

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

**CIV-2005-406-000091**

BETWEEN	ALTIMARLOCH JOINT VENTURE LIMITED Plaintiff
AND	DAVID SEFTON MOORHOUSE AND JILLIAN WINSTONE MOORHOUSE First Defendants
AND	THE MARLBOROUGH DISTRICT COUNCIL Second Defendant
AND	VINING REALTY GROUP LIMITED First Third Party
AND	GASCOIGNE WICKS Second Third Party

Hearing: 8-12 and 17-19 October 2007

Counsel: E D Wylie QC and R M Dunningham for Plaintiff  
T C Weston QC for First Defendants  
M R Camp QC and M Radich for Second Defendant  
A B Darroch for First Third Party  
F B Barton and M Couling for Second Third Party

Judgment: 3 July 2008

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**JUDGMENT OF WILD J**

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## **Introduction**

[1] Grapes cannot be grown successfully in Marlborough unless irrigated. Water, and the rights to it, are thus critically important in Marlborough's grape growing areas.

[2] This case concerns water permits for a property called Altimarloch in the Awatere Valley.

[3] Altimarloch was a farm property owned by the first defendants, Mr and Mrs Moorhouse (the Moorhouses). For pasture irrigation, the Moorhouses were granted by the second defendant, the Marlborough District Council (MDC), resource consents to take class A, B and C surface water. I will refer to these as A, B or C permits.

[4] In or about 2000-2001 the Moorhouses subdivided Altimarloch. In January 2001 they sold one part of the property to McNaught & Walker Limited (MWL) for development as a vineyard and olive grove. As part of that sale the Moorhouses transferred to MWL half their A, and all their B, water permits. Ms Leov of Gascoigne Wicks (GW) acted for the Moorhouses on that sale.

[5] In February 2004 the plaintiff purchased the remaining part of Altimarloch from the Moorhouses. Like MWL, the plaintiff purchased for vineyard development. The plaintiff believed it was acquiring, as part of this purchase, all the A, B and C water permits originally held by the Moorhouses. Indeed, upon settlement, the Moorhouses' solicitor handed the plaintiff's solicitor transfers to the plaintiff of each of those water permits. Only subsequently, when it attempted to register those transfers with the MDC, did the plaintiff become aware that the Moorhouses still held only half the A, and none of the B, water permits.

[6] This case results from that unfortunate situation. It was the A right the plaintiff had particularly counted on getting, because it would have permitted the

plaintiff to draw, direct from the Altimarloch Stream, sufficient water to irrigate all its proposed vineyard development.

[7] At the hearing it appeared that no more A class water was available to the plaintiff for Altimarloch. The 6 June 2008 memorandum of counsel for the plaintiff advised that the plaintiff had, unexpectedly, been able to purchase some additional A class water which will partially offset the A class water the plaintiff believed it was purchasing from the Moorhouses, but did not get. I deal further with this development in [224]-[226] following. The plaintiff does have the C water permit. That permits the plaintiff to take water during the wet winter months to fill a storage dam. Then, during the dry summer/autumn months up to harvest, the plaintiff can draw water from the dam to irrigate that part of its vineyard not covered by the half of the A permit it did get.

[8] The broad issues in this case concern both liability and quantum. The plaintiff holds the Moorhouses and the MDC liable. The Moorhouses seek to pass on any liability they may have to the land agent and/or solicitor who acted for them on the sale to the plaintiff. To that end, the Moorhouses joined the land agent and the solicitor as first and second third parties, respectively. The land agent is Vining Realty Group Limited, which traded/trades under the Bayleys banner, and which I will call Bayleys. The solicitor is GW.

[9] Apportionment of liability arises in three ways. First, two defendants are sued, although not as joint tortfeasors. Second, both defendants, and also both third parties, allege the plaintiff is partly or wholly the author of whatever loss it has suffered. Third, the Moorhouses sue both third parties in tort as well as contract, and each admits a tortious as well as contractual duty of care to the Moorhouses.

[10] The plaintiff claims the current cost of building the storage dam that would allow it to utilise the C water permit. But the defendants and third parties say that the plaintiff's loss, if any, is only the difference in the value of that part of Altimarloch the plaintiff purchased with, and without, the A and B water permits the plaintiff thought it was acquiring, but has not. That value differential is considerably less than the cost of building a storage dam.

## **The claims**

### ***By the plaintiff***

#### *Against the Moorhouses*

[11] The plaintiff sues the Moorhouses in contract under the Contractual Remedies Act 1979. It alleges that the Moorhouses represented to the plaintiff that they held, and were able to transfer to the plaintiff as part of the sale, all the A and B water permits to Altimarloch. Those representations were made by the Moorhouses by their agents:

- a) Bayleys, in two ways:
  - Pre-contract, in representing orally that:
    - There was ample water available for irrigation purposes;
    - The Moorhouses held an A water permit which would provide sufficient water for agricultural purposes;
    - The Moorhouses held all of the A and B water permits.
  - In writing, in the 23 February 2004 letter under cover of which it sent the plaintiff's solicitors (Wain & Naysmith) the contract together with copies of the A, B and C water permits certificates originally held by the Moorhouses, noting that those rights totalled "an irrigated area in excess of the total land area of 145.522 hectares being purchased ...".
- b) GW, when, in a letter to Wain & Naysmith on 27 February 2004, in terms of clause 19 it approved the agreement for sale and purchase.

[12] The plaintiff alleges these representations were false, resulting in damage to the plaintiff amounting to \$776,760. The plaintiff claims damages in that amount. \$776,760 was (at the date of trial) the estimated cost of building the storage dam needed to utilise the C water permit.

*Against the MDC*

[13] The plaintiff's case against the MDC is that the Land Information Memorandum (LIM) the MDC issued to the plaintiff's solicitor before the plaintiff confirmed the agreement as unconditional showed all the A water permits still attaching to that part of Altimarloch which the plaintiff was purchasing. In relation to its issue of the LIM, the plaintiff sues the MDC in negligence, for breach of statutory duty and for breach of the Fair Trading Act 1986. It alleges the MDC was negligent in:

- a) Issuing a LIM which showed the Moorhouses were holders of all the A water right.
- b) Failing to disclose the transfer of half the A right by the Moorhouses to MWL.

[14] The same two allegations are the basis of the second cause of action, alleging breach by the MDC of s44A Local Government (Official Information and Meetings) Act 1987 (LGOIMA).

[15] The same is true of the third cause of action, alleging that the LIM was a false and misleading representation breaching s14(1) Fair Trading Act. The plaintiff alleges the same loss, and claims the same damages, against the MDC.

***By the first defendants***

*Against Bayleys*

[16] The Moorhouses sue Bayleys as their agent for the sale of Altimarloch to the plaintiff. They allege Bayleys owed the plaintiff a duty, whether in contract or in tort, to act with the reasonable care and skill of a competent real estate agent. (The reference to ‘owed the plaintiff’ must be an error for first defendants, since Bayleys owed no contractual duties to the plaintiff, and arguably no tortious duties either.) They allege Bayleys knew or ought to have known that they held only half the A permit and the whole of the C permit.

[17] Bayleys admits it owed the plaintiff (again, I assume this was intended to mean the first defendants) a contractual and tortious duty of care, and admits also that its Mr John Hoare had been involved in the earlier sale of part of Altimarloch to MWL, but denies that it knew or ought to have known the correct position as to the water permits for Altimarloch.

*Against GW*

[18] The Moorhouses allege they retained GW as their solicitors on the sale of Altimarloch to the plaintiff. They allege GW owed them a duty of care, whether in contract or in tort, to act with the reasonable care and skill of a solicitor.

[19] The Moorhouses allege GW knew or ought to have known the correct position as to the water rights for Altimarloch, because GW had also acted for the Moorhouses when they sold the first part of Altimarloch to MWL. They allege GW was careless in its handling of the water rights on their sale to the plaintiff, and acted without their instructions in executing and handing over transfers to the plaintiff of the A, B and C water permits upon settlement.

[20] GW admits the alleged duty of care and that it had acted (its Mr Ron Crosby) for the Moorhouses on the earlier sale to MWL. It denies breach of its duty of care to the Moorhouses.

### **The issues**

#### [21] *Plaintiff's claim against Moorhouses*

- *Materiality:* Did the plaintiff make clear to the Moorhouses that its interest in purchasing Altimarloch was for vineyard development, and its requirement for the water necessary to do that?
- *Representations:* Did the Moorhouses, or their agents, make to the plaintiff in the contract the representations alleged by the plaintiff (and set out in [11] above)?
- *Inducement:* Did those representations induce the plaintiff to enter into the agreement and/or subsequently to confirm it as unconditional?
- *Representations false:* Were any representations that were made false?
- *Causation and contributory negligence:* Did the plaintiff cause or contribute to its loss, or was it contributorily negligent?

#### [22] *Plaintiff's claim against the MDC*

- *Duty of care:* Did the MDC owe the plaintiff a duty to take reasonable care in issuing its LIM, including to ensure the records it supplied with the LIM were accurate and up-to-date?
- *Breach:* If yes to the previous issue, in issuing a LIM which included all the A water permits, did the MDC breach its duty of care to the plaintiff?

(Note: In the agreed statement of issues of 27 June 2007, this issue stated that the LIM had included all the A and B water permits. That is not the case, and I have narrowed the issue accordingly, as did the parties' submissions.)

- *Statutory duty:* Did the MDC owe the plaintiff a duty, pursuant to s44A LGOIMA, to include in its LIM the information that half the A water right had been transferred to a third party (MWL)?

(Note: The same comment applies to this issue.)

- *Breach:* If yes to the previous issue, did the MDC breach that statutory duty, and does liability in tort follow?
- *Fair Trading Act:* Was the information contained in the MDC's LIM a "false and misleading representation" or did it amount to "misleading and deceptive conduct" in terms of the Fair Trading Act 1986?
- *Breach:* If yes, is the MDC liable to the plaintiff in respect of the LIM?
- *Contributory negligence:* Was the plaintiff contributorily negligent?

***Moorhouses' claim against Bayleys (as first third party)***

- *Bayleys' knowledge:* Did Bayleys know, or should it have known, that the Moorhouses had transferred half the A water permit and all the B water permit to MWL in 2002?
- *Misrepresentations:* Did Bayleys make any of the alleged misrepresentations?

- *Negligence:* Was Bayleys in breach of an admitted duty of care to the Moorhouses by making those representations knowing the true position, or without first checking the position with the Moorhouses?
- *Admission of liability:* Has Bayleys admitted its liability to the Moorhouses?

***Moorhouses' claim against GW (as second third party)***

- *GW's knowledge:* Did GW know or should it have known that the Moorhouses transferred half their A water permit and all their B permit to MWL in 2002?
- *Negligence:* Was GW negligent in relation to the water permits, in particular in not:
  - Clarifying with the Moorhouses which water permits were to be transferred pursuant to clause 20.0 of the agreement.
  - Advising the plaintiff's solicitors which water permits the Moorhouses would be transferring pursuant to clause 20.0.
- *Authority:* Did GW have authority to sign transfers of the A, B and C water permits and, if not, was GW's signing of those transfers causative of loss?

***Apportionment***

[23] If one or more of the defendants and/or third parties is liable, what is the apportionment as between the liable parties?

## Factual background

[24] The Moorhouses bought Altimarloch in 1982 for some \$300,000. It was a sheep and cattle farm, originally of some 1,500 acres (approx. 607 hectares). First the Moorhouses sold off some of the steeper hill country for forestry.

[25] The MDC granted the Moorhouses the following water resource consents:

<b>Resource consents to take water held by the Moorhouses</b>					
<b>No.</b>	<b>Date</b>	<b>Class</b>	<b>Irrigated area</b>	<b>Expiry</b>	<b>Details</b>
RC U 970068	12.3.97	A	86h	31.3.2007	To take water from Altimarloch Stream to irrigate grapes and olives.
RC U 991689	15.12.99	B	86h	20.12.2034	To take water from Altimarloch Stream to fill a storage dam.
RC U 010884	20.9.01	C	250h	30.9.2011	To take water from Altimarloch Stream to fill storage dams (yet to be constructed) for irrigation of pasture and proposed vineyard.  Note: states that the area to be irrigated "shall not exceed 250 hectares". After giving a legal description of that land also states "This land is currently the subject of resource consent for subdivision U010396 and new titles will subsequently issue".

As mentioned, although these are correctly described as resource consents to take water, I will call them water permits.

[26] The A water permit is the superior one. Very seldom can it not be utilised on a daily basis. Guidance from the MDC indicates that A water permits are only unavailable, on average, one week in every five years. Given recorded flows in the Altimarloch Stream, the A permit would have given the plaintiff a year round reliable source of irrigation water for all its vineyard development, without the construction of a storage dam. By contrast, the B and C permits can only be utilised with a storage dam, and those rights are expressed accordingly. There was a great deal of evidence about this, but that sufficiently describes the three classes of water permits granted in relation to Altimarloch.

[27] By the late 1990s, the vineyard potential of the Awaterre Valley, particularly its lower reaches, was well established. Pastoral properties with flat land and access to water acquired a new and much higher value for vineyard development. Altimarloch was such a property.

[28] Seeking to capitalise on this, the Moorhouses subdivided Altimarloch into two roughly equal parts. The new titles eventually issued on 6 May 2002. GW (Ms Leov) acted for the Moorhouses in completing this subdivision.

[29] Meanwhile, by agreement signed on (but not dated) 29 January 2001, the Moorhouses sold one of the two subdivided blocks to MWL for development as a vineyard and olive grove. Century 21 McMurtry Real Estate (Mr John Hoare, assisted by Ms Jacquie Herkt) was the Moorhouses' agent, and GW (Mr Crosby, assisted by Ms Leov) their solicitor on that sale.

[30] Water permits featured prominently in the sale to MWL. As part of the sale, the Moorhouses transferred to MWL one-half of their A, and all of their B, water permits.

[31] In addition, the Moorhouses granted MWL an easement to convey the B water over Altimarloch to a "reservoir" which MWL planned to build on its newly acquired land. They also granted MWL an easement right:

... to draw water from the Altimarloch Stream sufficient to irrigate no more than 5 hectares of vineyard (on MWL's land).

[32] On 8 August 2003 the Moorhouses appointed Bayleys their sole agent for the sale of the remaining block of Altimarloch. The agency authority named only Mr John Hoare as listing agent. However, a fresh authority signed by the Moorhouses on 13 February 2004 named the listing agent as "J Herkt – John Hoare".

[33] The Property Information brochure Bayleys prepared for the sale included this:

## 5. WATER SUPPLY & IRRIGATION

All house water and water for irrigation is supplied from a creek running through the property that originates from a spring in the hills behind. The house water is filtered. The intake level is some 90 metres above the flats. The water comes down the hill in a 150mm pipe that is pressure regulated into 50mm irrigation and house supply. There are no pumps on any of the systems, all water is gravity pressured. There are no holding tanks except for a concrete tank behind the garage that feeds a pump in the garage that can be used when the creek is in flood and discoloured, this has seldom ever been used. The water supply is covered by a ten year Water Right with four years to run. The water flowing in the creek hardly varies winter and summer. A 50mm fire hydrant is located close to the homestead – a fire hose is stored in the car garage nearby.

The lake is filled via a controlled weir in the creek, in the event of flooding the intake can be dammed. The lake supplies irrigation hydrants on the lower road flats, the lake overflow returns to the creek.

The farmed flat land away from the slopes at the base of the hill on the west boundary, can be watered by a portable sprinkler system. Hydrants are permanent placed in most paddocks with towed sprinkler lines on each that can be moved by a four wheel bike. There is sufficient water volume and pressure for approximately 75% of the sprinklers to be used at one time ...

...

## 9. LOCATION

... Surrounding properties include the Medway Vineyards.

[34] The Moorhouses had Mr D J Stark of Alexander Hayward Ltd, Registered Valuers of Blenheim, value Altimarloch. His valuation report, dated 16 December 2003, contained the following:

### LAND

...

The Altimarloch property has been subject to various water permits in recent years, some of which have transferred to the adjoining property to the east of some 132 hectares which was sold off the original Altimarloch property in 2001. Original Resource Consent for Class A irrigation water from the Altimarloch Stream was for 1,500 m<sup>3</sup> per day or 17.36 litres per second. This water permit has been amended with 750 m<sup>3</sup> per day remaining with our subject block. This Resource Consent expires 31 March 2007.

...

We consider an area of some 45 hectares on upper terrace flats to be suitable for viticulture although some form of frost protection will be required as this area is subject to frosts during the critical spring period. ...

...

CURRENT MARKET VALUE

\$2,400,000

[35] It is at this point that the plaintiff enters the picture. The sole director and shareholder of the plaintiff, and the driving force behind it, is Mr Warren McNabb. Mr McNabb is a graduate in law, commerce and business administration. He had mainly worked overseas. His parents owned The Bluffs Vineyard near Blenheim in Marlborough, and Mr McNabb had acquired a small shareholding in this in 2000. Then, in April 2003, The Bluffs and Mr McNabb's own company jointly purchased Omaka Terrace Vineyard, also near Blenheim.

[36] As a result of these investments, Mr McNabb was well versed in the economics and operation of the Marlborough viticulture industry.

[37] In mid-2003 Mr McNabb and his wife, both then living in Toronto, decided to return to New Zealand and purchase their own vineyard.

[38] Mr McNabb considered, but decided against, a property next to the Omaka Terrace Vineyard. This was his introduction to Bayleys, and in particular to Mr Hoare and Ms Herkt, who had moved to Bayleys and were selling that 'next-door' property. Mr McNabb indicated to Bayleys that he was interested in other properties that were suitable for development of vineyards.

[39] In October 2003 Bayleys advised Mr McNabb that Altimarloch was for sale. After checking details of Altimarloch on Bayleys' website, Mr McNabb concluded that the likely selling price was about \$3 million, putting the property beyond his price range. He therefore did not pursue his interest in Altimarloch at that stage. However, early in 2004 Mr McNabb and his wife decided to return to New Zealand sooner rather than later, and Mr McNabb renewed his interest in Altimarloch.

[40] Mr McNabb ascertained from Mr Hoare that Altimarloch was still for sale. On 5 January 2004 Mr Hoare sent him Bayleys' Property Information brochure, and Mr McNabb read it, including the information about irrigation water which I have set out in [33].

[41] Mr McNabb thought Altimarloch had potential. Later on 5 January he instructed Mr Vern Harris of Property and Land Management Limited (PALMs) to advise him on the suitability of Altimarloch for development as a vineyard. PALMs was/is a property consultant, in particular in relation to vineyard development.

[42] In the course of preparing his report to Mr McNabb, Mr Harris rang Bayleys and asked for Mr Hoare. Mr Hoare was away, but Mr Harris was referred to Ms Herkt who accepted Mr Harris' evidence that she told him she could answer any general queries he had about Altimarloch. Mr Harris asked Ms Herkt for copies of all the water permits for Altimarloch. Mr Harris' evidence was that he also asked Ms Herkt whether there were any concerns about the permits and she told him there were not. Ms Herkt did not recall this conversation, but said she would not have commented on the water permits for Altimarloch. (129/20-30)

[43] Ms Herkt dealt with Mr Harris' request by asking her office assistant, Ms Coyle, to go down to the MDC and get copies of the water permits. Ms Coyle returned with copies of the three water permits set out in [25], which Ms Herkt faxed to Mr Harris later on 14 January. There was no covering letter or note. Ms Herkt accepted that she did not tell Mr Harris that Bayleys had obtained the permits from the MDC, signing a disclaimer in order to do so. (130/5)

[44] Because neither Ms Coyle nor the MDC officer she dealt with (J M Boyce) gave evidence, there is no direct evidence as to what happened at the MDC's offices. I do not know whether a file or files were handed to Ms Coyle for her to look through, and extract the water permits for copying, or whether the Council officer did that and copied the permits for Ms Coyle. Ms Crawford, now in charge of the MDC's LIM processing team, and who gave evidence for the MDC, simply stated that "the Altimarloch property file was released to Ms Coyle of Bayleys ...". The property file is what was referred to by several witnesses as the grey file. Whatever process was followed at the MDC's offices, before Ms Coyle was able to obtain copies of the three water permits for Altimarloch, she was required to sign a release of information form which contained this disclaimer:

## **Disclaimer**

Council has made the information available under Sections 10 to 18 (inclusive) of the Local Government Official Information and Meetings Act 1987 ONLY. Council does not warrant its accuracy and disclaims the information. No person should rely on any information without seeking appropriate independent and professional advice. The information provided does not constitute a Land Information Memorandum or any similar document.

[45] After receiving the three faxed copies of the water permits from Ms Herkt, Mr Harris faxed them on to Mr McNabb commenting:

These arrived this morning. Have made some comments regarding them in a email, still to be sent, but you should receive shortly ... Overall water would not appear to be an issue ...

[46] The email Mr Harris referred to was sent by him later on 14 January and contained these comments about the water permits:

Have received copies of the current consents for water use. These are:

### **U970068**

Issued 14/03/97 Expires 31/03/2007

1500m.cu per day from Altimarloch Stream to irrigate grapes and olives. Appears to be Class A.

*Caution – will check Class A status. Also, although not shown I will check to make sure this consent is still intact i.e. parts have not been transferred with recent land sales.*

### **U991689**

Issued 17/12/99 Expires 20/12/2034

795m.cu per day from Altimarloch Stream. Class B.

### **U010884**

Issued 20/09/01 Expires 30/09/2011

4800m.cu per day from Altimarloch Stream. Class C. [probably for lake].

*Note – consent refers to subdivision application so likely some of this consent has been transferred, or will shortly be. Will check this.*

[47] Mr McNabb did not ask Mr Harris of PALMs to check the water permits position, and Mr Harris did not then do so, despite his advice that he “will check” the

A and C rights, in particular to ensure that each was intact and had not been transferred.

[48] Mr McNabb also obtained a valuation from Mr Lindsay Newdick of Newdick Fraser Limited, Registered Public Valuers in Blenheim. This valuation, dated 28 January 2004, valued Altimarloch at \$2,925,000. Mr Newdick's report said this about viticultural potential and water permits:

...

Although there is some 95 ha of flat land I consider that probably only around 55ha (135 acres) is readily suitable for viticulture development.

I understand there is a water right for up to 750m<sup>3</sup> per day which is substantially in excess of present and future requirements here.

...

[49] Although Mr McNabb noted Mr Newdick's understanding that Altimarloch had a water right for up to 750 m<sup>3</sup> per day, he thought Mr Newdick was mistaken, because that figure was at odds with the three water permits Bayleys had sent Mr Harris of PALMs, which Mr Harris had forwarded to Mr McNabb on 14 January.

[50] Late in January, Mr McNabb made, literally, a "flying" visit to New Zealand to inspect Altimarloch. He was only in New Zealand over one weekend, before returning to Toronto. Both Mr Hoare and Ms Herkt accompanied Mr McNabb on his inspection visit to Altimarloch. Both accept that Mr McNabb told them that his interest in Altimarloch was for development as a vineyard, and Mr Hoare accepted that he was thus aware of the importance of irrigation water. Ms Herkt accepted she was aware Mr McNabb was looking at Altimarloch for viticultural purposes (128/21). He says that Mr Hoare assured him Altimarloch had ample water for irrigation purposes. During that brief visit, Mr McNabb also called on Mr Naysmith of Wain & Naysmith, solicitors in Blenheim. Based on the date on Mr Naysmith's file note, this was on Monday 2 February. Mr McNabb indicated that he would be instructing Mr Naysmith to act, should he purchase Altimarloch.

[51] Following his return to Canada, Mr McNabb and his wife decided to try to buy Altimarloch. Negotiations and a series of offers ensued. These began with a

letter from Mr McNabb to Mr Hoare of Bayleys on 2 February, and concluded with a sale and purchase agreement dated 20 February 2004. That agreement is in the REINZ/ADLS form (7<sup>th</sup> Edition (2) July 1999). The agreement provided that the purchaser required a LIM, so clause 8.2 was effective. The agreement also included these further terms of sale:

18.0 18.1 This agreement is subject to and conditional upon the purchaser completing at their cost due diligence in relation to the subject property to the Purchaser's satisfaction and being satisfied, in the Purchaser's absolute and sole discretion with the outcome of due diligence enquiries in relation to the property on or before 12<sup>th</sup> March 2004. The Vendor will grant the purchaser or their appointed agents access to the subject property to complete such reports.

18.2 Due diligence enquiries may include but shall not be limited to:

(a) Viticultural inspection and feasibility reports.

(b) Marlborough District Council LIM report.

(c) Water issues including existing water easements, availability of rights to take water for irrigation purposes and the transferability of those rights to the Purchaser.

...

19.0 This agreement is subject to and conditional upon the Vendors and the Purchasers Solicitor sighting and approving this agreement as to the Title, Form and the "Further Terms of Sale" including any easements and any encumbrances that may transfer to the Purchaser with the Title on or before 4.00 pm within five (5) working days from the date of this agreement.

20.0 All water permits related to the property are transferred on settlement.

Mr McNabb added the last of these further terms at Mr Naysmith's suggestion, and using wording suggested by Mr Naysmith.

[52] The Moorhouses signed the agreement in Mr Sawyer's office at GW. Mr McNabb signed it by facsimile from Canada.

[53] On 23 February Mr Hoare of Bayleys wrote to Mr Naysmith in these terms:

**RE: SALE & PURCHASE – ALTIMARLOCH – AWATERE VALLEY – MOORHOUSE TO MCNABB (as agent)**

Please find enclosed the conditional agreement pertaining to the above sale & purchase of Altimarloch. Further terms of sale – Clause 18.0 – is conditional until 12<sup>th</sup> March 2004.

Also enclosed is a copy of an Easement Certificate and Resource Consent notices pertaining to the property – RC U 10884, RC U 991689, RC U 970068 regarding water permits to take surface water. We note that these notices total an irrigated area in excess of the total land area of 145.522 hectares being purchased and sold.

Please do not hesitate to contact me should you require further information or clarification regarding this sale & purchase.

[54] Mr Hoare sent the same letter and enclosures to Mr Sawyer at GW, also on 23 February.

[55] Having signed the agreement, Mr McNabb confirmed Mr Naysmith's instructions to act on the purchase, in particular in attending to the legal aspects of the clause 18.0 due diligence, solicitor's approval under clause 19.0, and checking the water permits in terms of clause 20.0.

[56] On 24 February Wain & Naysmith made to the MDC a request for a LIM for Altimarloch. A copy of the Certificate of Title for Altimarloch (21696, Marlborough Land Registration District) was attached to the request, accurately to identify the property.

[57] The parties' solicitors were due to approve the agreement, in terms of clause 19, by 27 February (within five working days of the date of the agreement). Early in the afternoon of 27 February Mr Naysmith sent Mr McNabb an e-mail alerting Mr McNabb to that approval requirement. Amongst comments Mr Naysmith made to Mr McNabb were these:

...

Bayleys have given me copies of the following water permits – U010884 and U970068. Without knowing what is on the ground it is difficult for me to usefully comment. If there are any issues as far as you are concerned please let me know.

...

In terms of my approval of the Agreement as to Title, form and the further terms of sale unless there is any issues arising from the above it is suggested I confirm that now. Any issues there might be, particularly in respect of the water, will almost certainly fall within the due diligence provision in any event.

[58] Later on 27 February, after receiving the plaintiff's instructions, and subject to one qualification, Mr Naysmith approved the agreement, pursuant to clause 19, on 27 February. The qualification to Mr Naysmith's approval was an inquiry as to one of the rights to convey water in Easement Certificate 5208046.4:

Our client advises that John Hoare indicated one of the water easements was short term and going to be removed from the Title. It is noted that the document referred to above does refer to a short term (4 year) arrangement in respect of direct irrigation of vineyard. It is noted however this would extend until February 2006 and in any event there is a right which is described as an entitlement to draw water from May until October of each year.

Please advise if there is any other arrangement or understanding which is not recorded in the documents.

[59] Also on 27 February, Mr Sawyer approved the agreement for the Moorhouses.

[60] On 1 March, Bayleys responded to Mr Naysmith's 27 February inquiry about the easements over Altimarloch in favour of MWL. Relevantly, this letter advised:

With regard to the responsibility of any prospective purchaser of Altimarloch, the Vendors have informed us that the purchaser will be obligated to supply the following pertaining to the adjoining property:

- An annual stock & domestic water supply easement to the adjoining property.
- Water for the purposes of dam water storage to the adjoining Walker/McNaught property. The water storage supply uptake is to be between the months of May through to October each year – the volume being as stated in the easement pertaining to the subject property.

In addition to the two water supply arrangements above, the parties have a further short term 4 year arrangement (balance term being approximately two years) for the supply of irrigation water to the adjoining property for up to 5 hectares of vineyard development.

Whilst this four year, short term arrangement is at present operational, the parties have verbally agreed that upon the creation of a proposed infiltration trench and a pumping site to be established on the banks of the Awatere River, the agreement for the temporary 5 hectare water supply will be at an

end. Walker/McNaught will then take responsibility for their irrigation water supply to their own vineyard and olive grove on their property.

Please note that Walker/McNaught intend to develop this new irrigation water supply at their cost from the Awatere River within the next few weeks.

I trust this clarifies the understanding and arrangement between the Vendors and their neighbours. Please do not hesitate to contact us should you require any further clarification regarding this matter.

[61] Having received that 1 March letter, Mr Naysmith sent it to Mr McNabb who asked Mr Naysmith to send a copy also to Mr Harris at PALMs for the purposes of his investigations. Mr Naysmith did that under cover of a fax dated 3 March 2004.

[62] The LIM issued by the MDC to Wain & Naysmith is dated 5 March 2004. Amongst the resource/planning consents affecting Altimarloch it listed the A and C water permits, and attached copies of both. Mr Naysmith faxed the LIM to Mr McNabb on 9 March.

[63] On 8 March Mr Naysmith and Mr Harris met. Mr Naysmith confirmed to Mr Harris that the A water right was listed in and attached to the LIM. Later on 8 March Wain & Naysmith wrote to GW requesting an extension of time to 19 March for satisfaction of clause 18 (purchaser's due diligence). That letter also contained this inquiry:

Our client also has an enquiry in respect of the arrangements relating to water. There are provisions relating to water in EC 5208046.4 and we have a letter from your client's agent, John Hoare. A copy of the relevant page of the easement and of the letter are attached. To clarify matters could you please confirm:

- (1) That there is only a right to take water and the actual water used for irrigation is the subject of an independent water right – that is not part of the water permits being transferred.
- (2) That the short term arrangement referred to in the letter from Bayleys (being the arrangement outlined under point 2 of Schedule B of the easement) will be ending in a few weeks as indicated notwithstanding that the easement period extends until February 2006.

Part of the reason for the above enquiry is that the letter from Bayleys does not make it clear who has the water right and although the easement is properly headed "right to convey water" in paragraphs 1 and 2 there is reference to an entitlement to draw water.

[64] On 12 March, having not received a response to his request for an extension of time, Mr Naysmith sent a follow up fax to Mr Sawyer.

[65] A formal memorandum of variation to the agreement was subsequently signed by both parties, extending the date for purchaser's due diligence to 19 March. That memorandum is dated 11 March 2004. It was obviously back-dated; paragraphs [64], and [68] following, demonstrate that.

[66] Meanwhile, Mr Harris had received the copy of Bayleys' 1 March letter that Mr Naysmith had faxed him on 3 March. Following his receipt of that letter, Mr Harris said he again rang Ms Herkt at Bayleys. He said he asked her about the volumes of water likely to go to MWL pursuant to the easement and she was unable to provide that information. He also again asked her (he had initially done this on 14 January - [42]) whether she was aware of any restrictions on or concerns with the water permits and she said she was not. Mr Harris said Ms Herkt indicated to him, though not "in so many words" (40/20), that none of the water permits had been transferred. Ms Herkt did not recall that conversation, but accepted that it may have occurred. (131/6) She said that she was not aware of any restrictions on or transfers of the water permits, so that is what she would have told Mr Harris if he asked her.

[67] Following that discussion with Ms Herkt, and having made some calculations, Mr Harris reported to Mr McNabb by e-mail dated 9 March as follows:

- A. Have checked the water 'easements' and have discussed with Allan Naysmith.
- B. He will comment from a legal perspective, but it appears that, while the easements are created, and cut off points to the supply determined, there is no actual specification as to you actually supplying water.
- C. I assume however that you are going to supply in any case. There would appear to be sufficient water available.
- D. As no volume figures are supplied I suggest you base on these:  
  
Stock and domestic water – 10cu.m/day as stated in the P.W/ARMP  
  
Grapes – if you use 5ha at 2200vines/ha and 12 litres per fine a day=132cu.m/day total.

This is probably too high as a reasonable rate and is more likely at 6 or 8 litres/vine/day. Your total availability is well able to supply 142cu.m/day, but around 70-90 a day is more likely.

- E. The letter from Bayleys regarding water is, I think, not strictly correct. Their bullet pt 3, para 2 state that on construction of the infiltration trench and pump the temporary supply for the 5ha will cease. This is a verbal agreement that is not quite in agreement with points 1 and 2 of the easement cert. I read it that the access to the reservoir must be maintained. Certainly the easement cert. Does not say it ceases.
- F. However, overall you have plenty of water.

Mr McNabb acknowledged that e-mail the same day (9 March), commenting:

Thanks Vern much appreciated – I didn't think there was an issue but it's prudent to make sure I understand what I am getting into

I'll be in touch ...

[68] On 12 March Mr Hoare of Bayleys e-mailed Mr McNabb, copying the e-mail to Mr Naysmith. He stated:

I have been contacted by Alan Naysmith office to request and arrange an extension re the financial timeframe for your offer to purchase Altimarloch – to be extended to 19<sup>th</sup> March 2004. We have had communication with the Moorhouses regarding this matter. They have indicated that this extension of time would be acceptable to them – but as yet we have been unable to obtain their confirmation in writing. I will endeavour to do this today.

I am also in receipt of a copy of a letter dated 8<sup>th</sup> March 2004 from Wain & Naysmith to Gascoigne Wicks requesting from them further clarification in regard to the water easements at Altimarloch. Excluding any stock & domestic supply to the neighbouring properties, the other water supply described in the easement is from Altimarloch Stream is to supply water to Walker/McNaught proposed dam site in the winter months. Their land adjoins the Moorhouses's land you are purchasing.

I understand your father Rob is intending to visit the Moorhouse's this weekend to inspect the plant and machinery equipment. Suggest you contact him if you have any concerns on how the future water supplies will operate. My understanding is that David Moorhouse has shown and explained to Rob the water supply arrangements as they operate now.

[69] It appears Mr McNabb responded by telephoning Mr Hoare, because the latter then sent Mr McNabb the following fax, also on 12 March:

As discussed, I forward copy of Right to Convey water schedule B, letter of explanation re water issues written to Allan Naysmith. This letter was approved by the Vendor (Moorhouses and a copy forwarded to Stephen

Walker) who also agreed to this explanation. It seems that Wain & Naysmith still have queries – so it would be appreciated that these queries could be addressed as soon as possible.

The letter of explanation enclosed was that dated 1 March, set out in [58].

[70] Late on 17 March Mr Hoare e-mailed Mr McNabb to check that all was “on line” for the purchaser’s confirmation on 19 March. Mr McNabb responded by telephoning Mr Hoare who, on 18 March, e-mailed Mr McNabb. Dealing with water, he said this:

Thanks for your telephone call this morning. We will follow through and clarify all issues re the K-Line Sprinklers. I can understand the confusion here. We will come back to you re this point – following clarification and discussion with David & Jill Moorhouse.

[71] On 19 March Mr Naysmith faxed Mr Sawyer:

We refer to the above Agreement for Sale & Purchase. We are instructed further term of sale 18 is satisfied. Our client is arranging for the deposit to be paid. We will forward our Transfer and notices of sale in due course.

[72] On 24 July Wain & Naysmith sent GW transfers relating to the water permits for Altimarloch. Mr Camp had Mr Naysmith confirm in evidence that he sent those transfers in reliance on the three water permits Mr Hoare had attached to or enclosed with the agreement, and not on the LIM:

Q. What you did was prepare three transfers of water permits for sending to the vendor’s solicitors for execution, one for each of class A, B and C rights?

A. That’s right.

Q. You did that in reliance on the three water permits attached to the contract?

A. Yes.

Q. You didn’t do it in reliance on the LIM or you wouldn’t have sent the B for transfer?

A. Correct.

(Notes 51/1-5)

[73] GW acknowledged those in a letter on 27 July, under cover of which it sent Wain & Naysmith a settlement statement as at 30 July.

[74] Settlement of the purchase duly took place on 30 July. Upon settlement GW handed to Wain & Naysmith executed transfers of the A, B and C water permits from the Moorhouses to the plaintiff. In an e-mail to Mr McNabb on the afternoon of 30 July, confirming settlement had been effected Wain & Naysmith inquired:

... The transfer of water permits that I have need to be completed by the Transferee – I plan on doing my reporting letter and bill over the weekend and propose to send the original out to you care of your parents. Thought I would include the water permits with that or do you want to send separately to your father for him to fill out???

[75] Mr McNabb returned the completed water permit transfers to Mr Naysmith on 31 August.

[76] Wain & Naysmith forwarded those transfers to the MDC under cover of a letter on 3 September:

***TRANSFER OF WATER PERMITS***

Please find enclosed completed Transfers of water permits U970068, U991689 and U010884. Would you please forward confirmation to us (as well as the Transferee) that the transfers have been completed.

Thank you for your assistance.

[77] On 5 October the MDC sent Wain & Naysmith an e-mail in these terms:

**Subject:** attn Alan Naysmith – re transfer water permits Moorhouse to Altimarloch Joint Venture Limited

Water Permit U991689 for 795m<sup>3</sup>/day of Class B water to fill a storage dam is not held in the name of Moorhouse. This consent was transferred to McNaught & Walker Ltd on 12 June 2002.

Water Permit U970068 for 1500m<sup>3</sup>/day to irrigate 86 hectares – Moorhouse transferred 1/2 share of this allocation to McNaught & Walker Ltd on 12 June 2002.

Water Permit U010884 is still held by Moorhouse.

Please contact as to how you wish to proceed

Many thanks

*Virginia Taylor*  
Senior Admin Officer Regulatory  
Marlborough District Council

[78] On 8 October Wain & Naysmith wrote to the MDC setting out the position, and requesting “an explanation and comment” about the failure of the LIM to record that one-half of the A water permits had been transferred to MWL on 12 June 2002.

[79] On 11 October Wain & Naysmith wrote to GW in these terms:

A serious issue has arisen in respect of the water permits. As you know the agreement was subject to a due diligence provision and a condition that all the water permits must be transferred as part of the settlement. With the agreement was a letter (dated 23 February) from your client’s agents Bayleys a copy of which is attached. You will note it refers to three resource consents for water permits (U 010884, U 991689 and U 970068). Copies of those were supplied.

As part of the due diligence process our client and it’s advisors relied on that information and determined there was sufficient water for their proposed vineyard development.

On settlement transfers of the above three water permits which had been prepared by us and signed by your clients as the water permit holder in each case were provided.

When we endeavoured to register the transfers Virginia Taylor from the Council advised that one of the permits (U 991689) had been transferred to a third party and a half share of the allocation of one of the other permits (U 970068) also transferred. A copy of her advice to us is enclosed.

It was always our client’s intention to develop a vineyard. This was known to your client and to Bayleys. The availability of sufficient water for irrigation for the entire proposed vineyard development was fundamental to our client’s decision to purchase. The unavailability of that water is a serious issue which needs to be addressed.

At this stage the options have not been considered but the issue is drawn to your client’s attention as notification of the issue and comment.

[80] On 14 October GW wrote to the MDC. The nub of the letter was to advise that, in the likely event of proceedings, the Moorhouses would apply to join the MDC as a party. The letter stated:

...

The Real Estate Agent requested from Council copies of Resource Consent for water permits held by Mr & Mrs Moorhouse and were provided with

copies of Consent numbers U010884 – Class C water permit, U991689 – Class B water permit, U970068 – Class A Water permit.

None of this information carried the MDC disclaimer and the Real Estate Agent attached those in good faith to the contract.

In actual fact a half share of water permit U970068 had been previously transferred as had water permit U991689.

It now appears that Council had not updated its files at the time which has left the purchaser with the impression that it bought the Moorhouse property with all of the above water permits.

It is our understanding that water permit U970068 was attached in its entirety to the LIM report.

...

[81] Also on 14 October, Mr Hoare wrote to Bayleys in Auckland, alerting it to what had occurred. In this letter Mr Hoare stated:

... The purchaser then enquired as to why we, as the Vendors agent, had attached documentation to the sale & purchase agreement that was incorrect regarding the water permits of the subject property.

...

There has clearly been a mistake made by forwarding incorrect information

...

[82] In the course of attempts to resolve the problem, GW wrote on 29 November to Wain & Naysmith. The letter includes this:

2. In order to assist us in advising our clients, we would appreciate receiving from you a copy of the LIM Report received from the Marlborough District Council and a copy of the valuation completed for your client by Lindsay Newdick. We understand Mr Newdick had access to a valuation which had been carried out for our clients by Alexander Hayward Limited. The Hayward valuation provides clear detail as to the Class A Resource Consent. We further understand that Lindsay Newdick was aware of the change in consent from 1,500 metres cubed per day to 750 metres cubed per day.
3. We have ascertained the Council files do have on them the Water Permit transfers. This information would have been readily available to anyone searching the property file as part of a due diligence exercise.

[83] Wain & Naysmith sent GW copies of the LIM and Mr Newdick's valuation under cover of a letter on 6 December. This letter commented:

Our instructions are that no regard was had to that as the comment was simply referred to as the valuers understanding. Specific information (a copy of the permit) and already been supplied by Bayleys and in the context of the due diligence process there seemed to be no need to go past that information as it was confirmed by the copy of the permit which was included with the LIM report.

In respect of the LIM we have had correspondence with Messrs Radich Dwyer and enclose a copy of that for your information.

Interestingly, the letter then notes that the expected cost of a storage dam would be \$280,000.

[84] Bayleys explained its position to GW in a letter dated 21 December. The letter is signed by Bayleys principal, Mr Graeme Vining. Dealing with Mr Hoare's earlier involvement, in the sale of part of Altimarloch to MWL, the letter states this:

...

John Hoare has explained to me that he was involved in an earlier sale of part of Altimarloch with the vendors – Mr & Mrs Moorhouse. At that time he was with another real estate firm – McMurtry Real Estate – and has confirmed with me that all records pertaining to the earlier sale remained the property of the McMurtry Real Estate. No documentation of this sale was, or is, in his possession on his move to Bayleys office. He is definite and has confirmed with me that all issues & volumes of supply relating to the appointment of the Marlborough District council water permits for Altimarloch at that time were negotiated and agreed between the parties with Gascoigne Wicks acting for both the purchaser and the vendor. John informs me that he had no part in the apportionment of the Altimarloch water permits.

...

[85] Dealing with Mr Hoare's 23 February letter (set out at [53]), Bayleys said this:

Furthermore, John has confirmed with me that he wrote a letter to you at Gascoigne Wicks & Co. on the 23<sup>rd</sup> February 2004 attaching the conditional agreement and informing you that he noted on the documentation that the irrigated area was in excess of the 145.522 hectares being purchased and sold.

### **Plaintiff's claim against the Moorhouses**

[86] I deal with this by addressing, in turn, the issues set out in [21].

### ***Materiality***

[87] From his involvement in vineyards in Marlborough, Mr McNabb knew the critical importance of irrigation water. Consistent with that, upon renewing his interest in Altimarloch in January 2004, one of the first things Mr McNabb did was retain PALMs to advise on the suitability of Altimarloch for vineyard development. Mr Harris of PALMs, in turn, requested from Bayleys (Ms Herkt) copies of the water permits attaching to Altimarloch. That must have demonstrated to Bayleys at the outset, the plaintiff's concern about the water permits attaching to Altimarloch.

[88] I find that Mr McNabb made clear to Bayleys that the plaintiff's interest in Altimarloch was for vineyard development, and that the plaintiff required sufficient water for that purpose. Mr McNabb was adamant about that in his evidence, which I accept. Ms Herkt agreed:

Q. (Mr Wylie) From your overall dealings with Warren McNabb you were aware at the time he was looking for a property for viticulture purposes and water was important to him?

A. For viticulture purposes.

Q. And water was important to him?

A. That would go along with viticulture purposes.

(Notes 128/17-21)

[89] In his evidence Mr Hoare resisted accepting that Mr McNabb had made clear, throughout, that his interest in Altimarloch was for vineyard development and that he required sufficient water for that purpose. He did accept that "viticulture and water ... go hand in hand" (171/15). Under cross-examination by Mr Wylie, Mr Hoare eventually accepted that Mr McNabb had made his vineyard/water intentions/requirement clear to Mr Hoare. Certainly, Mr Hoare accepted this was the position by the time the agreement was signed (176/20-22).

[90] Although I will need to revert to Mr Hoare's evidence in dealing with the Moorhouses' claim against Bayleys, it is convenient now to make a number of points about Mr Hoare's evidence, and an assessment of him as a witness. The following

are the salient points arising from Mr Hoare's evidence, with comment where appropriate:

- He claimed that he viewed Altimarloch as "a lifestyle property with potential to grow some grapes" (173/37) and had marketed it as such.

I cannot reconcile that claim with Bayley's Property Information brochure, from which I quote in [33].

- He said he could not recall ever having "in depth discussion with Warren McNabb about viticulture" (172/25).
- He was unaware that Ms Herkt had provided, to Mr Harris of PALMs, copies of the A, B and C water permits, after obtaining them from the MDC. He said:

I am very surprised ... Why would we be supplying Mr Harris with copies of water permits?

(174/12)

- He did not agree that Bayleys, as the Moorhouses' selling agent, needed to know what it was that the Moorhouses were selling:

Q. In the context where water is so important to viticulture wasn't it imperative for you to know what it was the Moorhouses were selling?

A. No. Its not imperative, I don't agree.

(175/6)

- He thought he had provided Mr McNabb with a copy of the valuation obtained by the Moorhouses from Mr Stark. When it was put to him that Mr McNabb said he had never seen, or had a copy of, that valuation, he accepted that. (175/26)
- He had only a vague recollection of accompanying Mr McNabb on his "flying visit" to Altimarloch in January 2004. He accepted that Mr

McNabb “may well have” reiterated to him on that visit that he was looking at Altimarloch for viticulture and that water was important to him. He accepted that, during that visit, he had told Mr McNabb that Altimarloch had “ample water” (175/30-36).

- He had no recollection of stapling or fastening the three water permits to the signed agreement, when he sent it to the parties’ solicitors under cover of his 23 February letter ([53]). When his 14 October letter to Bayleys in Auckland was put to him ([81]), he accepted that he had attached or enclosed the three water permits with the agreement. (177/3-8)
- He claimed that the aim of his 23 February letter ([53]) was to alert the parties’ solicitors to a discrepancy, in that he had noticed the land area given in the C water right was incorrect (178/6, 179/7). He rejected the suggestion that he was stating in that letter that the plaintiff was getting more water than it needed i.e. was getting a good deal (179/10). He accepted that there was no suggestion in his 14 October letter to Bayleys’ Head Office that his 23 February letter was a warning to its recipients (179/32).
- He did not agree that the parties’ solicitors were entitled to rely on his 23 February letter (178/12). He claimed that he was merely supplying the solicitors with information for them to use in completing their due diligence. He stated:

... In this case I was trying to assist both solicitors by saying this is the document we obtained from the Council.

(178/28)

In fact, Mr Hoare did *not* say that, as is apparent from the terms of his 23 February letter ([53]). And, earlier in his cross-examination, he had claimed he did not know that Ms Herkt had obtained those three water permits from the MDC (my third bullet point above).

- He did not know why he had written his 1 March letter, as opposed to leaving the matter to the Moorhouses' solicitors, GW. He said he had written that letter "in conjunction with the Moorhouses trying to clarify the situation" (180/6-10).
- He stated that he was not aware that half the A water right and all the B water right had been transferred by the Moorhouses to MWL. Questioned about his 12 March e-mail to Mr McNabb ([68]) this exchange occurred:

Q. Then on 12 March you sent an email to Warren McNabb and copied it to Wain & Naysmith referring to the letter from Wain & Naysmith dated 8 March and setting out your understanding of the position?

A. Setting out vendor's understanding of the situation.

Q. No mention of transfer of half A or B water?

A. No mention at all, because I just assumed the whole matter has been correctly stated.

Q. The difficulty is that its you and your office who stated it wrongly. You stated all three consents belonged to the Moorhouses in their totality and all three could be transferred to Warren McNabb, those were the representations you made?

A. I assumed all consents pertaining to that property were to be transferred to Warren McNabb, I made that clear, I sold a property, I considered all water permits pertaining to that property were to be transferred to Warren McNabb.

Q. The misunderstanding Warren McNabb was labouring under that he would get whole of A permit and B permit water was sourced from your office?

A. We have got the document from the Council and forwarded it on, it may have come from our office, I can't understand why nobody went to the Council and got a copy of the document.

[91] Based on those points, I consider Mr Hoare has a poor and unreliable recollection of events relevant to this case. I do not believe Mr Hoare's evidence in some respects. For example, I reject his evidence that the aim of his 23 February letter was to draw the parties' solicitors' attention to a discrepancy in the water

permits, in particular the B right. I resolve any conflict between the evidence of Mr McNabb and that of Mr Hoare by preferring Mr McNabb's evidence.

[92] To summarise, I am satisfied that the plaintiff made clear to the Moorhouses (to their selling agent Bayleys) pre-contract that the plaintiff's interest in Altimarloch was to develop it as a vineyard and that it required sufficient water to do that.

### ***Representations***

[93] I find that the representations alleged by the plaintiff (as I have set them out in [11]a) and b)) were made to the plaintiff by the Moorhouses by their agents Bayleys and/or GW. I find those representations were made as a result of a combination of the following:

- Bayleys sending copies of the A, B and C water permits to Mr Harris at PALMs on 14 January. Mr Harris' evidence was that he had telephoned Bayleys and asked to speak to Mr Hoare. He was unavailable but Mr Harris said he was referred to Ms Herkt, as Mr Hoare's associate agent, and Ms Herkt told him she could answer any questions. Mr Harris' evidence was that he asked Ms Herkt "to send any consent or all consents relative to the property" (34/38).
- Mr Hoare when he and Ms Herkt accompanied Mr McNabb on a visit to Altimarloch late in January 2004. Mr Hoare accepted that he had told Mr McNabb that Altimarloch had ample water.
- The combination of Bayleys attaching the three water permits to the agreement and sending it to Wain & Naysmith under cover of Bayleys' 23 February letter stating that the three water permits were those "pertaining to the property".
- Ms Herkt on the telephone sometime between 3 and 9 March. Mr Harris said that Ms Herkt advised him that she was not aware of any restrictions or concerns with the three water permits. Under cross-

examination by Mr Camp, Mr Harris' evidence about this conversation was:

Q. Do you say you actually asked her in specific terms if any of the rights had been transferred and her answer was no they had not?

A. Not in quite those words but the intent was the same, yes.

Q. Do you say her answer was saying none of these had been transferred rather than I don't know?

A. In so many words yes.

- GW, through a combination of Mr Sawyer approving the agreement on 27 February, pursuant to clause 19, and subsequently handing Wain & Naysmith executed transfers of the A, B and C water permits upon settlement on 30 July.

[94] No responding party submitted that the Moorhouses were not bound by representations made by Bayleys and/or GW. Section 6(1) Contractual Remedies Act 1979 imposes liability for a misrepresentation made "by or on behalf of another party to that contract". Those words encompass misrepresentations by that party's agent(s).

[95] On each of the occasions when a representation was made, it was made either to the plaintiff (to Mr McNabb) or to the plaintiff's agents, PALMs and/or Wain & Naysmith. If any authority is required for the proposition that a misrepresentation made to an agent is equally able to be relied upon by the principal, then I agree with Mr Wylie that it can be found in Williamson J's judgment in *Pearson v Wynn* (1986) 2 NZCPR 449 at 455.

### ***Inducement***

[96] I am satisfied that the representations of the Moorhouses' agents did induce the plaintiff both to enter into the agreement, and then to confirm it as unconditional.

[97] First, I accept Mr McNabb's evidence. Had he known that there was only half the A permit, and no B permit, Mr McNabb said that he would not have purchased Altimarloch, or would only have purchased at a price which reflected the cost of building a storage dam to utilise the C permit.

[98] Second, Mr Naysmith gave evidence that he understood Mr Sawyer's approval of the agreement on 27 February as confirmation that the Moorhouses were in a position to transfer the three water permits attached to the agreement. Mr Barton cross-examined Mr Naysmith about this. He got Mr Naysmith to accept that it may have been preferable for the plaintiff to specify the three water permits in the agreement. This exchange followed:

Q. If they had been specified there couldn't have been any confusion about the subject matter of the contract?

A. I didn't see there was any confusion when copies of actual permits came with the agreement that came from the vendor's agent.

...

Q. The copies of these permits that were supplied to you by John Hoare came along after the contract had been executed?

A. As far as I am concerned they came with the contract, all arrived together ...

Q. That doesn't necessarily mean they were part of the contract?

A. I can understand that now.

(52/3-15)

[99] The fact that the LIM listed and attached the A water right was clearly also a factor in inducing the plaintiff to confirm the agreement as unconditional. In that respect the LIM confirmed the representations I have set out in [93], at least in respect of the A water right.

[100] I agree with earlier decisions of this Court that the representations of the Moorhouses' agents need not be the only inducing factor, provided they were a significant one: *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 at 595; *Pearson v Wynn* at 455. I find that to be the case here.

## ***False***

[101] There is no room for contest here: the representations were untrue.

## **Causation/contributory negligence**

[102] Mr Wylie contended that contributory negligence is not a defence available to the Moorhouses, because they are sued only in contract. The defence is available only to a defendant sued in tort, and the Moorhouses are not: *Rowe v Turner Hopkins & Partners* [1980] 2 NZLR 550 at 552-556; Todd, *The Law of Torts in New Zealand* 4<sup>th</sup> Edition 2005 pp 857-8; Blanchard, *Civil Remedies in New Zealand* 2003 pp468-469.

[103] I do not accept this. As I find his reasoning persuasive, I accept the contrary view expressed by Cooke P in *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) at 564-565, albeit obiter.

[104] In that passage Cooke P expressed his agreement with the English Court of Appeal's decision in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 that the (materially similar, English) Contributory Negligence Act applies in cases of concurrent sources of duty. The English Court had affirmed the approach of Hobhouse J at first instance ([1986] 2 All ER 488 at 508), analysing the application of the Act to contract actions into three categories:

- (1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.
- (2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
- (3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

[105] Subsequent cases such as *Barclays Bank plc v Fairclough Building Ltd* [1995] 1 All ER 289 (CA) and *Bristol & West Building Society v Kramer & Co*

[1995] NPC 14 (HC), have held, in not dissimilar circumstances to those here, that contributory negligence does not apply to Hobhouse J's category (1), where the breach is solely of that contractual provision.

[106] I consider this case is in Hobhouse J's category (2). I accept that the Moorhouses are sued, for damages for misrepresentation, only pursuant to s6 Contractual Remedies Act 1979. Section 6(1) provides that the plaintiff is entitled to damages from the Moorhouses "in the same manner and to the same extent as if the representation were a term of the contract that has been broken". I note also that s6(1)(b) expressly provides that the plaintiff is not entitled to damages for deceit or negligence in respect of the misrepresentation. Thus, concurrent liability – or at least concurrent recoverability – in negligence is expressly proscribed. However, the misrepresentations sued upon by the plaintiff are essentially negligent misrepresentations. They were made to the plaintiff by the Moorhouses' agents Bayleys and GW, both of whom admit that they owed a tortious as well as a contractual duty of care to the Moorhouses. A further point is that s9 Contractual Remedies Act effectively permits the Court to hold the plaintiff partly responsible for its own loss, by giving a wide discretion as to the amount or form of relief.

[107] Lest it be thought I also have overlooked it, I note that Pritchard J's decision in *Rowe v Turner Hopkins & Partners* [1980] 2 NZLR 550 went on appeal: [1982] 1 NZLR 178. Without finding it necessary to decide the point, Cooke and Roper JJ at 181 expressed the view (different from that expressed by Pritchard J at first instance) that the Act can apply wherever negligence is an essential ingredient of the plaintiff's cause of action, whatever the source of the duty. Cooke P pointed this out in *Mouat v Clark Boyce* at 564, noting somewhat plaintively that the English Court of Appeal in *Forsikringsaktieselskapet* appeared to have been unaware of the appeal.

[108] I accept, as did Cooke P in *Mouat v Clark Boyce*, that opposing views can be taken as to the applicability of the Contributory Negligence Act in a case such as this. However, error on my part in taking the view that contributory negligence is available to the Moorhouses will be inconsequential, provided my findings that the plaintiff neither caused nor contributed to its own loss are upheld. Those findings are in [160]-[221] following.

## **Plaintiff's claim against the MDC**

[109] Again, I deal with this by addressing, in turn, the issues set out in [22] above. But, first, I need to deal with Mr Camp's submission that the plaintiff has not/will not suffer any loss as a result of not receiving the water permits it believed it was obtaining as part of the purchase of Altimarloch.

[110] There is nothing in this point. On 15 June 2004, prior to settlement, the plaintiff entered into a deed appointing it trustee to hold Altimarloch for the Altimarloch Vineyard Partnership and for Mr McNabb. The vineyard part of the property was to be held for the Partnership; the homestead, curtilage and the hill country for Mr McNabb. There is a partnership agreement dated 1 August 2004.

[111] The deed requires the plaintiff to deal with the vineyard property as directed by the partners. This proceeding was brought by the plaintiff on the partner's instructions, and Mr McNabb deposes that any award of damages will be used to build and pay for a water storage dam (and/or, I assume, for the additional A class water the plaintiff has conditionally purchased). The plaintiff will then hold those assets in trust for the Partnership.

[112] Mr Camp's submission was that the plaintiff suffers no loss from any lack of water rights as it does not use the land and has no beneficial or economic interest in the land. Mr Camp anticipated any submission that the Partnership should be substituted or added as a plaintiff by submitting that it is not a party to the agreement for sale and purchase. It did not exist when the alleged representations were made and it cannot sue on them.

[113] I regard these submissions as arcane and opportunistic, and lacking any real merit. Any loss suffered as a result of the defendants' misrepresentations cannot be permitted to fall "through the woodwork" in the manner contended for by Mr Camp. The plaintiff is the Partnership's bare or custodial trustee for property owning purposes. Mr McNabb deposed that, if this proceeding fails, the dam will need to be paid for by additional borrowing by the plaintiff and/or advances from the partners. His evidence is that failure may also result in the partners seeking to renegotiate the

deed, since they subscribe on the same basis as did the plaintiff: that the A, B and C water permits were being transferred to the plaintiff upon settlement. Those three water permits are detailed in paragraph 3.3 on page 9 of the Altmarloch Investment Proposal dated February 2004.

[114] I hold that the plaintiff is the correct party to sue for any loss resulting from the defendants' misrepresentations.

### *Duty of care*

[115] Starting points are the legal status of the MDC, its obligations and protections under the LGOIMA, and the MDC's approach to the provision of information to the public.

[116] The MDC is a unitary authority as defined in s5 Local Government Act 2002. It is constituted a unitary authority by operation of Schedule 2 Part 3 clause 3(1)(b) of that Act, which provides that a unitary authority is an entity exercising both regional authority and territorial authority functions. The MDC was constituted a territorial authority by the Local Government (Nelson-Marlborough Region) Reorganisation Order 1989, and was conferred regional authority functions by operation of s114 Local Government Amendment Act 1992.

[117] The LGOIMA applies to the MDC as a territorial authority. Section 41 protects the MDC from civil or criminal suit resulting from its provision, in good faith, of official information. Section 41, although itself in Part 6, does not apply to Part 6 which also contains s44A, which provides:

#### *Land Information Memoranda*

##### **44A. Land information memorandum –**

- (1) A person may apply to a territorial authority for the issue, within 10 working days, of a land information memorandum in relation to matters affecting any land in the district of the authority.
- (2) The matters which shall be included in that memorandum are –

...

(d) Information concerning any consent ... previously issued by the territorial authority (whether under the Building Act 1991, [the Building Act 2004,] or any other Act):

...

- (3) In addition to the information provided for under subsection (2) of this section, a territorial authority may provide in the memorandum such other information concerning the land as the authority considers, at its discretion, to be relevant.
- (4) An application for a land information memorandum shall be in writing and shall be accompanied by any charge fixed by the territorial authority in relation thereto.
- (5) In the absence of proof to the contrary, a land information memorandum shall be sufficient evidence of the correctness, as at the date of its issue, of any information included in it pursuant to subsection (2) of this section.
- (6) Notwithstanding anything to the contrary in this Act, there shall be no grounds for the territorial authority to withhold information specified in terms of subsection (2) of this section or to refuse to provide a land information memorandum where this has been requested.

[118] Although Mr Camp argued that the LIM was s44A(3) information, I hold it came squarely within s44A(2)(d). Mr Camp's argument was that regional councils grant water permits under s30(4)(f) Resource Management Act 1991 (RMA). As s44A applies to territorial authorities, it cannot encompass water permits. Mr Camp made the point that regional councils both grant water permits, and record any transfer of them. Most territorial authorities will not have any record of water permits unless they happen to be linked in some way to records maintained by the territorial authority. As I understand it, Mr Camp's point was that, relevantly, the MDC acted as a regional council and not as a territorial authority, and the plaintiff should not benefit from the fortuity that the MDC is a unitary authority.

[119] I do not agree. First, the fact is that the MDC is a unitary authority, combining the functions of a territorial authority and regional council. The combination is both a statutory one, and a pragmatic one in terms of the MDC's day-to-day operations. Acceptance of Mr Camp's argument would involve an artificial separation between the MDC's territorial authority and regional council functions: artificial in the sense that it is not the way the MDC actually operates.

[120] Second, Mr Camp's point that only regional authorities exercise the s30 RMA powers has no force in relation to the MDC. "Regional Council" is defined in s2 RMA as including a unitary authority.

[121] The next point is that the MDC disclaimed responsibility for the copies of the A, B and C water permits it provided to Bayleys on 14 January. That disclaimer ([41]) expressly stated that the information did not constitute a LIM. The obvious inference is that anyone wanting reliable information from the MDC about those water permits needed to obtain a LIM. Mr Stephen Wilkes, the Blenheim resource management consultant who gave evidence for the MDC, accepted that (106/9). On the other hand Ms Crawford, now leader of the MDC's LIM and PIM team, did not accept that, although she did accept that the disclaimer draws a distinction between a LIM and looking at the MDC's file(s) (113/20-33).

[122] Counsel for the plaintiff and the MDC agreed that the approach to be taken in determining whether the MDC owed the plaintiff a duty of care in relation to provision of the LIM is that laid down by the Court of Appeal in *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324 at [58]-[65] and *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [35]-[37].

[123] The Supreme Court noted the *Rolls-Royce* approach with apparent approval in *Couch v Attorney-General* [2008] NZSC 45 at [79] but, given the special circumstances there, adopted a different test ([85]).

[124] In *Body Corporate* the Court said:

[36] In determining whether a duty of care exists, the ultimate question for the Court is whether it is just and reasonable that such a duty be imposed. The Courts look to the proximity or relationship between the parties and also to any wider policy considerations that bear on whether a duty of care should be imposed.

[125] The pre-condition of a sufficiently proximate relationship between the plaintiff and the MDC requires, not only that it be foreseeable that the plaintiff would rely on the LIM, but also sufficient proximity to justify imposing a duty of care. The *Rolls-Royce* Court suggested six factors relevant to that assessment; *Body Corporate* identified four. I select those most relevant here.

[126] The first of those factors is the degree of analogy with cases in which duties are already established. Mr Wylie contended for analogy with four cases. The first is the judgment of Ellen France J. In *Resource Planning Management Ltd v Marlborough Wine Centre Ltd & Marlborough District Council* HC BLM CIV 2001-485-814, 10 October 2003. The case concerned information under s44A(2)(a) LGOIMA, about a piece of land subject to flooding and erosion by the Wairau River. Counsel for the MDC accepted that a duty of care may arise from matters of fact mis-stated in a LIM, but submitted there had been no breach of any such duty. At [166] the Judge observed that, “where the requirement is not simply one of disclosing all information on the files, there has to be some cut off point”. She held that the information the MDC had included in its LIM was sufficient to comply with its s44A obligation. I interpret the case as supporting the imposition of a duty of care here, where the MDC had overlooked the transfer (which it had in its records) of half the A water right, erroneously attaching the whole A right to the LIM. In other words, this case is different in that the MDC did simply fail to disclose all information on its files.

[127] Mr Wylie’s second and third cases also support the imposition of a duty of care. In *Smaill v Buller District Council* [1998] 1 NZLR 190 Panckhurst J found the Council negligent in not raising concerns about the stability of bluffs near a property on the Little Wanganui River, until after it had approved a scheme of subdivision and granted building permits for the property. The Judge found there was ample local knowledge (dating from the 1929 Murchison earthquake) and published geological research to alert the Council to the instability. In *Bronlund v Thames-Coromandel District Council* HC HAM CP48/94, 2 April 1998, Tompkins J found the Council liable in negligence for granting a building permit for a house sited unlawfully. The Council had issued a stop work notice while the house was being built. The plaintiff’s application for a building permit had attached a site plan showing the precise location of the house.

[128] Mr Wylie’s last case is Australian: *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) FLR 290. In each of three certificates issued by the Council under environmental planning legislation, the Council answered a specific question about the risk of flooding to the land by stating that the Council had

no information. In fact, the Council had on its files two studies indicating a risk of the land flooding. Reversing the Judge at first instance, the Federal Court held the Council liable in negligence to a developer who had purchased the land. In terms of proximity, the Court held that the relevant class of persons to be considered included potential purchasers of the property the subject of the Council's certificate. I regard *Mid Density* as providing further, albeit non-indigenous, support for the imposition here of a duty of care.

[129] The next factor is described in *Rolls-Royce* as balancing the plaintiff's moral claim to compensation for avoidable harm and the MDC's moral claim to be protected from undue restriction on its freedom of action and from an undue burden of legal responsibility. In *Body Corporate* at [37], the Court viewed this as involving "the substantiality of the nexus between the defendant's alleged negligence and the plaintiff's loss". This factor wholly favours imposing a duty of care on the MDC. Points are:

- The plaintiff's loss would have been avoided had the LIM accurately stated the position as to the A water right. The MDC actually had the transfer of half the right to MWL. Indeed, in an exchange of correspondence with GW 31 May/4 June 2002, the MDC had sought and obtained clarification of the legal description of MWL's land. In its reply GW had stated to the MDC:

Please note that the transfer would be for half of the A water permits U970068 and also all of the B water permits in U991689.

("would be" obviously means "is").

- Section 35(5)(gb) and (gc) RMA impose on the MDC as a "local authority" a duty to keep records of all water permits granted by it and of the transfer of those rights. "Local authority", as defined in s2 RMA, means "a regional council or territorial authority".
- The need for a LIM to be complete and accurate in terms of s44A(2) LGOIMA information is obvious from the wording of the section, in

particular s44A(5). That is true not only from the viewpoint of the recipient of the LIM, but also from the MDC's viewpoint, because the s41 protection does not apply to LIMs.

- Although the MDC should deal with every request for a LIM with the same degree of care, it was apparent to the MDC that this request had a serious and “legal” purpose, potentially checking the details of a property being considered for purchase. It came from a Blenheim firm of solicitors and was for a named client. Both the LIM request and the LIM itself record that.
- No question of restricting the MDC's “freedom of action” arises, because the MDC had a statutory duty to issue a LIM. Section 44A, in particular s44A(6) is cast in mandatory terms.
- Imposing a duty of care would unduly burden the MDC. As I have pointed out, it has statutory duties to keep all the records necessary to include the s44A(2)(d) information in a LIM, and it has a statutory duty to provide a LIM. Section 44A(4) permits the MDC to fix a charge for a LIM. Although it was more of interest than relevance, there was evidence that the fee charged by the MDC (\$275) more than covered its likely costs.
- None of the factors advanced by Mr Camp indicates that the legislature cannot have intended that the MDC be liable in damages for a defectively compiled LIM have any force. These were:
  - The MDC had only 10 working days to issue the LIM (s44A(1)).
  - The MDC files contained third party information.
  - The MDC's files were open to public misuse and misfiling.

There was no evidence to suggest the statutory time period was inadequate. The LIM here was issued nine working days after Mr Naysmith's request. Nor was there any evidence indicating the other two factors created problems for the MDC. The MDC could ask for clarification or confirmation of any unclear or doubtful information, and did in respect of the A water right ([129] – first bullet point). The MDC could control and supervise public access to files, and encouraged requests for LIMs rather than search ([42]).

[130] Next are what were described in *Body Corporate* at [37](c) as:

... general considerations of vulnerability on the part of the plaintiff and the potential burden on the defendant (or others similarly placed) of taking precautions against the risk in issue ... This necessarily raises the question whether the plaintiff (and others similarly placed) or the defendant (and others similarly placed) are better placed to take steps to avoid or minimise the relevant risk”.

[131] This consideration strongly favours imposition of a duty of care. The plaintiff (and other potential purchasers) could only apply to the MDC (or their territorial authority) for a LIM. It was the statutorily sanctioned method of obtaining the information the plaintiff needed. I reject any suggestion that the plaintiff ought to have gone behind the LIM, by itself trying to locate and check through the MDC's records. I am unpersuaded by the evidence of Messrs Wilkes and Williams that a search by the plaintiff or its advisers of the MDC's files for Altimarloch would have disclosed the correct position as to water permits. Both men are former MDC employees familiar with the Council's filing system, which apparently comprised “pink files” and “grey files”. Neither Ms Herkt (122/20-30) nor Mr Naysmith (53/17) shared that familiarity. Coupled with that, Messrs Wilkes and Williams have the benefit of hindsight in knowing that they could, upon search, have uncovered the correct position as to water permits. But, more cogently, the evidence ([42]) established that a request to the MDC for information, other than by way of a LIM, carried with it a disclaimer which directed the inquirer to apply for a LIM if accurate and complete information was needed.

[132] Fourth and finally, there is the nature of the relevant risk, and thus the resulting loss. The *Body Corporate* Court at [37](d) stated:

- (d) ... The Courts are most likely to find proximity where the underlying risk is associated with health, personal injury or death and more likely to do so where there is a risk of property damage than where the loss is purely economic. Of course, in building defect cases it is not always easy to distinguish between property and economic loss. Also relevant is the size of the class affected by the risk. The larger that class (and thus the more indeterminate the alleged duty), the less likely it is that a duty will be imposed.

[133] Given that s44A(2) obliges a territorial authority to provide a range of information including “identifying each special feature or characteristic of the land concerned”, stormwater and sewerage drains, rates, consents and requisitions, building and land use information, any argument for a differentiation between property damage and economic loss in cases such as this is weak. Further, any suggestion that imposing a duty of care would open the “floodgates” of liability is already discredited. In the 16 years that s44A has been in force, it appears that only one case in which a territorial authority has been sued in respect of a LIM has gone to judgment: the *Resource Planning Management* case cited in [126].

[134] To summarise, I consider the proximity factors overwhelmingly indicate that a duty of care should be imposed on the MDC in relation to the LIM.

[135] Next is whether there exist wider policy considerations indicating that a duty of care should – or should not – be imposed. Many of the factors already considered again apply, and all suggest that “policy” favours imposition of a duty of care. To summarise:

- Imposition of a duty of care would be consistent with the scheme, purposes and provisions of the LGOIMA, particularly s44A. There is a slight ‘disconnect’ between the s4 purposes of the LGOIMA, and s44A, which was inserted by an amendment to the LGOIMA in 1991, as an adjunct to the Building Act 1991. The purposes of the LGOIMA set out in s4 include providing for the availability to the public of official information in order to promote the accountability of local authorities and good local government in New Zealand.

- This consistency distinguishes at least three of the cases relied on by Mr Camp as pointing away from a duty of care. In those cases the Courts held that the imposition of a duty of care was not consistent with the purposes of the relevant Act. First, in *Attorney-General v Carter* [2003] 2 NZLR 160 the Court of Appeal held that neither the Shipping and Seamen Act 1952 nor the Marine Transport Act 1993 gave rise to a duty of care to the ship owner, when surveying the ship, to protect the owner's economic interests. The concern of the two Acts was the safety of seafarers.
- Second, in *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] NZRMA 301, the Court of Appeal declined to impose a duty of care to protect the economic interests of the owner or developer, when granting a resource consent.
- Third, in *Body Corporate* the Court held that there was not to be found, in the Building Act 1991, any direct relationship between the Building Industry Authority and building owners, so that the former owed no duty of care to the latter in respect of leaking face fixed monolithic cladding systems.
- Section 41 LGOIMA does not apply to LIMs.
- Section 44A mandates the provision of relevant information on Council records. There is no discretionary element of local government policy making, nor even of decision making.
- The MDC can, and does, fix a fee for a LIM. That fee could properly include allowance for insurance against the sort of careless omission which occurred here. (There was no evidence as to whether it did.)

[136] I have not overlooked Mr Camp's point (and Mr Wilkes' additional evidence) that water permits (i.e. resource consents to take water ([25])) are personal to the applicant. They do not run with the land. Although not strictly real or personal

property, they are treated as personal property in the respect set out in s122 RMA. Within the confines of the regional plan, they can be transferred from person to person and from one site to another in the same catchment: s136 RMA. That distinguishes them from land use resource consents which attach to and run with the land: s134 RMA.

[137] It was submitted that both Mr Naysmith and Mr Sawyer lacked an understanding of this. Although that may be true of Mr Sawyer, it is irrelevant in this context.

[138] These points were made by the MDC to bolster its submission that the information about water permits in the LIM is correctly viewed as discretionary information provided pursuant to s44A(3), so that s44A(5) does not apply. I reject that because the MDC treated rights to take water to irrigate Altimarloch in the same way as it did the land use consents it issued for Altimarloch. For example, when notified in 2002 of the transfer of half the A right to MWL, the MDC sought clarification of the legal description of MWL's land. I assume it did that so it could accurately record the transfer of half the A water right against MWL's land. Further, all the consents were listed together in the same place in the LIM. These were (with my own description of what each related to):

<b>Resource/Planning Consents Appended</b>	<b>Description</b>
U011079	2.10.01 – alterations to homestead.
U010884	24.4.01 – C water permit.
U010396	24.4.01 – sub-division into Lots 1 and 2.
U980233	21.5.98 – to construct the ornamental pond.
U970068	12.3.97 – A water permit.

[139] I regard that as correct and appropriate treatment, because both water permits and land use consents were equally important information to anyone requesting a LIM for Altimarloch.

[140] Armed with that information, a purchaser such as the plaintiff could then ensure that a term of any agreement it entered into to purchase Altimarloch required

the vendor/holder of the water permits to transfer them to the purchaser. That is what occurred here: clause 20 of the agreement for sale and purchase ([51]).

***Breach of duty of care:***

[141] Assuming I held the MDC did owe the plaintiff a duty of care in relation to the LIM, I understood Mr Camp to accept that there had been a breach. I hold that there certainly was, in that the LIM indicated that the whole of the A water right still attached to Altimarloch, when a reasonably careful check of the Council's records by its officer preparing the LIM would have shown that half the A right had been transferred to MWL. Questioned by Mr Wylie, Ms Crawford accepted that. She accepted that the Council officer (Ms Duncan) who prepared the LIM must have resorted to the Council's (pink) resource consent files in the course of preparing the LIM, because it did not contain the B right which had been transferred to MWL in its entirety. Ms Crawford was obliged to accept that Ms Duncan, when she looked at the pink file for the A right, "didn't pick up the fact half the A permit water had been transferred" (115/6-8).

[142] At least in cross-examining Mr Naysmith, Mr Camp contested whether the plaintiff had relied on the LIM in entering into and confirming the agreement. But I find that it did. Mr Naysmith's evidence was consistently that he relied on the representations by the Moorhouses' agents that the A, B and C water permits went with Altimarloch, and the LIM as confirming that in relation to the all important A right. Under cross-examination by Mr Barton, Mr Naysmith said this:

Q. Given its importance this information did need to be thoroughly verified?

A. My view was the availability of class A water was confirmed by the LIM report received and confirmed by what came with the agreement.

Q. Given the answer you have given, are you agreed that the information needs to be thoroughly verified?

A. My understanding was the agreement was those water permits could be transferred and the crucial part of it had been verified by the LIM report.

(53/11-17)

[143] Earlier, questioned by Mr Darroch, Mr Naysmith thought he could recall mentioning to Mr Harris that the B water right was missing from the LIM. He agreed with Mr Darroch that the discussion had gone no further when Mr Naysmith told Mr Harris that the LIM confirmed the A water right:

It (the absence from the LIM of the B right) didn't really matter in terms of what they (the plaintiff) were wanting to do.

(51/17)

### ***Statutory duty***

[144] Given the way Mr Wylie limited his argument under this second cause of action ([148] below) it might, strictly, be unnecessary to deal with it. I therefore do so comparatively shortly.

[145] Section 44A imposes a statutory duty on the MDC to provide a LIM to the plaintiff, and to include in that LIM the information on its records about the A water right.

[146] In opening for the MDC, Mr Camp submitted that breach of statutory duty had been subsumed into negligence. He relied on *Attorney-General v Carter* [2003] 2 NZLR 160 (CA). I read *Carter* as authority to the opposite effect, because it held that there is no cause of action for “negligent breach of statutory duty”. In short, the two causes of action are not to be confused. What *Carter* does say is that, where the statute creates a duty to take care, failure to do so will result in breach of statutory duty.

[147] It follows from [122] to [135], that s44A does impose a statutory duty at least to take care in issuing a LIM. I say “at least”, because the mandatory language of s44A(2) – “shall be included” – could be construed as imposing an absolute duty to include the information listed, with corresponding absolute liability for failure to do so.

[148] Mr Wylie contended only for “a statutory duty to take care in issuing a LIM”, so I need not go beyond upholding that such a duty exists.

### ***Breach of statutory duty***

[149] For the reasons set out in [141], I hold that the MDC breached that statutory duty.

[150] The LGOIMA, and in particular ss 41 and 44A, give the plaintiff a cause of action for that breach. The reasons are:

- The s44A duty is for the benefit of those who request LIMs, perforce paying the requisite fee. As Ellen France J's review at [163]-[164] in *Resource Planning & Management* demonstrates, there is little help as to the purpose of s44A outside the section itself. Her Honour considered s44A to be unique, and somewhat out of place, within the scheme of the LGOIMA, into which it had been inserted only to complement the Building Act 1991.
- Such requestors are "a limited class of the public", to adopt Lord Browne-Wilkinson's terminology in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731, adopted by MacKenzie J in *Goodship v Ministry of Fisheries* HC WN CIV 1997-485-13; CIV 2004-485-2428, 19 December 2006.
- No other remedy or sanction is provided to that limited class of the public by the LGOIMA for breach of the s44A duty, nor is any means of enforcing performance of the duty owed to that limited class prescribed.

[151] I base those reasons on *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 (HL); *X (Minors)* and *Goodship*. And also on the Court of Appeal's decision in *Select 2000 Ltd v ENZA Ltd* [2002] 2 NZLR 367 at [43], which emphasises that the "identifiable class" and "alternative modes of enforcement" tests of statutory intention, while helpful, are not determinative.

[152] No separate treatment of reliance and causation is required: [97] and [142] apply.

[153] Lastly, I reject the MDC's contention that the 'warning' statements in the LIM relieve it of liability. The LIM stated that:

- It dealt only with those matters which it specifically addresses and was not a general warranty of fitness.
- It addressed matters using information from the MDC's records, which may not be sufficient or sufficiently recent in a particular case.

Some of the information was supplied by third parties and may not be accurate.

None of this engages here. The LIM did specifically address the A water right. The MDC did have in its records the transfer of half that right to MWL, but carelessly overlooked it. The 'warnings' are not a general disclaimer of liability. Any such disclaimer would be ineffective because it would cut across the statutory duty imposed by s44A. Quite apart from any of that, these warnings would probably be too late to operate as effective disclaimers, being imposed unilaterally by the MDC after the plaintiff applied for the LIM and paid the fee.

### ***Fair Trading Act***

[154] As I have found for the plaintiff on its first and second causes of action, liability under this third cause would add nothing, except to the length of this judgment. The Court of Appeal's decision in *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 suggests – although it is not made clear - that no greater remedy would be available to the plaintiff. I therefore do not intend dealing with this cause of action beyond stating some tentative views, in case they should be relevant upon any appeal.

[155] Mr Wylie summarised the plaintiff's case under the Fair Trading Act by submitting that the Court must look at the true nature of the activity undertaken by

the MDC. The issue of a LIM was not a regulatory function. Rather, he contended, the MDC was selling a summation of its records in return for payment of a fee prescribed by it. As such it was in trade.

[156] I doubt that. What the MDC was doing was discharging a compulsory statutory duty. It had to comply with the plaintiff's request for a LIM containing at least the s44A(2) information: s44A(6). Certainly, the MDC charged a fee for this, but it was hardly trading in land information. I accept that organisations such as the MDC which are not primarily traders can and do engage in incidental activities having a business or trading character, and in carrying those out is "in trade". But I do not regard provision of LIMs as such an activity.

[157] My intuition is that the MDC's liability is for negligence and for breach of the statutory duty it was discharging, and not for any breach of the Fair Trading Act. Accuracy and completeness, and the care necessary to achieve those, were what was required of the MDC in preparing the LIM, not fairness.

[158] Section 14(1)(b) of the Fair Trading Act extends to a false or misleading representation:

... concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put ...

The MDC's oversight in relation to the A water right does not easily come within this wording, which is aimed at buyers and sellers of land, although I accept that the Fair Trading Act applies to local authorities (the s2 definition of "person").

[159] Mr Wylie pointed to *Gregory v Rangitikei District Council* [1995] 2 NZLR 208, as an example of a local authority being found liable under s9 Fair Trading Act. *Gregory* is altogether distinguishable on its facts, as a consideration, particularly of 231-235, of the judgment demonstrates.

## **Plaintiff caused or contributed to its own loss**

[160] Both defendants and third parties allege the plaintiff caused or contributed to its own loss. Although differently framed, the allegations encompass that the plaintiff itself caused its loss, that it was contributorily negligent, and that it failed to mitigate its loss.

[161] I have made the point that the plaintiff sues the Moorhouses only under the Contractual Remedies Act. I accept Mr Wylie's submission that relief to the plaintiff against the Moorhouses cannot be withheld unless the Moorhouses establish that the plaintiff actually knew that the Moorhouses retained only half the A permit and none of the B permit. Constructive or imputed knowledge on the plaintiff's part will not relieve the Moorhouses from liability. Mr Darroch, closing for Bayleys, accepted that. So he should, because it has been the law at least since *Nocton v Ashburton* [1914] AC 932 in which Lord Dunedin, at 962, said:

No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction. ...

[162] In *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569, five years after the Contractual Remedies Act came into force, Barker J held (at 595):

It is no defence to an action for misrepresentation that the representee had the means of discovering that it was untrue, or that with reasonable diligence, he could have discovered it to be untrue. See *Chitty on Contracts* (25<sup>th</sup> ed, 1983) vol 1, para 406 and *Redgrave v Hurd* (1881) 20 Ch D 1 (CA). I cannot see that the Act has changed the common law in this area.

[163] This statement of the law received affirmation, albeit indirect, from the Court of Appeal in *Buxton v The Birches Time Share Resort Ltd* [1991] 2 NZLR 641 in which the Court at 647 said:

Where there has been a misrepresentation, and it is asserted that it has been rectified, there is an onus on the representor to show that the truth was plainly brought to the attention of the representee. It is not enough that he could have discovered it had he searched; or even that he was invited to verify the position from a source that was made available to him: *Redgrave v Hurd* (1881) 20 Ch D 1.

[164] Asher J at [40] in *Northern Dairylands Ltd v Maxted* HC WHA CIV 2004 488 402, 20 December 2007 and Clifford J at [110] in *Cashmore v Sands* HC WAN CIV 2004 483 7, 7 February 2007, both apply *Emslie* and *Redgrave v Hurd*.

[165] I also endorse Barker J's view. It must be correct because the representee's reliance on the misrepresentation will invariably be the very reason why the representee did nothing, or nothing further, to check the position.

[166] There was no suggestion from any responding party that the plaintiff knew the true position as to the water permits for Altimarloch. Accordingly, I hold against the Moorhouses on their allegations that the plaintiff caused or contributed to its own loss.

[167] The third parties cannot, separately, allege that the plaintiff caused or contributed to its own loss. They are not parties to this proceeding at the suit of the plaintiff. They are parties only because the Moorhouses sue them, alleging breach of both contractual and tortious duties of care owed by each third party to the Moorhouses as their agent. The third party claims could be brought in a separate proceeding. The third parties' allegations of contributory fault on the plaintiff's part are misconceived.

[168] The position as between the plaintiff and the MDC is different. I have held the MDC liable to the plaintiff for breach of both tortious duty of care and statutory duty. I need to deal with the MDC's submission that the plaintiff caused its own loss, or was at least partly responsible. The allegation is two-fold. First, that the plaintiff failed to take a number of steps which would have shown it the correct position as to water permits for Altimarloch. Second, that the plaintiff failed to heed a number of "flags" or warnings, sufficient to alert the plaintiff to the need to check the water permit position. I will deal with these allegations in what I hope is their logical order.

*Plaintiff never asked vendor to particularise or specify water for sale*

[169] If “the vendor” refers to the Moorhouses, this is strictly correct. But it is not correct if “the vendor” includes the Moorhouses’ agent for the sale, Bayleys. In [42]-[43] I deal with this request in detail. I would not expect the plaintiff or its advisers to deal direct with the Moorhouses, when they had appointed an agent for the sale.

[170] This allegation is not made out.

*Reliance on the permits sent by Bayleys*

[171] The allegation here is that the plaintiff was not entitled to rely on the permits faxed by Ms Herkt to Mr Harris, and by Mr Harris to Mr McNabb, both on 14 January. For example, Mr Wilkes, the resource management consultant called by the MDC, stated “I do not believe that it is acceptable in the context of conducting due diligence to rely on copies of resource consents provided by real estate agents as correctly representing the purchaser’s entitlement to water in the event of a sale and purchase”.

[172] I have difficulty reconciling this allegation with the previous one. First the plaintiff is criticised for not obtaining the permits from the vendor. Now it is criticised for doing exactly that, or at least for obtaining them from the vendor’s agent for the sale. Quite apart from that, the plaintiff did not rely only on the permits faxed on 14 January. It relied also on the permits attached to the agreement when Bayleys sent it to the solicitors for purchaser and vendor on 23 February, and on the statement in the covering letter that those were the permits “pertaining to the property”. Finally, it relied on the water permits listed in the LIM, or at least on the fact that the vital A permit was listed there.

[173] Detracting further from the force of this allegation, and Mr Wilkes’ evidence in relation to it, is Ms Herkt’s acceptance that she did not tell Mr Harris that Bayleys had obtained the consents it faxed from the MDC’s property file, after signing a

disclaimer. She simply faxed them to Mr Harris in response to his request for copies of all the water permits for Altimarloch.

[174] This allegation fails.

*No check by Mr Harris*

[175] In his 14 January email ([46]), Mr Harris cautioned Mr McNabb about the need to check the A permit. He stated:

*Caution – will check Class A status. Also, although not shown I will check to make sure this consent is still intact i.e. parts have not been transferred with recent land sales.*

[176] The allegation was that Mr Harris did not check, and Mr McNabb did not follow up to ensure he had. I find that Mr Harris did check. First, he had the discussion with Mr Naysmith I have described in [63], in which Mr Naysmith confirmed to Mr Harris that the critical A permit was listed on the LIM. Second, I find that, around the same time, Mr Harris rang Ms Herkt for the second time and had the conversation I have detailed in [66]. I accept Mr Harris' evidence about this. It was not denied by Ms Herkt, who merely said that she could not recall the conversation. She agreed she was not aware of any concerns with the water permits.

[177] This allegation fails on the evidence.

*Reference in the C permit to sub-division*

[178] One of the conditions in the C permit is:

03 That the area to be irrigated by this water permit shall not exceed 250 hectares being the land currently described as Lot 4 and part Lots 1 and 2 DP 8605 and part Lot 1 DP 3242.

This land is currently the subject of resource consent for subdivision U010396 and new titles will subsequently issue.

[179] As I understand it, the allegation is that this reference ought to have been put to the plaintiff on inquiry, not only as to whether the C permit survived the subdivision intact, but also as to whether the A and B permits also remained intact.

[180] Mr Harris' 14 January email ([46]) demonstrates that he did note this reference to a subdivision, and thus the need to check. I have already found that he did check with Ms Herkt again, after 3 March ([66]). I find that in that conversation Ms Herkt conveyed to Mr Harris that, as far as she (Bayleys) was aware, all three water permits were intact.

[181] I accept that Mr McNabb did not note the subdivisional reference in the C permit. His evidence was that his focus was wholly on the A permit, indeed he said (14/18) that he did not notice that the B permit was not listed in the LIM until he set about preparing for trial of this proceeding. Mr Naysmith's evidence was to similar effect: he is not sure that he picked up the subdivisional reference, but he said that he knew it was the A permit that was critical to the plaintiff (48/18).

[182] I do not accept that the plaintiff can be faulted for not following up a concern about a permit that was of no concern to it. The plaintiff had no intention of building a water storage dam, and the C permit could only be used to fill such a dam. As Mr Weston pointed out, if the plaintiff had checked that the C permit was intact, the answer from the Moorhouses would have been "Yes it is". I do not consider it reasonable to suggest that the reference to subdivision in the C permit ought to have led the plaintiff to check also the A and B permits. After all, the area covered by the C permit was 250 hectares, that covered by each of the A and B permits 86 hectares, against the 145.5 hectares of land contained in the agreement. The only apparent discrepancy was in the unimportant C permit.

[183] This allegation is not substantiated.

*Bayleys' "warning" in its 23 February letter*

[184] The letter is set out in full in [53]. The "warning" is said to be this part:

We note that these (water permits) total an irrigated area in excess of the total land area of 145.522 hectares being purchased and sold.

[185] It is contended that the letter was pointing out to the parties' solicitors (Mr Sawyer as well as Mr Naysmith) a discrepancy that they needed to check. Although it was a little equivocal, Ms Herkt's recollection was that the passage I have quoted resulted from Mr Hoare and Ms Herkt adding up the land areas covered by the three water permits and finding that they exceeded the area of land being sold. Ms Herkt's evidence about this included:

Q. (Mr Weston): You added the amounts of land up and they came to something more than 145 hectares?

A. Correct.

Q. What conclusion did you draw from that?

A. That something didn't seem quite right to fit in with an amount of land and three water consents.

Q. What did you think the lawyers to whom you were sending this letter would do as a result?

A. Check this out.

(126/21-26)

[186] But then, in answering questions from the Bench and from Mr Weston, Ms Herkt became equivocal:

Q. (Bench): You added 250 + 86 + 86?

A. We identified 250 and 145 there was more on front first page there.

Q. (Mr Weston): But in using your calculator you were adding numbers up together?

A. I thought we were but I am not sure, I can remember us typing the letters up and looking at these thinking it didn't add up.

(132/13-18)

[187] This latter passage is more in line with Mr Hoare's evidence that what had concerned him was that the C permit covered 250 hectares whereas only 145.5 hectares was being sold. He said the 250 hectares "was still originally speaking of the Moorhouses' original holding of land" (169/24). Mr Hoare said he did not notice

that the 250 hectares was in a C permit. Ms Herkt said (133/10) that she and Mr Hoare did not check the legal description in the C permit against that in the agreement. Asked why Bayleys had sent the easement certificate and the water permits with the agreement Ms Herkt said it was something that would not normally happen. Then there was this exchange:

Q. (Mr Weston): Was it your decision to do that?

A. I can't recall but its not something that wouldn't normally happen, we normally just send over the agreement with the title.

Q. You have no recollection as to why your usual practice wasn't followed in this case?

A. Correct.

(126/17-21)

[188] Mr R V Eades was called by Mr Barton for GW as an expert on land conveyancing. Mr Eades is a senior and greatly respected conveyancing practitioner, who has often given expert evidence in cases such as this one. Mr Eades told me (150/24) that he read Bayleys' 23 February letter as pointing to a discrepancy which should have alerted the solicitors to whom it was addressed to inquire. He allowed that that included Mr Sawyer as well as Mr Naysmith.

[189] I own that that was not how I initially read the letter, and Mr Eades' view has not really changed my mind. My reading of the letter was put to Ms Herkt by Mr Weston in this part of his cross-examination:

Q. One possible reading of this letter is that you were saying to the lawyers you have a good deal here, [water rights covering] more land than you thought you were getting?

A. Not at all, purely that by adding the three figures up it was more land than went with the property and that put a bell on as to why that was the case.

(126/26-30)

[190] Mr Naysmith was questioned by Mr Camp about the 23 February letter. After being asked by Mr Camp to compare the land area in the C water right with that in the agreement for sale and purchase, and to compare also the legal descriptions of the land covered by each of those documents, Mr Naysmith accepted

that the C right “straddled the boundary”. Asked whether he noted that at the time he replied:

...I don't recall it but I wasn't too worried about class C water because Warren McNabb wasn't going to be constructing a dam so it really didn't matter...

(50/20-23)

Pressed further, Mr Naysmith said that it did not follow from the “boundary straddling” that the C water right would not transfer to the plaintiff upon settlement, and Mr Naysmith pointed out that the C right was still listed in the LIM for the land the plaintiff was purchasing.

[191] Mr Sawyer gave evidence that the letter had not raised alarm bells of any sort with him (140/20). So if Bayleys' aim was to put the parties' solicitors on inquiry, it failed to do that.

[192] Even if this letter is properly read as drawing its solicitor recipients to a discrepancy in the land areas covered by the water rights that they needed to check, I have already held that the check would have revealed that the C permit was indeed intact (this is the point I make in [182]).

[193] I find no substance in this allegation either.

#### *Mr Newdick's valuation*

[194] The allegation here is that Mr Newdick's statement about water rights was a further “flag” which ought to have put the plaintiff on inquiry. Mr Newdick stated:

I understand there is a water right for up to 750m<sup>3</sup> per day which is substantially in excess of present and future requirements here.

[195] Mr Newdick does not specify whether he is referring to an A, B or C right. If it was the first of those, then 750m<sup>3</sup> per day is only half the 1500m<sup>3</sup>/day abstraction rate permitted by the A permit. Mr McNabb accepts that he noticed this (7/25), but ignored it, treating it as a mistake, because it did not tally with the water permits already supplied by Bayleys, and again sent with the agreement (7/25, 24/24).

[196] Although Mr McNabb did not know it at the time, it transpires that Mr Newdick had copied these details about water from the valuation report provided by Mr Stark to the Moorhouses, which Mrs Moorhouse showed Mr Newdick when he inspected Altimarloch on 26 January (she did not show him the bottom line of the valuation). But what Mr Newdick did state in his report was this:

Due to the urgency in this matter and my excessive workload, I will at this stage only provide a brief interim report ...

[197] He also expressed the 750m<sup>3</sup> per day figure as his “understanding” of the water right.

[198] Mr McNabb said that he relied on Mr Newdick for valuation advice, not for detailed advice about the water rights attaching to the property. Mr McNabb would be the first to acknowledge a substantial connection between the two. But he was entitled to point out that, at \$2,925,000, Mr Newdick’s valuation allayed any concerns he may have had that the purchase price of \$2,675,000 was excessive.

[199] Given that Mr Newdick made it clear his valuation was urgently prepared and shortly stated, and given also that he expressed the water right as “his understanding”, I cannot find fault with the plaintiff for treating the water details in Mr Newdick’s valuation report as erroneous. The fact that they did not tally with the all important A permit already supplied by the vendor’s selling agent reinforces me in that view.

### *The easement*

[200] It is clauses 1 and 2 of the Easement Certificate sent by Bayleys on 23 February with the agreement that are relevant. By clause 1 the Moorhouses gave MWL the right to draw water from the Altimarloch Stream to fill a reservoir to be constructed by MWL on its land. The entitlement ceased when the flow of the Altimarloch Stream dropped to a specified level. There is no reference to the class of water right involved, but it is obviously a B or C right.

[201] Clause 2 provides:

Notwithstanding clause 1 above during the first four years from the date of this easement or until the Reservoir is constructed as per clause 1 above, whichever is the earlier, the Registered Proprietor of Lots 1 and 2 DP 305407 shall be entitled to draw water from the Altimarloch Stream sufficient to irrigate no more than 5 hectares of vineyard to be located on Lot 1 and/or Lot 2 DP 305407, provided that, as above, such entitlement shall cease in circumstances when the flow of the Altimarloch Stream is less than 100 gallons per minute measured at the boundary of Lot 3 DP 305407 and the Altimarloch homestead section located on Lot 3 DP 305407.

[202] Again, the class of water is not specified, but Mr Naysmith understood (47/10) that clause 2 was the one dealing with the A permit. That is why he focused on that part of the easement in his 27 February letter ([58]). Bayleys' 1 March letter ([53]) responding to Mr Naysmith stated that this part of the easement was ending "within the next few weeks". What Bayleys' letter did not make clear was whether clause 2 related to the A permit held by the Moorhouses, or to "an independent water right". Thus Mr Naysmith's 8 March letter ([56]), and in particular point (1) in that letter.

[203] I chronicle the consequent communications in [64]-[70]. The plaintiff must accept that it never got a square answer to query (1) in Mr Naysmith's 8 March letter, or at least none that is recorded in those communications. But the point is that the only part of the easement relating to the A permit was about to come to an end, and it was anyway unclear whether it related to the Moorhouses' A permit water, or MWL's A permit water. It might be said that that is the very point: had some of the Moorhouses' original A permit been transferred to MWL? Although Mr Naysmith queried that, and never got an answer, there was certainly no clear indication that there had been a transfer. Indeed, the small area (5 hectares) and limited time period (4 years) rather indicated that clause 2 entitled MWL to draw water covered by the Moorhouses' A permit.

#### *Inadequate due diligence*

[204] An initial point raised was: if certain about the water permits it was getting, why did the plaintiff insert the due diligence clause (clause 18.0) in the agreement? The answer to that point is that the plaintiff did not insert clause 18. It was drafted

and inserted by Mr Hoare of Bayleys, as standard in this type of agreement (Mr McNabb 21/20; Mr Hoare 169/12).

[205] The gist of this allegation was that all the “flags” already referred to (Mr Harris’ “caution” in his 14 January email; Mr Newdick’s 750m<sup>3</sup> per day water right; Bayley’s “warning” in its 23 February letter; the Easement Certificate “flowing from subdivision”) should have caused concerns to Mr Naysmith. Despite that he confirmed the contract without inquiry, and without being precise as to the water permits the plaintiff understood it was obtaining. Reliance for this allegation was primarily on Mr Eades’ evidence. He expressed the opinion that the difference between the 250 hectares covered by the C permit and the 145.5 hectares being sold is sufficient to have put the competent solicitor on inquiry, and:

A. ... was different enough to require some further investigation, notwithstanding that the client may well have been satisfied with the class A rights, it just didn’t seem to gel.

Q. (Bench): You think the non gelling in relation to the class C right should raise a general – a need for general inquiry into the water rights?

A. Yes.

(159/15-19)

And, asked to comment on Mr Naysmith’s fax of 19 March confirming the agreement ([71]) Mr Eades concluded:

Bearing in mind the general nature of the provision in the contract that all the water rights owned by the vendors should pass with the sale which was very general in its terms, the discrepancy which the agent had picked up on when forwarding apparently with the best will in the world the three permits what I understand to be the comment of the purchaser’s valuer as to the water rights which attached to the property and the fact that the LIM didn’t cover all of the permits I would have expected the competent lawyer in a letter of that sort to have defined the basis on which due diligence had been satisfied with regard to the water rights which would pass. I think it behoved the competent solicitor to specify what the purchaser believed it was getting in terms of the water rights.

(147/22-33)

[206] The difficulty I have with this carefully expressed opinion is that Mr Eades agreed with Mr Lloyd that conveyancing solicitors are entitled to rely on LIMs as

accurately recording water available for owners of property (148/10). Indeed, Mr Lloyd was adamant that in the circumstances here Mr Naysmith had no obligation to clarify the position as to water rights. This is the relevant part of Mr Wylie's re-examination of Mr Lloyd:

Q. Mr Weston asked you about whether both solicitors for the vendors and for the purchaser should have sought clarity as to what the water rights were before giving approval in terms of clause 19 ..., if this court finds the copies of the water rights were attached to the sale and purchase agreement, does that affect your view?

A. Yes. I believe that carries the day on that question, the vendor has said these are the water rights which go with the contract and clarifies clause 20.

(68/18-24)

[207] I do not consider the expert evidence permits a finding that the plaintiff's due diligence was deficient.

*Omission of B permit from LIM*

[208] The allegation is that the absence of the B permit from the LIM ought to have put Mr Naysmith on inquiry, at least to the point of checking the position with the MDC.

[209] To reiterate the position, Mr Naysmith's evidence (48/35-49/7) was that he did notice the B permit was not listed but thought this was a mistake of the type he had encountered before. For that reason but perhaps primarily because he knew the plaintiff was not concerned about the B or C permits, he did not double-check with the MDC.

[210] Mr Naysmith believed he did mention to Mr Harris, when the two met on 8 March, that the B water permit was not listed in the LIM (51/10). Mr Harris did not recall that (41/36). What is clear is that both men were focusing on the A permit because it was the one critically important to Mr McNabb.

[211] I reiterate my view that it was not a careless oversight for Mr Naysmith not to check when the B permit was not of importance to his client. This allegation fails.

*Not checking the MDC's resource consent (pink) files*

[212] Giving evidence for the MDC, Mr Wilkes said he routinely searched the MDC's resource consent files (the pink files) when he needed to confirm the status of water permits. He stated:

13. I do not rely on the views or opinions of any other party regarding the status of any resource consents. I undertake my own specific investigations to confirm the status of any resource consents by.

[213] Because the availability of water equated to land use development options, Mr Wilkes said that the status of water permits was often the most important individual aspect of a due diligence investigation. He stated:

15. In my opinion a comprehensive due diligence report cannot be undertaken without careful consideration of the relevant resource consent *Pink Files* held by Council.

[214] In the course of cross-examination, Mr Wilkes acknowledged that the disclaimer anyone searching MDC files was required to sign meant that if someone wanted accurate information upon which they could rely they should get a LIM (106/8). Notwithstanding that, a little later in his evidence, Mr Wilkes said:

What I say is when I undertake due diligence I don't rely on LIMs (107/7).

[215] Because I did not understand the basis for Mr Wilkes' evidence I asked him some questions of my own, and this exchange took place:

- Q. You just glossed over something I would like to know by saying that for whatever reason you don't rely on LIMs, what is the reason, because if you are trying to persuade me your practice is prudent, cautious practice I need to know why?
- A. I think I went on to say I don't rely on LIMs with respect to water resources.
- Q. But why?
- A. Maybe I am suspicious.
- Q. But why?
- A. My background was I worked in district council here, and other councils, I am very familiar with pink files and I just go straight at them because I believe that's the source of information which

usually hasn't got me into trouble. When, I guess I feel that I understand the process round the water permits and how they may or may not be transferred and the internal workings of the resource management practitioners at the Council so I can follow those pink files relatively successfully.

Q. That seems to come down to your liking pink?

A. I don't, they used to drive me crazy.

Q. If its important I don't understand why you say someone else couldn't prudently rely on the LIM in Marlborough?

A. From my experience I don't rely, cant tell you the reason why, I just don't rely on them and go straight to the pink files, its probably nothing more than I am familiar with the pink file process and believe I can extract from them the information I need and am comfortable doing that and believe I can get it right doing that.

(107/15-33)

[216] Thus, it emerged that the basis for Mr Wilkes' opinion was his own familiarity with the MDC's files, from having worked for the MDC. As I have pointed out, neither of the conveyancing experts shared Mr Wilkes' view that due diligence of water permits could not be based on a LIM. Nor did Ms Crawford in this exchange:

Q. (Mr Wylie): The person best placed to pick up all the information the council holds is an employee of the council familiar with the Marlborough District Council's record keeping system?

A. Yes.

(112/20-22)

[217] Mr Williams, the resource management expert called by Mr Barton, shared Ms Crawford's view:

Q. (Mr Wylie): Somebody not aware of the level of detail of information held by the council could perfectly properly rely on the LIM?

A. I guess that's correct, I guess there's a lot of people that wouldn't be thoroughly aware of the information held on council files and the level of information.

(159/33-37)

[218] It is significant that Mr Williams, also, was a former officer of the MDC, intimately familiar with its filing systems and how it held information.

[219] The preponderance of evidence is against Mr Wilkes' view that prudence demanded resort by the plaintiff or its advisers to the MDC's pink files. Accordingly, I hold that the plaintiff was not negligent in not searching those files.

### *Summary*

[220] None of the aspects in which the MDC alleges the plaintiff caused or contributed to its own loss has been made out. Even when viewed in their totality, I still reject that the several "flags" or warnings the MDC alleges the plaintiff failed to heed, justify a finding that it caused or contributed to its own loss.

[221] I mention that, in considering these allegations, I have tried to guard against the insight which comes with hindsight. This is the same approach I have taken when considering the plaintiff's allegations against the defendants.

### **Quantum**

[222] The contractual measure of damages applies to the plaintiff's claim against the Moorhouses. Two authoritative statements of what that measure is are:

The starting point and basic principle indicated by high authority is that the injured party is to be put as nearly as possible into the situation that he would have occupied if the contract had been performed ... In other words, the initial aim is restitutio in integrum as nearly as possible ... Various circumstances are recognised as justifying a departure in favour of the defendant from the full rigour of that principle. In particular a plaintiff must normally show that the damages are of a kind within the reasonable contemplation of the parties...

Per Cooke J in *Stirling v Poulgrain* [1980] 2 NZLR 402 at 419.

And:

... the overriding principle (is) that as far as possible the injured party is to be placed in the position it would have been in if the breach of contract had not occurred.

Confirmation that *Stirling v Poulgrain* and *McElroy Milne* remain good law is to be found in several recent decisions of the Court of Appeal: *Hodge v Apple Fields Ltd* (1999) 4 NZ ConvC 193,084; *Bloxham v Robinson* CA198/94, 18 June 1996 and *Donavan v Perisco* CA350/92, 12 February 1993.

[223] I accept the plaintiff's submission at trial that, applied here, that measure of damages is the cost of building a storage dam large enough to provide the plaintiff with the irrigation water it would have had had it received the transfer of the whole of the A water permit.

[224] By memorandum filed on 6 June, counsel for the plaintiff, Ms Dunningham, advises that the plaintiff proposes to mitigate its loss by purchasing an A water permit entitling it to draw 400 m<sup>3</sup>/day of water. The purchase price provided for in a draft agreement is \$320,000 plus GST. The agreement has not yet been signed, because it is subject to the MDC's approval of the transfer of that water permit from Awaroa Vineyards Limited to the plaintiff.

[225] Ms Dunningham's memorandum makes the obvious point that that purchase falls significantly short of covering the 750 m<sup>3</sup>/day shortfall of A class water under the agreement. She states:

... it is still proposed that, in the future, a smaller dam will be constructed on the property to provide the balance of the water required to irrigate the property when fully developed.

[226] Ms Dunningham explains that the advantage of this purchase is that it will provide adequate water through this coming summer, for that part of the vineyard the plaintiff has planted. In due course, a storage dam smaller than the one described in evidence at trial will be required to enable the plaintiff fully to develop its vineyard.

[227] The following passage at 424 in the judgment of Richardson J in *Stirling v Poulgrain* remains an authoritative statement about the date at which contractual damages should be assessed:

As a general rule damages for breach of contract are assessed as at the date of the breach. But, as has been stressed in many recent decisions and notably by Lord Wilberforce in *Miliangos v Frank (Textiles) Ltd* [1976] AC 443, 468; [1975] 3 All ER 801, 813, it is not a universal rule. It yields to the Court's power in the interests of justice to fix such other date as may be appropriate in all the circumstances. Where restitution involves the repair of premises the appropriate damages are the cost of repairs at the time it was reasonable to begin repair: whether the cause of action is in contract (*Johnson v Agnew* [1980] AC 367; [1979] 1 All ER 883 and *Domb v Isoz* [1980] 1 All ER 942; [1980] 2 WLR 565); or in tort (*Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928; [1980] 1 WLR 433); or for compensation under the land compensation legislation (*Birmingham City Corporation v West Midland Baptist (Trust) Association* [1969] 3 All ER 172; [1970] AC 874). The logic and justice of adopting that special rule so as to hold the balance between plaintiff and defendant where costs and values are changing over time are self-apparent. In these inflationary days we think more in terms of rising costs but, as Donaldson LJ pointed out in *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, 939; [1980] 1 WLR 433, 457, it would be wholly unfair to the defendant to charge him with the costs applicable to reinstatement when the damage occurred if the actual reinstatement took place at a later date when improved technology had reduced the cost.

[228] The regrettable fact that I am giving this judgment some eight and a half months after trial is no fault of the plaintiff. That has been a period of rapidly escalating costs, in particular of fuel costs. A litre of diesel cost \$1.1890/litre at the pump when this case was tried last October. The current price is \$1.889/litre. Although I do not know what portion of the cost of building the dam is represented by diesel fuel for the heavy machinery that will be needed, I anticipate it is significant. The cost estimate of \$776,760 to construct a dam large enough to store sufficient water to irrigate all the land suitable for vineyard development was as at 24 November 2006, and will thus be well out of date. In addition it will require revision to take account of the development I detail at [224]-[226]. Accordingly, "holding the balance between plaintiff and first defendant where costs and values are changing" as best I can, I intend awarding damages fixed as at the date of this judgment. My directions for fixing the judgment figure are contained in [286] at the end of this judgment.

[229] Mr Wylie accepted it is the tortious measure of damages which applies to both the claims on which the plaintiff has succeeded against the MDC – negligence and breach of statutory duty. That measure is the sum of damages which would place the plaintiff in the same position as if it had not been wronged. The way in

which this measure differs from that applying to the plaintiff's claim against the Moorhouses is neatly described in Todd's *The Law of Torts in New Zealand* 4<sup>th</sup> Edition 2005 at para 26.2.02:

In other words, tort damages look back to a former, unharmed plaintiff, contract damages look forward to a future, unharmed plaintiff.

[230] Mr Wylie submitted that that measure requires an award of \$450,000 here. That is the difference in value, as assessed by Mr Trueman in his valuation report dated 23 November 2006, of Altimarloch with the whole of the A water permit (value \$2,950,000), and its value with only half of that permit (\$2,500,000).

[231] In his report dated 8 October 2007, Mr Gross, called by Mr Darroch for Bayleys, put the valuation differential at \$347,000.

[232] As both valuers acknowledge, valuation comes down to a matter of opinion, but I prefer that of Mr Trueman, primarily because I think the value Mr Gross places on the unirrigated vineyard land is too high. Mr Gross' per hectare value of \$10-14,000 can be compared with Mr Stark's value of \$4,000, Mr Newdick's of \$10,000 and Mr Trueman's of \$5,500-\$8,000. For the reasons I give in [196] and [199], I largely discount reliance on Mr Newdick's hastily prepared valuation. Mr Gross had earlier, in September 2006, accepted Mr Trueman's valuation range (185/30).

[233] I am also impressed by the fact that Mr Trueman, in his reply evidence, factored in the \$7,900/hectare value of the unirrigated vineyard land on the comparable property called Upton Downs, but then reduced that to \$6,100/hectare to allow for the better aspect of Upton Downs (196/10-20).

[234] Mr Trueman very properly accepted that a valuation somewhat higher than his \$2,500,000 was a reasonable outcome. To reflect this, I adopt a valuation differential of \$400,000.

[235] Had it known the true position prior to settling the agreement on 30 July, Mr McNabb's evidence was that the plaintiff would have either renegotiated the agreement down at least to the value of Altimarloch, or have cancelled the agreement. I accept Mr McNabb's evidence. The consequence is that the plaintiff

has paid \$400,000 too much for Altimarloch, and that is the appropriate award of damages to the plaintiff against the MDC.

[236] By agreement, the parties ask me to apportion liability if I find both defendants liable. As mandating this approach, Mr Camp referred me to Thomas J's bold judgment in *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30. At [74] the Judge pronounced:

In my view the controversy which has surrounded the issue of concurrent liability in contract and tort in New Zealand ... is at an end. ... The tortious duty is enclosed by the general law and, unless the contract between the parties precludes them from doing so, plaintiffs may choose that remedy which appears most advantageous to them.

[237] Although I have misgivings about other aspects of *Dairy Containers*, as apportionment here is uncontested, I am content to undertake it. The mathematical apportionment resulting from the MDC being liable for only \$400,000, as opposed to the Moorhouses being liable for the full extent of the plaintiff's loss (I assume a figure of \$777,000), broadly accords with my assessment of a fault-based apportionment.

[238] That outcome has the additional advantage that the MDC's liability does not exceed the amount the plaintiff could recover from the MDC by direct action, which is the only way in which the MDC is sued here. The different outcome that appears to have resulted in *Dairy Containers* is an aspect of that case on which I respectfully differ from Thomas J.

[239] Accordingly, I apportion liability to the plaintiff as between the Moorhouses and the MDC:

- 66% to the Moorhouses (777/1177ths of \$777,000)
- 34% to the MDC (400/1177ths of \$777,000).

## **Claim by Moorhouses against the two third parties**

### *Generally*

[240] I accept Mr Weston's submission that the Moorhouses "did absolutely nothing wrong" and can pass on to the third parties the whole of the liability I have held they have to the plaintiff.

[241] Both third parties admit they owed both contractual and tortious duties to the Moorhouses, to take reasonable care in the circumstances. That enables me to apportion liability between the third parties as joint tortfeasors. I record that my view is that each third party is primarily liable to the Moorhouses for breach of its contract with the Moorhouses. In the case of Bayleys, that was its contract of 13 February 2004 for sole agency until 31 March 2004 to sell Altimarloch. In Gascoigne Wicks' case, it was the firm's contract of retainer to act for the Moorhouses on the sale of Altimarloch to the plaintiff.

### *Bayleys*

[242] In its pleading Bayleys accepts a duty of care to the Moorhouses to act with proper care and skill in selling Altimarloch.

[243] I hold that Bayleys fell lamentably short of the standard of care required.

[244] Before considering Bayleys' actions, some context is required. Two points. First, Mr Hoare and Ms Herkt had, when with Century 21 McMurtry Real Estate, acted on the sale of the first part of Altimarloch to MWL. I accept that institutional knowledge did not accompany them on their move to Bayleys, but personal knowledge did. The extent of that knowledge was demonstrated by three emails dated 9 and 15 February, and 15 March 2001, sent by Mr Hoare to MWL (to Mr Walker and to Mr McNaught). In the first of these, typed by Ms Herkt (121/23), Mr Hoare stated:

I have, this morning, checked matters with Dave & Jill Moorhouse. They are of the opinion that you should receive 50% of the “A” Water Right and the total of the “B” Water Right. They obtained this “B” Water Right from council for an irrigation water holding dam. ...

[245] In the second email Mr Hoare wrote:

The position regarding the water supply to the land you have under contract. 50% of the total Council “A” Water Right, 100% of the total Council “B” Water Right.

- (1) The “B” Water Right is to legally provide a total water storage volume for 86 hectares. The sufficient water storage reservoir would need to be developed over the suggested swamp area. There is an active spring in this swamp. This would also, in Dave Moorhouse’s opinion, keep the reservoir with bonus water. It was not intended to obtain consents etc for any of this particular Spring Water, as it would naturally be a part of the water storage reservoir to be developed. This water could, if required, be also used for frost protection in the spring from this proposed reservoir.
- (2) The “A” Water Right – 50% - 43 hectares will be supplied to the land you have under contract via the Altimarloch Stream – located on the balance of the Moorhouse land or pumped up from the river to the land you have under contract. This water would be in addition to the water you would have in storage on your property held in the reservoir.

[246] In the last email, to Mr McNaught, Mr Hoare advised:

- (b) The council water right for the subject land will be for 50% of the existing “A” water right and 100% of the “B” water right – refer to email sent to Stephen (Walker) 15<sup>th</sup> February – (forwarded to you today).

That was only three years earlier.

[247] Mr Hoare said he probably averaged 5-6 sales of this size each year (165/2). Given that frequency of sales, Mr Hoare ought to have recalled that the earlier sale involved water permits, and ought to have been alert that there was no element of “double sale” of those permits. In his evidence-in-chief Mr Hoare accepted the Moorhouses may have reminded him of the water permits they had transferred to MWL but said “I do not recall any detail”. Under cross-examination he accepted the Moorhouses had reminded him about this (167/18). Mr Hoare had Mr Stark’s valuation of 16 December 2003 on his file but accepted he did not “bother to read it” (167/34). He agreed that the Moorhouses had given him permission to provide this

to Mr McNabb but could not find any record of doing that (168/5). As I have pointed out ([90]), he accepted that he had not given Mr McNabb a copy of it.

[248] The second point follows from the first. This was a substantial sale. It earned Bayleys \$84,234 commission (165/20). That level of reward called for a careful and thorough sales job. In particular Bayleys needed to “get right” important details such as water permits and easements.

[249] I accept that Bayleys’ primary function was to find a buyer. But of what? Bayleys needed either to give accurate details about Altimarloch in the sales information it provided, or to be able to provide that detail accurately to prospective buyers upon request.

[250] The information about vineyard potential and the water available for it contained in Bayleys’ Property Information brochure is set out at [33]. I note that Mr Hoare did not prepare that brochure and could not recall reading it (165/28).

[251] Mr Darroch conceded this information “was relatively generic”, indeed he advanced that as a point in Bayleys’ defence. I do not see it that way. Bayleys was marketing Altimarloch as a property with vineyard potential. That was the point of Bayleys noting in its brochure that:

... surrounding properties include the Medway Vineyards.

Any buyer looking to develop Altimarloch as a vineyard would inevitably inquire: what water permits are included in the sale?

[252] Bayleys ought to have included accurate and complete information about the water permits in its sales information brochure, carefully checking that information with the Moorhouses and/or GW before issuing the brochure. I find Bayleys was negligent in not doing that.

[253] Inevitably, Mr Harris inquired of Bayleys what water permits were included in the sale ([42]). I have already detailed Bayleys’ response and how it obtained the information it gave Mr Harris. Ms Herkt did not know why she had not done that

(123/20-25). Had she done so, both Mr and Mrs Moorhouses said they would immediately have pointed out they only retained 1½ water permits to transfer to the plaintiff, not three (85/15; 91/5). Further evidencing Bayleys' lax approach is the fact that Bayleys faxed the three water permits to Mr Hoare without any covering letter or note advising how Bayleys had obtained the information.

[254] I find Bayleys negligent in either:

- Not obtaining the information it sent Mr Harris from the Moorhouses, or at least checking it with the Moorhouses before sending it; or
- Not obtaining a LIM. If Bayleys did not know that a LIM was the only reliable way of obtaining information from the MDC as to the water permits for Altimarloch, then it ought not to have gone to the MDC itself, but requested the assistance of the Moorhouses or (with their approval) GW.

[255] It is almost too obvious to state that an accurate answer by Bayleys to Mr Harris' question would have averted this proceeding.

[256] On 23 February Bayleys sent each of the parties a copy of the signed agreement under cover of the letter ([53]) which occupied so much time in evidence. I find Bayleys negligent in not first checking the three permits with the Moorhouses before it attached them to the agreement or enclosed them with the agreement as the water permits "pertaining to the property". At the very least, Bayleys was careless in not copying its 23 February letter to the Moorhouses.

[257] Again, it states the obvious that provision of the correct water permits would have avoided this litigation.

[258] I accept Mr Eades' evidence that, had he been acting in the matter, he would have read Bayleys' 23 February letter as drawing his attention to a possible discrepancy in the water permits enclosed. I do not accept Mr Eades' evidence that any reasonably prudent solicitor would have read the letter that way. Mr Sawyer did

not, but I need to exclude him because I find he was careless ([282] following). Mr Naysmith did not. He did, however, seek clarification about the easement.

[259] I am a Judge and not a conveyancer, but I did not, and still do not, read the letter as pointing to a discrepancy. If that was the aim of the letter, then it was a hopelessly inadequate and incompetent attempt by Bayleys to do that. Why did the letter not simply state:

We note that the C permit relates to 250 hectares, whereas the land being sold is 145.5 hectares. This apparent discrepancy should be checked.

[260] If the letter was intended to be cautionary, it further evidences Bayleys' deep incompetence.

[261] I have accepted Mr Harris' evidence that he double-checked the water permits with Ms Herkt some time between 3 and 9 March and was told Bayleys were not aware of any restrictions on or concerns with the water permits ([66]). I cannot reconcile this evidence with the suggestion that Bayleys' 23 February letter aimed to point out a possible discrepancy in the water permits. If Ms Herkt thought there might be a discrepancy, then Bayleys was negligent when Ms Herkt advised Mr Harris otherwise on the telephone between 3 and 9 March.

[262] In summary, from beginning to end of its involvement as the Moorhouses' agent in selling Altimarloch, Bayleys was incompetent and careless.

### *Gascoigne Wicks*

[263] Mr Barton accepted that GW had a duty to check and clarify the water permits position with its clients, the Moorhouses.

[264] But, in contending that GW had not breached this duty, Mr Barton submitted:

- The only misrepresentation by GW relied upon by the plaintiff in its claim against the Moorhouses was GW's 27 February letter to Mr Naysmith approving the agreement for the vendors.

- The clause 19 approval was as to title, form and the further terms of sale – the “conveyancing aspects or legal implications of the agreement”: *Dashwood Vineyards Ltd v Hammond* HC BLE CP15/99 21 July 2000, Wild J.
- In any event, Mr Naysmith’s 27 February email advice to Mr McNabb, that any water issues could be dealt with under due diligence, completely answered the plaintiff’s claim that it relied on GW’s 27 February letter as a representation that the Moorhouses were in a position to transfer the three water permits sent by Bayleys with the agreement, under cover of its 23 February letter.
- If clause 20.0 had been specific as to the water permits to be transferred as part of the sale, then GW would have had an obligation to check that those permits were correct. GW could have done that either by checking directly with GW or by checking with the MDC.
- Because clause 20.0 was “extremely loose” and not specific as to the water rights to be transferred, Mr Sawyer was under no obligation to check with the Moorhouses what water rights they had to transfer. His letter cannot be interpreted as “representing” a state of affairs that it makes no reference to.
- As early as 2 February, Mr Naysmith knew what water rights he believed were being transferred. He nevertheless drafted clause 20.0 non-specifically. Not until shortly before settlement did the plaintiff indicate what water permits it thought it was getting. That indication was given when Mr Naysmith, on 24 July, sent Mr Sawyer transfers of the three water permits for execution by the Moorhouses.
- Upon receiving those transfers from Mr Naysmith, Mr Sawyer ought, as a matter of reasonable care and prudence, to have checked with the Moorhouses that those were the water permits to be transferred.

- However, Mr Sawyer's failure to check with the Moorhouses was not causative of the loss. That was long after the agreement had been made unconditional on 19 March by Mr Naysmith for the plaintiff, so that both parties were bound by it.

[265] I do not accept those submissions. First, as Mr Weston pointed out, GW had acted for the Moorhouses on the sale of the first part of Altimarloch, to MWL in 2001. Thus, GW knew that the Moorhouses had transferred half their A permit and all their B permit to MWL as part of that sale. The evidence from GW's records established that (136/17-21). Certainly, it was Ms Leov (now Timms) who acted on the first sale, and not Mr Sawyer. But the second third party is GW – the firm – and not any of its individual solicitors. It is the firm's institutional knowledge which is relevant. Mr Eades accepted that Ms Leov should have alerted Mr Sawyer to the transfer of some of the water rights upon the first sale to MWL, particularly as she had also been involved in the early stages of the sale to the plaintiff (156/2-4).

[266] Second, like Mr Naysmith, Mr Sawyer received copies of the three water permits with the agreement under cover of Bayley's 23 February letter ([54]). This was as much a representation to Mr Sawyer, by his own clients' selling agent, as it was to Mr Naysmith, that the three enclosed water permits were those that would be transferred pursuant to clause 20.0. It is thus not correct to suggest that Mr Sawyer as the vendors' solicitor had no ability to check that the A, B and C permits were still held by the Moorhouses ("title") and available for conveyance by them ("conveyancing aspect") in terms of clause 20.0. I accept Mr Weston's submission that this situation is hard to distinguish from the situation where clause 20.0 specified the water permits to be transferred.

[267] Third, even if the view I have just expressed is incorrect, I reject Mr Barton's submission that the more specific clause 20.0 is, the higher the duty on GW to check the water permit position, and vice versa. My view is that GW's duty to check the water permit position with the Moorhouses was unaffected by the specificity of clause 20.0 or the lack of it. If there was no specificity, GW needed to ascertain and check the position. If there was specificity, GW needed to check that what was specified was correct.

[268] In evidence Mr Sawyer accepted that he never checked the water permit position with the Moorhouses. Thus, he accepted that:

- He did not check with the Moorhouses that Bayleys' 23 February letter correctly stated the position, and in particular that the three water permits enclosed with that letter were those to be transferred pursuant to clause 20.0 (138/27).
- He did not send a copy of Bayleys' 23 February letter to the Moorhouses. He said that was unnecessary if they already had a copy, but accepted that he did not know whether they did (145/19-21).
- He did not know what water permits the Moorhouses had to transfer pursuant to clause 20.0 (138/34).
- He signed the transfers of the three water permits without instructions from the Moorhouses that those were the correct permits (139/5).
- He took the view that it was for the plaintiff as purchaser to confirm the position as to water permits (138/30; 139/10).
- The Moorhouses assumed he was taking proper care of the water permit position from their viewpoint (140/30-32).

[269] Mr Sawyer maintained he had implied authority to transfer the water permits held by the Moorhouses. But he accepted that he purported to transfer more extensive water permits than the Moorhouses held (142/10).

[270] In his evidence-in-chief for GW, Mr Eades accepted that Mr Sawyer had a broad duty to check the agreement to ensure that it was correct and enforceable. Given that water permits were an essential part of the transaction, he accepted that they would rank high in terms of importance, but expressed the view that there "might need" to be something to prompt Mr Sawyer to check the water permit position.

[271] Mr Eades took the position that there was no “prompt” from the plaintiff or those acting for or advising it, as to water permits. At no stage did they alert GW to any problem about the water permits or raise any query about them.

[272] Mr Eades’ reading of Bayleys’ 23 February letter was that it was drawing the attention of the solicitors to whom it was addressed to a discrepancy in the water permits. Mr Eades’ view was that Mr Naysmith ought to have investigated that discrepancy. Under cross-examination, Mr Eades accepted that the letter should also have put Mr Sawyer on inquiry “if necessary to establish the true position at that point”. But he considered it was not necessary for Mr Sawyer to check at that stage, because the plaintiff had yet to undertake due diligence in terms of the agreement (151/10). When confirming the agreement following due diligence, Mr Eades considered that Mr Naysmith ought to have specified what water permits the plaintiff believed it was getting (147/32).

[273] After the plaintiff’s due diligence and confirmation of the agreement, Mr Eades took the view that Mr Sawyer would not undertake further inquiries, beyond having the Moorhouses confirm, when he got them in to sign the documents tendered by Mr Naysmith, that the contents of those documents appeared to be in order.

[274] Mr Eades did not accept that Mr Sawyer’s approval of the agreement constituted confirmation by the Moorhouses that they had the three water permits referred to in Bayleys’ 23 February letter to transfer pursuant to clause 20.0. He explained that that was because of the “discrepancy” in Bayleys’ 23 February letter, which I have referred to in [272] (152/18-28).

[275] In the course of extensive cross-examination, Mr Eades eventually accepted that Mr Sawyer should have checked the position as to water permits. This is the relevant passage in the evidence:

Q. Given the fact the letter of 23 February expressly enclosed those permits regardless of what the next sentence means wasn’t it a matter Mr Sawyer on behalf of the vendors should have checked to make sure they could sell the rights conferred by those permits?

A. He should have.

(153/36-154/2)

[276] Further, had Mr Naysmith when confirming the agreement spelt out the water permits the plaintiff believed it was obtaining pursuant to clause 20.0. Mr Eades' evidence about this was:

Q. (Mr Weston) Let me run that through, if the vendor's lawyer doesn't clarify that point, the possibility is that he gets the letter... saying this contract is unconditional, the one in March, that was the one you indicated you would write by putting the detail in, but if that's the first time the detail comes back its really a bit late for the vendor to start backpedalling because the contract has been declared unconditional and suddenly the vendor is left with a reading of the contract that's not in fact what the vendors thought it was?

A. That's right.

Q. It really would be far better if at the front end the vendor's solicitor as you would do clarified what the water rights were?

A. Yes.

(155/25-35)

[277] A lynch pin of Mr Eades' evidence was his interpretation of Bayleys' 23 February letter: that it was pointing out a discrepancy that should have put Mr Naysmith on inquiry. Mr Eades' reading of that letter did not alter my own view (I had already expressed it to counsel) that this letter was land agents' puffery. It was effectively saying "the agreement gives you more water than you'll need". When the letter was written the agreement was still both conditional, and subject to solicitors' approval.

[278] If it was not puffery, then it was a nonsense. Upon a literal reading, Bayleys had added up the 86 hectares covered by the A permit, the 86 hectares covered by the B permit and the 250 hectares covered by the C permit, totalling 422 hectares, and had pointed out that that exceeded the 145.5 hectares being sold. That was nonsensical because each of the three permits was of a different class but applied to the same land, save that the C permit covered a substantially greater area. This is essentially the point I dealt with in [184]-[193], in relation to the allegation of contributory fault on the plaintiff's part.

[279] Even accepting Mr Eades' interpretation of Bayleys' letter, I remain troubled by his view that the letter should have put Mr Naysmith on inquiry, but not at that point Mr Sawyer, who was entitled to await the outcome of the plaintiff's due diligence. As I have pointed out, under cross-examination Mr Eades ultimately accepted the points I deal with in [275] and [276].

[280] I conclude that reasonable care and prudence as a solicitor required Mr Sawyer to check the water right position with the Moorhouses *before* he approved the agreement on their behalf in terms of clause 19. In particular, he needed to check with the Moorhouses that they were indeed in a position to transfer the three water permits which Bayleys had enclosed with the agreement under cover of the 23 February letter. His firm's institutional knowledge was that the Moorhouses were *not* in that position.

[281] Had Mr Sawyer done that he obviously could not, and I find would not, have confirmed the agreement for the Moorhouses. The sale would not have proceeded.

[282] Accordingly, I find GW was in breach of the duty Mr Barton accepted at the outset that it had: a duty to check and clarify the water permit position with the Moorhouses.

[283] Mr Sawyer subsequently exceeded his implied authority by executing the transfers of the whole of the A, B and C permits tendered to him by Mr Naysmith, and handing those executed transfers to Mr Naysmith upon settlement. I cannot see that this excess of authority compounded GW's breach of its duty to the Moorhouses, and therefore say nothing more about it.

### ***Apportionment***

[284] Bayleys and GW both admit they are joint tortfeasors at the suit of the Moorhouses. I apportion their liability 80% to Bayleys and 20% to GW. Precision in apportionment is not possible in this case. The basis on which I have made that apportionment is best demonstrated in tabular form.

<b>Date</b>	<b>Third Party</b>	<b>Details</b>
August 2003	Bayleys	<i>Sales information:</i> Neither accurate nor complete. Not checked with the Moorhouses before it was released ([252]).
Early January 2004	Bayleys	<i>Request of plaintiff (Mr Harris) for information:</i> Did not check the information with the Moorhouses before it was provided to Mr Harris. Provided inaccurate information. Did not get the information from the MDC by way of a LIM. ([254]).
23.2.04	Bayleys	<i>Advice to parties' solicitors:</i> Did not check the content of the letter with the Moorhouses before sending it, or copy the letter to them. Provided inaccurate information in the letter ([256]).
27.2.04	Gascoigne Wicks	<i>Confirmation of agreement:</i> Failed to check the water permits position with the Moorhouses before approving the agreement in terms of clause 19 ([59] and [280]-[282]).

## **Result**

[285] I give judgment for the plaintiff against each of the first and second defendants.

[286] For the reasons outlined in [228], I reserve the amount of that judgment. I give the following directions as to the procedure for fixing the amount of the judgment:

- By **1 August 2008** the plaintiff is to file and serve a memorandum detailing the amounts for which it seeks judgment. I say amounts, because I anticipate the judgment sum will comprise the purchase price of the additional A class water the plaintiff has conditionally purchased ([224]-[226]) and an up-to-date estimate of the cost of constructing the (now smaller) water storage dam required to provide the remaining 350m<sup>3</sup>/day of irrigation water..
- By **22 August**, any party wishing to respond to the plaintiff's memorandum is to file and serve its memorandum in response.

- Unless any party requests a further hearing relating to the amount of damages (a course I do not encourage) I will then fix the amount of the judgment based on the memoranda filed.

[287] I apportion liability for the judgment once I have quantified it, 66% to the Moorhouses, 34% to the MDC.

[288] Upon their third party claims, I give judgment to the Moorhouses against each of Bayleys and GW. Obviously, the amount of that judgment must also be reserved.

[289] I apportion liability to the Moorhouses, as between the two third parties, 80% to Bayleys and 20% to GW.

### **Costs**

[290] I reserve costs. Failing agreement I will deal with them upon submissions which should be included in the memoranda I have directed in [286] above. My tentative views are:

- The proceeding should be category 3B for all its stages (as far as I can ascertain from the Court file, the proceeding has not previously been categorised for costs).
- There should be certificate for second counsel for the plaintiff.
- The defendants should pay costs to the plaintiff in proportion to their respective liability.
- The third parties should indemnify the Moorhouses for the costs the Moorhouses must pay the plaintiff, on the same basis as I have apportioned liability between them.

Solicitors:

Buddle Findlay, Christchurch for the Plaintiff

Raymond Sullivan McGlashan, Timaru for the First Defendant

Radich Law, Blenheim for the Second Defendant

Duncan Cotterill, Nelson for the First Third Party

Anderson Lloyd Caudwell, Dunedin for the Second Third Party