided a “*gross valuation figure only* as per your instructions and does not make allowance for any subdivision costs”. The “gross valuation figure only” was \$875,000.

[84] On 12 November 1998 Innes Dean faxed a letter to Castle Realty. This letter attached a copy of the signed form 14 and requested advice as to whether Mrs Cottle had supplied to Mrs Barber the valuation within the 14 day time period.

[85] Mrs Barber discusses in her evidence the reason for this letter. She says that she cannot be sure about the timing, but she thinks that it was about two weeks after signing the second agreement that they received a phone call from their surveyor, Mr Truebridge of Truebridge and Associates. Mr Truebridge had been at Foster & Co’s offices and had noticed a copy of the Barbers’ subdivision plan there. Mr Truebridge telephoned the Barbers to let them know about this. Mr Truebridge confirms that he did call the Barbers after noticing the Barbers’ plan at Foster & Co’s offices. However he cannot remember when this was.

[86] Mrs Barber goes on to say that she and her husband inferred from the plan being at Foster & Co that the purchasers were intending to subdivide the land. Mrs Barber says this was contrary to what she says she was told by Mrs Cottle in their discussions. Mrs Barber says that she felt she had been misled by Mrs Cottle. She says that she always believed that the property was worth more than \$700,000 because of its subdivision potential. She says that she felt gullible for having believed Mrs Cottle that Mr Herbert was a retired farmer. She says she had even argued with her step-son about this when he had said that Mr Herbert was a land agent. After discussing the situation with Mr Barber, Mrs Barber says she instructed her solicitors to extricate her from the agreement.

[87] On the same day as Innes Dean wrote requesting advice as to whether Mrs Cottle had supplied a valuation within the 14 day time period, Quotable Value provided a valuation addressed to Mrs Cottle dated 12 November 1998. The report referred to an inspection on 20 August 1998. It described the property as an “uneconomic finishing property/dairy run off block”. It also said that the property was “an attractive block of land very handily situated to Levin. It is ideally suited to be run with adjoining land either as a dairy run off block or intensive bull rearing enterprise”. The report made no mention of the subdivision potential of the property, or that a scheme plan had already been approved by the Horowhenua District Council, or that Mr Herbert intended to subdivide. The market value was assessed at \$700,000 excl GST. The valuation also contained a disclaimer stating:

Quotable Value New Zealand provides this report and valuation solely for the use of the Client. Quotable Value New Zealand does not and shall not assume any responsibility to any person other than the Client for any reason whatsoever, including breach of contract, negligence (including negligent mis-statement) or wilful act or default of itself or others by reason of or arising out of the provision of this report and valuation. Any person, other than the Client, who uses or relies on this valuation, does so at their own risk.

This valuation has been completed for the specific purpose in this report. No responsibility is accepted in the event that this report is used for any other purpose.

[88] Mr Fahey, the principal of Castle Realty, responded to Innes Dean’s letter of 12 November 1998 by letter dated 17 November 1998. Mr Fahey said that he had been told by Mrs Cottle that Mrs Barber had not required an independent valuation as Mrs Barber was employed by valuers Page and Associates and had already received an indication of value. Mr Fahey also said that Mrs Cottle has since received an independent valuation which he understood had now been delivered to Innes Dean.

[89] Mrs Cottle says that when she received the valuation it was in an envelope. She says that she did not open the envelope because the valuation was for the Barbers. Mr Shue’s note of his attendances for billing purposes confirms that he received the valuation from Mrs Cottle and forwarded it on to the Barbers.

[90] On 19 November 1998 Quotable Value records the following:

Dave Barber (current owner) in to see us for the CMV [current market valuation] done for Suzanne Cottle. He said was too [illegible word] – [illegible word] some errors. He had another valuation done by Nichols of a higher figure. He wanted us to reassess the value and give new report to Mrs Cottle. Can't do. He went away happy. The ppty is currently signed up at [illegible word] figure \$700,000.

[91] On 21 November 1998 Mrs Barber wrote a letter to Mr Fahey setting out her concerns. This letter takes issue with various comments in the Quotable Value valuation. The letter also refers to having expected that the property would be properly marketed and that Mrs Barber's only request was that a sign not be erected on the farm. The letter also refers to the subdivision plan having been with Foster & Co. Mrs Barber concluded with stating that the contract was not in order and that she awaited Mr Fahey's instructions.

[92] Mrs Barber had arranged to go to England and was leaving on 22 November 1998. On 20 November 1998 she gave a power of attorney to Mr Barber. She left instructions with her husband and Innes Dean to either terminate the contract or commence proceedings against Castle Realty, Mrs Cottle and Quotable Value.

[93] On 24 November 1998 Mr Fahey called Quotable Value. According to Quotable Value's records Mr Barber had told Mr Fahey that Quotable Value had said its valuation was wrong. Quotable Value told Mr Fahey they had not said that.

[94] On 27 November 1998 Cooper Rapley wrote to Innes Dean (sent by fax) referring to the Barbers' proposal that the settlement be deferred pending the Barbers obtaining a fresh valuation and a new agreement being negotiated. Mrs Cottle had discussed this with Cooper Rapley before the letter was written. Cooper Rapley advised that the purchaser intended to continue with the present agreement and to require settlement to take place on 30 November 1998. Cooper Rapley said that their instructions were that Mrs Barber had told Mrs Cottle that a valuation was not required because she had already obtained an oral valuation from her employer, Mr Page. Their instructions were also that Mrs Barber was prepared to accept the offer because, although it was lower than the valuation she had received, the settlement date was substantially advanced. They said that Mrs Barber had calculated that she would earn the difference in interest by taking the option of an early settlement date. Cooper Rapley said that Mrs Barber was now estopped from

seeking to rely on the 14 day time limit for providing the valuation. The letter concluded with the potential for legal proceedings to follow if the agreement was not settled.

[95] Innes Dean's letter to Cooper Rapley on the same day stated that a verbal waiver of the requirements of the Real Estate Agents Act was insufficient. The letter referred to a discussion with Mr Fahey in which the parties were said to have agreed to increase the purchase price to \$720,000 plus GST. The letter said that if Mrs Barber was forced to settle the sale of the property at \$700,000 plus GST she would sue Castle Realty for the commission.

[96] Mrs Cottle's instructions were again obtained by Cooper Rapley. The response, also on 27 November 1998, was that there was an estoppel, not a waiver. Cooper Rapley's letter said that they had no knowledge of any discussion with Mr Fahey and that he had no power to bind the purchaser in any event. The letter said that settlement was to proceed on 30 November 1998.

[97] Mr Barber telephoned Mr Shue on 28 November 1998. Mr Shue's file note records that they "discussed the situation and two options". It records that Mr Barber would like Innes Dean to settle at \$700,000 and sue for the refund of the commission. It also records that Mr Barber was to meet Mr Shue on Monday 30 November 1998.

[98] This meeting took place. There is a notation on the letter from Cooper Rapley referred to at [94] above stating that a copy of the letter was handed to Mr Barber on 30 November 1998. There is a further notation at the foot of this letter containing a signed acknowledgement from Mr Barber that Innes Dean were to settle the sale at \$700,000 plus GST (if any). In accordance with these instructions the sale was settled on 30 November 1998. Consistent with this, Mrs Barber's evidence was that Innes Dean advised her that the agreement should be settled and that a claim for damages and a refund of the commission could be made.

[99] Mr Shue's billing note for this period is as follows:

*... receiving new signed Agreement for Sale and Purchase at \$700,000 plus GST (if any) and perusing the same; receiving balance of deposit from Castle Fahey Realty Limited; attending to disbursement of balance of deposit into your nominated bank accounts in accordance with your instructions; receiving instructions that you had not been provided with a copy of a registered valuation by Suzanne Cottle within the statutory requirement of 14 days; receiving copy of registered valuation from Suzanne Cottle and forwarding copy of the same to you; attending upon you on signing of transfer and discussing with you your options to try to avoid the contract and to renegotiate a new contract at a higher price or to proceed with the sale at \$700,000 plus GST (if any) including discussing potential liability if you do not proceed with settlement of the sale; receiving your instructions to proceed with the sale at \$700,000 plus GST (if any); further telephone attendances with you and Mr Dave Barber discussing the discrepancies in the registered valuation provided by Suzanne Cottle and discussing your options whether to proceed with settlement or not; various telephone attendances with Mr Peter Fahey, manager of Castle Fahey Realty Limited and obtaining his advice that a fresh registered valuation was to be provided to you; receiving further telephone advice from Mr Peter Fahey that a new contract was being negotiated at \$720,000 plus GST (if any); advising Purchaser's solicitor that a fresh valuation was to be arranged with a view to negotiating a new Agreement and that settlement of the sale was to be deferred; receiving letter from the Purchaser's solicitor insisting on settlement of the sale on 30 November 1998 at \$700,000 plus GST (if any) with threats to sue for damages if we did not proceed; various telephone attendances and attendance upon Mr Dave Barber discussing the options available and receiving Mr Dave Barber's instructions to complete settlement at \$700,000 plus GST (if any), and then to sue Castle Fahey Realty Limited for refund of the commission of \$18,000 (inclusive of GST) and for damages; preparing GST invoice and settlement statement and forwarding the same to the Purchaser's solicitor; uplifting Certificate of Title from Public Trust Office; attending upon settlement; reporting and accounting to you; including all incidental attendances and relative correspondence thereto: ... (my emphasis)*

[100] After the settlement Mrs Cottle says that Mr Barber called her twice and visited her offices twice wanting her to agree to giving him another \$20,000. Mrs Cottle says that he told her that the property was really worth \$720,000 because that was the price Mr Herbert had originally offered. Mrs Cottle's response was that Mr Barber had received a fair price.

[101] As a result of the settlement PSL became the owner of the property. By letter dated 11 December 1998 Mr Shand of Foster & Co wrote to the Horowhenua District Council. In this letter Mr Shand stated:

"The new landowners are looking forward to working closely with the Department of Conservation in respect to the development of the gully areas and extension of native tree planting *into the balance land which will be developed for farming and lifestyle lots*. This liaison will involve consultation with Department of Conservation in respect to siting of houses and septic tank effluent systems and maintaining corridors of views from those house sites to Lake Papaitonga and native bush areas.

The survey of the gully areas will be completed on a Survey Office plan to enable gazettal of those areas as reserves.

*In addition to the sale of the gully areas, my clients wish to subdivide out four lifestyle lots along the Buller Road frontage for sale and transfer the area Council want for carparking, at the end of Buller Road adjoining Lake Papaitonga Reserve, to Council.*

The final form of Lots 1 to 4 may change as my clients are still considering the way they wish to develop the property.

*At the moment they strongly favour selecting houses sites throughout the development and creating "one acre" (4000 square metre) lots around these house sites with the balance land remaining as farmland. Appropriate consent notices or covenants would be established to prevent the farmland from being more intensively subdivided in the future. (my emphasis)*

[102] Mr Puklowski said that he was aware of the letter at the time and he saw the lifestyle lots mentioned in that letter as one possible option. He says that whenever you buy an asset you also look at the options available to any of your assets. He says that whenever you buy farmland it is quite common to get approval to a subdivision plan because, at the end of the day, it gives you an option of what you can do with the land. In respect of the Buller Road sections he says that it made sense to sell them because, if you were to lose stock on this property, this was where you could lose them. Mr Puklowski says that before the letter was sent it had been "loosely" discussed.

[103] Mr Herbert says that the idea of house sites throughout the property, also referred to as a "farm park", came from Mrs Puklowski. She was aware of a successful one in Taupo and had raised it as a possibility. He could not remember when it went from being an idea to crystallising into a project but he confirms that it was discussed as an idea some time in 1998. He also accepts that he probably had been discussing the options referred to in this letter with Mr Shand some months before the letter went to the Council.

[104] From the DOC subdivision there were two pieces of land cut off from the rest of the farm. Mr Herbert says he was keen to sell them because they did not make sense from a farming point of view and the sales would help reduce the debt owed to ASB. Mr Herbert approached the Horowhenua District Council to see if they were interested in buying one of those pieces of land. The Council agreed to this. He says that this sale was negotiated quickly. As a result, in December 2000, PSL sold about one acre of land to the Council for \$50,000.

[105] The other piece of land cut off of the DOC subdivision was at the north eastern corner of the property. Mr and Mrs Prince owned the property that adjoined this piece of land. Mr and Mrs Prince were approached about selling their land to PSL. They were agreeable. Again Mr Herbert says this transaction was negotiated quickly. Accordingly, in August 1999, the Princes' property was purchased for \$115,000. PSL subdivided the combined land (the corner of the Barber property and the Prince land) into five sections and sold them.

[106] Apart from those sales, Mr Cottle and Mr Puklowski farmed the property. Mr Herbert was still a land agent. At about the end of 1999, after PSL had been running the farm for about a year, Mr Herbert says that PSL reviewed the situation. The income from the farm was not sufficient to bring the farm up to standard. PSL then decided to proceed with the "farm park" idea that had been discussed earlier. Mr Herbert says that it was intended that the income from the sale of the residential sections would be invested in the farm. In January 2000 Foster & Co had prepared a plan showing this subdivision. It was a radically different subdivision than the Barbers' plan. PSL spent \$25,000 on advertising. Not a single bid was received and the plan was withdrawn from the market.

[107] In August 2000 the Puklowskis offered back their shareholding in PSL because they disagreed with the management of the company. They felt that things were not appropriately documented and they felt that the Herberts and the Cottles had strong personalities that made it difficult for them. Mr Herbert confirms that this was the position.

[108] In September 2000 Foster & Co prepared a subdivision plan for four lots along Buller Road (this was an amended version from the October 1998 five lot plan). PSL had no difficulty selling the lots.

[109] In late 2002 PSL changed banks from ASB to National Bank. Mr Herbert says that this was because ASB decided that financing subdivisions was not core business. National Bank wanted to know how PSL was going to maximise the return from the land. Mr Herbert says that it was at this point that PSL decided to break up

the land into a lifestyle subdivision. By this stage PSL shareholders were working away from the farm, and were running the property at weekends.

[110] In January 2003 Foster & Co produced another subdivision plan. This was approved by the Council in February 2003. PSL began selling the sections. The last section sold in June 2005. The costs of the subdivision development, but excluding holding costs such as interest and rates, were \$556,298 in the four financial years 2002 to 2005 inclusive. As at 31 March 2005 the pre-tax profit for PSL was \$1.7 million with one section left to sell.

### **Findings on disputed facts**

#### *Disputed facts that are relevant to the causes of action*

[111] It will be apparent from the above narrative of the evidence that there are a number of factual matters that are in dispute. Some of these are not material because they are not relied on in the causes of action pleaded against the defendants. Others are material and in the main the witnesses on each side of this proceeding give widely different accounts. It is therefore necessary to make findings on the material disputed factual matters.

#### *Reliability of witnesses' recollections*

[112] A difficulty with the oral evidence is that the events occurred eight years earlier. Witnesses cannot now be expected to recall all events and discussions, and matters of detail, accurately. Recollections may also have been affected to some degree by subsequent events – the Barbers feel strongly that they were misled and that they sold the property at an undervalue and Mrs Cottle has had her honesty and integrity challenged. Because of these difficulties with the reliability of the oral evidence, in making my findings, I have placed greater weight on the documentary evidence where it is available.

*Who was not called to give evidence*

[113] The purchasers and Mrs Barber refer to the failure of the other to call relevant witnesses and ask me to infer matters from that. The purchasers say that Mrs Barber should have called evidence from Mr Barber and Mr Shue. Mrs Barber says that Mr Barber has mental difficulties and that she understands that Mr Shue is in Hong Kong. Mrs Barber says that the purchasers should have called Mr Page. For Quotable Value it was suggested to Mrs Barber that she did not call evidence from Mr Nichols because his valuation had been unhelpful to Mrs Barber's case.

[114] Other potentially significant witnesses who were not called are Mr Shand of Foster & Co and Mr Langley of Quotable Value. Mr Shand could have given evidence as to his recollection about when Mr Herbert instructed Mr Shand on subdivision proposals. Mr Langley could have given evidence on what he was told about the purchasers' intention at the time of each of his valuations and whether he knew his 12 November 1998 valuation was for the purposes of Mrs Cottle's obligation under ss 63 and 64 of the Real Estate Agents Act. This was not raised by Mrs Barber and there is nothing before me to explain why they were not called.

[115] I do not have sufficient information before me about why any of these witnesses were not called. I consider that it is better to consider the evidence that was presented rather than to make assumptions about why various witnesses that might have been called were not called.

*The listing price*

[116] Mrs Barber does not rely on what was said about the listing price in her causes of action. Accordingly, although the figure of \$1 million may have been talked of by either or both sides, precisely who said what about the price that could be obtained is not material. Similarly, it is accepted that the suggested listing price of \$930,000 plus GST came from Mrs Cottle and quite how she came to this figure does not matter. Mrs Cottle was happy to list the property at this price and to see what potential purchasers were prepared to pay. As it turned out, this listing price

proved to be overly optimistic and expectations were lowered when this became apparent.

[117] What is more relevant is that as a result of the discussion in May 1998 Mrs Barber had confidence in Mrs Cottle and trusted her. My assessment is that Mrs Cottle would have presented in a professional, confident and competent manner (as she did in the witness box). Mrs Barber described Mrs Cottle as having a good manner with people. Ms Drew also says she liked her and that Mrs Cottle made a number of nice comments about their property. As a result of the discussions the Barbers were encouraged to list the property with Mrs Cottle.

### *Marketing*

[118] The different accounts of what was discussed about advertising (refer [14] to [16] and [18] above) are relevant and need to be resolved. That is because it is alleged that Mrs Cottle represented that the property had been properly marketed when that was not the case.

[119] It is agreed that Mrs Cottle was told that there was to be no sign at the property. Beyond that I consider it likely that the parties did not discuss what kind of advertising there could be and that a misunderstanding then arose about that. The Barbers assumed that the property would be advertised in other ways. Mrs Cottle understood that the Barbers did not want any advertising because Mr Barber did not want people to think he had gone broke. That the listing agreement was left blank is consistent with both sides' perception of what had been agreed. Mrs Barber may not have realised that this should have been discussed and an amount for advertising agreed. Mrs Cottle would not have seen the need to fill in this part of the listing agreement if there was to be no advertising.

[120] If Mrs Cottle had been instructed to advertise the property but then deliberately ignored that instruction that would mean that Mrs Cottle embarked on a deceptive plan from the outset. I do not accept this. There was no reason for her to do this – she did not become involved as a prospective purchaser until four months

later. It would also have been a risky plan as the Barbers were likely to discover that there was no advertising.

[121] On the balance of probabilities I consider that the Barbers did not state that there was to be advertising. Mrs Barber and Ms Drew gave evidence of their surprise at not seeing advertising. How often they looked up newspapers is not particularly relevant. It would be difficult after eight years to now be clear about that. I consider, however, that Mrs Barber did not raise the Barbers' surprise at the absence of advertising with Mrs Cottle directly (Mrs Barber accepted in cross-examination that she may not have) and this meant that the misunderstanding about advertising continued. Mrs Barber trusted that Mrs Cottle was handling the sale correctly and at one stage saw Mrs Cottle taking photographs. Had Mrs Barber asked Mrs Cottle why there was no advertising there is no logical reason for Mrs Cottle not to have responded by arranging some advertising. She was a new agent, keen to make a sale and advertising potentially would have helped. She did not become involved as a purchaser until much later.

*What were Mr Herbert's plans?*

[122] The parties have different views about whether Mr Herbert, and later PSL, intended to subdivide the property. This issue needs to be determined because it is alleged that Mrs Cottle led the Barbers to believe that potential purchasers saw no value in a subdivision of the property and that Mrs Cottle falsely represented that the purchasers would not be subdividing the property.

[123] For Mrs Barber it is said that Mr Herbert intended that if he was successful in purchasing the property it would be subdivided. In support of this, Mrs Barber relies on the following:

- a) When the subject was expressly raised by Innes Dean on behalf of the Barbers on 30 July 1998 Cooper Rapley's response did not deny that a subdivision was intended but simply asserted that a valid contract existed;

- b) The Quotable Value filenote dated 20 August 1998 refers to Mr Herbert's intentions to subdivide (refer [47] above). (It is said that Mrs Cottle's denial about the accuracy of this note should not be accepted.);
- c) The Quotable Value valuation to DOC dated 26 August 1998 refers to "the impending subdivision of the property by Mr Herbert" and the handwritten notes on that valuation also indicate a discussion between Mr Langley and DOC that Mr Herbert was buying the land to subdivide it (refer [49] above);
- d) The DOC filenote dated 9 September 1998 refers to Mr Herbert's intentions to subdivide and it also refers to various protections/conditions DOC would want in relation to a subdivision (refer [50] above);
- e) The DOC draft and final agreements contain the clause dealing with consultation over house sites (referred to at [56] and [76] above);
- f) The October 1998 subdivision plan for five lots on Buller Road, which Mr Herbert accepts he would have been discussing with Mr Foster back in August or September 1998;
- g) After the sale PSL proceeded, in various stages, to subdivide the property.

[124] For the purchasers it is submitted that the plan was to farm the property. It is submitted that, other than selling the gullies to DOC, there were no definite plans to subdivide. It is submitted that, at the most, Mr Herbert had ideas about possible later subdivisions. It is said that the DOC and Quotable Value records have confused the Barbers' plan with an intention on Mr Herbert's part to proceed with a subdivision. The purchasers say that afterwards, as per their intentions, PSL farmed the property. The two pieces of land that were sold off first were land locked. The sections along Buller Road were not sold until nearly two years later and this subdivision was

different from the October 1998 plan. It was not until 2002, when Mr Herbert says the farm business had not proved economic and the company was heavily indebted, that the residential subdivision got underway.

[125] My view of Mr Herbert's plans are as follows. From the outset the potential to subdivide the property was apparent (the Barbers already had consent to one plan). I find it likely that this was part of the potential attraction of the property for Mr Herbert. Mr Herbert could use the property to graze stock while working out what best use to make of the property. If a subdivision was economically feasible it would be pursued. Quite how subdivision might best be pursued had not been determined. Mr Herbert realised fairly early on that the Barber plan could be improved upon. He considered that a road going through the gullies, as per the Barber plan, was not ideal. He could also see an opportunity to sell the gullies to DOC. He had a number of ideas as to how a subdivision might be achieved but by the time of the second contract, other than the sale to DOC which was in its final stages of negotiation, they remained possibilities, rather than definite plans.

[126] The reasons for my view are as follows. I consider that DOC and Quotable Value documentary evidence provides the most reliable evidence of Mr Herbert's intentions. The Quotable Value filenote records that the purchasers were intending to create a subdivision. The Quotable Value valuation refers to Mr Herbert's intention to subdivide. Consistent with that, the handwritten note on the valuation refers to Mr Herbert having written off the farm improvements because he was intending to subdivide. The DOC filenote of the 9 September 1998 meeting also indicates that Mr Herbert was intending to subdivide. All of these are records of discussions that were made at the time by people uninvolved in the dispute that later arose and which resulted in these proceedings.

[127] I consider that the DOC records are not explained by Mr Herbert's intentions to subdivide the gullies and sell them to DOC. The DOC filenote refers to a 14 lot (or greater) subdivision and goes on to discuss matters relevant to that from DOC's perspective. I also consider it unlikely that DOC confused the existence of the Barber plan with an intention on Mr Herbert's part to subdivide. It is clear from the documents that there were detailed negotiations between DOC and Mr Herbert. If

DOC were mistaken about the need for various conditions Mr Herbert had the opportunity to point this out. From Mr Herbert's perspective (as well as for DOC) it made sense to clarify DOC's requirements in the event of a subdivision.

[128] I also consider it unlikely that Mr Langley confused Mrs Cottle's instructions. Mrs Cottle accepts she would have given the plan to Mr Langley. If Mrs Cottle had only said that the Barbers had a subdivision plan, there was no reason for Mr Langley to have referred to Mr Herbert's intentions to subdivide the property. If Mr Langley had considered the existence of the Barbers' plan was relevant to the value of the property, irrespective of the purchasers' intention, he could have referred to it in his valuation. Irrespective of the existence of the Barbers' plan, Mr Langley seems to have viewed Mr Herbert's intention as relevant to his valuation for DOC in buying the gullies from Mr Herbert. Mr Langley has recorded his understanding of that as per his instructions from Mrs Cottle. Mrs Cottle must have understood at this time that Mr Herbert was intending to subdivide the property, and she can only have got that impression from Mr Herbert.

[129] In addition to the DOC and Quotable Value documentary evidence, Mr Herbert and Mr Puklowski accept that subdivision was a potential option when buying an asset of this nature. Consistent with that, Cooper Rapley's response to Mr Shue's 30 July 1998 letter did not deny that subdivision was a possibility. Also, Mr Herbert accepts he was discussing ideas with Mr Shand prior to the settlement of the sale on 30 November 1998 and before that settlement Mr Shand had prepared a subdivision of five lots along Buller Road.

[130] I consider it relevant that almost immediately after settlement PSL was actively considering subdivision. This is evident from Mr Shand's letter to the Council discussing various subdivision proposals including the "farm park" idea. I also consider it relevant that in a reasonably short time frame PSL proceeded to subdivide: less than a year later PSL purchased the Prince land and subdivided the combined corner of the property; the next year the farm park idea was pursued (unsuccessfully) and PSL sold the corner section to the Council and subdivided the land along Buller Road; and four years after buying the property subdivision of the balance of the property proceeded.

[131] All this evidence is consistent with an intention to subdivide the land if that could be achieved successfully and in a cost effective way. The subdivision proceeded in stages. The easier sections were developed and sold first, and sales from those sections helped to reduce the borrowings. While determining whether the subdivision should proceed and in what way, the property was able to be used for grazing purposes.

*What did Mrs Cottle know of Mr Herbert's plans?*

[132] It is also relevant to Mrs Barber's causes of action to determine what Mrs Cottle knew about Mr Herbert's intentions and at what time. For the Barbers it is said that Mrs Cottle must have known Mr Herbert intended to subdivide the property.

[133] In support of this Mrs Barber relies on the Quotable Value filenote that records that the information about Mr Herbert's plans to subdivide came from Mrs Cottle. It is also said that Mr Herbert, on his own evidence, was desperate to find a replacement for Mr Puklowski. It is said that, in order to persuade the Cottles to sign up to the purchase, it is likely that Mr Herbert would have "sold" the Cottles the good points about the proposed purchase. It is said that this is a matter of common sense in the context of a \$700,000 partnership. It is submitted that Mr Herbert's denial about this should not be accepted. It is noted that Mrs Cottle could not remember what was discussed.

[134] The defendants say that at the most Mr Herbert was contemplating subdividing the property in some manner at some time. They say that there is nothing to indicate that this was communicated to Mrs Cottle. They say that from Mrs Cottle's perspective they were buying the land to graze heifers.

[135] My view is that as at 20 August 1998 Mrs Cottle understood that Mr Herbert intended to subdivide the property. That is the likely explanation for the Quotable Value filenote (refer [47] above) and the Quotable Value valuation report recording this as Mr Herbert's intention. There is, however, no indication that Mrs Cottle knew this prior to Mrs Barber signing the first contract on 29 July 1998. Mrs Cottle

was present at the meeting on 26 June 1998 but that does not mean that she was privy to all the discussions (whatever their extent) between Mr Herbert and Mr Shand and/or Mr Puklowski. Mr Herbert's view was that his intentions were his own business. At this stage Mr Herbert was not contemplating that the Cottles would come in as purchasers. There was no reason for Mr Herbert to involve Mrs Cottle in discussions about subdivision possibilities.

[136] I consider it likely that by the time the second contract was signed on 28 September 1998 Mrs Cottle understood that a subdivision would be considered and potentially pursued if it was feasible. Mrs Cottle understood as at 20 August 1998 that Mr Herbert was intending to subdivide. Mrs Cottle was not definite that when Mr Herbert asked the Cottles to join in the purchase, subdivision possibilities were not discussed. She could not remember. It is likely that the subdivision possibilities were discussed, at least in general terms, because Mrs Cottle and her husband were buying into the partnership. It was not an insignificant investment. Mr Herbert would have wanted to "sell" the deal to the Cottles because at this stage the Puklowskis had pulled out. The Cottles were interested in grazing stock, but the proposition was likely to be more attractive to the Cottles in light of the DOC negotiations and the potential for subdivision. Also, as Mr Herbert was intending to subdivide the property if that were economically feasible, it would make sense to disclose this to the Cottles in case they were completely opposed to the idea.

*What did Mrs Cottle tell the Barbers about their plans?*

[137] The Barbers allege that Mrs Cottle knew subdivision was intended but she told them that potential purchasers saw no value in subdivision, that the purchasers would not be subdividing the property and that they would be grazing dairy heifers and growing barley. Linked to this is what Mrs Cottle said about Mr Herbert's occupation. Mrs Barber's position is, in effect, that Mrs Cottle deceived them about Mr Herbert's occupation as part of the deception about his intentions for the property. In assessing what Mrs Cottle told the Barbers and at what time, it is also necessary to consider what the Barbers did and at what time.

[138] The starting point is the period leading up to the signing of the first contract. I consider that Mr and Mrs Barber were initially under the impression that Mr Herbert was a retired farmer and that they did not know that he was a real estate agent. Craig Barber and Mrs Barber agree that when Craig raised this, Mrs Barber did not initially believe Craig Barber. I consider it unlikely, however, that this was raised directly with Mrs Cottle. That is because it seems too unlikely that Mrs Cottle would deny that Mr Herbert was a real estate agent when Mr and Mrs Barber could easily check this.

[139] As it happened, the Barbers did find out that Mr Herbert was a real estate agent by no later than 30 July 1998. This is apparent from Mr Shue's file note on 30 July 1998 recording that Mr Barber told him that Mr Herbert was with Property Brokers and Mr Shue's billing note recording that he personally handed the 30 July 1998 letter to Mr Herbert. It is also consistent with Mrs Barber's typewritten notes (refer [44] above). After this time there was no longer any need to ask Mrs Cottle what Mr Herbert did and I find that the Barbers did not do so.

[140] I have already found that the evidence does not establish that Mrs Cottle knew before the first contract was entered into that Mr Herbert was considering the possibility of subdividing the property. Craig Barber said that Mr Barber asked Mrs Cottle whether Mr Herbert was going to subdivide the property and that Mrs Cottle said he was intending to graze stock. If Craig Barber has recalled that correctly I consider that this conversation was sometime before Mrs Cottle understood (sometime before she spoke to Mr Langley on 12 November 1998) that Mr Herbert was intending to subdivide the property. Alternatively Craig Barber may have confused what Mrs Cottle said about one of the other prospective purchasers (who was a bull farmer and who had been shown over the property) with Mr Herbert. To find otherwise would be to find that Mrs Cottle was prepared to lie to the Barbers. There would be no incentive on Mrs Cottle to do that unless she thought that was the only way she could secure a sale. The evidence for Mrs Barber does not satisfy me that this occurred.

[141] The next period to consider is that between signing the first contract and the meeting on 28 September 1998 when the second contract was entered into. The

documentary evidence indicates that whatever (if anything) Mrs Cottle said about Mr Herbert's intentions prior to the first contract, the day after signing the first contract the Barbers suspected that Mr Herbert did intend to subdivide. I consider that Mrs Barber has become confused about the timing of when she learned that their subdivision plan was at Foster & Co (refer [85] above). Mr Shue's file note of 30 July 1998 records an approach by Mr Truebridge. Consistent with that, Mrs Barber's typewritten notes also seem to indicate that they learned about the plan being at Foster & Co at around the same time as learning Mr Herbert was a real estate agent (refer [44] above).

[142] In any case, the evidence shows that the Barbers raised their suspicions about Mr Herbert's intention via Innes Dean's 30 July 1998 letter to Cooper Rapley. That letter was copied to Mrs Cottle and also handed directly to Mr Herbert. Mr Shue discussed it with Mr Herbert (refer Mr Shue's file note at [43] above and as confirmed by Mr Herbert). Cooper Rapley also formally replied. Both Cooper Rapley's and Mr Herbert's response was that there was a valid contract. Mr Shue's advice to the Barbers was that if the Barbers proceeded with the sale they could not stop the purchasers from subdividing the property. There is nothing in the documentary evidence to indicate that Mrs Cottle was involved at this point in advising the Barbers of Mr Herbert's intentions.

[143] Nor does the evidence establish any attempt by the Barbers after 30 July 1998 and before the 28 September 1998 meeting to find out from Mrs Cottle whether Mr Herbert was intending to subdivide the property. There is no documentary record indicating any discussion between Mr and Mrs Barber and Mrs Cottle. The requests Mrs Cottle made, on Mr Herbert's behalf, to extend the time for confirming finance were made via Mr Shue. The evidence also indicates that Mr Barber had a discussion with Mr Herbert on 25 September 1998. At this time Mr Barber and Mr Herbert agreed a variation to the contract (see [60]). If Mr Barber remained concerned about the purchasers subdividing the land then he had the opportunity to discuss this with Mr Herbert directly at this time. There is no suggestion that he did.

[144] Instead it seems that the Barbers were given no certainty nor comfort about Mr Herbert's intentions and they accepted Mr Shue's advice that if they sold to

Mr Herbert they could not stop him from subdividing the property. In spite of that the Barbers were prepared to continue with the sale. They had the opportunity to withdraw from the sale each time a request for an extension of the finance confirmation date was made. Mrs Barber says that the reason they granted the extensions was because Mr Shue had said they should take “the bird in the hand”. The Barbers also had the opportunity to withdraw when Mr Herbert negotiated the variation with Mr Barber. They did not do so and so it must be inferred that they were content to proceed at the price negotiated regardless of the purchaser’s intentions.

[145] By 28 September 1998 Mr and Mrs Barber (either or both) were again uncertain about whether to proceed with the sale. I infer this from the length of the meeting. It is accepted by both sides that one of the things discussed was the requirements of the Real Estate Agents Act. Mrs Cottle explained that she was required to obtain a valuation from an independent registered valuer. Mrs Barber signed the form which made it clear that Mrs Cottle was required to do this.

[146] Mrs Barber denies that she told Mrs Cottle that she could dispense with obtaining the valuation. I consider that Mrs Barber told Mrs Cottle that there was no need for a valuation because she believed, based on her husband’s earlier enquiry of Mr Page, that the price was a fair one. The reasons I take this view are:

- a) There is no other likely explanation for Mrs Cottle obtaining Mrs Barber’s consent to “form 14” and then not proceeding to obtain the valuation;
- b) Mrs Barber’s typewritten notes refer to a discussion with Mr Page before the first contract was entered into. They say:

We eventually decided to talk to John Page but when David did, John told him that he already had spoken to Suzanne Cottle, and he gave David a run-off dairy grazing price per acre (\$5,500). Although I used to work for John he had never been on the farm and had never seen it. He has never valued it.

We eventually settled on the figure of \$720,000 plus GST, the negotiations took place during July.

- c) Although Mrs Barber said in her brief of evidence she did not have a discussion with Mr Page, when referred to her typewritten notes she accepted in cross-examination that Mr Barber had discussed values with Mr Page and that she knew about this at the time. She said that Mr Page had given them general farm values rather than a specific valuation for their farm. However that sort of general discussion helps to explain why Mrs Barber was prepared to countersign at \$720,000 in July (significantly below her hopes as a result of the listing price discussion);
  
- d) When the Barbers were wanting to withdraw from the second contract, Innes Dean did not respond to Cooper Rapley's instructions that Mrs Barber had spoken to Mr Page and that was why she said she did not need a valuation.

[147] I accept Mrs Cottle's evidence that the topic of whether the purchasers would be subdividing (by selling the gullies to DOC or more generally) did not come up at the meeting on 28 September 1998. I consider that this is more likely than that Mrs Cottle stated that subdivision was not intended at all. Mrs Cottle says she told Mrs Barber that no one was interested in "buying" the plan. By that Mrs Cottle presumably meant that the purchasers did not see any added value to the property because there was a subdivision plan that had consent in place, and no other purchaser had seen added value from that either. To the extent that Mrs Cottle discussed their intentions, she referred to the Cottles grazing heifers and Mr Herbert growing barley. Those were their immediate intentions and from her perspective future possibilities (about which she had no detail), which would not involve the Barber subdivision plan, were not important.

[148] Beyond that I consider it likely that Mrs Barber did not directly ask whether the purchasers intended to subdivide the property, nor what the status of the DOC negotiations were. Mrs Barber had been advised by Mr Shue that she could not stop the purchasers from subdividing and she was comfortable with the price because of the discussion Mr Barber had with Mr Page. Nor did the Barbers otherwise make it clear to Mrs Cottle at the 28 September 1998 meeting either what the precise nature

of the DOC negotiations were or that the purchasers' intentions for the land were important to their decision whether to enter the contract.

[149] After signing the second contract Mr and Mrs Barber (either or both of them) again had second thoughts about whether to proceed with the contract. I do not think this was precipitated by a call from Mr Truebridge (refer [141] above). One of them apparently discussed the contract with somebody because on 1 October 1998 (just a few days after the contract was entered into) the anonymous complaint to the Real Estate Institute was apparently written (though not delivered for a few days). About a month later, Nichols inspected the property at the Barbers' request. It seems that at this point the Barbers wanted to use the valuation and/or a valuation obtained by Mrs Cottle to seek to negotiate a higher price than that to which they had agreed. This is evident from Quotable Value's notes of the discussion with Mr Fahey and Mr Barber (refer [90] above). It is also evident from the late request for the valuation required by the Real Estate Agents Act – Mr Shue seems to have told the Barbers much earlier that this was required (refer [62] above). This strategy was unsuccessful because both the Nichols valuation and Quotable Value's valuation effectively confirmed the contract price and the purchasers would not budge on proceeding with settlement of the contract on the settlement date.

#### *Need for urgency*

[150] Mrs Barber alleges that Mrs Cottle told her that there was a need for a very rapid response because the Herberts wanted to relocate quickly to move their daughter from an undesirable crowd and that there was a need to accept the agreement. Mrs Cottle denies this. Mrs Cottle accepts that she said that the Herberts wanted their children back in the country. She also accepts that she said Mr Herbert did not want to reopen negotiations.

[151] I consider that Mrs Cottle did convey the need for urgency and that there was to be no further negotiation. These were her instructions from Mr Herbert. I find, however, that Mrs Cottle did not say that the sale was urgent and needed to be accepted because Mr Herbert needed to move his daughter away from a bad crowd. The Herberts had been previously willing to extend the settlement date and to allow

the Barbers to remain on the property rent free for a period. This is inconsistent with the need for a rapid response in order to relocate their daughter from an undesirable crowd. I think it is more likely that the Barbers have now confused what was discussed and incorrectly linked the need for urgency with the Herberts' desire to have their children in the country.

*Consulting a solicitor*

[152] Mrs Barber alleges that Mrs Cottle said at the meeting on 28 September that she could not consult a solicitor. Mrs Cottle denies this. According to Mrs Cottle Mr Herbert had told her that he did not want the offer on 28 September 1998 to be seen as an opportunity to renegotiate the whole contract. She would have conveyed that to Mrs Barber. Mrs Cottle also says she pointed out that the terms of the offer were the same as the terms of the previous offer as varied three days earlier in consultation with her solicitor.

[153] I accept Mrs Cottle's evidence. In particular I accept that, in response to Mrs Barber proposing that she would first talk to her lawyer, Mrs Cottle pointed out that the offer had not changed from the one her solicitor had already seen. I also accept Mrs Cottle's evidence that she did not say that Mrs Barber "could not" consult her solicitor. I think it more likely that Mrs Barber thought that if she consulted her solicitor Mr Herbert might change his mind and withdraw the offer. She was persuaded that there was no need to talk to her solicitor.

*What did the Barbers know about the sale to DOC?*

[154] The purchasers defend the claims made against them in part on the basis that the sale of the gullies was the only subdivision the purchasers had in mind at the time the second contract was entered into. They submit that the Barbers knew about this because Mr Herbert had disclosed it to Mr Shue at the 30 July 1998 meeting and because Mrs Cottle says she told Mr Shue that the reason for the time extensions to the first contract was the DOC negotiations. For Mrs Barber it is submitted that the Barbers knew nothing of the intended sale of the gullies to DOC.

[155] It was put on behalf of the purchasers that the reference in Mr Shue's letter of 30 July 1998 about "subdivision possibilities" came from Mr Herbert's discussion with Mr Shue about the gullies. This does not seem likely to me. Mr Shue's letter seems more likely to have been triggered by Mr Barber's telephone call which refers to the Barbers' belief that a subdivision was being proposed and the approach from Mr Truebridge. That is what Mr Shue recorded in his billing note and that billing note also records that Mr Herbert's position was that there was a valid contract. That was the position taken in the formal response from Mr Herbert's solicitors, Cooper Rapley, as well.

[156] Quite apart from what triggered the Innes Dean letter of 30 July 1998, and although this was not put to Mr Herbert directly in cross-examination, it is not clear that Mr Herbert would have said to Mr Shue that he would be "selling" the gullies (as distinct from a more general reference to intending to negotiate with DOC). Mr Herbert said that he did not approach DOC until August 1998 and so as at 30 July 1998 he cannot have known that he would achieve a sale. At best he could only have disclosed that he hoped to sell the gullies to DOC. He also did not see his intentions as being something that he needed to disclose to the vendors. Further, had Mr Shue been told on 30 July 1998 that Mr Herbert was intending to subdivide and sell the gullies, it is likely that Mr Shue's September 1998 letter to DOC (refer [54] above) would have been more direct and asked what the current state of sale negotiations was.

[157] In the September 1998 correspondence (refer [53] above) (when a sale looked more likely), Mrs Cottle had referred to getting an "answer from DOC as to what their intended action is, if any, regarding the three gullies". The letter would have been more direct if it had referred to waiting to hear from DOC as to whether it would commit to buying the gullies. Mrs Cottle says that she spoke to Mr Shue several times to request the extensions and that she is "almost certain" that she gave to Mr Shue the proposal to sell the gullies to DOC as the reason. However, like the letter, I think it is likely that these discussions did not refer specifically to a "sale". At this stage Mrs Cottle was not a purchaser and Mr Herbert viewed the negotiations with DOC as something that he was doing and which was his business (and not the vendor's business).

[158] On the balance of probabilities I find that the Barbers did not know that the purchasers expected to conclude a sale of the gullies to DOC. They assumed that the negotiations would involve a similar arrangement to the one they had been discussing. The Barbers did not ask Mrs Cottle for detail from Mr Herbert about the negotiations. Instead they directed their enquiry to DOC. The DOC response to Mr Shue's letter was unhelpful in that it did not address the sale negotiations with Mr Herbert (which DOC apparently viewed as confidential – refer [185] below).

**First cause of action (against the first defendant): breach of fiduciary duty**

[159] The first cause of action alleges that Mrs Cottle breached a fiduciary obligation to Mrs Barber. It is alleged that Mrs Cottle sought, in conjunction with the purchasers, to acquire the property at a price that ignored the potential for subdivision. It is alleged that this gave rise to a conflict between her interests and Mrs Barber's interests. It is alleged that Mrs Cottle failed to disclose her conflict of interest and that instead she led Mrs Barber to believe that the property could not be advantageously marketed on the basis of its subdivision potential and failed to disclose the true value of the property or that the sale price did not recognise the most valuable use of the property.

[160] The cause of action then goes on to allege that Mrs Cottle made various statements with a view to hiding the conflict and the value of the property. The statements relied on are:

- a) That the property had been properly marketed and that Mr and Mrs Herbert were the only persons likely to be interested.
- b) That potential purchasers saw no value in the subdivision of the property, and it should be seen as a farm "run-off" block;
- c) The first contract had failed as the Puklowskis had pulled out.

- d) Mrs Cottle falsely represented that Mr and Mrs Herbert had to have a very rapid response as their daughter had become associated with undesirable people and they wanted to relocate quickly;
- e) Mrs Cottle falsely represented that she and her husband had replaced the people who had “pulled out” of an offer so that the sale could take place;
- f) The purchasers would not be subdividing the property, they would graze dairy heifers and grow barley;
- g) Mrs Barber could not consult her solicitor because time was of the essence;
- h) There was a need to accept the agreement.

[161] Mrs Cottle accepts that she owed Mrs Barber a fiduciary duty. She submits, however, that the duty was as prescribed by ss 63 and 64 of the Real Estates Agents Act. Those sections prohibit a real estate agent from purchasing land which he or she has been commissioned to sell without obtaining a valuation from an independent registered valuer. The valuation is to be obtained at the real estate agent’s expense. If the valuation is not provided before the vendor gives consent, or within 14 days of the vendor having given consent, the contract is voidable at the option of the vendor. Further, where the valuation is not provided within this time frame, and whether the contract is avoided or not, no commission is payable to the real estate agent on the contract.

[162] For Mrs Cottle it is submitted that to comply with ss 63 and 64 of the Real Estate Agents Act she was required to provide all material information to Mr Langley. It is said that she did this. Material information included the DOC negotiations and the Barbers’ subdivision plan. It is said that Mr Langley knew of these matters. It is further submitted that, even if there is a duty beyond the Real Estate Agents Act, Mrs Cottle disclosed all material information to Mrs Barber. It is said that Mrs Cottle had no duty to tell Mrs Barber that the property could be

subdivided as Mrs Barber already knew that. It is also said that the representations relied on by Mrs Barber are not made out on the facts. It is also said that Mrs Barber suffered no loss.

[163] I do not accept the submission that the Real Estate Agents Act is the extent of the duty owed by an agent when there is a conflict between the vendor and an agent/purchaser. Mrs Cottle's counsel accepts that there is no authority to support this submission. The well established legal position of a principal/agent relationship is that an agent cannot put herself in a position in which her personal interest may conflict with her duty to her principal unless the principal "with full knowledge of all material circumstances and of the nature of the agent's interest, consents": *Bowstead v Reynolds on Agency* (18 ed, 2001) at 6-055 and 6-053. (See also *Maclennan Realty Ltd v Court & Ors* (2004) 5 NZ ConvC 193, 900 at [27].)

[164] My view is that the Act provides a mechanism intended to protect a vendor from selling at undervalue to her agent. It also provides some protection for the agent/purchaser from later claims that the property was sold to the agent at undervalue. But there may be things other than price that are material to a vendor. To give one example, it might be material to a vendor of a family home that has been in the family for generations whether a purchaser proposes to demolish the house and replace it with a block of town houses. If the agent/purchaser knew that this was material to the vendor, and if that was the agent's intention, the agent would have a conflict of interest. Following the procedure in the Real Estate Agents Act would not deal with that conflict.

[165] I consider that the procedure under the Real Estate Agents Act is not intended to replace the scope of fiduciary duties that would otherwise apply. The Act does not say that. Nor does it state that the only material information for a vendor is the proposed purchase price. In my view the position is that, in addition to complying with the Real Estate Agents Act, Mrs Cottle was required to ensure that Mrs Barber had full knowledge of all material circumstances before she provided her consent to the second contract.

[166] In this case the purchasers' intentions for the property would be material, and would need to be disclosed, if the purchasers' intentions affected the price they would be prepared to pay or Mrs Barber's willingness to accept the price offer.

[167] Mrs Barber has not established that the purchasers would have been prepared to offer more because they intended to sell the gullies to DOC and to consider subdivision more generally. The evidence is that at \$720,000 Mr Herbert had already been pushed up higher than he had wanted, and because of that, he negotiated a revised offer of \$700,000 in return for some other benefits for the Barbers that were roughly calculated to be worth \$20,000 to the Barbers. The evidence is also that Mr Herbert did not want negotiations on price to be reopened on the evening of 28 September 2008. Consistent with this, when the Barbers later sought to negotiate an increased price the purchasers refused to engage.

[168] Mrs Barber has also not established that the purchasers' intentions for the property were relevant to Mrs Barber's willingness to accept the price offer. Mrs Barber already knew that, although the property could be used as a farm, it also had subdivision potential. Mrs Cottle was required to obtain an independent valuation. That would assess the fair market value of the property in light of all relevant factors including, if it was relevant to its value, its potential for subdivision. She offered to do that. Mrs Barber declined that offer. Mrs Cottle was entitled to assume that Mrs Barber was comfortable with the price offered despite its obvious subdivision potential.

[169] Irrespective of whether Mrs Barber was comfortable with the price, if Mrs Cottle was aware that it was important to Mrs Barber to know whether a purchaser would be subdividing the property then I consider that she was required to disclose to Mrs Barber that subdivision was a possibility. I do not, however, think it is likely that Mrs Cottle was aware of this. Mrs Cottle understood the Barbers viewed their plan as important but the purchasers were not interested in that plan. No other purchasers had been interested in it either. Mrs Cottle told Mrs Barber this.

[170] As Mrs Cottle's counsel noted, the pleading does not specifically rely on the non-disclosure of the intended sale of the gullies to DOC. The case that has been put

on Mrs Barber's behalf is that Mrs Cottle intended to subdivide the property and in order to secure the purchase at an undervalue she told Mrs Barber that no one was interested in a subdivision. No application to amend the pleadings was made. Nevertheless I record that it is not established that Mrs Cottle knew or ought to have known that the Barbers did not know that a sale to DOC was intended. Mrs Cottle advised Mr Shue that extensions were needed because Mr Herbert was in discussion with DOC. Mrs Cottle could expect Mr Shue to seek clarification of that if that was important to the Barbers.

[171] Because I find that Mrs Cottle did not know that it was important to Mrs Barber whether the purchasers had any subdivision plans (in relation to the gullies or more widely), I also find that Mrs Cottle did not make any statements with the intention of hiding the purchasers' intentions and/or the true value of the property. In terms of the specific statements relied on I find:

- a) Mrs Cottle understood, mistakenly, that advertising was not required. She did not make misrepresentations about this to hide the pleaded conflict of interest;
- b) Mrs Cottle did not say that potential purchasers saw no value in a subdivision of the property and that it should be seen as a run off. She did say that no prospective purchasers were interested in the Barbers' subdivision plan. She also said that one prospective purchaser was interested in subdivision but he had viewed the price as too high. None of these statements were made with a view to hiding the pleaded conflict of interest;
- c) Mrs Cottle did say that the Puklowskis had pulled out, but that was a correct statement and was not made to hide the pleaded conflict of interest;
- d) Mrs Cottle did not state that the Herberts had to have a very rapid response as their daughter had become associated with undesirable people and they wanted to relocate quickly. She did seek a response

from the Barbers on the evening of 28 September 1998, but the negotiations with Mr Herbert had been drawn out and it was possible that Mr Herbert would pull out. She did not seek a response from the Barbers that evening with a view to hiding the pleaded conflict of interest;

- e) Mrs Cottle did say that she and her husband had replaced the people who had “pulled out” so that the sale could take place. But this was a correct statement and it was not made with the intention of hiding the pleaded conflict of interest;
- f) Mrs Cottle did say that the purchasers would be grazing dairy heifers and growing barley. She also said that the purchasers saw no value in the existing Barber plan and did not wish to buy it. She did not say that the purchasers had no intention of subdividing the property at any time. She did not make these statements, or fail to disclose the possibility of subdivision, because she intended to hide the pleaded conflict of interest;
- g) Mrs Cottle did not say that Mrs Barber could not consult a solicitor. She did say that she saw no need for this. This statement was not made to hide the pleaded conflict of interest but because she considered the offer to be the same as that which the Barbers had already agreed to and informed Mr Shue about;
- h) Mrs Cottle did not say that Mrs Barber had to or needed to sign the agreement. She did say that the offer might be withdrawn if the agreement was not signed. She did not say this with the intent of hiding the pleaded conflict of interest.

[172] Mrs Barber’s first cause of action fails. For completeness I have nevertheless considered whether Mrs Barber suffered the loss she claims. Because the loss claimed is the same for all the causes of action I deal with this topic at the end (see [199] to [211]). (I note that Mrs Barber has not pleaded that Mrs Cottle breached a

fiduciary duty by saying that Mrs Cottle said that Mrs Barber need not consult a solicitor, separately from whether this was said to hide a conflict about the true value of the property. If any such allegation had been pleaded Mrs Barber would only be able to recover if she could establish loss.)

**Second cause of action (against the first to fourth defendants): deceit**

[173] The second cause of action is against Mr and Mrs Cottle and Mr and Mrs Herbert for deceit. It is alleged that Mrs Cottle made false representations (essentially those set out at [160] above) with the purchasers' knowledge and authority. It is alleged that the false representations were made with the intention of acquiring the property at a price that ignored its potential for subdivision. It is alleged that as a result Mrs Barber received less than the property's market value.

[174] Deceit arises where a defendant makes a false representation, knowing it to be untrue, or being reckless as to whether it is true, intending that the claimant will rely on the representation: Todd *The Law of Torts in New Zealand* (4ed, 2005) at 18-01. A principal is liable for the agent's wrongdoing where it was committed by the agent acting within her authority: Todd at 18-25. Similarly, if the principal expressly authorises his agent to make a statement which he himself knows is false, the principal is liable. Equally, the principal is liable if he deliberately employs an agent from whom he conceals facts in the expectation that as a result of her ignorance the agent will give false information to some third party: Todd at 18-26.

[175] For the reasons already set out I consider that Mrs Cottle did not make any of the false representations that she is alleged to have made. Bearing in mind the high level of satisfaction required for a finding of deceit, I also consider that Mr Herbert did not make statements to Mrs Cottle he knew to be false nor did he conceal facts in the expectation that Mrs Cottle would give false information to the Barbers. He did not tell Mrs Cottle to tell the Barbers that the property would only be used for farming purposes. He told the Cottles that he was close to finalising a sale of the gullies to DOC. He also told them that he had a number of ideas for subdivision although these were different from the Barber plan. Mr Herbert told Mrs Cottle that

he did not want the offer renegotiated. Beyond that he left it to Mrs Cottle to act as the agent. Accordingly deceit is not made out.

**Third cause of action (against the first to fifth defendants): breach of trust**

[176] It is alleged that having procured the land in breach of duty to disclose a conflict of interest and by deceit, the property is held on trust and the purchasers are liable to account to Mrs Barber. It is alleged that Mrs Barber's loss is the difference between the sale price and the market value. I agree with the purchasers that this cause of action does not add anything to the first and second causes of action. The first and second causes of action have not been established and so the property is not held on trust as is alleged. This cause of action is therefore not made out.

**Fourth cause of action (against the first to fourth defendants): Real Estate Agents Act**

[177] This cause of action concerns Mrs Cottle's failure to obtain a valuation within 14 days of the second contract as was required by ss 63 and 64 of the Real Estate Agents Act. It is alleged that, because of incorrect legal advice, Mrs Barber affirmed the contract. It is alleged that, because third party rights were acquired without notice, it is now impossible for the plaintiff, properly advised, to rescind the contract. It is alleged that Mrs Barber has suffered loss as a result. That loss is the alleged undervalue at which she sold the property. This loss is claimed as "equitable damages".

[178] This cause of action is not made out. There is no evidence that Mr Shue gave incorrect advice. Given the non-compliance with ss 63 and 64, Mrs Barber had two options: (1) to avoid the contract; or (2) to affirm the contract and claim the commission. Mr Shue pointed out these options (refer [97] and [99] above) and on his advice the second option was taken. It cannot be assumed this option was taken because Mr Shue thought there was any merit in the assertion that Mrs Barber was estopped. According to Mrs Barber, Mr Shue's earlier advice (when the Barbers were granting extensions to the first contract) was to take "the bird in the hand". That same advice may have been given at this time, particularly as by then

Mr Nichols' gross valuation (from which the costs of a subdivision would need to be deducted) was \$875,000.

[179] Even if incorrect advice was given, any loss from failing to rescind the contract was caused by that advice and not by the purchasers. There is no basis on which Mrs Barber can claim equitable damages from the purchasers merely because the Act was not complied with, nor because a solicitor gives incorrect advice about the options open to the vendor.

**Fifth cause of action (against the sixth defendant): negligence**

[180] The claim against Quotable Value is that it owed a duty of care to Mrs Barber when carrying out its valuation dated 12 November 1998 (see [87] above). It is said that Quotable Value negligently undervalued the property, that Mrs Barber relied on Quotable Value's valuation in settling the purchase and that she suffered loss as a result. The loss is said to be the undervalue at which she sold the property.

[181] Quotable Value says that it did not owe a duty of care to Mrs Barber because it had expressly disclaimed any liability to Mrs Barber by the disclaimer stated on the report (see [87] above). Quotable Value says that it is well accepted that disclaimers are effective to exclude responsibility for negligent misstatement: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 486, 504 and 533; and as recently applied, for example, in *McKinlay Hendry Ltd & Anor v Tonkin & Taylor Ltd* CA 81104 9 December 2005 at [8], [31], [32] and [36]. Quotable Value says that this common law position is not varied by ss 63 and 64 of the Real Estate Agents Act. Those sections impose obligations on real estate agents when they purchase property. It is submitted that the Act does not impose any duties or obligations on valuers.

[182] For Mrs Barber it is submitted that the disclaimer is inoperative against the requirements of the Real Estate Agents Act. It is submitted that Quotable Value must have known that Mrs Cottle wanted a valuation for the purposes of the Real Estate Agents Act. Alternatively, Quotable Value must have known that Mrs Cottle was Mrs Barber's agent and Quotable Value cannot rely on the disclaimer clause in

the report to an agent against the disclosed principal. Either way it is said that Quotable Value knew the report was for Mrs Barber and the disclaimer is to be construed as applying to persons other than Mrs Cottle and Mrs Barber.

[183] There was some limited evidence before me about the practice of valuers when giving valuations for the purposes of the Act. So far as that evidence went, it indicated that the practice amongst valuers differed as to whether a report required under ss 63 and 64 of the Real Estate Act was to be made out to the vendor or the real estate agent and whether a disclaimer would be included. Mr Lloyd, an experienced real estate agent who was called by Mrs Barber, said that in his experience ss 63 and 64 valuations are generally made out to the purchaser and generally include a disclaimer. Mr Hobson, an experienced valuer called by the purchasers, said that if his firm was instructed by a real estate agent they would clarify the purpose of the valuation. If the valuation was for the purposes of ss 63 and 64 they would make it clear that this was the purpose so that Mrs Barber was able to rely on it. Mr Loveridge, an experienced valuer called by Quotable Value, advised that his practice was to address the valuation to the real estate firm instructing him and to include a disclaimer similar to that contained in the Quotable Value valuation.

[184] I consider that the purpose of ss 63 and 64 of the Real Estate Agents Act is to obtain a valuation that the vendor can rely on so that the vendor can give informed consent to selling their property to an agent at the price offered by the agent. To meet this purpose the valuation report supplied must be one on which the vendor is entitled to rely. That could be achieved by having the report made out to the vendor. Alternatively the report might be addressed to the real estate agent but in that case it cannot then seek to disclaim liability to the vendor. Ideally, though not essentially, the report should state that it is for the purposes of ss 63 and 64 of the Real Estate Act. In this case, had Quotable Value known that the report was for the purposes of ss 63 and 64, I would construe the disclaimer as not applying to Mrs Barber. She would be “the client” for the purposes of the valuation.

[185] However, it is not clear that Quotable Value knew the valuation was sought for the purposes of the Real Estate Agents Act. Mr Langley was not called to give

evidence by any party. The evidence is that at the end of October 1997 Mrs Cottle approached Mr Langley for a current market valuation. Mrs Cottle says she told Quotable Value that it was required urgently. Mr Langley knew of the proposed agreement to buy the gullies because DOC provided it to Quotable Value but asked that it keep the agreement confidential. The evidence does not establish that Mr Langley knew at this point that Mrs Cottle was buying the property, nor that Mrs Cottle was intending to give the valuation to the Barbers, and nor that the purpose of the valuation was to (belatedly) comply with Mrs Cottle's obligations under the Real Estate Agents Act. After Mr Langley completed his valuation he knew that Mr Barber had seen the valuation and was not happy with it, but Mr Langley's view was that he could not change his valuation.

[186] It would be unfair on valuers to be exposed to liability to vendors if they are not aware that the purpose of their report is for vendors to be satisfied about the price that a real estate agent purchaser has offered. In the absence of knowledge that this report was for ss 63 and 64 purposes, the "client", as understood by Mr Langley, was Mrs Cottle. Quotable Value's disclaimer was effective to avoid liability to anyone other than Mrs Cottle. This meant that Quotable Value owed a duty of care to Mrs Cottle, but not to Mrs Barber.

[187] Because only Mrs Cottle could rely on the valuation, it did not (without an amendment to the disclaimer) satisfy the real estate agent's obligations under ss 63 and 64 (quite apart from it being out of time). Had Mrs Barber wished to avoid the contract she could have done so both because the valuation was out of time and because the valuer had stated that the report could not be relied on by anyone other than Mrs Cottle. Mrs Barber did not seek to do that.

[188] Because no duty of care was owed by Quotable Value to Mrs Barber the claim against Quotable Value fails. For completeness I consider the other elements of the claim against Quotable Value.

[189] Quotable Value submits that the report was not negligent. It submits that the value in the report was at the conservative end, but that it nevertheless was "within range". It refers to *Gosper & Ors v Re Licensing (NZ) Ltd & Ors* NZ Valuers

Journal, November 1999, 42 where the High Court accepted that valuation was a matter of opinion and there was room for wide margins without one valuation necessarily being wrong. In support of this submission Quotable Value set out the following evidence that is before the Court as to the market value of the property:

<b>Valuer</b>	<b>Valuation ex GST</b>
Evidence as to another purchaser's top price	\$680,000
QV (as per November 1998 report)	\$700,000
Mr Hobson (called by first to fifth defendants) (originally \$735,000 but later amended)	\$718,000
Mrs Barber's asking price in July 1998	\$720,000
Mr Loveridge (called by QV)	\$725,000
Mr Nichols (as per November 1998 report, allowing a deduction for costs)	\$725,000 (\$875,000 gross)
Mr Sampson (called by plaintiff)	
26 February 2003	\$997,000 (\$1,468,000 gross)
18 February 2005	\$890,500 \$1,583,000 gross)
18 October 2005	\$1,073,800 (\$2,223,500 gross)

[190] Quotable Value did not include the evidence of Mr Goudie (one of the experts called by Mrs Barber), possibly because Mr Goudie did not carry out his own valuation but instead critiqued the valuations provided by the other valuers. Based on this critique he concluded that "prudently a purchaser would pay more than a block of value of between \$700,000 - \$725,000". The defendants objected to Mr Goudie's evidence because it was late but after giving the defendants an opportunity to discuss the evidence with their experts the defendants accepted that they were not prejudiced by its late introduction. I therefore allowed the evidence to be given.

[191] In any case, putting to one side Mr Goudie's view and excluding the Sampson valuations, from this evidence Quotable Value submits that all of the evidence as to value falls within a 5% range. Mr Nichols (the expert called by the purchasers) and Mr Loveridge (the expert called by Quotable Value) say that,

although conservative, Mr Langley's valuation was within an acceptable range. Quotable Value also says that its valuation was 10% below the then current rating valuation of \$770,000. It says that this is similar to the average variation in the sales relied on by Mr Loveridge in this valuation.

[192] I do not place much weight on the evidence of another purchaser's top price. That purchaser did not give evidence. I do not know the reasons for that being his top price. It is evidence only that it was the most he was prepared to pay. It is not evidence that this top price was the fair market value.

[193] Nor do I place much weight on Mrs Barber's decision to sell at \$720,000 (nor, subsequently, at \$700,000). That decision was apparently based on general discussions Mr Barber had with Mr Page about farm values. Mr Page had not been to the property and carried out a formal valuation.

[194] I agree that Mr Sampson's figures do not provide the fair market value of the property. It is well above the other valuations. It is also well above the Government Valuation of \$770,000 when the evidence indicates that comparable properties in 1998 were selling below Government Valuation. The reason for Mr Sampson's valuation being out of line with the others is that he neither used the standard "hypothetical subdivision" approach nor did he crosscheck his valuation against the value of the land as a block. The reason he did not do a "hypothetical" subdivision is that he was instructed to determine how much the property could realise if it was sold. He says that he was assessing an actual subdivision rather than a hypothetical one on the basis of an approved plan.

[195] In making his calculations the defendants have pointed out a number of errors. For example Mr Sampson accepted his allowance for engineering, subdivision and legal costs were too light. His February 2005 value was based on an 18 lot subdivision which he understood was approved (when in fact it was a 16 lot plan that had approval). His October 2005 valuation was based on a 25-28 lot plan (for which there was no approval in 1998) and he accepted his allowance for holding costs was too light. Overall (and as pointed out by Mr Goudie and Mr Hobson)

Mr Sampson's gross realisation figures were inflated, his expenditure items were low and his allowance for profit and risk is inadequate for the market at that time.

[196] Putting Mr Sampson's evidence to one side, Quotable Value is correct that its valuation was within 5% of the other valuation evidence. In my view, however, that does not entirely answer Mrs Barber's claim that the report was not prepared to the required level of skill and care. Mrs Barber's claim pleads that the valuation report failed to identify that subdivision, or a sale on the basis of a subdivision, was a significant element in realising the full market value of the property. I consider that the apparent failure to consider the subdivision potential of the property is a valid criticism of Quotable Value's approach. Nowhere does Quotable Value make mention of the existence of the Barber subdivision plan or its subdivision potential generally. It is not apparent from its valuation report that Quotable Value has considered whether the subdivision potential increases the value of the property. This omission, however, is only significant if it led to a value that was lower than it otherwise would have been. This is essentially the same issue as whether the property was sold at an undervalue which I consider further below ([199] to [211]).

[197] Quotable Value says that it also has no liability to Mrs Barber because Mrs Barber did not rely on Quotable Value's valuation in any event. Mrs Barber's evidence was that she considered Quotable Value's valuation was deficient because it did not refer to the subdivision potential of the property. She wrote to Mr Fahey setting out her criticisms with the report. Mr Barber also contacted Mr Langley with a view to having him amend his valuation. Mr Shue proposed on the Barbers' behalf that a further valuation be obtained against which a negotiation could then take place. The strategy taken was to see if the purchasers could be persuaded to increase their price. The purchasers, however, were not prepared to negotiate. Against that background Mrs Barber says that in deciding to settle the contract she relied on Mr Shue's advice. Mr Shue's advice was that Mrs Barber could sue for the commission for non-compliance with the ss 63 and 64 of the Real Estate Agents Act and potentially also for damages. This was not inconsistent with his earlier advice that the extensions to the first contract should be granted because the Barbers should take "the bird in the hand".

[198] The valuation was provided before Mr Shue gave his advice. It may or may not have been a factor in his advice. Mr Shue did not give evidence and to say that his advice would have been different if a higher valuation had been given by Quotable Value would be to speculate. A valuation above \$700,000 but below \$720,000 would still have indicated that the purchase price was at fair market value (because Mrs Barber was receiving the benefit of other conditions viewed as being equivalent to \$20,000). Even if the valuation had been above \$720,000 the strategy may still have been to seek to negotiate an increase in the purchase price but, failing that, to settle at the contract price and sue for the commission and, potentially, damages. I therefore cannot infer that the advice would have been different. The evidence from Mrs Barber is that she did not rely on the valuation. On this basis Mrs Barber's claim against Quotable Value also fails.

**Loss: sold at undervalue?**

[199] On all the causes of action the loss claimed is the undervalue at which Mrs Barber says she sold the property. The defendants say that Mrs Barber suffered no loss because the \$700,000 paid was the market value of the property in September 1998. For Mrs Barber it is submitted that the Court is entitled to accept Mr Sampson's evidence in preference to Mr Hobson's and Mr Loveridge's. Criticisms are made of aspects of the approaches taken by Messrs Hobson and Loveridge. It is said that essentially what has happened is that the valuers called by the defendants have taken a conservative approach and Mr Sampson has taken a more optimistic approach. It is submitted that the burden is on the defendants to show that the claimed loss is not appropriate. As a "fall back" (that is, if the Court does not accept Mr Sampson's evidence), it is submitted that Mr Goudie's evidence should be accepted.

[200] In my view I am unable to place any weight on Mr Sampson's valuation. It has been adjusted a number of times, but remains out of line with the range evident from the other evidence. It suffers from the criticisms discussed above (refer [194] to [195]). Nor do I accept that Mr Goudie's view is an appropriate assessment of the loss. He has not carried out a fair market valuation. Instead he has peer reviewed all

the valuation evidence and concluded that prudently a purchaser would pay more than \$700,000 - \$725,000. He does not say how much more.

[201] Mr Hobson, the defendant's expert, describes the Nichols' gross realisation as "extremely conservative" even in the market prevailing at that time. By comparison Mr Hobson's gross realisation figure is \$928,090 excl of GST. Mr Hobson considers Mr Langley's valuation to be "at the conservative end of the range". Mr Langley has not specifically addressed the subdivision potential of the property. He has not crosschecked his valuation by using the hypothetical subdivision approach.

[202] Mr Hobson used two methods. He considered the property both as a livestock grazing entity, and then as a potential rural lifestyle subdivision. The farm valuation method resulted in a value of \$718,000. The rural lifestyle subdivision method resulted in a valuation of \$753,000. Based on these two methods he assessed the fair market value of the property as being \$735,000 (the halfway point between the valuations produced by the two methods).

[203] However Mr Hobson subsequently noted two errors in his approach on the subdivision method. Adjusting his calculation to remove those errors produced a valuation (on the subdivision method) of just over \$700,000. Mr Hobson was cross-examined about his approach. It was suggested that his valuation was conservative for reasons including the special features of this property, his 30% allowance for outlay (about which there is room for debate), the plans the purchasers already had for Buller Road and the corner section, and that he had not taken into account comparable sales from the Kapiti Coast. Mr Hobson did not accept any of these criticisms were valid.

[204] In assessing the fair market value of the property at \$720,000 Mr Loveridge used only the comparable sales approach. Like Mr Langley, he did not crosscheck his value against the hypothetical subdivision approach. As Mr Goudie notes, most of his comparable sales are dairy run off or deer farms. Sales of market garden type or lifestyle blocks have not been used. No premium is recognised for the existence of the subdivision plan.

[205] Mr Loveridge explained that the reason for not using the hypothetical subdivision approach was because he considered that lifestyle blocks were not the highest and best use of the property. He referred to the lack of interest in subdivisions of this kind in 1998 and therefore the risk associated with them and the difficulty of valuing it with any certainty on this basis. Mr Loveridge's view that the highest and best use was not as lifestyle blocks was supported by Mr Hobson's evidence as to his revised value from the hypothetical subdivision method. Mr Loveridge acknowledged that if the subdivision plan of the properties that fronted Buller Road and the Prince subdivision proposal were known in September 1998, he might have taken them into account.

[206] Overall I consider that the valuation evidence shows that there is room for debate and that the fair market value was between \$700,000 (conservative) and \$730,000 (optimistic). Mrs Barber sold the land at \$700,000 but received other benefits that were calculated to be worth \$20,000. I consider that Mrs Barber sold the property at its fair market value and not at an undervalue. On this basis also Mrs Barber's claims against the defendants fail.

[207] In addition, in relation to the first cause of action, I consider that if Mrs Barber had been told that the purchasers intended to subdivide the property she would have proceeded with the second contract. That was the fair market value and she knew that from the Nichols valuation (once costs were deducted) which the Barbers had obtained.

[208] That leaves the claim for the commission. The fourth cause of action pleads non-compliance with the Real Estate Agents Act. Mrs Cottle submits that the real estate agent from whom the commission is repayable is the sixth defendant. I do not accept this submission.

[209] Section 63 has two parts to it. The first part applies to a "real estate agent". The second part applies to a "partner or employee of a real estate agent". Both parts prohibit the purchase of land without the consent of the vendor on the prescribed form. Section 3 defines a "real estate agent" as being "a real estate agent who acts... for reward as an agent in respect of the sale". Section 63(3) provides that: "[n]o

commission shall be payable in respect of any such contract ... or any commission paid ... shall be repayable by the real estate agent”.

[210] The evidence from Mr Fahey is that Mrs Cottle was an independent contractor. He said that her remuneration was solely in the form of commissions paid when a property was sold. Mrs Cottle confirmed this. Mr Fahey also said that commission was divided up between those who played a party in the listing and selling of the property.

[211] In my view Mrs Cottle is a “real estate agent” for the purposes of s 63. She received the commission “in respect of the contract” between Mrs Barber and Castle Realty. She is required to repay the commission. There is no direct evidence of the amount Mrs Cottle received by way of commission on this sale. It is submitted for Mrs Barber that I should estimate this. I do not have sufficient information to do that with any degree of accuracy. Accordingly I order that Mrs Cottle is to repay the commission that she received. If there is any dispute between the parties about the amount they may submit memoranda to me within 30 days of the date of this judgment.

## **Result**

[212] Mrs Barber understood that no one wanted the Barbers’ subdivision plan and saw no value in that. Over the next five years a subdivision (though different from the subdivision plan) took place in various stages. The purchasers made a significant profit from that. However the causes of action are not made out on the evidence. Mrs Cottle did not make the false statements she is alleged to have made, and she did not attempt to secure the property at an undervalue by hiding the subdivision potential or through other statements. There was no deceit or breach of trust. The Real Estate Agents Act was breached but Mrs Barber elected not to rescind the contract. Mrs Barber did not sell the property for less than its fair market value. The only relief to which she is entitled is the return of the commission received by Mrs Cottle.

[213] The claim against Quotable Value is also not made out. Quotable Value's duty of care was to Mrs Cottle because it expressly disclaimed liability to anyone else. Although its valuation was conservative, and it did not take into account the subdivision potential, it nevertheless produced a reasonable assessment of the property's fair market value. In any event the valuation was not relied on by Mrs Barber and Mrs Barber suffered no loss because she sold the property at its fair market value.

[214] The defendants have requested the opportunity to make submissions on costs. If the parties are unable to agree on costs they may file memoranda within 30 days of the date of this judgment.

Mallon J

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