IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-1385
CIV-2020-404-1247
[2025] NZHC 2581

BETWEEN	GREEN & McCAHILL HOLDINGS LIMITED Plaintiff
AND	EVAN CHRISTOPHER WILLIAMS First Defendant
	ARA WEITI DEVELOPMENT LIMITED Second Defendant

Hearing:	6, 7, 8 May; 13-17 May; 20-24 May; 27-31 May 2024 4-7 June; 10-14 June; 17-21 June; 24-27 June 2024; 1-4 July 2024
Appearances:	B Dickey, K Morrison, A Manuson, K Tubbs and M Tan for the Plaintiff D Chisholm KC, MHL Morrison, CJH Fraser, M Sun and SE Tindale for First to Fourth Defendants RJ Gordon and EB Maw for Fifth Defendant DT Broadmore and C Tataru for Sixth Defendants
Judgment:	5 September 2025
Reissued:	25 September 2025
Further Reissued:	14 October 2025

JUDGMENT OF BECROFT J

This judgment was delivered by me on 5 September 2025 at 4pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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ARA WEITI BAY DEVELOPMENT LIMITED
Third Defendant

ARA WEITI INVESTMENTS LIMITED
Fourth Defendant

LAMBTON QUAY PROPERTIES NOMINEES LIMITED
Fifth Defendant

CLEARWATER CAPITAL PARTNERS DIRECT LENDING OPPORTUNITIES FUND, L.P. and CLEARWATER NZ1 SMA LIMITED
Sixth Defendants

OVERVIEW: WHAT IS THIS CASE ABOUT?

[1] Large scale property development is not for the faint-hearted. It is a risky business.

[2] Complications can easily arise. This is especially so where, as here, the landowner and the developer of a huge subdivision project are different entities.

[3] The complications to navigate include, for instance, to what extent and on what basis will the developer and landowner work together? How will money for the development (here tens of millions of dollars) be raised in advance? Will the landowner agree to mortgage its land to secure the developer's loans? Will the developer sell enough of the developed subdivided land fast enough to enable repayment of the loans, and reap a profit for both the landowner and developer?

[4] The risk/reward outcome is finely balanced. Landowners, as here, who mortgage their land to support a development are at significant risk if loans are not repaid. Developers constantly walk a tight rope. This case is an object lesson about all those risks and more.

[5] Here, the overseas owned landowner company (which is the plaintiff) maintains it has suffered a massive loss because of a botched subdivision development and the subsequent unfair and sham mortgagee sale of part of its land. It says it mortgaged part of its land in good faith to secure huge loans to assist the developer, on the strength of negligent misstatements and/or misleading conduct by the director of the development entity in his personal capacity (who is the first defendant). The following is an overview of how this all unfolded.

[6] In 2005, the landowner gave the developer an option to purchase its land. This was renewed several times. If any lots were developed and sold during the life of the option, this was built into the sale price. However, nothing came of the development over the next five or so years.

[7] The developer at this stage was a group of companies effectively "owned" by an individual—the first defendant. He was the driving force for the development. The landowner company was represented by a senior, overseas based director who regularly visited New Zealand. These two individuals were effectively the main protagonists in this case, although their involvement was primarily through various corporate entities.

[8] In around 2011, the parties entered into a development agreement. Importantly, in 2012, they also formed a "limited partnership" for up to 18 years. A limited partnership is a complex animal. Here, it cemented the involvement of the two main protagonists into the development.

[9] The general partner of the limited partnership was an entity controlled by the first defendant. The general partner had responsibility for the management of the development. It contracted that responsibility to a management company to oversee the development. The director of that management company was also the first defendant.[1] There were two other entities which were limited partners.[2] Each limited partner was controlled by one of the protagonists. The limited partner controlled by the plaintiff's senior director[3] had a 60 per cent share in the limited partnership. The limited partner controlled by the first defendant had a 40 per cent share.

[10] From 2012, the development was in the hands of the limited partnership. And for many years the legal structures adopted by the two protagonists functioned smoothly. The two apparently enjoyed a relatively constructive business relationship.

[11] The development (managed by the general partner) could not commence without upfront finance. Potential lenders, in the normal way, required security. Eventually, the landowner agreed (it says most reluctantly) to provide some of its land as security for a series of ever-increasing loans over the next five years.

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1 From this point on in the overview I will call this person the first defendant.

2 "Limited partner" is the language of the relevant Act (to be discussed in more detail later). However, counsel often differentiated between them by using the term "senior limited partner" and "junior limited partner." I use the terms interchangeably in this judgment.

3 From this point on in the overview I will call this person the plaintiff's senior director.

[12] Two separate loan facilities were obtained (about a year apart) by the limited partnership for the planning and consent stage of the subdivision. These loans were both relatively small and supported by a sophisticated mosaic of documents. Both were tripartite agreements[4] with mortgage security over a part of the land. The second loan paid off the first loan, but it went into default.

[13] A vastly larger loan, and a lesser junior or "mezzanine" loan, were then obtained for the first construction phase of the subdivision. They were secured over the same land. The documents relating to this included a quadripartite deed.[5] The associated loan facilities and obligations went through two further iterations, with the junior lenders being replaced at various times, on each occasion supported by a new quadripartite agreement. The second quadripartite arrangement resulted in even more of the land being mortgaged, which was continued in the third quadripartite agreement.

[14] The development began in earnest during this time.

[15] The landowner now claims it was induced into signing the mortgages by misrepresentations, not by the limited partnership nor any other corporate entity, but by the first defendant personally. These misrepresentations included that there was little or no risk to the landowner; that, on the basis of forecasts provided, the development would be profitable; and that the landowner would be progressively paid the agreed price for its land by set dates, in priority over the secured lenders.

[16] In early 2019, after the set dates had passed, but well before likely completion of the development, and with slow section sales, the landowner demanded some payment in priority to the mortgagees from the limited partnership (it had received nothing so far). This proved legally impossible. The relationship between the landowner (and its senior director) and the first defendant (and his companies) rapidly and irretrievably broke down.

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4 The three-way agreement was between the landowner, the limited partnership and a commercial lender.

5 The four-way agreement was between the landowner, the limited partnership, a "senior" commercial lender, and a "junior" or "mezzanine" lender.

[17] The first defendant and the then-mortgagee put various "salvage packages" to the landowner. They were rejected. The landowner wanted, but predictably did not obtain, an alteration to the mortgage agreements so that it would begin to receive some of the sale proceeds in priority to the secured loan repayments. It said it would not release any titles for sale completion without this payment. No further money was advanced by the lenders. The development stalled and became distressed.

[18] The landowner, the first defendant, and the mortgagees each pursued their own strategies, with their own advisers.

[19] Mortgagee sales resulted. The secured land was eventually sold (for less than the amount owing under the loans). The purchasers were new companies formed by the first defendant, funded with the assistance of a new, overseas financier. Separately, but at the same time, another new company formed by the first defendant received an assignment of the residual debt owed by the landowner under the loan agreements.

[20] Unsurprisingly, the landowner "smelt a rat". It strongly suspected the developer acquired ownership of the land, and the residual debt, by subterfuge.

[21] The first defendant maintains that the landowner deliberately "tanked" the development and then refused to co-operate, in the cynical assessment that there would be no other willing purchasers at any mortgagee sale. The landowner, it is said, wanted the mortgagees to "take a haircut", with the ultimate strategy of redeeming its own land at a discount as it would be the only realistic purchaser. The mortgagee maintains the orthodoxy of the sale process. The new companies argue that their acquisition of the mortgaged land and the assigned residual debt was entirely above board. And the overseas financier wants to protect its registered mortgage interests, securing the new loans to the new companies.

[22] There are five major issues, which reflect the five causes of action:

(a) Was the landowner induced to provide its land as security by various alleged misrepresentations/misstatements made about the development

by the first defendant, for which he is said to have assumed personal responsibility?

(b) Alternatively, was the conduct of the first defendant misleading or deceptive under the Fair Trading Act 1986 (FTA)?

(c) Was the mortgagee sale process carried out in accordance with the mortgagee's statutory duties and in good faith for repayment of the loan, and was it used by the mortgagee (with assistance from the first defendant) for the improper purpose of depriving the landowner of its land?

(d) Can the landowner enforce a personal guarantee against the first defendant originally given to the senior lender as part of the first quadripartite arrangement?

(e) As a counterclaim, can the company created by the first defendant enforce the residual debt assigned to it against the landowner? And if so, what interest is payable by virtue of certain problematic provisions in the Credit Contracts and Consumer Finance Act 2003 (CCCFA)?

[23] These five issues form the essence of the case, although there are many other issues and sub-issues. This decision is structured around these five causes of action.[6]

[24] The previous overview is intended to provide a way into understanding this complicated case. The facts span 15 years. I am told the case relates to as many as 55,000 documents. It needed 40 court sitting days to hear and it generated 2,822 pages of evidence.

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6 The discussion in respect of each cause of action, other than the first two, is largely self-contained. They are written so they can be read separately. However, some overlap and repetition of the facts and themes cannot be avoided.

[25] I record my clear initial advice to counsel that realistically I would only be able to consider those documents to which I was specifically referred. The documents were all digitised and easily accessible with an in-court technology system expertly "driven" by the junior counsel for each of the parties. It was of enormous assistance.

[26] I acknowledge all lead counsel, and their teams, for their helpful assistance and the care taken in the presentation of their evidence and in their comprehensive subsequent submissions.

[27] For the record, I remind myself that the plaintiff (and counterclaim plaintiff) bears the onus to prove its case on the balance of probabilities. However, in respect of the mortgagee sale cause of action, there is an argument, dealt with later, that the onus shifts to the mortgagee fifth defendant.

[28] Before addressing the five key issues identified above, I address some key introductory matters:

(a) a description of the parties;

(b) a description of the land;

(c) a detailed chronology—which provides the context for this case, which is contained in an appendix to this judgment;

(d) my credibility findings, mainly in respect of the two key protagonists; and

(e) my analysis of the deepening business relationship between the plaintiff's senior director and the first defendant.

WHO ARE THE PARTIES?

The plaintiff: Green & McCahill Holdings Ltd

[29] In 1956, Green & McCahill Holdings Ltd (GMHL) was incorporated. It was a holding company for a large block of undeveloped land at Weiti Bay (called in this

judgment "the Weiti land"). It borders the Hauraki Gulf, just north of suburban Auckland. It is described in more detail in the next part of this judgment.

[30] In 1991, the Liu family, from Taiwan, acquired GMHL and, in so doing, acquired the Weiti land.[7] As I understand it, the Liu family purchased the land for about $4 million. The Weiti land was first brought to the attention of Mr Tong Kuang Liu (Mr Liu) by a New Zealander known to Mr Liu. GMHL is effectively owned by Orere Farms Ltd which, in turn, is owned by the Liu family.

[31] Mr Liu is a senior director of GMHL. He is one of the two key protagonists in this case I referred to in the overview.

[32] Mr Liu does not live in New Zealand. I understand he ordinarily resides in Taiwan. As a director of GMHL, he was authorised by the company to enter all transactions and dealings with the land. Mr Liu is the principal witness for the plaintiff. His father, the very respected Dr Jieh Jow Liou (Dr Liou), was, until his death in the mid-2010s, effectively the patriarch of the Liu family. He played a part in the early negotiations.

[33] The Liu family consists of apparently very wealthy, extremely capable, and internationally educated businesspeople. They are fluent in English and highly experienced in property matters. They have extensive property investments around the world including in Taiwan, Canada, France, the United Kingdom (particularly Scotland) and Japan. Mr Liu now runs the family business interests.

[34] Mr Liu has two sons in their early forties, Zoltan and Justin, and at least one sibling—a sister, Dr Linda Liu (Dr Liu). They all gave evidence.

[35] Mr Dickey and Ms Morrison and their team act for GMHL.

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[7] Green & McCahill (a well-known Auckland construction company until 2002), now apparently part of the Hugh Green Group, has no part in this case at all. The original name of the company was simply retained by the Liu family.

First defendant: Mr Evan Williams

[36] Mr Evan Christoper Williams is the first defendant. He is the other protagonist described in the overview. He is sued in his personal capacity.

[37] Mr Williams is qualified as a lawyer. He practiced as a commercial solicitor, including as a partner in Chapman Tripp from 1985 to 1995. He was managing partner of that firm from 1987 to 1993.

[38] Since the late 1990s, Mr Williams has effectively been a property developer, with developments in New Zealand and Fiji.

[39] Mr Williams was a shareholder and director of various development companies originally established to manage the proposed development of the Weiti land. In a practical sense, they are all his companies and they are his "creations" for the development. He was intimately involved in the limited partnership agreement with Mr Liu. He was also originally the sole director of the second and third defendant companies which now own some of the Weiti land as a result of the mortgagee sale. Those companies were effectively also his creations. The same is true for the fourth defendant company.

[40] The essence of GMHL's claim against Mr Williams is that, in reliance on representations he made personally, not as director and/or CEO of the various development entities, GMHL was induced to mortgage some of its land as security for various loans necessary to subdivide the land. It seeks very considerable damages.

[41] Mr Chisholm KC and Mr Morrison and their team act for Mr Williams and for the second, third and fourth defendants, described next.

Second, third and fourth defendants: Ara Weiti Development Ltd, Ara Weiti Bay Development Ltd, and Ara Weiti Investments Ltd

[42] Mr Williams is directly "associated" with a number of companies involved with the development at various stages (I understand at least 12), of which the second, third and fourth defendants are examples. Those three companies were all incorporated in 2020—much later than the others.

[43] As I understand it, the first two companies (the second and third defendants, Ara Weiti Development Ltd (AWDL) and Ara Weiti Bay Development Ltd (AWBDL)) were established by Mr Williams[8] for the sole purpose of acquiring, through the mortgagee sale, all the land (in two parts) that GMHL had mortgaged.[9] They are implicated, at least indirectly, by their part in the alleged unfair and unlawful mortgagee sale by which they acquired the mortgaged land. They are the entities in respect of which the plaintiff seeks an order for return of the land it previously owned and lost as a result of the mortgagee sale.

[44] The fourth defendant company, Ara Weiti Investments Ltd (AWIL), was incorporated to receive the assignment of the residual debt owing after the mortgagee sale. It is sued because of its alleged role as part of the same flawed mortgagee sale. It is AWIL that brings the counterclaim, referred to below.

Fifth defendant: Lambton Quay Properties Nominees Ltd

[45] Lambton Quay Properties Nominees Ltd (Lambton Quay) is the fifth defendant. It is a Wellington-based finance and lending company in respect of property and commercial development. It is headed by the well-known Wellington businessman and philanthropist, Sir Mark Dunajtschik (Sir Mark).

[46] Lambton Quay was the second mortgagee in the third and final quadripartite deed, concluded in July 2018. In June 2019, it eventually exercised its right to "buy out" the first mortgagee, the Bank of New Zealand (the BNZ), and is said, by novation,[10] to have acquired all the Bank's rights. Lambton Quay then exercised its rights, as mortgagee, to sell all the mortgaged land owned by GMHL by way of mortgagee sale. The proceeds of sale were insufficient to satisfy the secured debt.

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8 Mr Williams' evidence, which I accept, is that he was initially the sole director of the three Ara Weiti companies. His son, Asher Williams, was appointed as a director on 2 June 2020. At the time of the hearing, Mr Williams had no interest in the three companies, which are all ultimately beneficially owned, through trust structures, by Williams family members—not including Mr Williams.

9 As I understand it, AWBDL became the registered proprietor of almost all the Weiti Bay lots (28 out of 33) and AWDL became the registered proprietor of the remaining Weiti Bay lots and Village 1. The names for different parts of the development will be discussed shortly.

10 I record that when it came to argue the counterclaim, there was a dispute between the parties as to whether this transaction was properly characterised as a novation or an assignment. I have not found it necessary to determine that dispute. For simplicity, I will refer to it as a novation throughout the judgment. That is not intended to indicate my view on that dispute.

[47] GMHL claims the mortgagee sale process was in breach of Lambton Quay's statutory duties and was otherwise unfair. It wants all the mortgagee sale transactions set aside. It wants the current registered proprietors, and the current, new mortgages, removed from the titles and seeks the restoration of itself as registered proprietor. Further, or alternatively, it seeks damages against Lambton Quay.

[48] Mr Gordon and his team act for Lambton Quay.

Sixth defendants: Clearwater Capital Partners Direct Lending Opportunities Fund, L.P.; Clearwater NZ1 SMA Ltd

[49] For convenience, I describe the sixth defendants as Clearwater.

[50] As I understand it, Fiera Capital (Asia) Hong Kong Limited (Fiera HK) is a subsidiary of a Canadian asset management company Fiera Capital Corporation. Fiera HK is involved in the management of various funds and investment vehicles, many of which have the descriptor "Clearwater" in their names. Those include, relevantly, one of the two sixth defendants in this proceeding, Clearwater Capital Partners Direct Lending Opportunities Fund, L.P. (Clearwater Direct Lending). This company specialises in senior secured debt financing in the real estate sector in Asia, focussed on Australia and New Zealand.

[51] Clearwater are not the subject of any direct claim by the plaintiff. However, Clearwater, in one of its guises, provided finance to the second and third defendants to enable them to purchase the mortgaged land during the alleged unfair "sham" mortgagee sale process. It is claimed that Clearwater had knowledge of Lambton Quay's alleged breaches of its mortgagee duties.

[52] Clearwater is involved in the proceedings because, amongst other things, the plaintiff seeks to unwind the mortgagee sale process. This will have significant ramifications for Clearwater as the registered mortgagee over the land now owned by the second and third defendants. In other words, Clearwater wishes to protect and maintain its mortgage security. Unsurprisingly, it is adamant the mortgagee sale process was proper and lawful, was not a sham, and should not be set aside.

[53] The managing director and portfolio manager of Clearwater Direct Lending is Mr Joshua Bartlow. He was the sole witness for the sixth defendants. He manages Clearwater Direct Lending's loan portfolio in Australia and New Zealand.

[54] Mr Broadmore and his team act for Clearwater.

Counterclaim plaintiff: Ara Weiti Investments Ltd

[55] As well as being the fourth defendant, AWIL is the counterclaim plaintiff against GMHL (the overall plaintiff). As described, this company was incorporated for the purpose of obtaining the assignment of debt from Lambton Quay constituting the shortfall of the mortgage loan (the residual debt) after the mortgagee sale. AWIL seeks to enforce this assignment as against GMHL, together with interest. Amongst other issues, GMHL disputes the amount of interest that can be properly claimed as part of the alleged residual debt.

THE WEITI LAND

[56] The Weiti land is about 30 minutes' drive north of Auckland, between Long Bay to the south and the Whangaparāoa Peninsula to the north. It partly borders the Hauraki Gulf. It is near Stillwater. It is said to be well suited to subdivision.

[57] The land is a very large block of coastal land (909 hectares); the size of many Auckland suburbs. It is slightly larger than the Devonport and Bayswater suburbs combined, and is equivalent in size to the Te Atatū Peninsula. It is surrounded by a marine reserve on its northern, eastern, and southern boundaries.

[58] The Weiti land was then comprised of a rotational pine forest, native forest and a small area of bare land on the coast. It is largely still covered by densely planted pine trees.

[59] In 2005, it was zoned to allow only 150 dwellings on the entirety of the land. In 2013, planning permission was finally obtained for up to 550 lots. Approval was then sought (later in 2013) for up to 1200 lots. By early 2019, it seems that process was well down the track, but certainly not finalised. I accept that the indications as to

approval were positive. At various stages, there was even talk of approval for up to 1600 lots being attainable. However, at the time of this hearing, consent for more than 550 lots had not been finally granted. This was because the development had stalled, and the application could not be progressed.

[60] Significant construction work was carried out during 2016 and 2017 to develop what was originally known as the "Karepiro" component of the Weiti land but which came to be known as Weiti Bay. It was to be developed in two stages. This consisted of 80 lots and 70 closely associated lots—150 lots in total—comprising approximately 77.28 hectares.

[61] The construction work included a major access road from State Highway 1 (SH1) to the development, in addition to establishing connections to water, sewage and other utilities and services. This brought to finalisation the first 150 bare lots which were available for sale/transfer of title to purchasers and then the construction of residential homes. There was also a connection established from the finalised access road to the significant Peninsula Link Highway (Penlink), which was built later, connecting SH1 to the Whangaparāoa Peninsula. This link was, and will be, of considerable benefit to all the eventually subdivided Weiti land by improving access to SH1.

[62] The first 150 bare lots were finalised between 2017—2019. Most were sold. They were relatively larger lots than the remaining planned 400 lots. They were in the subdivision's prime position. These lots were intended to be, and are, part of an exclusive gated community.

[63] The remaining 400 lots were to be incorporated into what became known as the Village 1 (36 hectares) and Village 2 (25.46 hectares) developments. This has not yet occurred. However, these bare lots, when finally completed, will have the considerable benefit of all the access roading and services/utilities construction work already carried out.

[64] The rest of the Weiti land, most of which is forested or covered in scrub, is termed the "balance land", comprising 734.79 hectares. It is largely unfit for subdivision development. It is planned to be slightly developed for recreational purposes, including mountain biking and walking tracks.

[65] It is worth noting that it was only the Weiti Bay lots, and later Village 1, that were specifically mortgaged by GMHL.[11] Therefore, at the time of the hearing, GMHL retains the ownership of Village 2 and all the balance land. However, as a result of the mortgagee sale processes, AWDL became the registered proprietor of the Village 1 land, and AWBDL owned most of the remaining unsold titles (28 lots) in Weiti Bay.[12]

[66] Thus arises an "inconvenient reality". Contiguous land within the overall Weiti land—that is Village 1 and Weiti Bay on the one hand, and Village 2 and the balance land on the other—is owned by different entities. These entities are effectively the key "warring parties" in this case.

[67] Self-evidently, this will make future subdivision development problematic. For instance, I am told that any further development of Village 1 will necessitate entry onto the Village 2 land and therefore require the consent of GMHL. But these are all matters for the future and are outside the scope of this judgment.

[68] The following maps will be of assistance to locate the Weiti land and its component parts (including the newly constructed road) already described:

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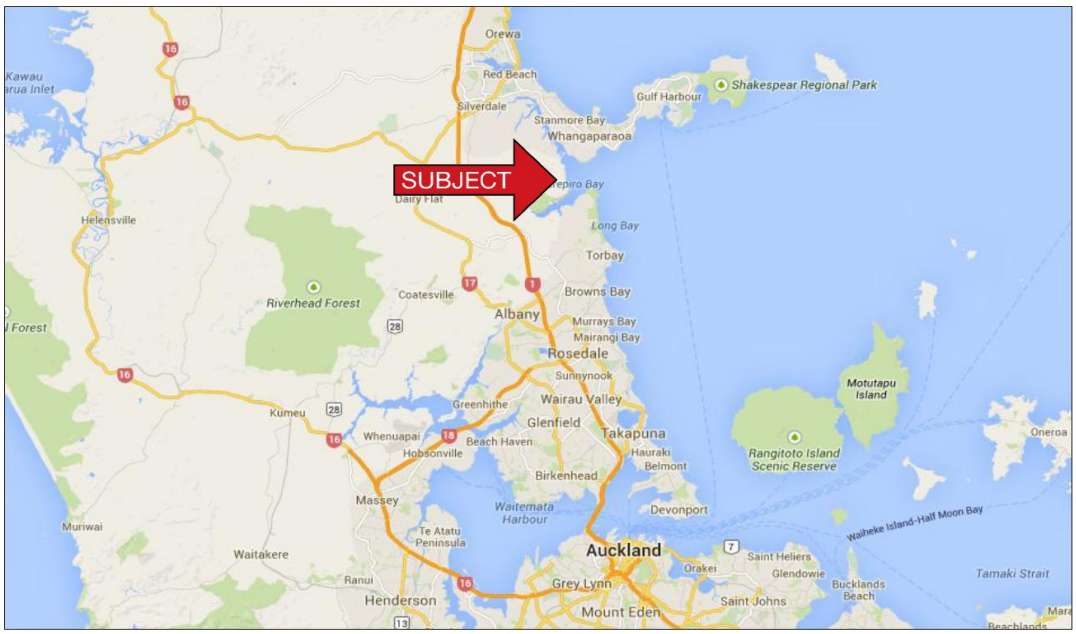
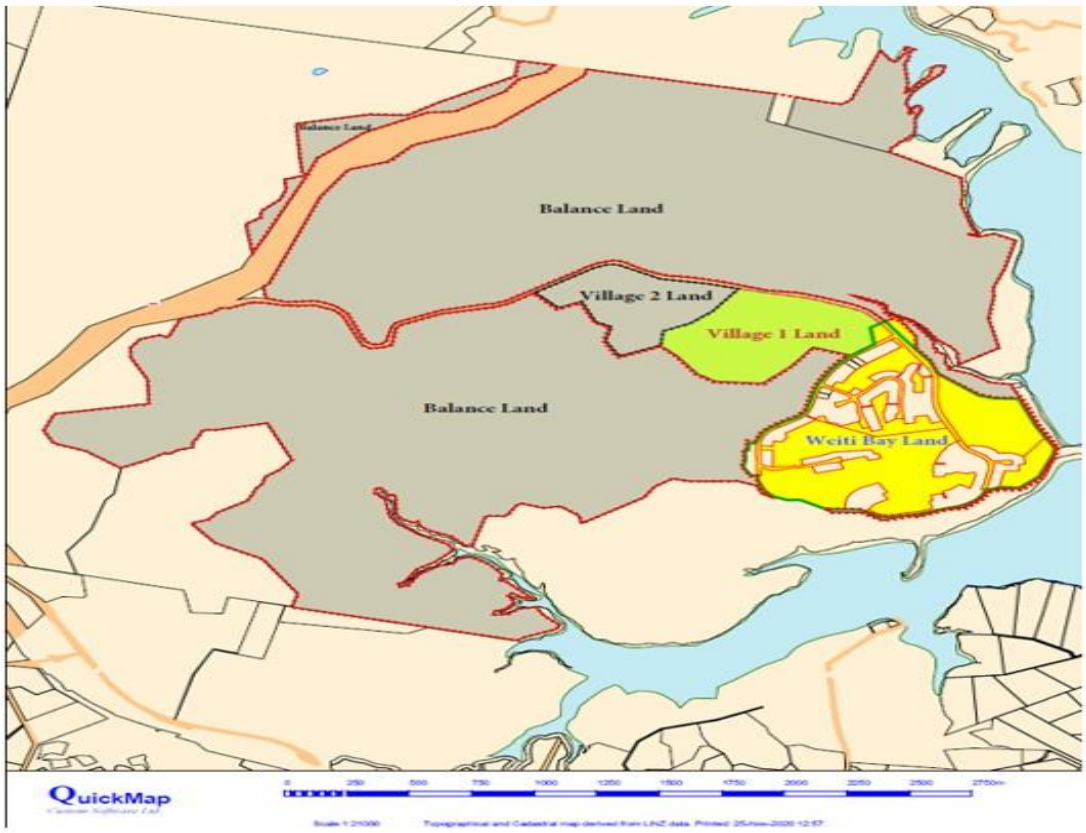
11 I note there is ongoing argument as to the effect of various covenants that were entered into by GMHL at the time of executing the relevant mortgages. The defendants argue those covenants also create rights over Village 2 and the balance land. This is disputed by the plaintiff.

12 I understand from the parties that some of those titles may have been sold since the hearing.


SUBJECT
Orewa
Red Beach
Silverdale
Gulf Harbour
Shakespear Regional Park
Stanmore Bay
Whangaparaoa
Dairy Flat
Helensville
Long Bay
Torbay
Riverhead Forest
Coatesville
Browns Bay
Albany
Murrays Bay
Mairangi Bay
Rosedale
Sunnynook
Motutapu Island
Wairau Valley
Kumeu
Greenhithe
Glenfield
Takapuna
Whenuapai
Beach Haven
Hobsonville
Hauraki
Belmont
Rangitoto Island Scenic Reserve
Birkenhead
Massey
Waitemata Harbour
Devonport
Muriwai
Te Atatu Peninsula
Waitakere
Auckland
Saint Heliers
Glendowie
Orakei
Tamaki Strait
Ranui
Grey Lynn
Bucklands Beach
Henderson
Saint Johns
Mount Eden

Map 1


Balance Land
Village 2 Land
Village 1 Land
Balance Land
Weiti Bay Land
QuickMap

Map 2

[69] The following photographs show parts of the Weiti land and the progress of the subdivision work over many years. They depict the sheer size and magnitude of the development—an understanding of which is important in terms of resolving the plaintiff's claims.

[70] The first photo was taken in 2005. It shows (in the foreground) that part of the Weiti land (then completely undeveloped) that is easternmost and closest to the Hauraki Gulf. It is this land (still in pine trees) that mainly became the 150-lot Weiti Bay subdivision. A large strip of land, closest to the water, was retained as a green space for recreational and community use. In about 2005, removal of the pine trees for the Weiti Bay subdivision began.

Photo 1

[71] The second photo is an aerial view taken in 2011–2012. It shows initial preparatory work on the Weiti land with most of the trees in the proposed subdivision areas having been felled.

Photo 2

[72] The third photo shows the development in progress of the 150 Weiti Bay lots to the middle and right.

Photo 3

[73] The fourth photo shows the completed access road.

Photo 4

[74] The fifth photo, taken in 2018, shows in the foreground the area of the finalised bare lots of the Weiti Bay 150-lot development, (on some of which houses have already built). It also shows part of the land, to the left centre, for the Village 1 and Village 2 lots.

Photo 5

CHRONOLOGY

[75] The dates of the relevant agreements between the parties and the dates of the mortgagee sale and related significant events are set out in a detailed table, attached to this judgment as Appendix 1.

[76] The relevant dates span over 20 years. This is only the "bare bones" of the saga surrounding this subdivision development. Even bearing in mind the need for a skeletal summary at this stage, the chronology is necessarily long and detailed. It is important to understand the complicated development process. However, more detail will be provided, when relevant, as each of the issues addressed in this judgment are analysed.

[77] This chronology requires me to extract what I generally understand to be accepted relevant dates. Counsel will likely think that much more could be included, even at this stage of the judgment.

[78] For ease of understanding, the most important legal agreements and their dates (not in dispute) are highlighted in bold, and those emboldened events should be briefly consulted now. Consulting the chronology now will also be important because it references all the relevant entities and the times when they first become involved. Also, there is some detail in the chronology that may not appear in the rest of the judgment.

CREDIBILITY FINDINGS

General observations

[79] At this point, it is necessary to address the credibility of two key witnesses, Mr Liu—speaking for GMHL, and Mr Williams—who gave evidence on his own behalf and on behalf of his many companies. Their evidence bestrides this case.

[80] Credibility findings are crucial. These findings, to a significant degree, explain much of the reasoning underpinning my conclusions about the plaintiff's causes of action.

[81] I expressly recognise that credibility findings are not central to all the issues in this case. There are many issues which must be resolved by close analysis of the documentary evidence, including accounting spreadsheets, financial statements, and the various complex agreements between the parties, to name but a few. But for many other issues, credibility findings are vital. These include, whether Mr Williams represented to Mr Liu that GMHL would receive payment for its land in priority over the secured lenders, and also the extent to which Mr Liu (for GMHL) relied on Mr Williams, personally, for advice. Both involve credibility findings.

[82] In respect of those and several other issues, Mr Liu's and Mr Williams' evidence about key events cannot both be right. Their explanations for the development of their business relationship; their evidence about what Mr Liu/GMHL knew of the plans for, and progress of, the development; and the risks involved, are all at variance. Much of what they say on these, and many other issues, is mutually exclusive. Indeed, much of Mr Liu's and Mr Williams' evidence is effectively at polar opposites. For instance, they disagree on whether Mr Liu knew from a relatively early stage that large-scale subdivisional development of his land would need significant commercial loans, which would have to be secured by mortgages over GMHL's land, to which the lenders' security would take priority over GMHL.

[83] This is why credibility findings about Mr Liu and Mr Williams are so important.

[84] It is important for me to set out my conclusions and the reasons for them because they provide the platform for the rest of the judgment.

[85] This is one of those cases where I need to say there is considerable advantage in seeing and hearing the key witnesses give evidence. I had prolonged opportunity to observe how they gave their evidence. As a result, I have reached some very clear conclusions.

[86] Mr Liu gave evidence for eleven-and-a-half days. Two days were his evidence-in-chief; and nine were cross-examination. He was re-examined for a half-day. The notes of his evidence stretch to 1,064 pages.

[87] Mr Williams gave evidence for eight-and-a-half days. Three-and-a-half days were taken up with his evidence-in-chief; and three-and-a-half days in cross-examination. He was re-examined for one-and-a-half days. The notes of his evidence stretch to 654 pages.

Mr Liu

[88] I conclude that Mr Liu's evidence is neither reliable nor credible. Given that Mr Liu is apparently a man of some standing in his own country (and in the Asia and Pacific Economic Council (APEC) community), I know that this finding will be a blow to him. He will find it hard to accept. Therefore, I owe it to him to carefully and respectfully set out my reasons.

[89] From an early point in his evidence-in-chief, Mr Liu sought to contrast himself to Mr Williams. He said that Mr Williams had not been the managing partner of Chapman Tripp "for nothing", and he was someone who obviously knew what he was doing. As for himself, he said he and his family "were some stupid foreigners who came to New Zealand". This, and variations on this theme, became a continuing refrain.

[90] A short time later in his evidence, when there was a natural break while counsel located relevant documents, I asked Mr Liu about his background because he was giving his evidence in a polished and urbane way, with what appeared to be something of a USA accent. He answered that he went to high school in New Hampshire and was educated on the east coast of the USA, in Boston. He said he gained a master's degree in business administration from Boston University. He also completed postgraduate marketing courses, amongst other things, at Harvard University. The courses were all taught in English.

[91] Mr Liu much later accepted in cross-examination that at various times he has been head of the Chamber of Commerce in Taiwan, has occupied a responsible economics role in Taiwan-Japanese cooperative bodies, and since 2006 has been a standing representative on behalf of the Taiwanese government at all APEC meetings. He had also been involved in significant business ventures in countries outside of Taiwan.

[92] The one thing that can be said with certainty is that Mr Liu is not "some stupid foreigner". In my assessment, he is a charming, engaging, highly qualified and intelligent professional man, despite his attempts to paint a different picture of himself.

[93] Against this background, Mr Liu's evidence and particularly his answers in cross-examination, were strange, unconvincing, and became quite unbelievable.

[94] As his cross-examination developed, he resorted to a series of stock, and much-repeated answers that, in my view, given his intelligence, ability, education and experience, were simply not credible. I highlight four examples:

(a) At an early stage in his evidence, Mr Liu indicated that he was effectively a "puppet" in Mr Williams' hands and/or that Mr Williams was like a "puppeteer", or variations on that theme. On my count, Mr Liu used this explanation as being manipulated by Mr Williams on tens of separate occasions. It was a continuing refrain in his evidence. Furthermore, he said that Mr Williams was "brainwashing" him. These responses, in my view, became almost standard to explain why he had signed documents that he now clearly regrets executing, particularly the loan and mortgage documentation. But I do not accept them.

(b) Mr Liu frequently referred to himself as a "70-year-old man", who was "stupid" or had a poor memory. Again, on my count, he said this well over ten times, referring to many different occasions. He used the word "stupid" about himself, or that he "stupidly signed the document" on 14 occasions. Of course, Mr Liu, in my judgement, is far from stupid. (And his evidence was often about events when he would have then been in his late fifties or early sixties assuming he is now a 70-year-old man). He is astute, quick-minded and very analytical. Several times when he read a document put to him in cross-examination, he was able to grasp its import and meaning very quickly. Often his response was then to say "I was stupid to sign it" or "I stupidly signed it" or words to that effect. He also used the word "duped". Again, I find these explanations unbelievable.

(c) In response as to why he had signed certain agreements, he frequently resorted to describing himself as responding like "Pavlov's dog". Again, on my count, he said this on at least six occasions and maybe more. However, while giving evidence and challenged with certain documents, he demonstrated a real ability to see mistakes in some of the documentation on the spot, such as when a loan offer at the time mistakenly only referred to the 150 Weiti Bay lots and did not include Village 1.

(d) In contrast to himself, Mr Liu consistently described Mr Williams as "brilliant" (23 times); a "genius" (11 times); or a man of "great eloquence and charm". In my view, he consistently over-estimated, to a degree that became quite unconvincing, Mr Williams' intelligence and his own stupidity. For instance, he said at one point, "he was like a God to me".

[95] Overall, it seemed to me that Mr Liu simply could not be trusted in his evidence. I say that with great respect to him. In my assessment, many of his answers were designed to save face, to paint himself in the best possible light, and to blame others for his actions rather than taking self-responsibility.

[96] A glaring example was Mr Liu's repeated evidence that Mr Williams and his companies offered GMHL $300 million outright as a sale price for all the Weiti land. I am quite satisfied that was never the case. What was offered, by way of an agreed option to purchase, was a price where $300 million was used as the base price for a mathematical formula. The actual price was entirely dependent on a calculation being applied to that base price, depending on the number of lots approved by the Council. He perpetuated his view of this matter, which he must know was plainly incorrect, on at least 20 occasions during his evidence, even when this error was pointed out to him.

[97] I was initially confused when Mr Liu first gave this evidence. I checked with him as to the formula and how the actual price would seldom reach anywhere near $300 million if the formula was applied. He very quickly grasped the formula and understood the point, but said that he must have not understood this at the time or

missed it. Yet he continued in his evidence, fixated on the belief that the original offers from the Williams' companies were always a standard $300 million. This was simply not the case, and it frustrated all cross-examining counsel.

[98] Mr Liu maintained that his facility with the English language was at times not sufficient for a proper understanding of how the subdivision project was developing. Again, this is a contention I reject. His facility with the English language was excellent. For instance, on one occasion, when cross-examined by Mr Gordon, he said of Sir Mark that he was "not a neophyte baby like me, who doesn't know his head from his tail". Mr Gordon responded, "I don't think anyone will ever accuse you of being a neophyte baby Mr Liu". I agree. A neophyte, to avoid resort to the Oxford Dictionary, is a beginner. Anybody who uses that word so adroitly in response to rigorous cross-examination, can hardly be said to be struggling with the English language. Moreover, in matters of business and accounting, Mr Liu is certainly no "neophyte baby".

[99] The evidence shows Mr Liu could also be very decisive in his business dealing when that was required. That was plainly obvious. For instance, in a 16 June 2016 email to Mr Williams, he said:

> In all instances of important or pertinent [*sic*] issues, you need to email me the documents first, talked [*sic*] to me first and then I will talk to my advisors.
>
> not the other way around.

[100] That could hardly be said to be comments from a man who was passive, indecisive, with poor command of the English language, and who was vulnerable and easily manipulated.

[101] I also note Mr Liu's comment that he did not like trusts and his request to Mr Williams to use a limited partnership instead of a trust. This would seem to indicate Mr Liu had an advanced understanding of legal structures.

[102] I also record that it emerged, during cross-examination, that by virtue of his property purchase in Scotland, Mr Liu acquired the title of Baron. When Sir Mark was referred to by his full title, Mr Liu made clear that he could have insisted that he be always called "Baron" in the Court hearing. This is not to be critical of Mr Liu. It

is not disputed that he has a right to that title. It just indicates that Mr Liu is not a shrinking violet and that he is more than capable of asserting himself when and if he chooses to do so. This is in stark contrast to how he tried to paint himself to the Court.

[103] Putting Mr Liu's evidence in the best light I can, it may be that he simply wanted to emphasise how much he felt manipulated and eventually betrayed by Mr Williams. At their most favourable interpretation, the answers I have set out may, in Mr Liu's mind, give weight to his allegations of negligent misstatement. If so, Mr Liu grossly "over-egged the pudding". He did himself a significant disservice. His whole construct of being a naïve, passive and easily manipulated Taiwanese national manipulated by Mr Williams, his brilliant New Zealand puppet master, borders on farcical. I do not accept it.

[104] But I need to go further. Not only did Mr Liu consistently resort to these frankly unconvincing and unbelievable answers, but also, he often said when confronted with documents, particularly documents that were contrary to his case, that he "doesn't read documents". He said that so many times, that in terms of his claims of negligent misstatement, it made it very difficult to understand what alleged written representations he had actually relied upon. He cannot have it both ways. It cannot be that he relied on documents allegedly constituting negligent misstatements while at the same time saying he never read them.

[105] The profound frustration that all cross-examining counsel experienced with Mr Liu was palpable. Frequently, Mr Liu simply would not answer the question until I directed him to do so. Interestingly, when I rephrased a question, he had absolutely no difficulty in answering it. Mr Liu showed great respect and deference to the bench but not to defence counsel.

[106] Mr Chisholm's frustration got to the point that he eventually sought a formal ruling that I hold Mr Liu in contempt. Given the significance of the case for Mr Liu and GMHL, this was something I was most reluctant to do (as set out in the detailed

ruling I gave at the time).[13] However, I did put Mr Liu on notice for the final time that he was required to listen carefully to the questions and answer them accurately.

[107] Furthermore, Mr Liu seemed to sense a "fishhook" or a "hand grenade" in virtually every question in cross-examination. He immediately tried to answer what he thought was the underlying question. Often, he was simply being asked to acknowledge that he had signed a document and recognised it. As a Judge, I have never witnessed a more difficult and frustrating cross-examination.

[108] For several days I gave Mr Liu the benefit of the doubt, particularly given his different cultural background. I thought he might understand cross-examination in a quite different way than is part of the common law adversarial model. In the end, I concluded that Mr Liu well understood what was happening and was simply determined not to answer any question that included the slightest degree of criticism of him or his business approach—or which he considered might be detrimental to his case, even indirectly.

[109] Regrettably, if that were not concerning enough, I need to record that Mr Liu has previously filed an affidavit in these proceedings which seems now to be clearly untrue.

[110] As previously mentioned, in the chronology, GMHL's original (discontinued) claim included causes of action alleging breach of fiduciary relationship—in the context of the business relationship between GMHL and Mr Williams and his companies. This is all recorded in the Court of Appeal judgment.[14] In an affidavit, dated 19 August 2020, prepared for that caveat case, he affirmed that he has no interest in Weiti Trustee Ltd (WTL) the 60 per cent limited partner in the Weiti Development Limited Partnership (WDLP)[15] and little or no involvement in ownership of WDLP. Specifically, he said:

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13 *Green & McCahill Holdings Ltd v Williams* HC Auckland CIV-2020-404-001385, 29 May 2024 (Minute).

14 *Green & McCahill Holdings Ltd v Ara Weiti Development Ltd* [2022] NZCA 218.

15 These two entities play an important role in this case. They are referred to in the Chronology and in particular in the next section about the business relationship between Mr Liu and Mr Williams under the heading "The Weiti Development Limited Partnership agreement".

> 3.31. In or around 2013 I sold the shares in [Peninsula Development Ltd][16] to Mr Lee Mao Pin. Since that time, I have had little or no involvement with the ownership of WDLP …
>
> 3.32. I believe that Mr Williams knew that I had sold my interests in WTL (via PDL). I told Mr Williams, and Mr Williams, and Michael Anderson, many times that I did not have an interest in WTL.
>
> …
>
> 4.23. The WDLP agreement also provided for fees to be paid to a person appointed by WTL. As I have not been involved with WDLP, WTL or PDL for a number of years, I do not know as to how much of these fees were ever paid.

[111] This is clearly not the case. It has now emerged that, behind the scenes in a series of documented deeds and agreements, Mr Liu retained a beneficial interest in WTL. This is beyond dispute. Yet he had effectively affirmed the opposite in proceedings in the High Court and Court of Appeal to support his application to sustain a caveat. It is very hard not to conclude that Mr Liu deliberately lied—although I step back from that finding.

[112] At the hearing, Mr Liu was clearly uncomfortable when all this was put to him and he was most unimpressive in the manner and content of his answers. In cross-examination, when it was suggested to him that when he affirms an affidavit he would read it carefully to ensure that it was truthful, he answered that it was a loaded question and suggested that he did not read affidavits very carefully. During this exchange, he was most reluctant to answer the questions. He noted that these were documents that his lawyers required him to sign which were necessary to support his case. He denied responsibility and effectively blamed his lawyers. The inference being he had not understood them or their importance. I cannot accept that. Mr Liu has clearly demonstrated himself to be man of great intelligence. I can only conclude that, on occasions, he uses the truth as relative concept. When necessary, he clearly accepts that it is something he can "shape" to suit his case. Frankly, and I cannot shrink from this conclusion, I gained the clear impression during his evidence, that he was prepared to do so in respect of his current claims also.

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[16] I refer to this entity in the judgment as PDL.

[113] Another example of Mr Liu's willingness to bend the truth, from the aforementioned affidavit, is Mr Liu's evidence that he was unaware as to what fees had been paid to a person nominated by WTL. As he readily admitted in this case, he was the nominated person. And the fees were payable in respect of his role as a member of the Advisory Committee established as part of the WDLP structure. He remembered that this fee was $1 million. It was to be increased to $1.2 million. This is hardly a trivial sum. It is simply not credible that he did not remember receiving any of those payments which, it is accepted by counsel, amounted to at least $4.3 million.

[114] On this point, it is noteworthy that Mr Broadmore asked Dr Liu in cross-examination, whether she was aware that since 2013 her brother had received over $4 million personally in "advisory fees" for his advice to WDLP. She said "no". I asked her, "Would it surprise you if he had?" She answered, "Yeah, I suppose so. It is surprising to hear".

[115] I think it perfectly appropriate to infer that Mr Liu had chosen to keep his significant personal remuneration a secret from his family. In my view, this is quite consistent with how he approached business dealings.

[116] Overall, I conclude that bright and intelligent as Mr Liu is, he showed a near desperation to prove his case. I say this with great respect to Mr Liu who is obviously a man of great standing in his own country. I have to record that I do not consider him a reliable witness. I cannot trust him on essential details. I conclude that he was someone who would feel able to compromise the truth if he felt it was justified in the interests of his case.

[117] It may be that one of Mr Liu's strengths lies in being an "instinctive" big picture businessman. Indeed, this is how he portrayed himself. But his oft repeated explanations that he did not understand all the details of the important documentation he signed on behalf of GMHL became hollow. When he needs to understand detail, he is clearly very quick in assessing and absorbing it. As I discuss further, he knew much more about the subdivision of the Weiti land, the need for a mortgage to support the development loans, the long-term risks associated with the development, and the

risks to some of GMHL's land when it was provided as mortgage security, than he was ever prepared to concede to the Court.

[118] I also conclude that when the development project did not progress as Mr Liu had anticipated, and particularly when he received what I expect would have been the bombshell news that Mr Williams' companies had purchased the mortgaged land, he blamed everybody but himself. Mr Liu was quick to find a scapegoat. He was committed to saving his own face, and I doubt whether this side of heaven he will ever come to accept his part in the collapse of this subdivision development.

[119] For the sake of completeness, I address one specific part of his evidence. Significant cross-examination was devoted to Mr Liu's and his family's involvement in what seems to be a large commercial redevelopment of a hotel and golf course in Scotland. Aspects of a legal case about this project had reached the Supreme Court of the United Kingdom. There were various allegations and counter-allegations that Mr Liu had been struck-off as a director of the development company for a period; that the striking-off was either justified (or unjustified); that at some stage he may have been restored as having the right to be a director, and that he had been described as a trustworthy witness by at least some of the courts he had appeared before.

[120] I found it impossible to understand the nature and detail of that case and, specifically, what findings had, or had not, been made against him. In any case, my task in this case is to analyse Mr Liu's evidence and his credibility before *this* court. It would be wrong of me to refer to any findings by other courts. To make it perfectly plain, I put all this evidence to one side and out of my mind. It plays no role in this judgment. All that can be said, by way of observation, is that Mr Liu is apparently not a complete stranger to commercial court cases.

[121] Finally, I have to record that the way that Mr Liu responded to cross-examination significantly elongated and prolonged it, by several days. Some counsel estimated that it added an extra week to the court hearing. Mr Broadmore observed that, in his view (shared by other defence counsel), Mr Liu held the Court to ransom in the way he gave his evidence.

Mr Williams

[122] On the other hand, I unhesitatingly conclude that Mr Williams is a reliable and credible witness.

[123] As with Mr Liu, he is also a highly intelligent and well-educated man. He holds LLB and LLM (Honours) degrees. He was a law lecturer at Victoria University for three years. He practiced as a commercial solicitor, and, as already noted, he was the managing partner of Chapman Tripp from 1987 to 1993. In that capacity, Mr Williams advised a substantial number of major companies, governments and government corporations, on mergers, takeovers, projects and financing.

[124] Mr Williams has had a variety of governance roles both local and overseas. These include, for instance, roles with Auckland City Mission from 1993 to 1997, and the Museum of New Zealand—Te Papa Tongarewa from 2011 to 2019, where he was chairman between July 2013 and 2019.

[125] Mr Williams has particular experience in large-scale coastal property developments. He was the chair of Tabua Investments Ltd, the developer of the main development at Denarau Island, Fiji, which Mr Williams described as the mainstay of Fiji's tourism interests. He was a shareholder and subsequently chair of that company from 1996 to 2002.

[126] In New Zealand, Mr Williams was involved in the development of Mataka Station, a 30-lot development on an approximately 1200-hectare property in the Bay of Islands. He was also involved in "Bream Tail", a 40-lot development on approximately 470 hectares of property near Mangawhai. Both of these were residential developments on large coastal properties.

[127] Mr Williams regarded the development of the Weiti land as a similar challenge but, I observe, on a much greater and more significant scale.

[128] One thing became clear about Mr Williams during his evidence: he is a very intelligent and apparently gifted lawyer. At times he strayed between giving evidence and explaining the legal implications of the documents that he drafted or had signed.

He was reminded in cross-examination, with respect, to stay in his lane. When his legal expertise was challenged in evidence or cross-examination, he was respectful and balanced.

[129] Mr Williams also had the advantage, when giving his evidence, of relying on copious records, file notes and letters all of which he had indexed and filed. In Mr Williams' view, over the course of the development, the communications between Mr Liu, GMHL, Mr Williams and their respective advisers, totalled over 2,500 emails and 4,600 documents. He referred to many of them in his evidence. His reference to detailed file notes, made at the time, lent significant strength to his reliability and credibility.

[130] I assessed Mr Williams' record keeping as meticulous. It was also impressive.

[131] His evidence relied heavily not on his recollection, but on the documentary evidence and notes that were kept at the time. In this respect, his evidence was qualitatively more impressive than Mr Liu. His record keeping put him at a significant advantage over Mr Liu—whose reliance on documents was not so pronounced, and who often spoke mainly in terms of generalities and impressions.

[132] That is not to say that Mr Williams' evidence was flawless. On one occasion at least, he was also a little disingenuous—in his analysis of who had effective control of WDLP which I describe in the next section. But I understood what he was attempting to explain, even though I felt he exaggerated the position.

[133] Mr Williams was also subjected to searching, comprehensive and expert cross-examination by the very skilled Mr Dickey. He was pressed on many points. In my view, Mr Williams answered those questions carefully, thoughtfully, and honestly. His answers were consistent with the documentary evidence. What he said made sense and was plausible and persuasive. He made concessions where necessary. He did not overstate the position. I assess him to have been largely unshaken by the cross-examination.

[134] I have given careful consideration to one aspect of Mr Williams' cross-examination by Mr Dickey. On 23 August 2015 at 7.02 pm, Mr Dempsey (the CFO of Williams Land Ltd (WLL)) emailed Mr Williams (copy to Simon Matthews—the external project manager for WDLP). That email re-attached information Mr Dempsey recorded had been previously forwarded to Mike (Anderson) and Paul (Wigglesworth).[17] It contained a summary of cash flow and a development return analysis. Mr Williams forwarded that email to Mr Liu and Mr Anderson and Mr Wigglesworth at 7.28 pm on the same day.

[135] Mr Dickey pointed out the two emails (but not the detailed attachments) were slightly different. Amongst other things, the original email from Mr Dempsey stated that as at December 2018 GMHL would receive all its $60 million for the land whereas the "forwarded-on" email said that payment would be made between December 2017 (earliest) and December 2018 (latest) and added "and there is a margin". The difference was well spotted by Mr Dickey. He suggested to Mr Williams that he altered it to provide a more optimistic outlook—a more positive outlook, than Mr Dempsey had forecasted.

[136] Mr Williams accepted the two emails were different. He accepted that it would have been possible for him to change the email in the way suggested. He said he could not account for the change. He suggested there may be another email. He said it would be a very surprising thing for him to do. I must say it would appear that in the 26 minutes between receipt and forwarding on, it would be hard to imagine how anyone else except Mr Williams could alter it—assuming (reasonably, in my view) that there was not another email from Mr Dempsey at exactly the same time.

[137] I think it likely that Mr Williams did alter it. However, it was certainly designed to present what Mr Williams, as director of WLL, understood would be the best and worst outlook as to payment. And, I have to say, both emails were sent to Mr Anderson and Mr Wigglesworth—so the difference would have been obvious to them. And they may have forwarded it on to Mr Liu. All the other information was identical.

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[17] Mr Anderson was one of GMHL's lawyers and acted as a director of GMHL from October 2015 to July 2020. Mr Wigglesworth had introduced Mr Liu to the Weiti land and was an advisor for GMHL.

There was no material error. Only the more optimistic outlook was inserted. If Mr Williams did alter it, it was wrong of him. He should have simply said that his view differed from Mr Dempsey and that the December 2017 earliest repayment was realistic—which was clearly his view and it was not the only time he said it.

[138] This is the only documented example drawn to my attention where Mr Williams may have been less than truthful and fully candid in his dealings with GMHL. I regard it as an isolated lapse over 15 years of dealing with GMHL and Mr Liu. It does not reflect well on him. But I do not see that it affects my overall impression of him.

[139] In general, Mr Williams impressed me as a witness who was reliable, accurate, and honest. I regard him as completely credible. Clearly, he was deeply, if not obsessively, committed to the subdivision project. In Mr Williams' own words, he "invested the better part of the last two decades and millions of dollars into the Weiti land development". It is obviously something that he believed in, and still believes in. He is of the view that the project, in spite of all its crises, can be resuscitated.

[140] Undeniably, this commitment and optimism "colours" Mr Williams' evidence. His unshakeable belief that the subdivision was and will be profitable and can still be completed is honestly and genuinely held. But all that, in my view, has not led him to twist his evidence or mislead the Court. And I assess his view about the subdivision and its prospects throughout the development as essentially reasonable.

[141] One example of Mr Williams' commitment to this project, and a very human one, was his email to his family when Mr Liu, on behalf of GMHL, finally confirmed that he would sign the mortgage documentation to secure the major loans to develop the property in earnest (the first quadripartite deed and the suite of documents). Mr Williams wrote to his family, very humanly, indicating his relief and excitement. This was not the reaction of a "puppeteer", or a "manipulator". It was simply understandable relief that a major milestone in the project had been successfully reached.

[142] Another example is Mr Williams' keen sense of moral duty to still try to ensure that Lambton Quay receives some (if not all) of the money it lost as a result of the mortgagee sale. I cannot say if this will ever happen. But Mr Williams was credible in expressing his commitment to try to compensate Lambton Quay for at least some of its losses.

Mr Liu v Mr Williams

[143] I record that in all areas of the evidence given by Mr Liu and Mr Williams, and certainly where there is any conflict between their evidence, I unhesitatingly prefer and accept the evidence of Mr Williams and reject that of Mr Liu.

[144] I also observe that Mr Liu and Mr Williams' relationship (before it disintegrated) was always conducted very formally. The two always referred to each other as "Mr" in all their correspondence and meetings. This was obviously important to Mr Liu. He expected and demanded respect and deference. If Mr Williams' employees ever became too informal in their interactions with Mr Liu, he quickly corrected them.

[145] I conclude that Mr Liu is something of an enigma. He is urbane, polished in his delivery, charming and witty. Yet at the same time, he is a big picture man, reluctant (at his own cost in this case) to become involved in detail (but nevertheless well able to do so if required). He is also instinctive, and as the evidence shows, at times volatile.

[146] In my assessment, Mr Liu would have been difficult to work with. Mr Williams interacted with him with considerable patience. During the trial, I reached the view that it was a challenging relationship for Mr Williams which he had to manage and cope with as best as he could. For instance, on one occasion, I accept Mr Williams' evidence that during phone calls involving himself, Mr Liu and some of his advisers, it became clear that Mr Liu "had become offended during a terse negotiation with me as he required a written letter of apology." Such apology letter was duly proffered by Mr Williams in July 2013. He explained that his comments were directed at the issues arising from dealing with the banks and no personal offence was intended.

Other witnesses

[147] At this stage it is not necessary to set out in detail my credibility findings in respect of the other witnesses. That will emerge as I discuss the relevant issues for which their evidence is important.

[148] It is, however, important to say at this stage that in respect of Sir Mark in particular, I assess him to be an absolutely reliable, honest and trustworthy witness. He came under significant attack. Frankly, on my assessment of Sir Mark and the way he gave his evidence, it would be hard to imagine someone less likely than he to be involved in the Machiavellian scheming that is alleged by GMHL. In my view, he is just not that sort of person. He is cut from different cloth.

[149] I found the evidence of Sir Mark's legal adviser, Mr Anthony Staples; Mr Williams' lawyer, Mr Paterson; and that of Mr Bartlow, who gave evidence for the sixth defendants, Clearwater, to be impressive, trustworthy, and reliable. They had a clear recollection of the detail. In my view, they answered questions fairly, thoughtfully, and clearly. I signal that I accept their evidence. Their evidence was in respect of the third cause of action in this case—the validity of the mortgagee sale. The evidence called by GMHL/Mr Liu in this respect, particularly from Mr Stiassny, an expert insolvency practitioner and advisor to GMHL, was not significantly at variance with the defendants' key evidence although presenting a different perspective of the events that took place.

THE BUSINESS AND LEGAL RELATIONSHIP BETWEEN GMHL/MR LIU AND MR WILLIAMS: HOW AND WHY IT DEEPENED AND THEN COLLAPSED

[150] The chronology in Appendix 1 requires fleshing out. It does not explain why and how the business relationship between GMHL and Mr Liu on the one hand, and Mr Williams on the other, developed and deepened over the years. An assessment of that business relationship is essential in determining this case. This section provides the context and backdrop against which all the five causes of action fall to be decided.

[151] That assessment is best carried out by reference to the significant agreements that entities associated with Mr Liu and Mr Williams progressively entered into with each other and their reasons for doing so. This led to a series of commercial loans to WDLP which were secured by mortgages over some of GMHL's land. It is also necessary to briefly refer to the progress of the development; why the parties' business relationship collapsed; and why and how the subsequent mortgagee sale procedures ensued.

[152] Some of my findings depend on the credibility assessments already made.

Original business proposal to the Liu family

[153] In 2005, Mr Liu was introduced to Mr Williams through Mr Paul Wigglesworth, a New Zealander well known to Mr Liu. Mr Liu recalls that Mr Williams offered (orally) to pay $300 million for the Weiti land which obviously piqued the interest of the Liu family. In my view, Mr Williams never made such an absolute offer. The subsequent proposal was much more nuanced, as I now set out.

[154] Later that year, Mr Williams presented a written proposal to the Liu family. The proposal offered a maximum purchase price for the Weiti land of $300 million. It was based on consents for between 2,000 to 3,000 lots being achieved, with provision for an adjusted purchase price if such consents were not achieved within two years. There was a proposed pricing formula dependent on the extent of consents for lots to be developed. The proposal was built on the fundamental feature that the value of the land would increase as consent approvals and the subdivision development advanced.

[155] Mr Liu and his family members, including his mother and father, and his sister Dr Liu, met with Mr Williams. I understand that Mr Liu's father, Dr Liou, who passed away in 2016, was a prominent international businessman and senior political figure in Taiwan. At that stage, Dr Liou was the family patriarch and influential in decision making. The family was clearly impressed with Mr Williams, and vice versa.

[156] At this stage, GMHL faced something of a dilemma. It did not want to develop the land itself, nor apparently enter a joint venture to do so. Presumably, GMHL did not wish to pay tax on profits from the development. But, equally, it wanted to maximise its return on its investment in the land, and there were obvious possibilities for commercial development and significant profit.

[157] It will be recalled that prior to this point, various parties had approached the Liu family to purchase the Weiti land. Indeed, a number of offers were made. One of these offers was about $80 million in cash for the land as is. Clearly, the Liu family saw long-term value in the Weiti land and did not want to sell it at that level. This was Mr Liu's evidence and I accept it.

[158] My assessment of GMHL/Mr Liu's thinking at this time is that he was attracted to the opportunity for a massive increase in profit from the sort of development proposed by Mr Williams. Land purchased for $4 million, 14 years later could have been sold for $80 million. But GMHL/Mr Liu were clearly (and understandably) enticed by the lure of a much greater post-development return.

"Option" to purchase agreement and parallel "Put" agreement

[159] On 7 December 2005, GMHL and WLL (then named Williams Capital Ltd), executed "Call" and "Put" option agreements which were subsequently extended as set out in the chronology.

[160] WLL was granted an option to purchase the Weiti land for a non-refundable "option fee" of $5 million.

[161] Central to these agreements was a price formula which provided for a purchase price not less than $155 million and not exceeding $295 million, tied to the number of lots for which final consent was granted:

> New Base Price = B
>
> B is ($\frac{x}{2000}$ x $300,000,000) less $4,995,000
>
> *x* is the number of residential lots for which final consent is granted — provided that the Base Price may not in any circumstances be more than $295,000,000 nor less than $155,000,000.

[162] The "Put" agreement meant that if GMHL gave notice that it wished to sell, WLL was required to buy the Weiti land.

[163] The "Option" and "Put" agreements were variously extended and re-entered into several times on slightly different terms. As part of the second fresh agreement, GMHL was paid a further $1 million. These agreements governed the business relationship between GMHL and the Williams' companies between December 2005 and June 2010.

[164] In his evidence, Mr Liu's continuing refrain was that the original arrangement was always for a payment of $300 million. I do not accept that. Mr Liu knew exactly what the price setting formula was, even if he could not bring himself to admit it in the witness box.

[165] In 2007, the Williams' companies obtained consents for 150 lots for what was then known as Karepiro Bay and what came to be known as the Weiti Bay part of the development. Although appealed, the consent issue was resolved in June 2008.

[166] At this stage, there was also approval in principle with the Council for three zone precincts within the Weiti land:

(a) Precinct A—Karepiro (Weiti Bay) for 150 lots.

(b) Precinct B—Villages 1 and 2 with 400 lots, plus up to 100,000 square metres gross floor area of commercial buildings.

(c) Precinct C—Green belt and conservation policy areas known as the "balance land".

[167] At any time, during the period of the option, had the "Put" agreement been exercised by GMHL, theoretically it would have received $155 million together with the $5 million already received as the deposit.

[168] However, I accept that WLL was not able to exercise its option, partially at least because of the repercussions of the global financial crisis, the collapse of many other property developments and the difficulties in obtaining loans. Neither did GMHL wish to exercise its "Put" option. As I understand it, this was because it knew that WLL was not in a financial position to be able to make the required payment.

[169] During this period, the parties held meetings and discussed matters including financial models, business plans and a potential financing option involving a first-ranked mortgage and a deferred payment. However, none of these eventuated. In August 2010, the option agreements had come to an end. Mr Williams (both personally and through his companies and associates) had contributed up to $20 million in pre-development work for the Weiti land. Including the "Option" fees, the spending was at least $26 million.

[170] By this stage, I infer that Mr Williams had put in too much effort and money to walk away from the possibility of a profitable development.

[171] Equally, GMHL could have sold the entire land much earlier for perhaps as much as $80 million. There was also the possibility of $155 million (during the life of the option to purchase agreements). It elected not to sell. This supports the inference that GMHL, as it was entitled to do, grasped the possibility of a much greater return upon a possible successful subdivision development. It is reasonable to infer

that GMHL still wanted to maximise its return to the greatest extent possible in respect of land it had purchased 15 to 20 years earlier for $4 million.

[172] That said, I accept that up and until this time, Mr Liu's view that the relationship between GMHL and Mr Williams and his interests, had been essentially one of vendor and purchaser.

[173] These findings are important, and I stress them. They are the initial context in which GMHL says it later relied on alleged misstatements made by Mr Williams. It is fair to say that, from an early stage, GMHL knew the development of the land would be a very large project with the possibility of huge reward but, as with all developments, not without risk. I am quite satisfied that Mr Liu knew this. He is a vastly experienced businessman. It is one of the reasons why he did not want GMHL itself to become a developer and why he resisted early invitations to allow GMHL's land to be mortgaged. GMHL thus understood and was aware of "the risk and reward" character of the development from an early stage.

Master sales agreement—21 September 2010

[174] This agreement, together with an associated development agreement (next discussed), provided a further way forward for the parties. The agreement was executed between Mr Liu, as agent for a company to be formed, and WLL.

[175] Among other things, this agreement recorded that the parties had agreed to work together on a long-term sales programme. WLL would carry out the development and the Liu interests would retain ownership of the land until selling parcels of land as titles were issued. Purchase prices for the land would be agreed prior to commencement of construction for each stage. The agreement provided that the Williams' interests would not receive any capital from the sale of any of the Weiti land unless and until GMHL had received a minimum of $180 million. This was carried into the development agreement.

[176] I note that by virtue of the 2015 first quadripartite deed, this master sales agreement ultimately ceased to have any practical effect and is recorded as being superseded by the development agreement.

[177] At this stage, there was a danger that the consents for 150 lots already obtained, would expire. The Williams' companies were at the same time exploring financing and loan opportunities with investment from overseas companies. I accept that it may not have been then obvious to GMHL that commercial loans with a security against GMHL's land would be required. However, I accept that Mr Williams had raised with Mr Liu the possibility of mortgage security for loans, as one financial model for development, as early as December 2007. So, the concept for this development was not unfamiliar to Mr Liu.

[178] Equally, it was clear that the Liu family did not favour such a solution. They favoured a more straightforward "debt structure approach". The Liu family did not see itself as a property developer and, as far as that assertion goes, I accept it. But the family certainly wanted the profit that went with such development.

Development agreement—28 February 2011 and subsequent progress

[179] This development agreement was between GMHL and Williams Capital No.1 Limited (WCNL) or nominee. It referred to the intended staged development of all of Village 1, Village 2 and Karepiro (now Weiti Bay). It was then envisaged that Village 1 would be developed first. Subsequently, this was changed so that the premiere Weiti Bay was developed first.

[180] It allowed for a staged development and for prices to be paid at various completed sub-stages, eventually agreed as follows:

(a) Village 1 — $60 million.

(b) Karepiro (Weiti Bay) — $80 million.

(c) Village 2 — $80 million.

[181] This represented a price payable of $220 million which already signalled a reduction in that which might have been possible during the previous life of the option.

[182] Over the course of 2011, clearance of the forest cover on the development sites of the Weiti land continued, with views for the prime lots in the 150-lot Karepiro Bay/Weiti Bay development becoming accessible.

[183] The Williams companies continued their efforts to try to secure equity investment through a potential investment company, all of which proved unsuccessful.

The Weiti Development Limited Partnership agreement (WDLP agreement)—26 June 2012

[184] This agreement represented a very significant change in the structure of the relationship between the two parties. It was entered into under the then relatively new Limited Partnerships Act 2008 (the LPA).[18] It is of vital significance.

[185] The key features included:

(a) The "general partner" (as defined under the Act) was the Weiti Development General Partner Ltd (WDGPL), a company of which Mr Williams was the sole director. It was responsible for day-to-day management, in consultation from time to time with the Advisory Committee (see below). This management role was contractually provided by Williams Management Trustee Ltd (WMTL)[19] effectively owned by the Williams family members and for which I understand Mr Williams was a director and perhaps the CEO or active in a similar role.

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[18] The limited partnership structure allows for partners to participate in a partnership and to have limited liability in certain circumstances. It is said the limited partnership regime has been adopted in New Zealand to encourage growth in New Zealand's venture capital and private equity industries by establishing a modern, internationally recognised regulatory regime for limited partnerships. The LPA provides for limited partnerships to have separate legal personality. A limited partnership is formed on registration and continues in existence until it is deregistered. The partnership agreement has effect as a contract between the limited partnership and each partner, as well as between the partners themselves. There are two classes of partners: general partners and limited partners. These are both essential components of a limited partnership. General partners are involved in the day-to-day management of the limited partnership and are jointly and severally liable for the debts of the partnership. Limited partners are liable only to the extent to which they take part in the management of the limited partnership. However, limited partners can take part in certain activities without those activities being deemed to be participation in the management. These activities, as outlined in the Schedule to the LPA, are known as "safe harbour" activities. They include taking part in investment decisions, taking part in decisions about the partnership structure and its amendment, reviewing and approving the accounts of the limited partnership. But the permitted safe harbour activities are essentially quite limited.

[19] As allowed by cl 14.6

Its chief financial officer, for most of the relevant period, was Mr Stephen Dempsey. He was also the CFO of the Williams companies.

(b) There were two "limited partners", as defined under the Act.

(c) First, a company newly established by Mr Liu, Weiti Trustee Ltd (WTL), holding "his" 60 per cent interest as a limited partner. The shares in that company were in turn owned by PDL, a British Virgin Islands company controlled by Mr Liu as the trustee of the Weiti Tuck Trust, a trust in which Mr Liu and his children were named as the final beneficiaries. Mr Liu executed the declaration of trust dated 26 June 2012 as a director of PDL (the trustee). The consideration for this 60 per cent stake was the agreement that WTL *"has agreed to assist, and has assisted, WDLP to finance the development"*.[20]

(d) Weiti General Partner Ltd (WGPL), was the second limited partner. WGPL was the general partner of another limited partnership—Weiti Limited Partnership (Weiti LP). WGPL was to hold the Williams interests' 40 per cent stake in the WDLP. This was expressed to be in recognition of the Williams Group investment to date in the project, and the transfer of all investments in the project to date, and the transfer of all of the Williams Group intellectual property to WDLP (by way of the Weiti Asset Transfer Deed executed the following day).[21] Although not made explicit in the evidence I have little difficulty inferring the entity was effectively controlled by Mr Williams and his family.

(e) An Advisory Committee was established[22] to which Mr Liu and Mr Williams were initially appointed as members. WDGPL was required to "consult" the Advisory Committee but the Committee could not conduct its business so as to take part in the management of WDLP. Mr

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20 Clause 6.2(b). I note that while the reality of Mr Liu's control of WTL is now accepted, in earlier proceedings Mr Liu denied this in an affidavit supporting the registration of caveats. I have discussed this previously [109], and following.

21 Clause 6.2(a).

22 Clause 13.1.

Liu, through WTL, had the right to appoint up to three members to the Advisory Committee (whereas Weiti LP was limited to two). Therefore, Mr Liu was in a position to always have the controlling vote. Mr Liu was in a position, through the Advisory Committee to at least significantly "influence" the WDLP, although the parties dispute the extent of that legal and practical influence.

(f) WDGPL was to receive $1.5 million per annum in management fees,[23] and a person appointed by WTL (here Mr Liu) was to receive $1 million per annum in Advisory Committee fees.[24] This recognised Mr Liu's personal involvement in the project. WDGPL's management fees covered the overheads and core costs of running the project. The agreement provided that both fees were to step up in October 2014 to $1.8 million and $1.2 million respectively.[25]

(g) A Business Plan was required,[26] and the initial Business Plan was as set out in the agreement.[27] That plan recorded that Stage 1 was to be the development of the main access road and infrastructure into the property, and the first 80 of 150 lots in "Karepiro Bay".

(h) The existence of conflicts of interests were acknowledged[28] and, importantly, given GMHL's previous Court of Appeal case where fiduciary duties were alleged, fiduciary duties were explicitly excluded.[29]

(i) Assignment of the interests of the limited partners were the subject of a comprehensive transfer regime.[30] WTL had the ability to transfer any part of its interest *"to a party of good standing without requiring consent, providing the balance of this clause 11 is complied with"* (with

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23 Clause 9.1(c)(i).
24 Clause 13.10.
25 Clauses 9.2(c)(ii) and 13.10(c).
26 Clause 5.1.
27 Clause 5.1 and Schedule 5.
28 Clause 14.9.
29 Clause 14.10.
30 Clause 11.

the balance of the clause prescribing a transfer procedure including steps such as notice requirements).

[186] The agreement, in the first instance, was to last for 18 years. In my view, this is significant. The development was envisaged from the outset to be a long-term exercise. To my mind, given the events leading up to the mortgagee sale process in 2019, it is impossible to over emphasise the importance of that time frame.

[187] On my assessment of the evidence, one of the key reasons for the limited partnership must have included GMHL's reluctance to be seen as a developer itself thus avoiding any tax burden which might arise. The limited partnership agreement, as the chosen vehicle, was an ideal solution for GMHL because it removed its fingers from the development pie. It was also enticing for Mr Liu personally because it remunerated him handsomely for his contributions to the Advisory Committee.

Amendment of the development agreement

[188] The day after the WDLP agreement was executed, the existing development agreement was amended. This provided, amongst other things, for payments to GMHL to be due on the issue of certificates of title and equal to the net proceeds received from the sales of lots/sections to third parties. Importantly, these payments were targeted to be made on the dates set out in the cash flow model—although no fixed dates were then specified. Also, the rights of WCNL under the development agreement were novated in favour of WDLP.

Significance of these 2012 agreements and the deepening business relationship

[189] In my view, these agreements represented a significant and fundamental change in the relationship of the parties. I accept Mr Williams' assessment of the structure and importance of WDLP. On the other hand, Mr Liu significantly downplays the significance of the limited partnership. I do not accept Mr Liu's evidence on this point. I find he knew exactly its rationale and consequences. He certainly knew of the advisory fee and accepted many payments (totalling at least $4.3 million). As previously discussed, it seems he did not disclose these fees to at least some of his family.

Who controlled WDLP?

[190] It is as well to address now the competing claims as to who controlled WDLP and hence the subdivision development as a whole. These claims became of significant importance. Both Mr Williams and Mr Liu were a little disingenuous in their evidence about this issue.

[191] In my view, there is a difference between the legal and practical control of WDLP.

[192] I accept Mr Williams' explanation in terms of the drafting of the limited partnership agreement. In theory, it allowed for the control of the limited partnership by the (60 per cent) majority limited partner, here WTL, controlled by Mr Liu and his immediate family.

[193] However, Mr Dickey highlighted that the "majority of partners", here WTL alone, could only remove the general partner in specific situations involving fraud and negligence set out in cl 10.2 of the WDLP agreement. In Mr Dickey's view, Mr Liu's ultimate influence was thus restricted.

[194] However, Mr Chisholm drew my attention to cls 9.5 (and 9.6) of the Third Schedule to the agreement, (Partners' Meetings Rules) which confirms a motion to remove the general partner will bind the general partner if there is a resolution by limited partners holding 60 per cent or more of the percentage shares—in this case, the stake held by WTL. Whether that removal power should be limited to instances of fraud and negligence, is moot. At any rate, Mr Chisholm's clear view was that, by law, Mr Liu was in a position to exercise ultimate control.

[195] In that sense, it may be correct to say that, legally, WTL (with its 60 per cent share) could control the development and its direction, by deciding who is the general partner. But, in my view, Mr Chisholm goes too far in his suggestion that WDLP was the "effective slave" to Mr Liu/GMHL.

[196] The reality is that Mr Liu/GMHL was so reliant on the expertise of Mr Williams and his "Williams group of companies" that it would have been foolish for them to exercise any power to remove the general partner. Therefore, I accept Mr Dickey's assessment that the management and oversight of the subdivision development was, for all intents and purposes, in the hands of the general partner and by extension WMTL—Mr Williams' company that was contracted to manage WDLP.

[197] That said, as it became increasingly clear that external finance for the development could only be raised through commercial loans secured by mortgages over GMHL's land, so too it became clear that GMHL controlled the pace and extent of the development. That is because, whoever it may be said legally controlled WDLP, the amount of mortgage finance that could be raised, in the end, depended on whether and to what extent GMHL would consent to such mortgages. Put bluntly, WDLP had no separate assets of its own, and therefore could not undertake any development without Mr Liu's (and GMHL's) involvement and support. GMHL could thus be both a handbrake and accelerator for the development. For practical purposes, GMHL controlled the development's speed and extent.

Mr Liu's significantly changed (and deepened) legal involvement

[198] Mr Liu's role and status changed significantly with the advent of the WDLP. In the legal sense, GMHL was still simply the owner of the land and the vendor under any agreement. But, as Mr Williams put it, its director, Mr Liu, was now on "both sides of the equation". He was no longer at "arm's-length" given his role effectively as a 60 per cent limited partner in the limited partnership.

[199] It is important to explain that Mr Liu, despite his protestations to the contrary, was therefore "involved" in the development in three capacities. First, as a director of GMHL—the owner of the land, which could control the level of finance available to WDLP. Second, he was effectively the legally controlling (60 per cent) limited partner in WDLP. And third, he was a member of the Advisory Committee, for which his services were to be remunerated.

Mr Williams' legal involvement

[200] Mr Williams was also involved in three capacities. He was effectively a 40 per cent limited partner of WDLP. Second, he was the director of the general partner, which had the day-to-day responsibility for the management and operation of the limited partnership and was the director/"CEO" of the management company which carried out that role. And third, he was also a member of the Advisory Committee.

Their deepening relationship

[201] I therefore accept Mr Williams' assessment that from this time on Mr Liu was closely and deeply involved in WDLP.

[202] I note that the statement of claim asserts that between 2008 and 2013, the relationship between the parties changed from a purely contractual relationship between vendor and purchaser to joint venturers with a relationship of trust and confidence with defined roles and responsibilities. I conclude the relationship did change. However, the plaintiff's allegation overstates (and misstates) the position, given that the WDLP agreement specifically excludes any fiduciary obligations, as observed by the Court of Appeal in the earlier caveat litigation. I note that despite the wording of his own claim, it was certainly not Mr Liu's view. In his evidence, he made it clear, repeatedly, that there was no such joint venture or co-developer relationship.

[203] From the time of the formation of WDLP onwards, consistent with their new business relationship, Mr Williams and Mr Liu communicated with each other much more frequently. Usually this was by way of emails or telephone calls. However, Mr Liu also regularly visited New Zealand. As Mr Williams has recorded it, and is evidenced by documents before the Court, Mr Liu came to Auckland 18 times between April 2012 and 5 February 2019. These visits were usually three or four times a year for between four to seven days. They included regular (and often long) meetings with Mr Williams and the WDLP team and site visits. Updates, including detailed financial information, were provided to Mr Liu. Mr Williams also visited the Liu family in Taipei in October 2014.

[204] It is what was said in these communications and during these meetings which forms the basis of GMHL's claim of negligent misstatement against Mr Williams. It is alleged that various representations were made which induced GMHL to enter into the various formal loan and mortgage agreements and eventually the first quadripartite deed which, when the mortgages were enforced, caused significant loss to GMHL. GMHL's case is that it would not have entered into the agreements without those representations.

GMHL loan

[205] On 8 December 2012, given Mr Liu's/GMHL's reluctance to use any of the Weiti land as security, GMHL entered into a loan agreement with WDGPL to help fund some of the initial development. $1.569 million was loaned in five tranches. Mr Liu made clear that this loan remains outstanding.

The aborted Manson offer/loan offer

[206] In the first half of 2013, the opportunity arose for a significant loan (from New Zealand Mortgage and Securities Ltd, owed in part by the Manson family) but secured over *all* the Weiti land. This would provide for both the pre-development and construction costs. Mr Williams and Mr Liu worked hard together to make this work. Mr Liu "oscillated" in his attitude. Eventually, his concerns regarding mortgaging *any* of the land were too great. Mr Liu, on behalf of GMHL, retreated from agreeing to provide its land as security. Mr Williams pleaded with him to do so but had to accept that Mr Liu's refusal was a proper decision made by GMHL. The reality is such a loan would have been cheaper and more efficient (that that subsequently obtained) and would likely have enabled much quicker progress of the subdivision development.

The Spinnaker tripartite deed and loan facility

[207] In August 2013, GMHL crossed the Rubicon, as it were. It allowed part of its land, the Weiti Bay Land (see Map 2, before) to be provided as security for a loan of $6.25 million from Spinnaker Capital Ltd (Spinnaker) for six months. The loan was to allow for pre-development work for the subdivision. The relationship between Spinnaker, GMHL and WDLP was set out in a tripartite deed.

2014 Killarney tripartite deed and loan facility

[208] The Killarney Capital Ltd (Killarney) loan replaced the Spinnaker loan, and was on similar terms. It provided for the bridging development costs until the construction phase could begin. The Killarney loan was for $10.42 million, again for six months. Here too, a detailed tripartite deed documented the relationship between the parties.

[209] As the planning and pre-development work continued, in 2015, this loan went into default. Continued discussions took place between the parties about the construction and development stage of the project and how it would be financed. Mr Liu unilaterally, and without consultation, arranged a short-term loan from Westpac to repay Killarney.

Further mortgage security and the emerging paradox

[210] At this stage, GMHL, through Mr Liu, was still not prepared to mortgage all of its land to secure a loan. Such a decision would have enabled more favourable loans to be obtained from financiers, particularly conventional commercial lenders. Nevertheless, GMHL was adamantly opposed to providing all its land as security. I infer this was because of the risks perceived by Mr Liu. At various times in his evidence, he maintained he was not sure about the ramifications of a mortgage. I simply do not accept his evidence on this. He is a seasoned businessman. He knew the position. The risk entirely explains his reluctance.

[211] There was something of a paradox in all of this. GMHL's reservations about providing all its land as security to a conventional commercial lender, meant that those lenders were unwilling to fund the entire development price, then estimated to be between $65 to $75 million. This was because, generally, conventional lenders required security over all the land. That meant, on top of some financing from conventional commercial lenders, junior (or mezzanine) lenders had to be acquired. Those lenders inevitably charged higher interest rates, thereby increasing the costs of the development. The growing costs of the development remained a concern for GMHL; yet its reluctance to mortgage its land inevitably drove those costs up. This was to be the continuing reality of the situation.

[212] Having invested so much in the development to date, I again infer that Mr Williams and his companies felt unable or unwilling to pull out. The Williams companies and WDLP effectively had to "make do" with the situation presented by Mr Liu, and had to tolerate a much less profitable way of obtaining finance for the development.

[213] I cannot help but observe that it was at this stage that potential seeds of serious difficulties were being sown. The parties were committed to the subdivision development. But, given the restrictions arising from GMHL's approach, the development had to be incremental, with finance only available at high interest rates. This meant that the development, as it seems with many land developments, became destined to walk the most precarious of tightropes: between obtaining loans to finance the development and ensuring costs did not blow out and, at the same time, achieving enough pre-sales and sales to ensure sufficient revenue to repay the loans.

First quadripartite loan—BNZ/Capital Group/GMHL/WDLP

[214] With the execution of the first quadripartite deed signed on 7 September 2015, the business relationship between the parties took a further qualitatively, more complicated and very significant step forward. Major loan facilities were provided by, first, the BNZ as senior lender (for at least $67 million) and, second, Capital Group (Weiti) Ltd (Capital Group) as junior lender (up to $9.7 million). There were also very complicated security arrangements entered into including first and second ranking mortgages by GMHL to the lenders over the 150-lot Weiti Bay land and further encumbrances in favour of the BNZ and Capital Group in respect of the Village 1 and Village 2 land and the balance land.

[215] There was a composite general security deed and cost guarantee from WDLP and WDGPL to the BNZ. Mr Williams also executed a deed of personal guarantee to the BNZ for up to $1.5 million.[31] Amongst other reasons, Mr Liu required this

[31] As will be apparent, a suite of documents were executed around the time of this first quadripartite deed. So too with the second and third quadripartite deeds. In this judgment, when I refer to the "quadripartite agreements", I refer to all the documents executed in association with the particular quadripartite deed being referred to, including that deed itself.

guarantee as a small confirmation by Mr Williams of his personal stake in the development.

[216] This quadripartite deed contained an assignment to the lenders of all GMHL's interest in the project's intellectual property and the development agreement. It also confirmed that the master sales agreement was of no further practical effect or relevance and had been superseded by the development agreement.

[217] The financing documents contemplated the requirement for additional finance being required for stage 2 of Weiti Bay, being the construction of the final 70 of 150 lots. Mr Williams described these documents as follows. His conclusion does not seem to be disputed by the plaintiff.

> The 2015 financing documents created a "locked box" finance arrangement—where the above-described facility documents and the securities granted the lenders the right to complete the project (including expenses beyond facility limits) and the right to control construction. The lenders control was exercised through the engineer to the project (Beca) and the lenders' appointed Quantity Surveyor (Kingston) supervised by bank representatives, and in consultation with WDLP (Mr Mathews—an engineer—and me). Ultimately, the lenders had the right to make decisions.
>
> Effectively then, GMHL and WDLP had given control to the lenders and if GMHL or WDLP disagreed with the lenders and decided to pick a fight with them, the lenders had the right to call a default and take control of the project.
>
> The effect of this structure was that for the period from November 2015 to 2019, when GMHL withdrew, GMHL and WDLP had to accept and live with the lenders effectively having ultimate management and control of construction and operations.
>
> Pursuant to the above arrangements, there was a regular reporting regime for the lenders which included:
>
> [Quantity surveyor] reports being prepared for the lenders prior to each drawdown for the facilities;
>
> Monthly finance and [project control group] meetings were held, and minutes issued.

[218] In my view, this first quadripartite deal was the point of no return. Given the amount of money involved and the extent of the mortgage securities and encumbrances, any actionable misstatements by Mr Williams to GMHL had to have been made before this quadripartite arrangement was signed. From that point on, save for adding Village 1 as security—which was required by the lenders and in respect of which there was little realistic choice if the development was to continue, GMHL was

simply continuing and refining a general agreement which, on its own evidence, it had already been wrongly induced to enter with disastrous consequences.

Second quadripartite loan—BNZ/Pacific Dawn/GMHL/WDLP

[219] As I understand it, very similar documents as for the first quadripartite deal were again executed in February 2017, allowing the replacement of Capital Group by Nomura—through its wholly owned New Zealand subsidiary, Pacific Dawn Limited (Pacific Dawn).

[220] However, for the first time the mortgage security was extended to include Village 1. This was a significant extension. Of course, it exposed GMHL to greater risk in terms of any eventuating mortgagee sale. But as I explained above, the parties had little choice but to accede. In all other respects, as pleaded by the plaintiff, the terms and conditions were materially unchanged from the 2015 quadripartite agreements.

Third quadripartite loan—BNZ/Lambton Quay/GMHL/WDLP

[221] The third quadripartite deed was executed on 20 July 2018. Its significance is that it swapped out Pacific Dawn as junior lender with Lambton Quay as its replacement. As is evident from the chronology, it is Lambton Quay which, having later acquired the rights of the BNZ (the first registered mortgagee), conducted the mortgagee sale.

[222] Again, it seems that the documents were essentially similar, and the terms and conditions were materially unchanged from the 2015 and 2017 quadripartite agreements.

[223] Security and encumbrances were provided over the same land and there were deeds of priority and subordination between WDLP, WDGPL, the BNZ and Lambton Quay. Also, GMHL covenanted to pay the BNZ and Lambton Quay respectively all money due, owing or payable by WDLP under the original 2015 BNZ facility agreement as amended on 27 July 2018 and the Lambton Quay term loan agreement.

[224] GMHL is clearly now of the view, at least in its evidence, that it never intended to include Village 2 and the balance land as any security for any loan. I accept that at the time GMHL was very clear that it would not grant mortgages over those two additional land parcels. But it did grant encumbrances over all its land—including those two additional parcels. It did so with advice from experienced lawyers such as Mr Anderson. And I accept that BNZ and Lambton Quay would not have agreed to advance any loans if GMHL had not granted those encumbrances.

[225] Mr Williams is clearly of the view that, given the encumbrances over GMHL's Village 2 and balance land, the lenders would not have been prohibited from recourse to that land if, ultimately, WDLP and GMHL were unable to repay all their debts owed to the financiers. As it happened, such recourse was never made, and I need not reach a conclusion about it.

The business relationship collapses

[226] By the end of 2017, it was plain that GMHL would not, and could not, receive any money from the first 80 lots of Weiti Bay. I accept that Mr Liu understood this.

[227] During May to July 2018 (before the third quadripartite deed), Mr Williams' evidence, which I accept, was that Mr Liu was becoming increasingly impatient about GMHL not being paid anything for its land. His advisers were seeking further information.

[228] The details of the subsequent and rapid collapse of the business relationship in early 2019 between GMHL/Mr Liu and Mr Williams and his interests are not relevant to the first and second cause of action. The details are all set out in the factual narrative for the third cause of action.

The state of the development as at early 2019

[229] Finally, it is necessary to summarise the progress of the development to this point—late 2018 and early 2019. I accept Mr Williams' summary of the position.

[230] The first stage of the overall development had been effectively completed. This constituted a $100 million plus construction project. It included a five-kilometre access road and a 150-lot premiere subdivision (Weiti Bay). The only exception was five lots with subsidence issues because of a design flaw requiring remediation and in respect of which the pre-sale contracts were cancelled.

[231] This was only the first stage in a complex master planned Weiti project of at least four stages covering a large land area. I accept that it was highly likely, certainly much more probable than not, that approval for up to 1,200 lots[32] would be granted by Auckland Council. As I understand it, this process was reasonably well advanced. There was, therefore, considerable potential for much further development (and profit) than the initial 150 lots.

[232] I also accept that the 150-lot Weiti Bay stage was completed, as Mr Williams stated, under very tight cost control systems. These were managed by the lenders, particularly the BNZ, the lender's quantity surveyor and WDLP. The development had overcome the additional cost of the switch to the Penlink motorway section—for approximately two kilometres of the five-kilometre access road, at an additional cost of $9 million;[33] geotechnical issues estimated over $7 million; and, higher than expected mezzanine finance costs. There were also unbudgeted annual cost increases of 4.5 per cent per annum in respect of the first 80 lots of Weiti Bay and approximately 12.5 per cent per annum in respect of the second stage of 70 lots. These costs increases were during periods that Auckland's construction costs were rising at higher than expected rates.

[233] On the position then-known to the parties, I accept that by this time it would not have been possible for WDLP to pay GMHL the $60 million figure in respect of the development to this stage that had been promised and contained in the budgets. On the then projected sales targets, the remainder of the first ranking BNZ debt of

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[32] The senior expert Planning Adviser for WDLP, Mr John Duthie, was confident the application, nearly finalised, would be lodged by May 2019 and would succeed. I accept his evidence.

[33] As I understand it, after discussions with Auckland Transport (AT) in mid-2016, WDLP and GMHL agreed to construct part of the access road to Weiti Bay along the "Penlink alignment" at "Penlink design levels". This added significant unbudgeted cost to the access road project but came with the assurance that AT would not object to a special housing area application being made by WDLP/GMHL.

approximately $12.4 million and either all or most of the second ranking Lambton Quay debt of approximately $30.5 million could have been repaid. That would have left either a break even or a relatively small deficit with security continuing over Village 1 only. Interestingly, the retrospective analysis by the plaintiff's accounting expert, as set out at [475], suggested that, on a best case scenario, there may have been about a $16 million surplus available to pay GMHL. This is discussed in more detail at [606]-[614].

[234] I also accept, as is often the case with property development, that this project was "negatively geared". In other words, significant costs were incurred up front, more than forecasted and expected. Self-evidently, profit can only be received when all costs have been repaid from the net proceeds of future sales.

[235] The parties never advanced beyond developing just short of the 150 lots in the Weiti Bay (first and second stage) part of the development, even though, by then, (early 2019) very costly infrastructure, planning and services had been completed. These were all necessary for the much larger remaining parts of the project to proceed—and which would significantly benefit those parts (Village 1 and 2) and the additional lots for which consents were likely. Mr Williams' evidence that the overall project was "on track"—even though the 150-lot Weiti Bay development had not led to any payment to GMHL, is optimistic, but not without reasonable basis.

[236] To that extent, it is fair to observe that the parties will never know what profits might have eventuated had GMHL/Mr Liu not brought the development to a premature end by "tanking" it. This is Mr Chisholm's description of Mr Liu's actions, and I agree with it. Mortgagee sale procedures then ensued. The eventual sale price of $35 million was not sufficient to pay off all the existing loans and a significant residual debt of $20 million was left outstanding. All this is the subject of the third cause of action and is hotly contested. I say no more at this stage.

[237] I now turn to the first and second causes of action.

FIRST CAUSE OF ACTION—NEGLIGENT MISTATEMENT BY MR WILLIAMS?

Summary of the cause of action and the importance of context

[238] This is a tort-based claim. There is no allegation of contractual breach. This is important to highlight given that the relief sought is apparently contractually based—a matter I deal with last.

[239] From the outset, it is also necessary to emphasise that this cause of action covers up to six years from 2012, and from the plaintiff's perspective extends back even further—until 2005/6. On this basis, the cause of action could cover up to 15 years. The sweep of time covered by this, and the second cause of action, is vast. Even from the time of formation of WDLP in 2012, there were three years of pre-construction negotiations, design, and preparatory work, supported by the Spinnaker and Killarney loans. In late 2015, the BNZ and Capital Group loans allowed actual construction work to begin.

[240] During this period, there were hundreds, if not thousands, of communications and meetings between the parties and their representatives. These included emails, letters, file notes, spreadsheets, and accounting records with forecasts and estimates attached. It is in the context of this long time period and the vast number of communications that alleged misstatements were made.

[241] Therefore, it is very important to first set out exactly what is alleged by the plaintiff. This is particularly so in this case, given defence counsels' focus on the pleadings and their alleged inadequacy. Below, I list as accurately as I can, the pleaded representations[34] allegedly made by Mr Williams and said to be relied upon by GMHL.

[242] It will be seen that in the list of those representations, while some are specific, others are not particularised at all and are very general. Furthermore, some are allegedly not even made by Mr Williams.

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[34] "Representations" is the word used in the statement of claim alleging negligent misstatement. Often the words representation and misrepresentation on the one hand, and statements and misstatements were used interchangeably.

[243] GMHL's statement of claim, in the context of the chronology, business agreements and interactions that I have just set out, alleges:[35]

1. Mr Williams expressly or impliedly assumed a common law and/or equitable duty to GMHL to exercise reasonable care and skill in making statements to GMHL in relation to:

    a. the current and anticipated financial position of the Weiti Development (as that term was used in the statement of claim).

    b. the corresponding level of risk that was, or could be, faced by GMHL's land that was subject to mortgages granted by GMHL.

2. Mr Williams breached that duty by making the representations without due care and skill and/or recklessly as to their truth. The statement of claim particularised the following representations by Mr Williams to GMHL (set out in pleaded order):

    a. In or around 2013, that there would be little risk associated with using some of GMHL's land as security and that the proceeds of the development would be more than sufficient to repay the loan and discharge the securities.

    b. In September 2014 (in Auckland) and/or October 2015 (which must mean 2014) (in Taipei), there were eight alleged specific representations in a PowerPoint presentation which portrayed the Weiti Development as successful, and which suggested there was little or no risk to GMHL.

    c. On 30 April 2015, by email (from lawyers) in response to concerns raised by GMHL as to delays in payment to it and its level of risk under the proposed mortgage, that a key term of any financing

[35] For reasons which will emerge, I try to follow the wording of the statement of claim as closely as possible.

arrangement was that GMHL provide mortgages over numerous and/or large parcels of the Weiti Land as security and that the proposed mortgage structure was conservative and created considerable protection for GMHL and a great deal of value for GMHL. The email also attached a Weiti Bay Debt Funding paper.

d. On 15 and 19 May 2015, by email (from lawyers), in response to the same concerns, above, nine specific representations were made as to the development.

e. On 14 May 2015, at a meeting, that it would be cheaper for the parties and less risky for GMHL, if it also provided a mortgage over the Village 1 Land.

f. On or about 14 August 2015, in an email to Mr Liu, that there was a high degree of certainty that the project would be completed on time and on budget and the sales contracted would repay the lenders.

g. On 20 December 2017, in a letter to Mr Liu, that Mr Williams was conscious that construction was delayed in 2017 and they were later in settling the first 80 lots than planned; that WDLP was proceeding down the path agreed and working to ensure that GMHL was paid; that WDLP would pay GMHL $40 million in May 2018; that WDLP was working to acquire further funding to enable WDLP to pay GMHL the full $60 million by or before May 2018; and that WDLP was working hard to achieve GMHL's goals and confirmed its commitment to ensure GMHL would receive its money; and (although not specifically pleaded as relied upon) representations that continued to suggest that GMHL's risks were low and that it would ultimately be paid for the Weiti Land.

h. On or about 11 August 2014, that an increase of $3.5 million of the Killarney facility agreement would be enough to fund the commencement of construction of the Weiti Development.

i. In or around July 2015, in the lead-up to the BNZ Facility Agreement and the Junior Facility Agreement (as defined in the statement of claim), that the overall development budget for the Weiti Development was $68.6 million—being a $3 million increase from the development budget presented in April/May 2015 due to an increase in road construction costs, legal fees and contingency provisions among other things. (These representations were expressed to be made by WLL).

j. On or around 28 July 2015, that the total loan amount of $76,405,738 would fully cover the increased budget. (This representation was again said to be made by WLL).

k. On or about 21 December 2015, by email, that construction of Stage 1 was going well, and that Mr Williams wanted to bring the projected finish date forward for the first 83 lots, from October 2017 to December 2016.[36]

l. That there was strong market demand for the lots and the Weiti development was and would be financially successful (a completely unparticularised, non-specific allegation).

m. That the initial stages of the development would be completed so to enable sales to be settled, in early 2016, or alternatively late 2016, or 2017, or 2018 (again a completely non-specific allegation as to time and place).

n. That GMHL would receive payment of $60 million for GMHL's Weiti Bay Land upfront or, alternatively, upon transfer of the lots, notwithstanding other debts incurred by WDLP (again unspecific as to time and place).

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[36] The statement of claim also pleads as a representation that stage 1 was further delayed, and titles were not issued until early 2018. However, given this is not a representation (but an agreed fact), I do not include it amongst the list of pleaded representations.

o. That there were reasonable grounds for anticipating that Auckland Council would approve a plan providing for the subdivision of up to 2,000 lots for the Weiti Development (again unspecific as to time and place).

p. That the land offered by GMHL as security for WDLP's debts would not be unreasonably exposed (again unspecific).

q. By providing specific financial predictions to GMHL from time to time without any reasonable basis, further particulars of which would be provided following discovery.

These pleaded representations were described as the "Representations."

3. Mr Williams failed to advise GMHL promptly, or at all, when he became aware that the Representations did not present a true and fair view of the Weiti Development.

4. It was reasonably foreseeable that the Representations could cause GMHL to suffer loss. In particular:

a. a failure of Mr Williams, and companies associated with him, to successfully conduct the Weiti Development would affect GMHL's ultimate return on the Weiti Land; and

b. a failure of WDLP to meet its obligations under the BNZ and Lambton Quay Transaction Documents could see GMHL lose the 2018 Mortgaged Weiti Land.

5. GMHL reasonably relied on the Representations from time to time in:

(a) granting security over its land as security for WDLP and WDGPL's debts;

(b) forbearing from enforcing debts owed to GMHL by WDLP and WDGPL; and

(c) entering into various contractual documents including:

(i) the GMHL Mortgages in relation to the indebtedness of WDLP and WDGPL;

(ii) the 2013 tripartite deed; and,

(iii) the 2015, 2017 and 2018 quadripartite deals as varied from time to time.

6. As a result of GMHL's reliance on the Representations, it has incurred loss in terms of:

a. loss of its land sold by Lambton Quay at mortgagee sale for $35 million to Mr Williams' AWDL with no return to GMHL, and no return to GMHL from the earlier sale of other lots by WDLP; instead of

b. GMHL receiving:

i. around $160 million as agreed between Mr Williams and GMHL; or

ii. around $128,279,750.50 under the Development Agreement Amendment; and

c. GMHL having no liability to Mr Williams' AWIL of over $20 million for the shortfall resulting from the mortgagee sale.

7. As a result, GMHL claims damages or equitable compensation of $128,279,750.50 or such other amount as determined by the Court.

First preliminary issue: concerns about the pleadings

[244] It is all too tempting to bypass the pleadings and to begin the analysis by going straight to the evidence. In my view, the plaintiff's submissions succumbed to this temptation. They focussed on the various alleged misstatements identified by Mr Liu and his expert accountant in their evidence. But that is to put the evidential "cart" before the statement of claim "horse."

[245] Given the length of time during which pre-construction and then construction begun (3–4 years), and the sheer number of communications between the parties, the pleadings take on particular importance in identifying the representations/statements said to be relied upon. Therefore, the starting point must be the pleadings. And in the case of the alleged negligent misstatements, the starting point must be when, where and by whom they were made, whether they were written and/or oral, and the content of each statement.

[246] Mr Chisholm's point is that many of the allegations lack the necessary specificity. In other words, the claim is not properly particularised which makes responding meaningfully difficult or, in some cases, virtually impossible. He says the defendants are significantly prejudiced.

[247] The first thing to say is that some of the alleged representations (as Mr Chisholm conceded) *are* sufficiently particularised. They refer to exact dates and circumstances, and how the representations were made, such as by email or PowerPoint presentation.

[248] However, Mr Chisholm must be right that many representations are not particularised—being (at least) those representations set out at [243] (l)–(p). There is simply no detail of what exactly was said, how it was conveyed, the date and place it was said or the context in which it was said. For instance, the alleged representation that "there was strong market demand for the lots and the Weiti Development was and would be financially successful" is without the faintest suggestion as to when, where and how such an alleged misrepresentation was made. It could conceivably have been made at any time within a six-to-10-year window. I agree that it is virtually impossible to respond to, and prepare for, this allegation.

[249] In fact, all of the alleged representations listed as (l)–(p) previously, and which appear to be fundamental to GMHL's case, are bereft of particulars.

[250] Mr Chisholm contended that even more difficulty arises from the alleged representation (q), listed previously, that Mr Williams provided "specific financial predictions to GMHL, from time to time, without any reasonable basis, further particulars of which will be provided after discovery". It is accepted that no such particulars were ever provided. Mr Chisholm bluntly submitted that in the absence of such further particulars, the allegation cannot stand.

[251] At the opening of the trial, Mr Chisholm informed the Court that the first to fourth defendants had previously requested further particulars of the alleged negligent misstatements relied upon. None had been provided. Indeed, Mr Chisholm indicated that he had continually expressed concerns regarding what he described as the generalised, non-particularised and inadequate state of GMHL's pleadings for the first and second causes of action.

[252] I must confess that when I first read the pleadings before the trial started, I was confused as to what specific representations had been made and by whom (as sometimes the statement was attributed to WLL, and perhaps on one occasion to WDLP). Other than those which were particularised, I could not easily understand what representations were relied upon by GMHL and when.

[253] Such was my concern that I raised this issue with Mr Dickey during his opening.

[254] Mr Chisholm became quite animated about the point. He made what I take was a reference to the well-known film, *The Castle*, by submitting that the pleadings (for the first and second causes of action) were "all about the vibe." That is, they are general allegations of misrepresentation with insufficient specificity and particularisation. I had sympathy for his concerns.

[255] As a result, GMHL's counsel (without conceding it was necessary to do so) provided the Court and the defendants with an evidential reference guide, linking the claimed misstatements with the relevant documents and/or other evidence so that the allegations could be understood. This indirectly provided the further particulars apparently absent from the pleadings. And this certainly provided some, but not complete, detail. However, I must say that the very fact such a document was needed at all—to fully understand the claimed misstatements—rather served to emphasise the validity of Mr Chisholm's concerns.

[256] I accept that this issue was clearly signalled by Mr Chisholm in the defendants' most recent statement of defence in response to at least four instances of claimed misrepresentations.[37] For example, in response to the claimed representations in or around 2013, (listed at (a), previously) the statement of defence, after making some positive assertions, records that "until GMHL provides full particulars of the pleaded representation including time and place, the defendants cannot plead any more fully".

[257] In my view, Mr Chisholm's concerns and submissions are well made. But the fact is, for what I assume are tactical reasons, he did not take his apparently well-founded concerns further. Avenues to do so were open to him. He did not, for instance, seek further particulars through the Court or otherwise draw the matter to this Court's attention. Mr Chisholm could have ridden the horse he now wants to ride all the way to a pre-trial ruling. He undertook no such journey. Mr Dickey's argument to this effect is realistic. And I accept it.

[258] In these circumstances, I will not strike out those pleadings to which Mr Chisholm takes objection. It is too late. Mr Chisholm has chosen to proceed "as is" and the trial has gone too far down the track. The plaintiff is entitled to a ruling on the merits of its case, in the context of its pleadings. I agree with Mr Dickey that, overall, justice requires this. However, I do record that in the circumstances, and to avoid prejudice to the defendants, I gave Mr Chisholm leave to make a (succinct) response to Mr Dickey's closing submissions on the misstatements issue.

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[37] See paras 5.1, 5.32, 6.1, and 11.2 of the statement of defence by the first to fourth defendants in response to the plaintiff's second amended statement of claim.

[259] But Mr Chisholm goes further. In his final submission, he contended that GMHL went wholly beyond the scope of its pleadings by adding new and major allegations:

(a) alleging for the first time in its opening submission, that Mr Williams occupied the effective role of "principal advisor" or "in-house lawyer" to GMHL;

(b) seeking to add a variety of new alleged misrepresentations to its claim (and through its evidential guide referred to above) which were never identified in its pleadings, spanning back to 2012; and

(c) cross-examining on non-pleaded conduct/communications. For example, the communications and models which included what came to be known during the trial as "recharges". The recharge issue became a feature of the case. I will return to it later. But in short "recharge" refers to the decision made by WDLP and its advisors to reapportion or "recharge" some of the initial costs of the development such as roading and service installation, which were initially solely charged to the Weiti Bay 150 lots, to Village 1 and Village 2 which were also to receive the benefit of this same work. In this way, those charges were said to be fairly redistributed across all the developed land. That had not been pleaded.

[260] Mr Chisholm also emphasised that while most of the alleged misstatements occurred before the important first quadripartite contracts were completed, on the face of the statement of claim, each representation was superseded by subsequent representations. Plainly, he said, they could not all be relied upon as set out in the statement of claim. He submitted that only the most up to date representation then "in force" could possibly found any claim. This is a matter to which I will return.

[261] And Mr Chisholm goes even further. In his submission, a plaintiff's pleading must disclose a complete cause of action which includes an appropriate identification of the alleged loss claimed as precisely as the nature of the case admits. Mr Chisholm's

point is that on the face of the statement of claim, the damages sought are plainly (and incorrectly) classified and quantified as contractual expectation loss rather than tort-based reliance damages. He submits that no particulars of damage for reliance loss, said to be the correct measure of loss, are provided. Here, Mr Chisholm seems on strong ground. This again, is a matter to which I will need to return.

[262] In all his argument on these points, Mr Chisholm referred to what he submitted was the fundamental role pleadings play in civil litigation. This is something which I understand has been long recognised. As the Court of Appeal observed:[38]

> Pleadings play a fundamental role in defining the parameters of a trial. The parties are entitled to prepare for trial on the basis that the pleadings identify the facts in issue and the nature and scope of the case that the plaintiff will present and the defendant must meet. For good reason, after the close of pleadings any amendment requires the leave of the court. It is not open to a plaintiff to present a case beyond the scope of the pleadings at trial without seeking leave to amend. The process of seeking leave to amend serves two purposes:
>
> (a) It identifies the additional facts and issues raised by the new argument that the plaintiff wishes to present, and that must be established by the plaintiff if they are to succeed. If there is a change of course part way through a trial, the defendant is entitled to have that new course mapped with the same clarity that is required in advance of trial.
>
> (b) The application for leave requires the parties, and the court, to engage squarely with the question whether the new departure can fairly be accommodated.

[263] I accept, as emphasised in *Mainzeal*,[39] that the rules about pleadings are not arid technicalities. In a complicated case such as this claim, their purpose of fairly informing the other party of the nature of the case and limiting the scope of the issues and the evidence, is of great importance and I might say, of great assistance to the Court.

[264] Mr Chisholm noted *Banks v Farmer*,[40] as to the difficulties that unfocussed claims of misrepresentation inevitably cause. He drew attention to these comments by the Court:[41]

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38 *Yan v Mainzeal Property and Construction Ltd (in liq)* [2021] NZCA 99, [2021] 3 NZLR 598 at [493].

39 At [494].

40 *Banks v Farmer* [2023] NZCA 383.

41 At [122]. The Court also commented on the need to plead misrepresentations relied on in [210].

> As a general observation, such a widely-cast net creates its own challenges for the parties and the judge because it can make it difficult for everyone to identify and maintain a proper focus on the key issues, evidence, and submissions.

[265] Therefore, I accept that it is a well-established and bedrock principle that a court cannot decide a case upon allegations, evidence or argument falling outside the pleadings.

[266] In reply, Mr Dickey's argument relied on the Court of Appeal's comments in *Price Waterhouse v Fortex Group Ltd*.[42] With respect, that case is of little assistance in these circumstances. I accept that the Court noted that particulars of the claim are intended to supply an outline of the case advanced, sufficient to enable a reasonable degree of pre-trial briefing and preparation. It was observed that they were not to contain the full detail which is to be contained in briefs of evidence. But here, the particulars (such as they are) just do not sufficiently or adequately outline the case.

[267] Nor is it helpful for Mr Dickey to explain in his closing submissions that some of the pleadings can be understood as being directed towards, or referring to, this or that piece of evidence later identified in the submission. This should have been plain on the face of the pleadings.

[268] I also accept that in *Price Waterhouse*, the Court observed:[43]

> As so often is the case in procedural matters, in the end a common-sense and balanced judgment based on experience as to how cases are prepared and trials work is required. It is not an area for mechanical approaches or pedantry.

[269] But the concerns that Mr Chisholm raises, for instance about the "recharge" issue, or Mr Williams being an "in-house lawyer" to GMHL, are not a mechanical approach or pedantry. Nor are they an insistence on excessively refined pleadings. The "recharge" issue assumed great significance in the evidence, and it needed to be pleaded. It is not enough simply to plead no more than the provision, from time to time, of specific financial projections to GMHL that were without any reasonable basis, and to then fail to provide further particulars until "all is revealed in evidence."

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42 *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998.
43 At 19.

[270] Suffice to say, despite all of these concerns, GMHL has not sought leave to file an amended pleading which might remedy what I accept are some deeply problematic aspects of the statement of claim. In any case, given the scope of the amendments which might have been required at this late stage, a court would surely have been reluctant to do so unless there was no prejudice.

[271] I do however record that more detailed and refined pleadings would certainly have assisted the Court. I mean no criticism to Mr Dickey and Ms Morrison, his junior, in all of this. It seems clear Mr Dickey accepted the case at relatively short notice (November 2023). Also, Mr Liu has gone through several law firms in this case. The pleadings have altered quite significantly since the first statement of claim and the caveat proceedings which were taken all the way to the Court of Appeal. For instance, the pleadings still refer to a joint venture, something that Mr Liu adamantly denied in his evidence, and which does not seem to be part of GMHL's case. Indeed, it is hard to see how it could be, as the allegation of fiduciary duties, which formed an important part of the previous Court of Appeal case, is now withdrawn.

[272] I have set this all out in some detail to underscore the difficulties facing the Court arising from the unsatisfactory pleadings. In fairness to the parties, I will decide this case on the pleadings which the defendants, at least by implication, understand and are ready to meet. However, given the lengthy and careful submissions focussing on unpleaded representations, and their link to the pleaded representations, I touch on them also.

Second preliminary issue: the Limitation Act argument

[273] Mr Chisholm argues that some of GMHL's claims are barred by the Limitation Act 2010. He relies on s 11 of the Limitation Act set out as follows.

> **11 Defence to money claim filed after applicable period**
>
> (1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the claim's primary period).
>
> (2) However, subsection (3) applies to a money claim instead of subsection (1) (whether or not a defence to the claim has been raised or established under subsection (1)) if—

(a) the claimant has late knowledge of the claim, and so the claim has a late knowledge date (see section 14); and

(b) the claim is made after its primary period.

(3) It is a defence to a money claim to which this subsection applies if the defendant proves that the date on which the claim is filed is at least—

(a) 3 years after the late knowledge date (the claim's late knowledge period); or

(b) 15 years after the date of the act or omission on which the claim is based (the claim's longstop period).

[274] Mr Chisholm argues that s 11(1) applies and the negligent misstatement claims in this case have a six-year limitation period. Therefore, since GMHL's first statement of claim (alleging negligent misstatement as its fourth cause of action) was filed on 21 August 2020, Mr Chisholm says GMHL cannot rely on alleged misstatements before 21 August 2014. This defence was pleaded in the relevant statement of defence.

[275] As far as it goes, that is a straightforward argument.

[276] But, as Mr Dickey emphasised, it is much more complicated than that. Mr Dickey submits that GMHL had late knowledge of its claim as defined in 14(1) which provides:

14 Late knowledge date (when claimant has late knowledge) defined

(1) A claim's late knowledge date is the date (after the close of the start date of the claim's primary period) on which the claimant gained knowledge (or, if earlier, the date on which the claimant ought reasonably to have gained knowledge) of all of the following facts:

(a) the fact that the act or omission on which the claim is based had occurred:

(b) the fact that the act or omission on which the claim is based was attributable (wholly or in part) to, or involved, the defendant:

(c) if the defendant's liability or alleged liability is dependent on the claimant suffering damage or loss, the fact that the claimant had suffered damage or loss:

(d) if the defendant's liability or alleged liability is dependent on the claimant not having consented to the act or omission on which the claim is based, the fact that the claimant did not consent to that act or omission:

(e) if the defendant's liability or alleged liability is dependent on the act or omission on which the claim is based having been induced by fraud or, as the case may be, by a mistaken belief, the fact that the act or omission on which the claim is based is one that was induced by fraud or, as the case may be, by a mistaken belief.

[277] Mr Dickey's relies on (c). He emphasises that the test assesses what GMHL would have reasonably discovered at the relevant time without the benefit of hindsight or discovery. In his submission, up until 2019, and certainly no earlier than 2018, GMHL had no reason to suspect that it would not be paid for its land. Mr Dickey argues that it was not until February 2019, when the final date for payment for the Weiti Bay land to GMHL had come and gone, and Mr Williams finally confirmed that no funds were coming anytime soon, that GMHL discovered that it may have suffered loss. Mr Dickey thus puts GMHL's "late knowledge date" at February 2019. At the earliest, he says GMHL was put on notice when it was asked to transfer the Weiti Bay titles in early 2018 without receiving payment.

[278] Therefore, under s 11(3), GMHL's claim was filed comfortably within the three-year "late knowledge period". Furthermore, no claims are barred by the 15-year "longstop period" as GMHL has not pleaded any misstatements before 20 August 2005. Overall, Mr Dickey submits that GMHL has filed its claim in accordance with s 11(3) and none of its claims are barred by the Limitation Act.

[279] Mr Chisholm is of the view that the claim does not, and can not yet, have a "late knowledge date". His argument is that the plaintiff suffered no loss in February 2019—only a further delay in respect of payment which would have been available when further parts of the development were completed. In any case, the so-called "loss" that was discovered was only potential loss. That it eventuated was entirely attributable to GMHL's own actions. In his view, the only arguable "losses" that GMHL suffered outside of the primary period were entering into the GMHL loan in December 2012 and entering into the Spinnaker loan in 2013. Each of these, GMHL had immediate knowledge of. Therefore the "late knowledge" provisions of the Limitation Act cannot be relied upon.

[280] There is something in Mr Chisholm's view on this point. The "discovered" loss was only potential loss—crystalised by the plaintiff's own actions. As I have foreshadowed, I conclude that GMHL "tanked" the development, or at least brought it to a premature end, thereby causing its own loss. This is discussed at [788].

[281] This is a relatively complex and difficult issue in the context of an even more complex and difficult case.

[282] In my view, there is no need to decide it. I say this because, as I later set out, the representations made before what Mr Chisholm says is the cut-off date, that is prior to 20 August 2014, are not the representations on which this cause of action stands or falls.

[283] Further than that, other than recording the parties' positions as I have done, I see no need to go.

Elements of tort of negligent misstatement.

[284] Counsel agree that *Carter Holt Harvey Ltd v Minister of Education* correctly sets out the elements of this tort:[44]

1. Was a false or misleading statement made by Mr Williams?

2. Was it made in circumstances where Mr Williams, personally, owed a duty of care to GMHL?

3. Was there reasonable reliance by GMHL on the statement made by Mr Williams?

4. Was there resulting loss to GMHL?

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[44] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321 at [112].

An important factor that covers all the elements to be proved

[285] For the most part, it will be appropriate to discuss separately these elements of the cause of action and that is what I do below. However, there is one important point to make at the outset that only becomes clear when considering the elements together as a whole. It particularly relates to what are best described as forecasts and opinions, the nature of which I examine in more detail shortly.

[286] Given the sweep of time in which the misstatements are said to arise and the sheer volume of communications, it will already be understood that there were over 20 identified and pleaded forecasts and opinions. The point to make is that they were all updated and they regularly changed. This was particularly as to the costs of construction but also the expected revenue. This is unlike many of the reported cases where there are one or two key alleged misstatements or for instance sets of accounts that are said to be misstatements.

[287] As just set out, to be actionable, any negligent misstatement must have been made in circumstances where it was reasonable for the plaintiff to rely on it and must have caused loss.

[288] In respect of reliance, I record that in my view each representation made to GMHL on a specific point superseded any previous representation made on the point. To that extent, it would not be reasonable to rely on a representation that had been superseded by a new one at the point of making any material decision. Put another way, I am of the view that each new forecast, and any opinions based on them, provided to GMHL effectively superseded the previous forecast. This must have been their effect. In fact, generally, each new forecast, presented a changed and more negative position. It just cannot be that GMHL continued to rely on outdated forecasts which had been overtaken by new ones.

[289] For example, in August 2015, it would not be reasonable to rely on financial projections provided in October 2014 that had been replaced or superseded by fresh projections in May 2015. The October representations are no longer “active”.

[290] A very good specific example, as I will shortly discuss in detail, is the information presented by Mr Williams to the Liu family in Taipei in October 2014 (of which much was made by Mr Liu). It was overtaken and superseded by the forecast (with much higher costs) provided to Mr Liu when he visited New Zealand in May 2015. Understandably, this more "negative" forecast angered Mr Liu. Indeed, the meeting where that new (and to Mr Liu's ears disappointing) information was given, became known during this case as the "angry meeting". Self-evidently, Mr Liu's reaction was prompted by updated figures where the development costs had become clearer and had increased. Consequently, the "profit" from the first 80 Weiti Bay lots payable to GMHL had decreased and the date for its payment extended. The point is, Mr Liu and his advisers had these figures available to them. And those forecasts were, in turn, superseded by further forecasts/estimates, sometimes with changed assumptions, in May and then in August of 2015. This was before the very significant first quadripartite arrangements had been signed and the mortgage security for the first major loan had been given by GMHL.

[291] Flowing from this, in my view, it is only the "active" or "operative" representations at the time of the first quadripartite agreements in August/September 2015 that could be said to have caused loss. That is because representations made before that point had been superseded. And after that point, any steps taken by GMHL did not result in fundamental changes to its financial liability. Although, I note the second suite of quadripartite contracts did extend GMHL's mortgage security over Village 1. That is a matter which I discussed previously[45] and to which I will return. However, the key point is, the first mortgage loan and quadripartite contracts were for all practical purposes the point of no return.

[292] In any case, the statement of claim does not specifically plead any misstatements said to have induced GMHL to have entered into the Village 1 mortgage. Notably, it pleads that the terms of the 2017 quadripartite deed were materially unchanged from the 2015 deed. If GMHL wanted to rely on a substantial increase in its liability under the 2017 quadripartite deed it needed to plead this as a basis for its loss.

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[45] See the discussion, previously, at [218], in the section "The Business and Legal Relationship between GMHL/Mr Liu and Mr Williams …" under the heading "First quadripartite loan…"

[293] This point significantly qualifies any assessment as to the nature of the representations/misstatements alleged by GMHL. It also qualifies the extent to which reliance could be said to have been placed on them. And it also affects the analysis of any loss caused to GMHL.

[294] I now address each of the four elements of this cause of action in turn.

1. Did Mr Williams make a false or misleading statement?

Law

[295] Mr Chisholm submits that, ordinarily, to succeed in a claim for negligent misstatement, a plaintiff must prove that there has been a misstatement of past or present fact.[46] There appears to be no dispute about that. However, in this case, the focus is on opinions and forecasts provided to GMHL.

[296] Mr Chisholm further submits that giving an opinion or making a prediction as to future events, which subsequently proves to be incorrect, will only be actionable where the plaintiff can establish the opinion was not honestly held at the time it was made, or if there was no reasonable basis for it.[47] The reference to honesty is a reference to an issue that is not part of GMHL's claim for this cause of action. GMHL only claims *negligent* misstatement. As set out above, the statement of claim alleges the representations were made without due care and skill and/or recklessly as to their truth. I must say the reckless element comes closer to alleging dishonesty, but dishonesty is not specifically pleaded, and it does not seem to be a part of GMHL's case.

[297] Findings as to Mr Williams' honesty in making the representations therefore do not seem to be required. That said, given there is some suggestion that it might be relevant, I take the additional step of addressing it alongside my findings as to reasonableness.

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46 *Bisset v Wilkinson* [1927] AC 177 (PC); and *Jorden v Money* (1854) 5 HLC 185, 10 ER 868 (HL).
47 Francis Cooke *Laws of New Zealand* Misrepresentation and Fraud (online ed) at [13].

[298] In determining whether there is a reasonable basis for projections, the Court should not reason backwards from the results actually achieved. Hindsight is irrelevant and a "retrospective evaluation" is wrong in principle.[48]

[299] The position in relation to forecasts is no different: there needs to be evidence that there was no reasonable basis for these at the time they were made. *New Zealand Motor Bodies Ltd v Emslie* (cited by GMHL in its opening) reflects this.[49] In finding the forecasts at issue in that case were misstatements, Barker J considered the circumstances at the time they had been prepared. His Honour determined that they had been prepared negligently as, due to factors known at the time they were prepared, there had been no real chance of them being fulfilled.[50]

[300] The importance of assessing the reasonableness of an opinion at the time it was made was emphasised by the Court of Appeal in an FTA case of *David v TFAC Ltd*.[51] That case involved statements made to a potential franchisee before its purchase of a business. The franchise business was established in Australia but was only just beginning in New Zealand at the time of the purchase. The purchaser claimed it had been misled, pointing to statements including that the franchise business was readily "transferable to New Zealand". The High Court's finding that this was not reasonable, drawing on the benefit of hindsight, was overturned by the Court of Appeal—which found there was no evidence that the opinion in question had been unreasonable at the time it was made and hindsight was irrelevant.[52] Leave to appeal this decision was dismissed by the Supreme Court.[53]

[301] While it is an FTA case, *Banks v Farmer* provides a recent example of the Court of Appeal assessing reasonableness of forecasts particularly when, as is often the case, the revenue is based upon uncontracted sales figures and when the underlying assumptions are disclosed.[54] The Court confirmed that hindsight knowledge could not be relied upon. For example, the Court noted:

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48 *David v TFAC Ltd* [2009] NZCA 44, [2009] 3 NZLR 239 at [46]–[47].
49 *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC).
50 At 592.
51 *David v TFAC Ltd,* above n 48.
52 At [49]–[50].
53 *TFAC Ltd v David* [2009] NZSC 51.
54 *Banks v Farmer*, above n 40, at [133]–[149].

> [148] The hindsight knowledge of Mako's actual end of year results does not prove that Messrs Farmer and Gamble ought to have known that fulfilment of these projections lacked a reasonable foundation at the time they prepared them in November 2010. …
>
> [149] In summary, we are not persuaded that the Judge was wrong to conclude that there was a reasonable factual foundation for the projections at the time they were prepared. There was no serious suggestion that the forecasts did not represent the honestly held opinions of the directors at the time. Mr Banks has not shown that there was no reasonable factual basis for the projections.

Some introductory comments

[302] I start this analysis by noting Mr Chisholm's submission that there is no allegation in the statement of claim of representation by omission. Only active representations are pleaded. I accept that. For instance, there are no claims of half-truths or incomplete information. That said, there is a claim, after the representations are listed and defined, that Mr Williams failed to promptly, or at all, advise GMHL when he became aware that the representations did not present "a true and fair view of the Weiti Development." No particulars are provided as to when and how this might have occurred. I deal with this issue as best I can.

[303] Second, I observe there is no pleading of, or any evidence of, any misappropriation of funds by Mr Williams. No such allegation was ever explicitly made by Mr Liu that I am aware of, but it appeared to be an underlying concern for him. In my view, there is no basis for it. At all times, the development has been heavily audited and analysed by quantity surveyors. Mr Philip Judge, understood to be a respected accountant, was engaged in 2018 to undertake a full audit and Mr Liu confirmed in his evidence that Mr Judge found nothing—that is no fraud or dishonesty. To further support this conclusion, there are audited financial statements for WDLP for the years ending 31 March 2015, 2016, 2017 and 2018. These were all available to Mr Liu and his advisers. Also, there has been very careful budgeting and quantity surveyor approved processes, strictly applied throughout the course of the project and drawdown reports, numbered 1 to 35, which had been prepared by Kingstons, the quantity surveyors appointed by the lenders—the BNZ, ANZ, and Nomura. These were all emailed to Mr Liu again on 25 June 2018.

[304] Third, it is worth noting that I originally understood the plaintiff's case to be based on the fact of misleading or wrong figures—negligently or deliberately presented to Mr Liu. This in fact seems not to be the case. As carefully clarified by Mr Dickey, the case is essentially based on two types of negligent misstatements:

(a) first, representations as to when GMHL would be paid the agreed $60 million for the Weiti Bay stage; and

(b) second, continuing representations that there was little or no risk to GMHL in mortgaging its land and that GMHL would be paid on the issue of titles to the individual lots and their subsequent completed sale before repaying, and in priority to, the lenders.

[305] These were both continuing themes in Mr Liu's evidence. As I later highlight, the problem with the second part of the second type of representation is that I cannot see where it has been directly pleaded, in the way Mr Dickey set out the representation in his submissions.

Overall conclusions in respect of first element

[306] It will be useful to state my conclusions on this first element of the tort, from the outset. In this section, I cover and make findings about all the major allegations and themes as to the alleged misstatements. Then, in the next section, I address the specific alleged misstatements in detail.

Opinions and forecasts

[307] In my view, all the alleged misstatements were either *opinions*—or more often *forecasts*, which made predictions as to future events or the likelihood of specified outcomes occurring. In a general sense, if classification is needed, the *opinions* largely relate to the level of risk to GMHL if it mortgaged some of its land. The *forecasts* relate to the dates and amounts of money that would be paid to GMHL by WDLP.

[308] I conclude they were honestly held opinions and forecasts when they were conveyed to GMHL. Moreover, these opinions and forecasts were entirely reasonably based. To be explicit, I conclude they were not false or misleading at the time they were made. I also find they were made with due care and skill. Neither were they made recklessly.

[309] One may perhaps have some sympathy for GMHL. It expected to receive payment first for Weiti Bay ($60 million) and then Village 1 ($60 million) by specific dates. Those dates were postponed and ultimately did not eventuate by the time GMHL pulled the plug on the development. The forecasts provided to GMHL, over many years, were constantly revised and proved to be incorrect. Mr Liu also understood that the level of risk to GMHL in mortgaging at least some of its land was relatively low. And yet, GMHL lost that land through a mortgagee sale.

[310] But hindsight, while convenient, is not the appropriate test. Hindsight does not prove that WDLP and Mr Williams knew that the projections would not be fulfilled or that they lacked a reasonable foundation at the time they were prepared. It also cannot be used to prove that WDLP knew that GMHL would lose some of its land. Honesty of purpose and the existence of a reasonable basis for making the statements at the time is the test and is what matters.

Honesty?

[311] As to honesty, it does not seem to be seriously suggested that WDLP and its officers were acting dishonestly in providing the opinions and forecasts. Given my credibility findings as to Mr Williams, and that I find Mr Dempsey (the CFO for WDLP and the Williams companies) to be a reliable and honest witness, there is no basis for such a suggestion. Mr Williams and Mr Dempsey at all times acted entirely honestly. The forecasts that were prepared, and the opinions as to risk to GMHL, were made honestly in good faith.

Reasonable basis?

[312] I also accept that the forecasts were all made with a reasonable basis. As but one example, I accept Mr Dempsey's evidence that at all times he used specialist

property development feasibility modelling software (ARGUS EstateMaster) to construct the forecasts. In doing so, he inputted all available financial information as to costs and projected revenue. He used figures provided from available experts as to construction and other costs and from valuers as to the estimated value of the lots and likely sales revenue. There is no evidence that the component parts of the forecasts were unreasonable at the time, and I am certainly unwilling to reach that conclusion.

[313] Mr Chisholm made much of this point and noted that even the accounting expert for the plaintiff, Mr Shane Hussey, did not give any evidence as to the unreasonableness of the successive forecasts. The forecasts were regularly updated as and when actual construction and other costs became clearer and in light of updated valuations or sales information as to the planned lots.

GMHL/Mr Liu knew that the forecasts/estimates were updated and changing

[314] At this point, it must be said that GMHL/Mr Liu knew that the forecasts were regularly revised and were changing. GMHL/Mr Liu was not a stranger to this reality. Specifically, he knew that projected and actual costs were increasing. Indeed, in one part of his evidence he emphasised that throughout the project there were numerous blowouts. Apart from revealing his frustration, this demonstrated his knowledge of the increased costs and the regular (more negative) changes in the estimates and forecasts.

[315] In his evidence, it emerged that Mr Liu was very familiar with the word "blowout". He used it regularly; on my count about 15 times. For instance, in his brief of evidence, he said that on 15 November 2014 (after the Taiwan meeting presentation), "Mr Williams advised me of a $20 million cost blow out" and that Mr Williams provided a revised budget.

[316] When cross-examined by Mr Chisholm about the "Taiwan presentation" estimate costs increasing with a revised budget, he said:

> Who are you kidding? You know about business plans and you know about people who are supposed to be good business people. Nobody does a blowout like this and know [Mr Liu meant no] tomorrow and then keep doing blowouts.

And, similarly:

> How can this be, you know, a good valid document that I am supposed to count on, but then if I go see from 60 million then another blowout to 100—what happened?

[317] So, in the context of being questioned about the revised Taiwan figures and the "angry meeting", Mr Liu indicates (without doubt) that he knows full well that what he has been previously provided as to costs, is being consistently revised upwards.

[318] And then later in his evidence, he said:

> … wow Mr Evan Williams told us he was starting to have blowout costs in 2014, 2015 huge blowout and that's why we are at this desperate situation and I thought to myself —
>
> [At this point I questioned Mr Liu on the matter]
>
> Q: It's interesting that Mr Williams told Mr Liu that there were blowout costs from 2014.
>
> A. Yeah.
>
> Q. And 2015 and kept saying that.
>
> A. Exactly your Honour.

[319] The point is, Mr Liu, on behalf of GMHL, knew that the forecasts were "best estimates" on the information then available—and he knew that because they were revised so often, with revised assumptions. He cannot set such estimates or forecasts in stone and turn them into cast iron outcomes.

[320] Given what Mr Liu says GMHL knew about all the previous forecasts, it is somewhat artificial and unconvincing for Mr Liu to point to the most recent forecast before signing with the BNZ as inducing him to act, and holding Mr Williams personally accountable for them, when GMHL knew that all the other estimates/forecasts had not been, and could not be, adhered to. There would be no reason to treat the most recent forecasts any differently from those provided to GMHL previously.

[321] This point must significantly qualify any assessment as to the nature of the representations/misstatements alleged by GMHL. It also qualifies the extent to which reliance could be said to have been placed on them—a different element of the misstatement tort.

Forecasted dates for payments often postponed and never eventuated

[322] Turning to the first type of alleged misrepresentation, I conclude that the relevant representations as to when payments would be made to GMHL were all honestly held and reasonably based. Mr Liu/GMHL complained that the forecasted dates for paying GMHL for its land were always changing and extending—again indicating that he/GMHL knew, or must have known by mid-2015, if not well before, that what was being provided were forecasts or estimates based on the then best available information but subject to change. It was clear, and in my view very clear, to GMHL/Mr Liu, that every single forecast was updated, often monthly, and always with more estimated costs and often with less than predicted sales. That, of course, affected the projected dates for payment to GMHL.

[323] In my view, it is also readily understandable and explicable, when the construction of the 150 Weiti Bay lots had been completed, why no money could be paid to GMHL towards the end of 2018/start of 2019 as WDLP had forecast would occur.

[324] A number of unanticipated additional costs and other market influences meant that the forecast—which I find was reasonably made some years earlier—could not eventuate. This included, as already noted, the additional costs arising from the Council-imposed Penlink motorway section joining State Highway One to the Whangaparāoa Peninsula (estimated at $9 million additional costs); geotechnical issues including the land slips, especially the major slip in May 2017 ($7 million additional costs); higher than expected "mezzanine" finance costs; unbudgeted annual cost increases for both the first and second stage of the Weiti Bay development; unpredicted increases in Auckland's construction costs; and delays caused by extraordinarily heavy rainfall and several much wetter than usual winters.

[325] Also, sales/revenue were less than expected. The Weiti Bay sales were not completed as forecast. Part of the reason for this related to restricted overseas investment opportunities—even though there was genuine interest from overseas purchasers in Asia about some of the Weiti Bay lots. Notably, in late-2017 the government introduced a foreign buyer ban. There was also a general Auckland-wide

downturn in real estate sales. Simply put, there was not the committed interest from purchasers that reasonably had been anticipated.

[326] All these matters were unknown to WDLP and its officers in mid-2015 (and beyond their control), at the time the quadripartite contracts and loans were put in place. These factors significantly compromised the forecast.

[327] On 23 August 2015, Mr Dempsey, as CFO of WLL, advised Mr Williams and Mr Simon Matthews, an external project management consultant engaged by WDLP to assist with the development, that GMHL would get paid $60 million for Weiti Bay by December 2018 when the stage 2 lots would be delivered, and after the bank was paid its remaining debt.

[328] In Mr Dempsey's subsequent email of 24 August 2015 to Mr Liu/GMHL, detailed spreadsheets, for Weiti Bay stages 1 and 2, were attached for him to use when talking to his father and sister. Mr Dempsey noted "the cashflow programs $20 million being paid to GMHL for land in September 2017." He made clear that this projection assumed that the Capital Group loan was refinanced at a lower interest rate. And Mr Dempsey noted the stage 2 model, from which $40 million will be paid as the remaining balance of the $60 million, sometime after June 2018 when the bank would be repaid. The models attached made several obvious assumptions, including that 57 stage 2 lots would have been sold by that date generating $85 million, and that an estimated 30 of those lots would be sold through the Chinese market through a Mr Paul Kelly. Mr Dempsey also advised that WDLP expects a $25 million return out of Weiti Bay. To any cursory reader of the spreadsheets, the $25 million was obviously a "paper return" dependent on the "recharges" to Village 1 and 2 actually being paid as a result of those parts of the development being completed.

[329] Importantly, irrespective of how Mr Dempsey said he had programmed the cashflow payments, the overall funding model provided to GMHL, as a matter of accounting reality, showed very clearly that the stage 1 part of Weiti Bay would be unable to deliver $20 million; and the full $60 million would come from stage 2.

[330] As if to emphasise this, the financial details provided to Mr Liu earlier, at about the time of the "angry meeting", already showed that the stage 1 Weiti Bay lots would not result in any payment to GMHL for its land and that payment (in an accounting sense) was scheduled to come from the sale of 57 stage 2 lots.

[331] As it happened, the unanticipated increased costs I have just set out were borne by the stage 2 development, and the projected sales of the 57 lots, with the assumption of 30 lot sales to the Chinese market, totalling $85 million, nowhere near eventuated. As I understand it, that eroded the profit for stage 2 (and the overall profit for Weiti Bay) which, at the time Mr Liu made his 2019 ultimatums, with lots still unsold, could not deliver the promised $60 million.

[332] All that shows that in general terms the estimates, reasonably made at the time, and honestly held by WDLP and its officers based on the clearly made assumptions, did not eventuate, largely for situations beyond WDLP's control.

[333] I have looked at the figures long and hard. In light of the expert accounting evidence, I cannot see that they were unreasonable at the time. I have already indicated that I regard Mr Williams as a careful and thorough man, who paid attention to detail. So too, Mr Dempsey. They were keen to ensure the forecasts they prepared were accurate and clearly conveyed the real picture. In my view, all that information and the explicit in-built assumptions, was available to GMHL/Mr Liu, and their advisors.

[334] In all the circumstances, GMHL was prepared, based on what it and Mr Liu knew to be ever changing and more negative estimates/forecasts, to proceed with the development and mortgage its land—on the estimated basis that when the Weiti Bay 150 lots had been developed and fully sold as predicted, GMHL would receive $60 million.

[335] That was a calculated risk that GMHL chose to take based on honestly believed and reasonably based forecasts provided by WDLP/Mr Williams. GMHL cannot turn them into guarantees. There was always the possibility, even on reasonably based forecasts, that the dates for payment would be postponed and at least in respect of the first stage of the development (Weiti Bay) that the payments might not eventuate. That

they did not eventuate is clearly of extreme disappointment to GMHL. Having taken that known development risk, Mr Liu cannot blame others for it.

[336] But yet, that is exactly what he is trying to do. Now, with the benefit of hindsight, he wishes to find someone to blame and, in effect, blames everybody but himself, including his advisers. In that vein, during his evidence, he remarked that as 60 per cent owner of WDLP he should have exercised his right to fire Mr Williams as of September 2015 when he borrowed the money from BNZ and everything else. He also said that seeing what his advisors saw, "I realised that I should have fired them all."

Little or no risk to GMHL in mortgaging some of its land to secure loans

[337] The other major "type" of "continuing" misstatement identified by Mr Dickey was that there was little or no risk to GMHL in mortgaging some of its land, and that GMHL would be paid when title passed and before any payment to the lenders. I deal with the first part of that alleged misstatement here and then the second part under the next heading.

[338] I find that general statements as to low risk, or relatively low risk, of losing its mortgaged land were made to GMHL several times—before it mortgaged its land. I also find that the purpose of the statements was to reassure GMHL that taking that significant step would not expose it to significant risk.

[339] Again, that GMHL lost its mortgaged land as the result of a mortgagee sale does not, with benefit of hindsight, establish a misstatement was made. In fact, as I set out later, the mortgagee sale, in the first instance, was caused by GMHL's ultimatum that it would not consent to further loan advances unless it was first paid a specified sum in priority to the BNZ. This, and its subsequently adopted strategy, effectively tanked the development. As I conclude later, Mr Liu/GMHL thus precipitated the mortgagee sale. They had dirty hands. The WDLP was to exist for 18 years. GMHL would almost certainly not have lost its land at mortgagee sale if it had stayed the course. There might not have been the money it anticipated available to pay GMHL for the Weiti Bay land. But if GMHL had held the course, I am clear it would have received some money, and it would not have lost its land for nothing.

[340] The real point is, at the time WDLP/Mr Williams proffered the opinion as to risk it was honestly made. And it was made on the strength of forecasts and estimates which were, as already noted, reasonably based at the time.

GMHL to be paid when title passed and before any payment to the lenders?

[341] The final type of representation to address is the suggestion that GMHL would be paid when titles to the individual lots passed to the individual purchasers. The first problem with this representation is that I cannot see where it clearly pleaded in this way. The closest the statement of claim comes is two alleged misrepresentations by Mr Williams:

(a) First, (totally without particulars) "that GMHL would receive payment of $60 million for GMHL's Weiti land upfront or, alternatively, upon transfer of the lots, *notwithstanding other debts incurred* by WDLP". (This is recorded as (n) in the list of pleaded representations at the start of this Part).

(b) Second, that in April and May 2015, WDLP would sell the balance of 15 sites from the stage 1 Development and 56 sites from the stage 2 Development and the money received would go to GMHL*, over and above repayment of the lenders*."[55] (This is recorded as part of (d) in the list of pleaded representations at the start of this Part).

[342] But even then, at the same time as that latter representation, the statement of claim recites that Mr Williams represented that "*following the repayment of the senior lenders*, all net proceeds from the sale of lots and all other income from WDLP would be paid to GMHL, in the sum of $60 million." Self-evidently, that claim is in outright contradiction to the two other alleged representations.

[343] As so much evidence and submissions were directed towards it, I nevertheless deal with the alleged representation.

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[55] (emphasis added).

[344] This was said by Mr Dickey to be a continuous representation. And it was certainly a continuing thread in Mr Liu's evidence that he always understood that as part of any contractual arrangements, GMHL would be paid first, before any loans were repaid, before or when title passed to a purchaser. He was clear this was accepted by WDLP and Mr Williams, who made representations to GMHL to this effect, before the first mortgage loan was finalised.

[345] I accept this was very much mentioned by Mr Liu to Mr Williams and acknowledged as a principle, from an early stage. However, by the time of the first quadripartite deed and the associated loans, the situation had changed markedly. As a matter of reality in this case, no institutional lender with mortgage security would forego its priority. I just do not believe Mr Liu believed that was the case, despite his protestations to the contrary from the witness box.

[346] For instance, it was put to him, that Mr Williams had summarised a meeting with him, Mr Williams and Mr Paul Wigglesworth as follows:

> Evan Williams said that virtually all of his correspondence can be summed up in one sentence, that it had been agreed that the lenders would get a first and second mortgage and access to the sale [proceeds] before anyone else to repay the mortgage and there was no way to move forward without that.

[347] Mr Liu was clearly reluctant to answer that question. Mr Chisholm then again asked:

> Stop. I ask the questions. The proposition I'm putting to you though Mr Liu is that you always knew that the financiers, whether they be the first and second mortgagees were always going to be paid out in full until you or until GMHL received a single dollar and indeed it was only until February 2019 when you through your lawyers sought to be paid in advance of the financiers that the whole development collapsed.

[348] Something of an impasse then developed between Mr Chisholm and Mr Liu. To progress matters, I asked Mr Liu whether he knew that if he signed the mortgages then the bank's interest would come before GMHL's. He said he did not know that.

[349] Despite his evidence on the point, I find there was conversation after conversation and communication after communication where it was made clear to Mr Liu that if GMHL entered into mortgages, then the loans would have to be paid off *first* before GMHL received any of the money. There was no representation ever made

to the contrary by WDLP or Mr Williams. I accept Mr Williams' careful evidence on this point. I specifically reject Mr Liu's evidence which, as he is an experienced and international businessman, is simply not credible.

[350] Mr Liu's advisers certainly knew the position of the priority of the mortgagees and must be presumed to have passed this onto him. In any case, Mr Williams made the priority point clear in his communications to Mr Liu. Indeed, Mr Williams regularly said that there could be no progress if the mortgages were not entered into, and if so, the lenders would wish to be paid first to protect their security. There was simply no way around this. I do not accept that Mr Liu believed that the opposite was represented to him, and it was certainly not a representation he was acting on when he signed the first quadripartite agreements.

[351] Having made those overview findings, it is easier to analyse the specifically pleaded representations themselves. I turn now to that exercise.

Specific alleged misstatements

[352] It will prolong this already too long judgment to address every single representation—there are simply too many and the responses too detailed. But I deal with the pleaded allegations. In any case, many overlap, and only a few are what I have already called "operative".

Misstatements in 2012

[353] In its reference guide to the alleged misleading conduct/negligent misstatements, circulated near the beginning of the trial on 8 May 2024, the plaintiff refers to representations in 2012. Such misrepresentations were not specifically pleaded in GMHL's statement of claim nor included as particulars. In fairness, I should put them aside.

[354] For what it is worth, those alleged misstatements regarded the need to begin the construction, otherwise GMHL could lose its future ability to do so. They also provided affirmations and assurances to Mr Liu as to payment of the purchase price because of the overall profitability of the development. They are said to have led

GMHL to enter into the amended development agreement. This gave further flexibility to attend to the timing of payment of the agreed purchase price and for GMHL to advance a loan of $1.58 million for the development.

[355] In any case, events, further discussions, and subsequent forecasts/estimates superseded what was allegedly said. Also, it is not clear what loss to GMHL resulted. Finally, I am satisfied that they were not, in their context, anything more than statements of opinion reasonably based at the time.

[356] Mr Dickey regarded these misrepresentations as setting the scene for the overall profitability of the development. Mr Liu did not seem to refer to these projections in his evidence.

Misstatements in 2013

[357] The first pleaded misrepresentation is that, in or around 2013, Mr Williams asked GMHL to make some of its land available as security and was led to believe there would be little risk to the land and the proceeds of development would be more than sufficient to repay the loan.

[358] As noted, that allegation is devoid of specificity. In fact, the reference guide provided by Mr Dickey referred to seven statements made in 2013, none of which seem to have been pleaded. My view is that even if they are within the limitation period, they have been superseded by other representations. They could only have been relied upon, to the extent they occurred before the 8 August 2013 tripartite agreements, as a reason for entering the tripartite agreements including the mortgage security.

[359] That particular loan, from Spinnaker, was for $6.25 million. There was an entirely reasonable basis for believing that proceeding with that agreement was "relatively low risk" in all the circumstances. This was a small loan and was easily repayable.

The "blue sky" projection

[360] There was one other representation in 2013 that assumed significance during the evidence. It was not pleaded but I discuss it briefly given the significance it assumed. The representation was a forecast provided by Mr Dempsey to Mr Liu "based on a 1600 lot project". The forecast resulted in a pre-tax gross development margin of $560 million. The forecast then set out that more than $530 million was projected to go to GMHL and WTL.

[361] Understandably, Mr Dickey zeroed in on the projected profits in this forecast. He subjected Mr Williams to searching cross-examination on the issue suggesting that he could not have genuinely believed that the Weiti lots would sell at the prices required for the projection to eventuate. Mr Dickey's ultimate submission on the forecast was that it was part of a continuous strategy or "plot" to soften up GMHL so that it would be favourably disposed towards granting mortgage security over its land.

[362] In response, Mr Williams explained that the projection was what he called a "blue skies" forecast. It was based on a potential development that nowhere near eventuated. It included, for example, a golf course which would have allowed for sales of the Weiti Bay lots at an average of $2 million. Further, he said that the projection was primarily prepared between Mr Dempsey and Mr Liu. Mr Williams suggested the model was the result of Mr Liu asking "If this all goes well, what does it look like?"

[363] I accept Mr Williams' careful response. The projection was in one sense not just "blue sky" but "pie in the sky". The development it was based on was very quickly replaced by a more confined development. And, progressively more up-to-date forecasts in respect of the more confined development were subsequently provided to GMHL.

[364] Furthermore, I do not accept that this projection was part of any grand design to soften up GMHL so that it would agree to grant mortgage security over its land. I would think these sorts of discussions are common at the beginning of a development looking at all possible developmental opportunities.

Misstatements in 2014 regarding the Killarney loan/mortgage

[365] The next alleged misstatements relate to the Killarney loan of $10.42 million designed to repay the Spinnaker loan and "bridge the gap" until construction.

[366] It is at best only indirectly pleaded that the same misstatement which is alleged to have been made to induce entry into the Spinnaker loan/mortgage, was also relied upon in respect of the Killarney loan.[56] I reach the same conclusion for this allegation as I did, above, in respect of the Spinnaker loan and mortgage.

[367] A second pleaded misstatement is that "on or about 11 August 2014, Mr Williams confirmed that an increase of $3.5 million of the Killarney Facility Agreement (above the $6.25 million Spinnaker loan) would be enough to fund the commencement of the construction of the Weiti development".

[368] Mr Chisholm carefully analysed this alleged representation to demonstrate the dangers of inaccurately "summarising" representations. I accept his argument. In my view, Mr Chisholm's argument indeed shows the importance of a detailed consideration of any alleged misrepresentation/misstatement. I accept his points as follows:

(a) This alleged representation does not conform with the document it is said to originate from. Certainly, there is an 11 August 2014 letter from Mr Williams, signed as director of the WDGPL, in answer to Mr Liu's question as to whether the $3.5 million loan would be sufficient to enable WDLP to achieve the planned senior bank loan to fund commencement of construction of the 150-lot development at Weiti Bay. In fact, the answer in the letter, as Mr Chisholm points out, is that, "*the proposed interim debt facility is sufficient to bridge the gap to a senior bank loan and we can operate on a basis into a timetable which achieves that within budget*".

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[56] It not a representation listed in the first cause of action in the statement of claim. But it is mentioned in the outline of the "negotiation and implementation of financing agreement" section as relied upon when entering the Killarney tripartite agreement and Mortgage. It is strange that it is not specifically pleaded as a representation made by Mr Williams in breach of his duties.

(b) The letter simply does not contain the representation claimed.

(c) Nor is there any evidence to show that this statement was not genuinely and honestly believed or had no reasonable basis at the time it was made.

(d) In any event, the statement was not inaccurate as WDLP did not obtain any further debt funding after the Killarney loan until the first quadripartite agreements which provided the substantial finance for the beginning of construction. This may be a small point, but a detailed analysis of each alleged misstatement is required.

(e) And, importantly, in terms of chain of causation and reliance, the Killarney agreement was superseded by later forecasts and subsequent refinancings, including that Mr Liu arranged the Westpac 2015 refinancing of the Killarney loan when it went into default, initiated and controlled by GMHL itself. It is not reasonable for GMHL to suggest it was still influenced by this statement years later.

(f) Finally, on the letter, there is a handwritten PS by Mr Williams: "The safety valve is we don't pay us or advisory fees if it runs over time." This seems a responsible, and transparent suggestion to cover the possibility of any financial difficulty.

[369] All of this is to say that I am quite satisfied there were no actionable misstatements in 2014 relating to the Killarney loan. The plaintiff has not come close to proving this.

The Auckland and Taiwan meeting misstatements

[370] GMHL clearly regards the pleaded representations made to it/Mr Liu in September 2014 in Auckland and/or October 2014 in Taipei as being extremely important. It is alleged that in a PowerPoint presentation, Mr Williams made various representations regarding the prospects of the Weiti development. There are eight specifically pleaded representations:

(a) 53 lots had been sold for a total of $49,840,000;

(b) $49,840,000 would cover 95% of the proposed loan to fund construction, and sales prior to application to the banks and would take this figure to over 100 per cent;

(c) the 53 sales were achieved in a slow sales period;

(d) the demand for houses in Auckland was very strong and there were not enough houses to meet the demand;

(e) the cost of construction was at least $56,300,000;

(f) the construction finance would include repayments of existing debt of $10.5 million to Killarney and $2.0 million to GMHL;

(g) the funding would be provided by senior lenders (i.e. retail banks) and the willingness to lend was a strong certification that the project was robust; and

(h) GMHL would be paid $60 million for the Weiti Bay Land.

[371] It is alleged these representations portrayed the Weiti development as successful and suggested that there was little or no risk for GMHL.

[372] The fundamental problem with these representations, in all their detail, is that there is no evidence to show that the statements of past or present fact were inaccurate. For instance, that 53 lots had been sold for a total of $49,840,000 and that the 53 sales were achieved in a slow sales period. Nor is there evidence to show that the representation that "demand for houses in Auckland was very strong and there were not enough houses to meet the demand", was false or unreasonably based at the time.

[373] Those opinions that were part of these presentations such as the construction cost was at least $56,300,000 are not shown to have been made other than on a reasonable basis nor were not honestly and genuinely held. And the words, "at least" are surely an important "open-ended" qualifier and hardly speak of a misrepresentation; rather the reverse.

[374] But the even bigger problem is that over 10 months passed between the date of these presentations and the date of the next and very important financing being the first quadripartite agreements in August/September 2015. By that time, the representations made in this presentation had been superseded by subsequent events.

Any misstatements, or inaccuracies in the forecasts, if there were any, had been corrected and communicated, given that construction costs had increased.

The April 2015 "angry meeting"

[375] By the time of the "angry meeting" in late April 2015 in Auckland, the construction costs set out in the Taipei meeting had significantly increased. This was carefully explained by the officers of WDLP. As a result, Mr Liu was clearly angry. There were meetings the next day to explain the position to him. I find the representations made to him in those meetings to be examples of reasonably based forecasts being provided to him—which he did not like. But information was not withheld.

[376] In my view, this projection showing significantly increased costs was also reasonable based on the information available at the time. The figures were honestly presented, as follows (this in summary form).

WeitiBay Overall Funding

Costs excluding GST	**Stage 1 plus Paul Kelly Lots (93 lots)**	**Stage 2 (57 lots)**	**Total WeitiBay (150 lots)**
Total forecast cost to title (including replay $1.5M of Killarney interest/financing) as per project budget sheet	$65M	$20M	$85M
Interest and financing on $65M bank loan (BNZ plus Capital Group)	$13M	$2M	$15M
Cost of sales (agents)	$1	$2M	$3
Total Cost	**$79M**	**$24M**	**$103M**
Total sales Stage 1excluding GST (72 lots)	$60M		
Sale of balance Stage 1 lots @ $900,000 (21 lots)	$19M		
Sale of Stage 2 lots @ $1,300,000 (57 lots)		$74M	
Total Sales	**$79M**	**$74M**	**$153M**
Balance			**$50M**

[377] Mr Liu's view, which I reject, is that:

> … in hindsight I consider these financials were all prepared for one reason, to dupe me. It became a once-a-year ritual and I tried to be polite to get it over with. That is why I always brought it back to the point that GMHL was not to release titles until we got paid.

[378] His evidence was that he did not receive the emails from Mr Dempsey to Mr Williams explaining the details of the changed forecasts. In Mr Dempsey's email to Mr Williams and Mr Matthews of 23 April 2015, he is clear that after September 2014, "Mr Liu was informed by way of email that the cost numbers had gone up, as attached." I accept that. Be that as it may, I find that the details were explained to Mr Liu at those meetings—hence his anger.

[379] All that said, I understand his anger. The payment of $60 million for Weiti Bay was imperilled. This was crystal clear on the above figures, presented to Mr Liu, where the forecast balance was only $50 million. However, I must say, presenting that figure so openly hardly supports allegations of withholding information.

[380] Following the "angry meeting", Mr Liu's evidence was that had he been informed of the full extent of the "negatives" and how the position had changed since the Taipei presentation, he "would have called it quits". Mr Liu said:

> Mr Williams knew better than to tell me there was no guaranteed outcome from the development. Why would GMHL have its land base be used as collateral if there was any risk it would not be paid?

[381] In fact, I think Mr Liu knew well of those risks and that accounts for his "anger" at the meeting. That can be well understood. Even at that stage, in April 2015, he realised that the development was becoming tighter and on the then figures—a $50 million surplus of sales over costs—the $60 million payout to GMHL was in jeopardy.

[382] Perhaps the high-water mark of GMHL's case is the internal emails, apparently not disclosed until discovery, which show that behind the scenes, employees of WMTL (as manager for WDLP) were keen themselves to understand the reasons for the higher costs.

[383] Mr Dempsey wrote to Mr Matthews that the quick summary of reasons for the increased costs were bank interest, the road and stage 2. In Mr Dempsey's view, "the objective is to tie back to the $50 million out turn we gave Mr Liu". That can only be understood as a reference to the projected $50 million profit, which obviously was less than required to fully pay GMHL.

[384] This reduced balance was of obvious concern to Mr Williams, who in response, emailed Mr Dempsey, with a copy to Mr Matthews, saying:

> Hi guys. The objective is not to finish up at $50 million. We need to understand where the differences are and how we can maximise the profit. Let's talk in the morning.

[385] Mr Dempsey replied in some detail to that email as to how the costs had gone up and sales had gone down, with an "overall delta" of $38.5 million since the September and October (Taipei meeting) figures. At this time, it is clear that more thought was given by the WDLP team as to projected sales revenues. I also accept that Mr Williams' genuine objective was always to ensure that $60 million was available to GMHL.

[386] I do not regard those emails as demonstrating dishonesty. I have looked at them hard in the light of the figures. In my view, they show that the April projection resulted in considerable soul searching. That resulted in the reworked (reasonably based) table handed to Mr Liu on 28 May 2015, discussed next, which contained the recharges, and which set out the same costs and which showed a $11 million higher sales revenue.

[387] The final point to stress is that, in the preceding September, $60 million was presented in the forecasts as what would be available to pay GMHL. By the next April, that amount was reduced to $50 million. So, even the most untrained eye (which Mr Liu is certainly not) would have realised there were already potential difficulties with GMHL receiving the agreed amount.[57]

[388] In my view, that is the real point to make. There was no possibility of payment at that stage from the stage 1 development. The stage 2 development was also not going to provide even then the full $60 million. And, of course, there were obvious risks in the sales revenue and the possibility of future cost "blowouts". Both of which Mr Liu, must have been aware of, despite his evidence to the contrary. He is, as I have often said, just too smart and too intelligent not to pick that up. From that point on,

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[57] I note that in the papers prepared for the Taipei meeting, and perhaps subsequently, there was reference to the $60 million coming from just stage 1 of Weiti Bay development—not all of that development—stage 1 and 2 of Weiti Bay. Mr Williams explained this was a typo, and clearly not correct. I accept his explanation.

Mr Liu must have known that there were risks that the Weiti Bay part of the development alone might not deliver all the $60 million which had been "programmed" (as was the word) for GMHL.

April/May 2015 misstatements

[389] The next pleaded allegation is that in or around 30 April 2015, by way of email, it was represented, through an attached "Weiti Bay Debt Funding— GMHL Analysis" that:

(a) a key term of any financing arrangements was that GMHL provide mortgages over numerous and/or large parcels of the Weiti land as security; and

(b) that the proposed structure was conservative and created considerable protection for GMHL and a great deal of value for GMHL.

[390] The email was also sent from WDLP's lawyers to GMHL's then lawyers. The first of these statements is a statement of legal reality. The second has not been shown to be made without honesty or without a reasonable basis. In my view, the "Analysis" was clear and realistic in terms of what was known at the time.

[391] I note the "Analysis" states that GMHL holds title to all land until transfer to purchasers. It makes clear (with my emphasis added) that "[t]he *loan offers and facility documents require repayment of the debt first* and the balance of the Weiti Bay lots remain in GMHL's name and control." Later it records "GMHL retains all titles in its name until sold to purchasers (and thereby *all revenue proceeds after bank repayment*)." Nothing could be clearer in respect of GMHL not receiving payment in priority over the lenders.

[392] GMHL then raised further concerns particularly as to level of risk. It is alleged that on 15 and 19 May 2015, WDLP/Mr Williams, through its lawyers, represented that:[58]

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58 (emphasis added).

(a) finance would not be provided without security being provided by GMHL;

(b) the lenders would withdraw the offers of finance if GMHL were to be in a position of priority *vis-á-vis* the lenders;

(c) WDLP had always been aware that GMHL sought to be paid at the earliest possible moment and the business plans developed by Mr Williams sought to achieve this;

(d) the joint business plans developed by WDLP, and the personal relationship between them and between Mr Liu and Mr Williams, had been at the heart of the successful development venture;

(e) WDLP would sell the balance of 15 sites from the Stage 1 Development and 56 sites from the Stage 2 Development and the money received would go to GMHL, over and above repayment of the lenders;

(f) general security over WDLP and a guarantee and indemnity from Mr Williams could not be provided to GMHL to secure WDLP's indebtedness to GMHL as it was inconsistent with the "joint venture" nature of the relationship;

(g) following the repayment of the senior lenders, all net proceeds from the sale of lots and all other income of WDLP would be paid to GMHL, in the sum of $60 million;

(h) the minimum construction cost of the Weiti Land for stage 2 development was $20 million; and

(i) the Weiti Land would not be locked up by the financing agreements.

[393] As I understand it, most of the representations are accepted as having been made, except (e) and (i) above. I also note the general and glaring inconsistency between (g) and (e) in that paragraph. I accept that (g) reflects the legal position but does not include the junior lender, Capital Group, which perhaps may not have been confirmed at that time. At any rate, it cannot mean that repayment is only confined to the senior lenders and does not include repayment to any junior lender. I do not accept a representation was made in the way suggested in (e), that payment to GMHL would be paid in priority to the lenders. That would have been unacceptable to any secured lender, and Mr Liu, as I have concluded, knew that full well. I accept Mr Williams' evidence on that issue.

[394] In that way, the "representations" regarding insistence by the financiers that some of the development land should be provided as security, and that the lenders debts would take priority, are simply a statement of legal reality. There is nothing misleading in all of that.

[395] As I analyse the remaining statements, GMHL has adduced no evidence to show that those statements of past or present facts are inaccurate nor that the opinions about the future were unreasonable or not honestly held at the time.

[396] The business plan and proposed development represented the then thinking. It was reasonably based on information then available. Moreover, I find that at the time, the structure proposed through the anticipated quadripartite contracts, and the statements that arrangements were of low risk, were protective of GMHL and provided a great deal of value, were all reasonably based opinions.

[397] The representations set out in (a)–(c) were accurate and hardly constitute misstatements. Neither can I see any real problem with (d). It is a statement of fact and by that time the 10-year relationship between Mr Williams and Mr Liu could hardly be expressed in any other way. I do not regard it is somehow manipulative. It is reflective of the mutual trust and respect that then existed between the two men.

[398] These alleged misstatements need to be put in the context of Mr Williams' communications at the same time including an email of 17 May 2015, already referred to at [346], into which Mr Liu had input. It was Mr Williams' summary of a discussion between himself, Mr Liu and Mr Wigglesworth. It was sent to Michael Pritchard and Laurie Mayne, GMHL's lawyers from Mayne Wetherell, and also to WDLP's lawyers Alan Paterson and Cathryn Barber. It recorded, amongst other things, and I set this part out in full, given its importance: that:

> Mr Liu indicated that his concern is GMHL's position at the bottom of the waterfall and that he is trying to make sure that GMHL does get the purchase prices agreed.
>
> Evan Williams said that virtually all of his correspondence can be summed up in one sentence – that it had been agreed that the lenders would get a first and second mortgage and access to the sales proceeds before anyone else to repay the mortgages and there was no way to move
> forward without that. He pointed out the benefits to GMHL of moving the development forward now – that it would build the road, generate cash from the sales contracted, open up the other sites, that investors and other purchasers would come in because the road is being built, and that this is the path to cash for GMHL. Mr Liu said he understood that we needed to give the lenders the first and second priority and that he was trying to do everything he could to protect GMHL without disturbing that. He asked what could be done to ensure

> that. Evan Williams indicated that if that was the case we needed to flesh out the principles in the draft of 8 May and spell out more clearly the principles underlying the bank priority and then the payment arrangements and obligations from WDLP to GMHL. Everyone agreed that should be done and that Evan Williams would generate a further draft and send it to the lawyers later this weekend. The draft needs to spell out why and how we are protecting GMHL's position after the lenders.

[399] I accept Mr Williams' position that this conversation took place and that is what was said by him and Mr Liu. And to state the obvious, GMHL's lawyers knew it too—if only because they were copied in.

[400] There were no misstatements at this time.

The sacrosanct principles

[401] In May 2015, there was also discussion between Mr Williams and Mr Liu about recording some agreed overriding principles and terms. These became known during the case as the "sacrosanct principles". They were contained in a draft amendment agreement which I am not sure was ever signed. But certainly, Mr Williams agreed and accepted that these had been agreed and drafted at his suggestion. They were not pleaded

[402] The three principles, which would replace all previous provisions as to prices and payment, were:

(a) A $180 million purchase price for the development land representing $60 million each for the Weiti Bay land, Village 1 land and Village 2 land.

(b) GMHL must be paid on issue of new Certificates of Title within each part of the development land.

(c) WDLP's business plans and cashflow targets must have the primary objective of ensuring GMHL receives the minimum payments in a short timeframe with GMHL having the right to scrutinise and monitor these business plans and cashflow targets.

[403] In my view, this was recorded as a general understanding, but in the context that Mr Liu knew that the bank's security comes first. The second principle was not an unequivocal representation that GMHL would be paid on issue of titles. Instead, it was a general principle which was always subject to any secured lenders being repaid first. This is Mr Williams' evidence, and I accept it. Mr Liu made significant "play" of this second statement—and it remained a general principle. But it would have been crystal clear to Mr Liu that, in practice, GMHL would not (and could not) be paid until the secured lenders had first been repaid. And then, only if there was, at the time, a surplus in terms of income from lot sales over expended construction costs. In this sense, I conclude that principle was aspirational and known to be so by Mr Liu. If there was any doubt about that, the discussion summarised five paragraphs previously conclusively removes it.

[404] That statement of principle, which Mr Liu agreed did not need to be signed, cannot be turned into a guarantee that GMHL would be paid its money in priority to the lenders—even if there was no surplus available to do so.

[405] At any rate, as a result of "agreeing" on these three overriding principles, Mr Liu was happy to instruct his then lawyers to continue with negotiations that led to the first quadripartite agreements, whereby GMHL's legal obligations, and secured lenders priority, were abundantly clear.

[406] What Mr Liu emphasised continually, and what Mr Dickey carefully drew to my attention in his submissions, is that in Mr Liu's words:

> Time and time again Mr Williams confirmed that he will pay GMHL first in writing and you know what is this 2015, a lot of times, even afterwards, he knows he's got to pay GMHL first before we issue titles.

[407] I am crystal clear that Mr Liu repeatedly gave that evidence. But with respect to Mr Liu, I am also crystal clear that on this point he knew that the lenders had to take priority to GMHL. I hope he will understand why I cannot accept that evidence, and why I must reject it.

Recharges

[408] I now turn to the issue of "recharges". They were not pleaded. However, as they acquired such significance during the evidence and submissions, as with other statements and issues, I deal with this issue simply as a matter of fairness to GMHL.

[409] Recharges refers to the accounting practice whereby construction costs incurred that would benefit the whole development—such as the access road into the development—which had been borne in accounting terms, by just Weiti Bay, were "recharged" to the remaining parts of the development—that is, Village 1 and Village 2. This seems to have first been adopted as an accounting practice in a tabulated summary of the overall funding for Weiti Bay that was provided to Mr Liu personally on 28 May 2015. It was continued thereafter.

[410] A series of meetings took place during Mr Liu's visit which included Mr Wigglesworth, his long-time adviser, and Mr Anderson his legal adviser whom he had just retained. These projections were a development on the projections handed to Mr Liu at the "angry meeting". Rather than explaining the position in detail, it is convenient to include the summary document in this judgment.

Weiti Bay Overall Funding

Excluding GST	**Stage 1 plus Paul Kelly Lots (93 lots)**	**Stage 2 (57 lots)**	**Total Weiti Bay (150 lots)**
Costs			
Total forecast cost to title (including replay [sic] $1.5M of Killarney interest/financing) as per project budget sheet	$65M	$20M	$85M
Interest and financing on $65M bank loan (BNZ plus Capital Group)	$13M	$2M	$15M
Cost of sales (agents)	$1	$2M	$3
Total Cost	**$79M**	**$24M**	**$103M**
Land Cost			**$60**
Total Cost			**$163**
Revenue			
Total sales Stage 1 excluding GST (72 lots)	$60M		
Sale of balance Stage 1 lots @ $900,000 (21 lots)	$19M		
Sale of Stage 2 lots @$1,300,000 (27 lots)		$35M	
Sale of Stage 2 lots @$1,650,000 (30 lots) (assume sales in Chinese market)		$50M	
Total Sales	**$79M**	**$85**	**$164M**
Recharge of 66% of Access Road (21M)			**$14M**
Balance			**$15M**

[411] It will be seen that the change between this forecast, and that provided at the "angry meeting" is an increase in projected sales revenue from $153 million to $164 million. In my view, this increase was reasonably based. As Mr Williams explained in his evidence, which I accept, the revenue figure had been revised by incorporating prospective investment from Chinese buyers. The potential for sales at a premium price to investors in China was reasonably based at the time. Notably, Mr Kelly had brought a group of Chinese investors to view Weiti Bay. Mr Williams understood his view was that the stage 2 Weiti Bay lots would attract a premium price for purchasers in China. Mr Williams had also met potential Chinese investors when he visited China in March 2015.

[412] The recharge is shown at "66% of Access Road ($21M)" being $14M which is added to the revenue that could be expected for Weiti Bay. It will be immediately obvious that figure is "paper accounting" for an amount that could only be paid by WDLP through money derived from the future sales of Village 1/Village 2 or by way of a loan in advance from a commercial lender.

[413] Given that the overall Weiti land development was staged, with Village 1 and Village 2 being developed and completed after Weiti Bay, it is reasonably obvious that this is an adopted accounting practice to spread the true construction costs over all the whole development—but without there being the $14 million referred to, currently at hand. All that, in my view, would have been reasonably obvious.

[414] The accounting experts for each side agreed in the joint statement that WDLP included these allocations of costs to Villages 1 and 2; and that cost allocations are often appropriate, in principle, for the purpose of financial reporting. However, the financial expert for GMHL, Mr Hussey, considers that after May 2015, but for the recharges, the forecast for Weiti Bay would not have projected a surplus and could not have projected a surplus of more than $60 million.

[415] Indeed, Mr Hussey suggested that changing the basis of the forecast (by providing for the recharges in the later forecasts) might have been a strategy to make the outcome look more appealing to GMHL/Mr Liu—rather than continuing to report on a like for like basis consistent with the process originally applied.

[416] As I understand it, Mr Hussey retreated a little from that position. It was appropriate that he do so, given that it is not within his expertise to know what WDLP was intending. That said, I accept that Mr Liu seemed to be concerned at the hearing by the "recharge" practice.

[417] In my own view, consistent with my view of the credibility of the key witnesses, WDLP presented the recharging information clearly, and plainly did not sweep it under the carpet or use it as a device or subterfuge to mislead Mr Liu. Mr Hussey responsibly conceded that the contrary conclusion was not a finding within his expertise and nor was it appropriate for him to reach it.

[418] In any case, the accounting expert for Mr Williams and his companies, Mr Eric Lucas, was a careful, thoughtful and, in my view, very impressive witness. I accept his view that the:

> … cost allocations were largely irrelevant at the time. The forecasts were produced when the key consideration was if and/or when WDLP would be able to pay $60 million to GMHL from cashflows from the Weiti Bay development.

[419] The overall funding table, set out above, makes clear that the recharges are positioned at the end of the table, after it is clear that the sales will exceed costs (including the $60 million payable to GMHL) by $1 million.

July 2015 misstatements

[420] GMHL pleads two misstatements in July 2015.

[421] The first, said to be made in or around July 2015 by WLL, in the lead-up to the first quadripartite agreements, was that the overall development budget for the Weiti Development was $68.6 million—being a $3 million increase from the development budget presented in April/May 2015. In fact, this was overtaken by the second alleged misstatement a short time later, and therefore requires no discussion.

[422] The second misstatement is particularised by reference to an email of 28 July 2015, "WLL represented to GMHL that the total loan amount of $76,405,738 would fully cover their increased budget". In my view, this was either a statement of opinion

or a forecast—but either way it had a reasonable basis. And it was certainly made honestly. By this time, two sets of quantity surveying firms had reviewed the cost budgets (Barnes Beagley Doherr (BBD) for WDLP and Kingstons for the lenders). The development programme was to be independently reviewed going forward. And it was to be (and was for that matter), tightly controlled by the lenders with their appointed quantity surveyors—Kingstons—needing to approve and issue reports for each drawdown. The $76,405,738 stage 1 budget was very close to that which Kingstons approved.

[423] However, as previously discussed, for unanticipated reasons, some of which were beyond WDLP's control, the budgeted costs were exceeded. The statement of claim, itself, sets out the progressive increases in the construction cost budget, culminating in May 2018 with a revised budget of $98,335,430. In the end, total costs for Weiti Bay approached $103 million.

[424] Revealingly, and somewhat unhelpfully for GMHL's claim, the statement of claim itself lists six contributing factors to the progressive increases. Some of these are plainly beyond WDLP's control such as a slippage on the access road and "additional road construction" which I assume is referring to the impost of the Penlink connection. These rather make the case for the defence, not the plaintiff. Other listed factors do not affect the reasonableness of the costs forecast, and I do not accept that those factors such as increases in finance costs and professional fees were known and—by inference in the statement of claim—were deliberately not included in the budget approved by the BNZ and sent to GMHL.

August 2015 misstatements

[425] About a month before the first quadripartite deal was signed, the plaintiff claims that on or about 14 August 2015 Mr Williams represented to Mr Liu there was a high degree of certainty that the project would be completed on time and on budget and that the sales contracted would repay the lenders.

[426] It is important to note from the outset that the allegation (and the relevant email) refers only to the sales contracted as repaying the lenders, not repaying the lenders and paying GMHL $60 million. This is far from a pedantic point. When

misrepresentations or misstatements are relied upon, Mr Chisholm must be right again that the words themselves must be the starting point.

[427] This alleged misstatement is a key part of the plaintiff's case given that it occurs so close to the signing of the first quadripartite deed and the mortgages which provide the money for the development of Weiti Bay. Also, more up-to-date financial forecasts are provided at this time. Effectively, this pleaded representation and the accompanying provision of forecasts/estimates, supersede all the previous pleaded representations as to viability of the development.

[428] As background to this representation, in late July 2015, a draft initial funding report for the Weiti Bay development was prepared and was forwarded to Mr Anderson, GMHL's lawyer.

[429] On 10 August 2015 Mr Anderson the solicitor for GMHL, advised that GMHL was not prepared to sign the BNZ/Capital Group loan facilities which led to the first quadripartite agreements. Four reasons were set out. GMHL's concerns included that it is being asked to give up title to the land before it has received payment for it. Also, GMHL has reviewed the estimated costs and sales projections/processes and is concerned there will be insufficient funds generated by the sale of Weiti Bay (stages 1 and 2) to pay GMHL the agreed price of $60 million. It believed this risk was exacerbated by a number of costs increases from the budget presented to GMHL in the April 2015 "angry meeting". GMHL was also concerned, in respect of what Mr Anderson described as the Killarney debacle, that it was left in the position of having to refinance the Killarney loan itself.

[430] Suffice to say, from all of this, it seems clear that GMHL was aware of the "development risks" in the project. And Mr Liu was aware of this right from the beginning, and up to the time of providing the mortgage security as part of the quadripartite deed, despite his evidence to the contrary which I reject.

[431] On 10 August 2015, Mr Williams provided a detailed five-page response. It is impossible to traverse it in detail. I regard it is a very important report about the development. It is structured to answer all four concerns posed on behalf of GMHL.

In my view, it provides a reasonable basis for the forecasts, the costs increases, and the realities and implications of the contemplated security structure.

[432] Perhaps the crucial concern, which Mr Williams implicitly accepts in his response as being reasonably asked by GMHL, is whether Stages 1 and 2 of Weiti Bay will produce the agreed price of $60 million? That, of course, is one of the underlying issues in this whole development.

[433] As I read Mr Williams' response, without the inestimable benefit of hindsight, his explanation of the estimated/forecasted revenue, and the basis for it, is reasonable. The assumptions are clear. Mr Williams makes the point that depending on one assumption the forecast margin will be very tight:

> If all the costs of the road and infrastructure including those referable to Villages 1 and 2 are all carried by the Weiti Bay budget, the Weiti Bay development has only just enough forecast margin in it to produce the $60 million payment required to be paid to GMHL for Weiti Bay.

[434] In my view Mr Williams, writing as the director of the management company employed by WDGPL, is very transparent.

[435] As I say, I accept Mr Williams' surrounding evidence on this point and that his explanation/forecasts on behalf of WDLP were honestly made.

[436] On 11 August 2015, Mr Williams, as director of WLL, provided more detailed information as to the background assumptions for the projected $85 million revenue for the second part of Weiti Bay at that time being described as 57 lots. That was carefully explained by Mr Williams in an email later that day and I assess his explanation to be reasonable and fair. Information was provided to GMHL's lawyers, to the accounting firm that it retained, and to Mr Wigglesworth, Mr Liu's long-time general adviser.

[437] Finally, later on that day, there was a further response which provided three scenario forecasts each depending on the length of involvement by the junior lender, Capital Group.

[438] The first, and least optimal, projection assumed the Capital Group loan ran to full term. The second projection was a scenario where Capital Group was repaid after six months. The final scenario was without involvement from Capital Group at all. It was essentially the same cost information already provided, but the scenarios incorporated a full re-run of the cost and revenue budgets. Mr Williams, again writing in his director capacity, included the following comment:

> The sensitivities on the revenue side of the return analysis are straightforward. As discussed with Mr Liu in May we have used the Paul Kelly plan for 30 lots to sell into the Chinese market which he is keen to implement. If that plan was felt to be too aggressive one would simply subtract an amount per lot off 30 lots. We think a low case at $200,000 less per lot may be acceptable.
>
> We have also attached the overall Weiti Bay development cost budget. That budget has been thoroughly reviewed by the contractors and banks quantity surveyors and engineers.

[439] All three projections forecast the same revenue—approximately $79 million for 93 stage 1 lots and $85 million for 57 stage 2 lots. However, all of the projections make clear that the $85 million for stage 2 was based on the assumption that 30 of the 57 stage 2 lots would sell for $1.65 million each through the Chinese market, as had been negotiated by Mr Kelly.

[440] All three projections also forecast the same costs ($24 million) for the stage 2 lots. However, the stage 1 costs projections range between $79.35 million and $86.2 million depending on the length of Capital Group's involvement.

[441] Only on the third projection, involving no involvement from Capital Group, was there enough money to pay GMHL the full $60 million for the Weiti Bay land upfront. If the Capital Group loan ran to six months, (the second projection) the revenue would be $1 million short of enabling the full $60 million payment. On the first projection, if the Capital Group loan ran to full term the revenue would fall approximately $6 million short of allowing full payment to GMHL.

[442] In the first and second scenarios, the full $60 million payment would effectively depend on recharges (set at $26 million in all three projections). Those recharges were transparently set out in the projections. Self-evidently the recharge money would not be available for any immediate payment to GMHL.

[443] However, for the third scenario/projection, the way the recharges were presented made clear that receipt by WDLP of the $26 million recharge amount was not necessary for GMHL to first receive its $60 million.

[444] Finally, it is also noteworthy that the "recharges" in each of the three forecasted scenarios had significantly increased from the previously adopted amounts in May. In addition to the proportionate cost of the access road, there was a further $12 million as a recharge for the Weiti pre-development costs of $18 million. The recharges increased to $26 million,

[445] This led to email exchanges on 14 August 2015 where GMHL's pleaded representations are made in an email to Mr Liu, as follows:[59]

> Last night Paul indicated to me that your concerns may lie more after the banks have been repaid than before. As you know, the degree of bank supervision is very high - every last thing has to be signed off by the independent QS plus the banks - and the degree of independent cost scrutiny already plus the contingencies *allowed gives a high degree of certainty that the project will be completed on time on budget and the sales contracted will repay the lenders.*

[446] I have reflected on those representations. They are expressed relatively strongly. However, they should be understood in their context. The "degree of certainty" asserted by Mr Williams comes from the bank supervision and independent quantity surveyor involvement. The figures provided a little earlier have not been shown to be other than reasonably based at the time. I conclude that when those representations were made, they were not made negligently or carelessly or without due skill and expertise.

[447] I should also note that a day earlier, Mr Williams had already indicated that he could not provide a personal guarantee to GMHL. Mr Liu had sought such a personal guarantee as a tangible indication of Mr Williams' commitment to the project. On 13 August, Mr Williams had said that he was unable to do it as he did not have the resources to do so. Secondly, and more importantly, such a guarantee would not be consistent with the joint venture nature of the relationship he had with Mr Liu as "partners in WDLP" (in which he noted Mr Liu held a "controlling interest of 60 per cent as opposed to Mr Williams' entity—Weiti LP which held 40 per cent.")

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[59] (emphasis added)

[448] Mr Williams emphasised that Mr Liu had the ability to control WDLP's decision-making should he choose to do so. He also emphasised that, as landowner, GMHL controlled the key strategic choices. Also, he said that in all the financing choices it is GMHL's decision as to the balance or risk, timing, the market, and the level of exposure GMHL was prepared to accept.

[449] Mr Liu's response to Mr Williams, set out below, is illuminating. It sets out the position that he took in evidence and which, I have explained, I do not accept.

[450] His response is an example of the way that when, under pressure, Mr Liu is prepared to blame others, not accepting GMHL's personal responsibility for the development to date and displaying a willingness to engage in brinkmanship on the eve of signing the quadripartite deal. He says as follows:

> Mr Williams
>
> That is not how I remembered it. 10 years ago, you came to us and signed an agreement to purchase by a certain date our property for 300 million nz in cash. Many dates have expired, and we have rolled over the dates for you to still have access to the property – many many times. And we have still made other changes to allow you to buy the property in pieces rather then pay for it in one lump sum. Because you claim that you did not have the money to buy it and that you do not have other property for collateral – so we generously agreed that you can use one of our property as collateral. And now you are implying that we made the wrong decision to let you use the one property for collateral.
>
> Frankly – it is your loan. You wanted to buy – than you should have made all the arrangements for what is required so that you can purchase – ie including the collateral.
>
> You are forgetting. You are the general partner. You make all the spending decisions that can and result in all the losses.
>
> Liu Tong Kuang

[451] Mr Williams responded by email, using a "Williams Land" footer. He made clear he was not implying that GMHL had made wrong decisions but simply indicating that, in practice, as Mr Liu owns 60 per cent of the development entity and GMHL owns 100 per cent of land, that is where the ultimate control regarding the equity financing for the development lies.

[452] Mr Williams also added that he could not guarantee "what he did not control" in the development and also indicated that he personally:

> … got nothing other than the management fee and a chance to recover 23 per cent of WDLP at a point where GMHL had been paid. Any chance for WDLP to profit only arose when GMHL had been fully paid.

[453] Relevant (but apparently not pleaded) forecasts/estimates provided in an email by Mr Williams/WDLP to Mr Liu leading up to the execution of the quadripartite deal included further information on 23 August 2015 regarding current and estimated pre-sales, and that:

> … between 2017 (earliest) and 2018 (latest) when Stage 2 lots are delivered, the banks will be repaid their remaining $7 million and GMHL will receive all of its $60 million for the land and there is a margin.

[454] On 24 August 2015, a further email importantly clarified that the stage 2 Weiti models assumed that all lots would be sold prior to the end of construction and that GMHL would be paid $40 million as the remaining balance of the $60 million having earlier been paid $20 million.

[455] Much of this information was provided by Mr Dempsey, with a footer at the bottom of his email recording his role as CFO of WLL, and I infer, in his capacity as an officer of the management company.

[456] On 24 August 2015, Mr Liu sought the "financials" in order to show them to his father and sister, Dr Liu. These were all sent, with the explanation by Mr Dempsey in the above two paragraphs.

[457] In this respect, I accept that the financial models were all prepared by Mr Dempsey, a chartered accountant, who had no personal stake in the project. Mr Liu had significant business experience, which obviously would include an understanding of financial models and forecasts. I accept Mr Williams' assessment that:

> … it was clear to me that he [Mr Liu] readily understood them. He also had very capable advisers to assist him. In my view he was fully aware of the financial situation, and that the only realistic way that construction of the development could commence, would be through senior secured lending.

[458] All the then forecasts were based on or extrapolated from expert reports (and in limited areas assumptions were expressly noted). Mr Chisholm submits that they were reasonably based. This I readily accept.

[459] It was all this information, and in the context of the discussions that I have outlined, that led GMHL to execute the first quadripartite deed. As I have repeatedly mentioned, that deed and the loan, in practice irrevocably tied GMHL into its obligations to allow the construction phase of the development to commence. And, I conclude that Mr Liu knew the implications of the forecasts and the risks.

[460] Mr Liu was cross-examined on that point as follows:

> Q. What you've shown Mr Liu is that you're actually quite quick with financial documents being put in front of you?
>
> A. No Mr Chisholm what I've shown you is that even though I don't care to read, I don't read and what everybody [inaudible] to push me to it, yes, I'm going to take my time to understand it. Don't take me for a fool Mr Chisholm.
>
> Q. I'm not. I'm complimenting you in saying that —
>
> A. Well then you're welcome thank you.
>
> Q. — you quickly pointed out a correct point but do you recollect analysing these documents in late or mid to late August 2015?
>
> A. I think that goes back to what I've always answered which is I counted on Mr Williams to tell me what it is he wants me to know right. Obviously if I had thoroughly analysed all these documents I probably should've reacted the way I just did. Is that what you want? That is correct and you know that.
>
> Q. What do you mean by that, "I probably should've reacted the way I just did"?
>
> A. Your Honour this is 2015 right. If he had a cost of 160 million how is he ever going to pay for anything? This is a complete bankrupt situation. Nobody in their right mind should've gone and borrowed money when they did. The fact that Mr Williams did that is completely irresponsible, very, very irresponsible. That's what I said the other day I should fire him as of 2015.

[461] In other words, all the material was presented to Mr Liu for his and GMHL's analysis. He was capable of analysing it. He did so in cross-examination. As I have previously noted he can, and demonstrably did, absorb information very quickly. During cross-examination he realised the implications of the forecasts very quickly, and the reality that the forecasts put to him were not risk free. I simply do not accept that he did not realise the implications in August 2015 when he was originally provided with the material.

[462] All the figures necessary for analysis were there in the forecasts. Mr Liu now draws the conclusion that it was obvious what the figures were saying. With respect, they were just as obvious in August 2015, just before GHML executed the quadripartite deal. Out of Mr Liu's own mouth is acceptance that the figures were clear and transparent. Nothing was hidden. While this conclusion also overlaps with the reliance issue, GMHL cannot now be heard to say that the forecasts were misleading.

[463] There is a final point to make about one of the 14 August emails from Mr Williams to Mr Liu. It includes the following:[60]

> GMHL remains the landowner at all times and at settlement GMHL will own all the sites. *Once the bank has been repaid*, a site cannot change hands without a GMHL signature. GMHL will not sign without payment.
>
> * No one can put a mortgage on the land without GMHL's signature.

[464] Yet again, the point is made to Mr Liu that GMHL's ability to demand payment on the issuing of titles could only arise *once the bank has been repaid.*

December 2015 misstatements

[465] GMHL alleges that on 21 December 2015 by email, Mr Williams represented "that construction of stage 1 was going well, and that he wanted to bring the projected finish date for the first 83 lots forward, from October 2017 to December 2016." In fact, stage 1 was further delayed, as acknowledged in a letter by Mr Williams of December 2017, and not completed until 31 October 2017, with titles not issued until early 2018.

[466] That is not exactly what the 21 December 2015 email said. It said:

> We are working with Hicks to bring their finish date on first 83 lots forward from October 2017 to December 2016 or early 2017.

[467] And, later in the email, Mr Williams said he was working with HEB Construction to see if they could bring their programme forward also.

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[60] (emphasis added)

[468] I agree that the email is positive. However, I do not see a misstatement in what is alleged. That is because, as quantity surveying and engineering reports provided to Mr Liu at the time confirm, Hicks Brothers (earthworks construction company) was tracking ahead of its project.

December 2017 misstatements

[469] A letter on 20 December 2017 is also said to contain misstatements. Mr Williams, on a WDLP letterhead, explained that "we are conscious that construction was delayed throughout 2017 and that we are late in settling the first 80 lots". He said, "we are working to ensure that substantial payments will be made to GMHL in the early part of next year". He went on to say:

> … on the basis of our present facilities, repayment of senior lenders and actual and forecast sales, WDLP will pay to GMHL $40 million in May 2018. WDLP commits to paying that amount.

[470] The letter concluded by saying that:

> … we are working very hard to achieve GMHL's goals. We confirm our entire commitment is to ensure GMHL gets its money. We appreciate your support and are determined to honour that.

[471] Mr Dickey's submission is that this letter is "beyond the realms of realistic possibility and that Mr Williams knew, or ought to have known that".

[472] With the benefit of hindsight, that submission is unarguable. However, in his evidence, Mr Williams explained in some detail the basis for his expectations as to expected refinancing. And, on the balance of probabilities, I accept his explanation and that it was reasonably based at the time.

[473] In any case, it does not seem useful for this Court to become too involved in analysing pleaded representations made after the first and certainly the second quadripartite agreements in February 2017. This is because it is difficult to see how these alleged misstatements contributed to GMHL's alleged loss. As previously explained, after the signing of the first quadripartite agreements, GMHL's liability and exposure under the mortgage did not significantly alter other than the inclusion of the Village 1 land in the second quadripartite agreements.

The financial/accounting information

[474] At this point in the assessment of the alleged misrepresentations/misstatements it is necessary to say a word or two about the parties' expert accounting evidence.

[475] The plaintiff's accounting expert was Mr Shane Hussey. His evidence is that the development costs for Weiti Bay projected in 2014 were $68 million. These costs eventually increased to $130 million as at January 2019. This was an increase of around $63 million. Mr Hussey indicates that revenues reduced by around $10 million. He concludes that as of 2014, the projection was that the project would deliver a return of $89 million before the payment of GMHL's land costs of $60 million. This left $29 million as a profit for WDLP, to be apportioned between its beneficial owners. However, by 2019 Mr Hussey estimates that had unsold lots been sold, there would only have been a surplus of around $16 million available to GMHL for its land. This would have left a deficit to GMHL of $44 million. I do not understand this evidence to be substantially disputed.

[476] Mr Hussey's evidence is that the format and the classification of the costs presented to GMHL at different stages of the project changed over time. In his view, this made the extent of the cost increases and/or revenue decreases unclear or at least difficult to follow. Indeed, Mr Hussey presented a very helpful table with columns for each important forecast so that they could each be compared, like for like. I agree this made the changes quicker to identify. And of course the changes, on their face, as set out by Mr Hussey were concerning to GMHL, at the time and especially with hindsight.

[477] But with respect, I think Mr Hussey overstates the difficulties. The changes are transparent and obvious even after a relatively quick read through—particularly to a man of Mr Liu's business experience and acumen. In any case, the projections were made on a reasonable basis, and were honestly believed. In my view, WDLP/Mr Williams did not fall short of their duties.

[478] The first June 2012 projection, when adjusted, projected a surplus of $164 million for the Weiti Bay land. In April 2013 there was a significantly higher projected revenue with a surplus of $207 million, before paying GMHL for its land. I regard

both these estimates as occurring in the early days of the development. They were "indicative". As is often the way with such estimates, they were refined and developed. Consequently, the expected surpluses greatly reduced over time. There is no evidence that Mr Liu for GMHL relied on these initial projections, although of course they were positive and attractive. And in any case, they were superseded by the subsequent much more detailed projections which were based on the emerging, and more up-to-date and exact, construction cost estimates. And, as set out, those construction costs increased markedly even from the October 2014 Taipei presentation to the Liu family.

[479] Mr Eric Lucas, the expert accountant for the first to fourth defendants, suggests:

> … it is not surprising that Mr Hussey has identified a series of changes in the forecasts over time as the project developed. Changes in forecasts do not necessarily mean that forecasts were not reasonable when prepared. It is well documented that this development suffered a series of costs which had not been foreseen at the time significant borrowing commitments were made.

[480] I accept Mr Lucas' assessment. As previously remarked, he was a quietly impressive witness. In my view, it sums up the position well.

[481] Mr Hussey is correct that the costs for the 150 lots in April 2015 showed a significant/substantial increase compared to the projection prepared in 2014—from $67.6 million (total stage 1 and 2 costs) to $103.4 million for the 150 lots in April 2015.

[482] And for the August 2015 projection, Mr Hussey appears not to be critical of the costs forecasts, but correctly notes the forecast revenue for unsold lots was significantly higher than included in a formal valuation provided by Savills in April 2015.

[483] On that point, I accept Mr Lucas' comments that the Savills valuation was undertaken for first mortgage lending purposes. It could thus be expected to err on the side of prudence, particularly around likely realisation. On the other hand, WDLP included sales in its August 2015 forecasts as $79 million for stage 1 and $85 million

for stage 2. This included the assumption regarding selling to the foreign market through Mr Kelly.

[484] The stage 1 sales to date (74 lots) were correctly recorded. The balance of the stage 1 lots were assumed to sell for an average of $900,000 or an eight per cent premium on actual sales for stage 1 achieved to that date. I accept that WDLP expected increased realisations given that access to the lots already sold had been so difficult but would be considerably improved.

[485] In respect of stage 2, it was expected that 27 lots would sell at $1.3 million and 30 lots at $1.65 million. These forecasts are substantially higher than those included in the Savills valuation of 2015 which suggested an average return of $940,000 net of GST. The August projection would total $85 million for stage 2 which was specifically queried by Mr Elwood, a partner of Deloitte Private, on 11 August 2015 by email to Mr Williams with copies to Mr Anderson and Mr Wigglesworth (who was acting as one of Mr Liu's advisors).

[486] In response, Mr Williams set out his assumptions in the way he calculated this amount very clearly on a 10-point basis. In my view, those assumptions were reasonable and clearly drew attention to the fact that the "Paul Kelly Plan" may yield less than predicted. And "if you wanted to take a more conservative view, you might take $200-300,000 off, but you should be pretty safe at that".

[487] If that was applied to all 57 lots, this would amount to $11.4-$17.1 million of reduced margin. In other words, while GMHL is now, with the benefit of hindsight, critical of the forecasted revenue sales, all the assumptions underpinning the data were made available to it and its advisers when the reasonableness of those forecasts was challenged. Thus, in my view, GMHL was provided with all the relevant information. The information provided was reasonably based and the assumptions were clearly set out. The information was also provided honestly and in good faith.

[488] In Mr Lucas' view, which I accept, it should have been apparent to GMHL at that time, on the assumptions made, that it could not expect to clear all of its $60 million land sale price solely from the sale of the Weiti Bay lots and "every dollar of sales shortfall would make the position worse".

[489] Generally, I accept Mr Lucas' evidence that:

> … irrespective of Mr Williams' expectations, for practical purposes, the best way to maximise returns was for WDLP to complete the Weiti Bay development as soon as possible and sell all remaining lots. Any other course of action would have been value destructive.

[490] Mr Lucas accepts Mr Hussey's assessment that as at March 2019, the Weiti Bay development would generate no more than $16 million towards the $60 million which WDLP was required to pay GMHL for the development of Weiti Bay.

[491] I also agree with Mr Lucas' conclusion:

> There is in any event an air of unreality about the position now taken by GMHL. WDLP is not an entity that was independent of GMHL. It was 60 per cent owned by interests associated with Mr Liu. The development of GMHL's land could never realistically been undertaken by WDLP (an entity without assets) without GMHL granting security over the land being developed.

[492] The actual projected net revenue of the sales (less commissions, sales costs, GST) from April 2015 through to March 2019, fluctuated between $132.6 million—the April Savills valuation; $163.9 million adjusted to $160.9 million at a high end in August 2015; down to $147.1 million in March 2019. These fluctuations in my view are not alarming and are explained in the evidence. They are within reasonable bounds and, in any case, were all made clear one way or another to GMHL and its advisers.

The "unparticularised" misrepresentations/misstatements

[493] There are six unparticularised alleged representations remaining. They are set out previously at (l) to (q) of [243(2)]. Conceivably, some could have been made within a very large window of time—over four or five years beginning from 2011/12. Without the pleaded context, it is very hard to analyse them.

[494] The first alleged generalised statement is that there "was strong market demand for the lots and that the Weiti development was and would be financially successful". Pleading these two representations in "linked" form is slightly puzzling. I am not sure there was ever a statement in this exact general form, although at various times the representations in each half of the statement were made.

[495] The first part, as to market demand, seems to have been made on several occasions. As Mr Chisholm emphasised, no evidence was led to disprove that statement. Certainly, anticipated sales throughout the relevant period were not as expected. But that begs the question as to whether the statement was reasonably based. The evidence does not establish a lack of reasonable basis. When they were made, I have concluded they were made honestly.

[496] As to the forecasted "financial success of the development" (which must mean the whole development), I note that the whole development was not completed prior to trial. So, its overall financial success or otherwise, is moot. Moreover, what amounts to financial success is not clear from the pleaded allegation. Even on Mr Hussey's evidence, some financial success is still possible. Finally, as I have already concluded, such forecasts that were made as to financial success were reasonably based and honestly made.

[497] The second general allegation that "the initial stages of the development would be completed so as to enable sales to be settled in early 2016, or late 2016, or 2017, or 2018" presumably refers to the Weiti Bay stages 1 and 2. I have already dealt with these allegations and concluded there was no misstatement: see the discussion under the heading *Forecasted dates for payments often postponed and never eventuated.*

[498] I have already rejected the third generalised allegation that "GMHL would receive payment of $60 million for the Weiti land upfront or, upon transfer of the lots, notwithstanding other debts incurred by WDLP." I conclude no such statement was made. It would have flown in the face of the legal reality of this development whereby secured lenders demanded first priority.

[499] The fourth general allegation that "there were reasonable grounds for anticipating that Auckland Council would approve … up to 2,000 lots for the Weiti Development" is particularly hard to analyse without a pleaded specific statement. There may have been very early and only high-level discussions (soon after 2006) about the development supporting up to 2,000 lots. This was not a clear statement. Thereafter, I conclude there was no unreasonable or dishonest statement made to this effect.

[500] The real point is that the evidence referred first to consent for 150 lots. Then zoning consent was obtained for up to 550 lots. And now there is the (still undetermined) application of an extension to 1200 lots, for which I accept, according to the planning expert there was (and is) a reasonably based expectation of success. In a 14 August 2015 email to Mr Liu, Mr Williams recorded that:[61]

> I will put my position as clearly as I can. Yes the history is true – we came to you to buy (at $160m base) and the GFC meant we could not complete. You have been flexible and you have extended dates and amended the contracts and I am grateful for that. We have both put an incredible amount of time in over the last 9 years and travelled a long road together. As you have put the land up, I have added value through extending the consents, invested over $30m in cash, *and extended the zoning by a factor of 8 times*…

[501] Clearly, just before documentation of the BNZ/Capital Group loans, Mr Williams was representing the achievement of a "zoning" change allowing for 1200 lots (that is eight times the original 150 lots). But it had previously been made very clear to Mr Liu that consents for those lots were still required. In my view, the evidence shows that Weiti Land was notified by the Council at 1200 lots in the draft Auckland Unitary Plan in 2013. WDLP had made application to increase the zoning capacity to 1200 lots. That is still unresolved. There was an application lodged for 1600 lots in the draft Auckland Unitary Plan. However, the eventual High Court settlement was on the basis of 1200 lots, described by Mr Williams' planning expert as conservative. As I read the evidence, after WDLP's formation, there was no representation of anticipated approval for 2,000 specific lots. All the planning information was communicated exactly to GMHL. Mr Liu may have misinterpreted the words used which have a particular planning meaning—such as "zoning" and

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[61] (emphasis added).

"draft plan". But no false or misleading information and statements were deliberately communicated. I am quite sure that Mr Liu knew the exact situation.

[502] The fifth allegation is that "land offered by GMHL as security for WDLP's debts would not be unreasonably exposed." I am not sure when such a specific representation was made, let alone, what to make of it. Presumably it refers to the loans for construction. There is no evidence that GMHL's land was "unreasonably" exposed. I have held to the contrary.

[503] The sixth and final pleaded representation is that other specific financial predictions were made by GMHL from time to time without reasonable basis, *further particulars of which will be provided following discovery.* I am informed no such particulars were provided. The summary of alleged misrepresentations given to the Court at my request, after this trial had started, hardly qualifies. Nevertheless, I have covered as many of them as seem relevant in the preceding lengthy analysis.

A comment about the second quadripartite agreements and mortgages

[504] I conclude with a reference to the second quadripartite agreements, and particularly the mortgage documents associated with the ongoing BNZ loan and the new loan by Nomura/Pacific Dawn as second mortgagee. For the first time, the mortgage security was extended to include the Village 1 land, as well as Weiti Bay. Several times previously in this judgment I have referred to this as the only change. I also said that otherwise in signing the first quadripartite deed and mortgages, GMHL had passed the point of no return. I have previously explained why GMHL had no realistic choice but to extend the amount of secured land as demanded by the lenders. Even so, for myself, I would have regarded this change to the mortgage as reasonably significant as it extended the land at risk of possible sale.

[505] But, the statement of claim notes the key terms of this quadripartite deed (and the third and final deed in 2018) as materially unchanged from the 2015 and first quadripartite deed. The statement of claim does make clear that all three quadripartite deeds were entered into on the strength of all the pleaded representations. And it does not refer to representations which were specifically relied upon (after the first

quadripartite deed) as a basis for entering the second quadripartite deed and the associated mortgages—even if it did increase GMHL's potential liability.

[506] The only pleaded representation that could apply during that time period is the 21 December 2015 email that construction was going well and that Mr Williams wanted to bring the projected finish dates forward for the first 83 lots. I have already dealt with that alleged misrepresentation and will not repeat my conclusions. Similarly, I have dealt with all the pleaded representations relied upon for entry into all the quadripartite deeds and associated documents.

Conclusion as to first element of negligent misstatement tort.

[507] I have tried to address all the pleaded allegations with a level of analysis appropriate to the comprehensive submissions and argument by counsel. Frankly I cannot do justice to them all. But I have endeavoured to cover the key and repeating allegations and alleged misstatements. I conclude that no false or misleading statements were made.

[508] This is enough to dispose of the first cause of action. Given my findings, I conclude that it cannot succeed. However, in case I am wrong, and out of deference to the considerable argument and evidence directed to the remaining three elements of this tort, I now go on to address them. As will emerge, the plaintiff has problems with establishing any of them.

2. Did Mr Williams make the alleged misstatements in circumstances where he owed a personal duty of care to GMHL?

Law

[509] This element requires an assessment of the relationship between the parties. In determining whether it is fair, just and reasonable to impose a duty of care on Mr Williams personally the following factors are ordinarily considered:[62]

(i) proximity;

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62 *Carter Holt Harvey Ltd v Minister of Education*, above n 44, at [113]–[115].

(ii) foreseeability; and

(iii) policy considerations.

[510] Mr Dickey submitted that there are two particularly important elements to this issue: does a duty of care arise; and is it owed by Mr Williams personally?

(a) The first part of GMHL's argument is that there are two bases on which a duty of care arises here:

(i) Proximity/foreseeability. Mr Dickey argues that the making of detailed statements specifically directed or addressed to Mr Liu, with Mr Williams' knowledge that it would likely cause Mr Liu, on behalf of GMHL, to form a belief or understanding of the subject, is sufficient to create a duty of care.

(ii) A special relationship between the parties whereby Mr Williams had a relationship of trust and confidence with GMHL and in that capacity made statements and gave assurances to GMHL. In so doing, it is argued Mr Williams drew on his personal reputation, status, expertise and connections to create a relationship with GMHL that had been developed since 2005.

(b) As to the second element, it is argued that Mr Williams is *personally* liable (as opposed to WDLP or any other entity which Mr Williams might want to refer to) as he assumed personal responsibility for the conduct/statement. In Mr Dickey's view, "as Mr Williams moved from one entity to another between 2005 and 2020 and purported to deal with GMHL via these different entities, it did not change the character of his relationship with GMHL". It is said that Mr Williams, personally, was the main constant since 2005. It was his word and commitment that mattered as he was the person that GMHL relied upon and trusted. It is argued that GMHL would not have dealt with any of these other entities but for Mr Williams.

[511] Realistically, the central issue is the second element. And this is the essence of what is pleaded—that Mr Williams *personally,* either expressly or by implication, assumed a common law and/or equitable duty to GMHL. As with counsel, it is on this issue which I focus.

Five introductory comments

[512] There are several introductory comments that need to be made about this allegation.

[513] First, the pleadings themselves do not specify *when*, during the parties' long involvement Mr Williams assumed such personal responsibility. The inference from the pleadings is that it was from the beginning of Mr William's relationship with Mr Liu, and it subsisted throughout the subdivision development. That is a very significant and far-reaching claim. In his opening, Mr Dickey advised that Mr Williams assumed such a duty of care "over the course of a decade". He did not say when Mr Williams' assumption of that role was complete. It is therefore hard to immediately see which of the misstatements alleged were made in that "fully fledged" capacity—but again, presumably all of them. None of this is clear from the pleadings.

[514] Indeed, in opening for GMHL, Mr Dickey claimed that Mr Williams "gradually assumed the role of a principal advisor to GMHL and effectively acted as GMHL's in-house lawyer." He stressed it was this that gave rise to a duty of care. I accept Mr Chisholm's submission that this specific allegation did not feature in the plaintiff's pleading. I also accept Mr Chisholm's suggestion that such a submission, on the face of it, seeks to "impute elements of an undue influence claim by stealth." Certainly, Mr Dickey's claims go significantly further than the statement of claim. They change or widen its character. But in fairness to the plaintiff, I will deal with the submissions. It is also important to emphasise, as did Mr Chisholm, that Mr Williams did not practice as a lawyer during the relevant period, nor was he formally engaged as GMHL's adviser. Moreover, as I discuss later in this section, GMHL had its own financial and legal advisers.

[515] Second, the alleged duty of care does not arise out of any contract or other written arrangement between Mr Williams personally and GMHL. Clearly, Mr Williams was not engaged personally to carry out the development.

[516] Third, there is no evidence to which I have been referred wherein Mr Williams has expressly or explicitly assumed such a duty for the entire period of the development. The claim is more reasonably put on the basis of an ongoing, evolving, implied assumption.

[517] Fourth, Mr Williams' duty of care in the pleadings is confined to statements made to GMHL in relation to:[63]

(a) the current anticipated *financial* position of the Weiti Development; and

(b) the corresponding level of risk that was or could be faced by GMHL's land *that was subject* to mortgages granted by GMHL.

[518] Therefore, on its face, this pleading refers to a narrower personal duty than was canvassed in the plaintiff's submissions.

[519] And fifth, it is undeniable that there *was* a personal relationship between Mr Williams and the Liu family that developed from 2005. It was formal in its character (Mr Williams always referred to "Mr Liu," and apparently vice versa), and focussed on their business relationship. But they trusted each other and knew of each other's personal lives. Generally, at least, they seemed to get on well enough until (according to Mr Williams) he noticed a deterioration in the relationship which began in 2018. And, obviously it was through Mr Williams' "human" agency that most of the information and forecasts were communicated to Mr Liu/GMHL. But just because it was his voice, or his hand behind the emails—does not necessarily mean that he was assuming *personal* responsibility for all he said. The question remains—in what capacity was he speaking?

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63 (emphasis added).

[520] Mr Dickey argues that question can be answered very simply. He says this is "a simple case which has at its heart Mr Williams' relationship with Mr Liu and the rest of his family in relation to GMHL and its land since 2005". Whatever the legal structure, it did not change the fundamental personal constant and, in Mr Dickey's view, nothing could be simpler. Mr Dickey accepts that the law does not impose a duty on an individual as a matter of course, unlike the Fair Trading Act 1986 (to be discussed in the second cause of action). Nevertheless, as Mr Dickey would have it, this is a straightforward case. However, in my view, the case is not "simple". And in particular the legal structures cannot be ignored.

The nature and importance of the legal structures adopted—particularly WDLP

[521] In fact, those structures, particularly the sophisticated and legally complex agreements that the parties entered in 2012—primarily, the WDLP agreement—are the starting point. It was that structure, deliberately adopted, that governed the legal relationship between the relevant parties including, here, Mr Williams and GMHL. Mr Williams was not directly a party to those agreements in his own personal capacity. They were carefully constructed. They represent how the parties chose to regulate their relationship. In my view, the fact and complexity of those agreements must generally speak against any personal liability by Mr Williams to GMHL.

[522] It will be recalled that, under the WDLP structure, Mr Williams wore "three legal hats":

(a) First, he was a director of the general partner (and he was the CEO/director of the management company employed by general partner).

(b) Second, he was the director of WGPL which was a "limited partner" with a 40 per cent share (sometimes called the junior limited partner).

(c) Third, he was one of the two members of the WDLP Advisory Committee. Only as a member of the Advisory Committee was he acting personally, as was Mr Liu.

[523] So, when Mr Williams was communicating with Mr Liu/GMHL in the first instance he should be regarded as wearing one of those three hats. It is just too simplistic to ignore those "hats" and to conclude that given the close personal relationship with Mr Liu and his family he was consistently speaking in some sort of assumed personal role as a trusted (legal/financial) adviser.

[524] There is also the complication that if Mr Williams was wearing separate hats, so, too, was Mr Liu as the receiver of the information. Mr Liu was an "insider" of WDLP through WTL, the 60 per cent limited partner, and as a member of the Advisory Committee. Information that was disclosed and given to him was not invariably and only as a representative of GMHL. That said, I am prepared to accept that in terms of most of the alleged representations, they were made to GMHL.

[525] Mr Dickey submits that "there is no need to try and decipher what 'hat' Mr Williams was wearing for each email" and that "at the heart of the dealings between GMHL and Mr Williams lay this personal relationship that was key to obtaining GMHL's trust and agreement." With respect, that is too simplistic an approach to take, although not without a certain attraction. In fact, some careful "deciphering" is surely required. Mr Dickey argues that the adopted legal structures should be put to one side in this analysis. That is the only way the Mr Dickey's argument can fly. I am not prepared to do that so easily.

[526] In my view, when Mr Williams was speaking to Mr Liu, usually it was in his capacity as sole director of the general partner (and as the director/officer of the management company organising the development under the authority of the general partner). Generally, all that he communicated was in the context of that role within an entity (and its delegate) which was part of a larger complex structure.

[527] Frequently, when sending emails, Mr Williams used a footer describing himself as "CEO" or occasionally "director". Mr Dempsey used an identical footer in a number of his emails describing himself as "CFO". When there was a letter, the equivalent letterhead was used. In evidence, Mr Williams confirmed that the footer was a WLL footer. He said it was part of the standardised WLL "letterhead".

[528] Mr Williams went on to explain that WLL either held shares in or managed other subsidiary companies in the group. That essentially provides the link between WLL and the actual entities involved in the management of the Weiti development including WDGPL (as general partner of WDLP) and WMTL as the management company engaged by WDGPL.

[529] Given this, I am satisfied that Mr Williams' use of the footer was to demonstrate that he was acting on behalf of a "Williams company" even if that company was not necessarily WLL itself. This points against Mr Williams having a personal duty of care for the statements he made when using that footer. It is not a conclusive factor, but it is certainly a factor warranting careful consideration.

[530] Overall, use of the footer simply reinforces my view about the role Mr Williams was performing when he communicated with Mr Liu about estimates/forecasts/progress.

[531] In my view, that structure, deliberately adopted, prevented the lines of their relationship from becoming blurred. And it kept their personal relationship in proper perspective.

[532] The importance of that structure, and its contractual framework, is particularly relevant here, given s 9(3) of the Limited Partnerships Act 2008, which provides:

> (3) On registration of the limited partnership, the partnership agreement has effect as a contract between the limited partnership and each partner, and between the partners themselves, under which the limited partnership and each of the partners (including any subsequent partners) agree to observe and perform the agreement so far as it applies to them.

[533] I would have thought that courts would think long and hard before constructing a personal duty of care in these circumstances, where the parties themselves had made their own arms-length and independently advised decision as to how their relationship would be structured. The circumstances would need to be compelling before a court would step outside that legal matrix.

[534] In this respect, I bear in mind the comments of William Young P and Arnold J in *Body Corporate 202254 v Taylor*:[64]

> The courts have been very reluctant to confer rights to sue in negligence which are inconsistent with (perhaps just in the sense of going beyond) the rights for which plaintiffs have bargained. As well, to be successful a plaintiff will usually have to show an assumption of personal responsibility by the defendant to the plaintiff which is akin to acceptance of a contractual obligation.

[535] To similar effect are the comments from the Court of Appeal (majority) in *RM Turton & Co Ltd (in liquidation) v Kerslake and Partners*[65] which was similarly a case involving the tort of negligent misstatement where the parties had sought to regulate their various relationships by contract. The Court observed:

> In a comprehensive contractual situation such as existed here, the Court should be hesitant to go beyond that relationship. A tortious duty of care outside that framework, but affecting the rights and liabilities of the various separate parties coming within the very contractual setting, should not lightly be imposed.

[536] Mr Williams was alive to this very issue from an early stage. For instance, in an email on 4 May 2013 to Mr Liu, Mr Williams (with the WLL footer setting out his position as CEO), addresses the issue of the progress of the development and the need to protect the existing consents and zoning. He commented:

> While ultimately the agreement between us takes the form of a sale of property, in most respects (and particularly on the economics) it is near to a partnership and that is the way you and I have approached these kinds of issues. It is in this spirit that I offer the following recommendations.
>
> I believe that the key questions on which GMHL needs expert input to make sure GMHL's risk is properly assessed and managed going into the loan transaction are:

[537] Mr Williams then sets out five areas of risk including the issue of the legal risks for GMHL, the loan arrangements and how should GMHL best manage those risks. The letter then suggests that the law firm of Russell McVeagh provide a report to GMHL spelling out the risks to GMHL under the covenant and the mortgage.

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64 *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [16].
65 *RM Turton & Co (in liq) v Kerslake & Partners* [2000] 3 NZLR 406 (CA) at [36].

[538] In that email, Mr Williams goes on to set out and identify a series of reports that "GMHL can use to assess the various risks." Mr Williams goes on to say, "All reports would be provided by independent professionals with liability for the standard of their work and advice."

[539] It can thus be seen that, at least by 2013, Mr Williams clearly highlighted the need for independent advice. By implication, at least at that stage, he specifically did not assume the role of legal and financial adviser as is GMHL's now articulated case.

[540] Mr Williams makes his inability to act as a lawyer crystal clear in an 18 July 2013 email to Mr Liu, (again "signed" with the WLL footer), in respect of specific advice as to whether the GMHL constitution requires Mr Liu to account to GMHL for any remuneration or other benefits he might receive as director or officer in another company. Presumably, this was a question Mr Liu posed as to whether he was required to account to GMHL for the advisory fees. Mr Williams provided a tentative view on that narrow point but makes clear in the second paragraph of the email as follows:

> Bearing in mind I do not practice as a lawyer (and could not formally advise you anyway as we have a business relationship) here is how I see it.

[541] Mr Williams then makes clear that Mr Liu "may wish to get this checked independently".

[542] In my view, a better argument might be for a duty of care to be imposed on WDLP and its general partner. But I have received no submissions on the point. As I understand it, WDLP, and the general partner have no assets and have now ceased to function. That may well be the reason why liability is claimed against Mr Williams personally. If so, that WDLP, as a potentially liable entity, has become insolvent, does not make it appropriate to look beyond the "insolvent entity" for relief.[66]

Did Mr Williams (clearly) step outside the formal legal structure?

[543] All that said, I accept that at times, albeit in respect of specific issues, Mr Williams arguably stepped outside that formal structure and personally inserted himself as an advisor to GMHL. A number of key emails are illustrative:

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66 *RM Turton & Co (in liq) v Kerslake & Partners*, above n 65, at [37].

(a) In the very email of 18 July 2013, described above, after stressing he cannot give advice, Mr Williams goes on to do just that. He did say "you may wish to get this checked independently." But it would have been better for Mr Williams to go no further. However, the advice was personal to Mr Liu, not GMHL, about a sensitive matter apparently relating to Mr Liu's apparent desire to "keep quiet" his advisory fees.

(b) On 28 April 2013, Mr Williams wrote to Mr Liu, apparently not using the usual "footer", regarding the then proposed Manson loan. That loan subsequently fell through because, amongst other things, GMHL was not prepared to mortgage all of its land. Mr Williams said:

> As we discussed, as well as representing Weiti Development LP, I regard it as also my job to protect the interests of GMHL as we go through this.

I have carefully considered this email which Mr Dickey clearly considers as indicating an assumption of a personal duty of care to protect GMHL. I understand the argument. However, on the face of the comment, it is not exactly clear this is what Mr Williams is meaning. It is also consistent with him pointing out that, as part of Weiti Development which he represents, he also wishes to ensure that GMHL is properly protected by what WDLP does.

If it is an assumption of personal liability, it is certainly confined to the "going through" of the Manson deal, which collapsed and from which no liability emerges. That said, in this instance, it is potentially indicative of blurring the lines of Mr Williams' role.

(c) On 5 August 2013, Mr Williams emailed Mr Liu, without, it would seem, the usual formal "footer", regarding encumbrances required by Spinnaker before the first tripartite loan. Mr Williams said:

> Relative to the downside of doing nothing and losing the 1200-1600 lots increased for good, plus losing the bulk of the Village 1 consents, which I think is going to happen very soon if we do not do something, the risks associated with the debt transaction are low and the value added is high.

Mr Williams then added, significantly:

> From a GMHL perspective I believe this is the right transaction to do and recommend it.

Mr Dickey understandably highlights this comment. It is a fair submission. But the comment is as consistent with advice from WDLP as it is with what is said to be an assumption of personal responsibility.

(d) On 25 August 2014, in the context of some proposed amended wording for the Killarney tripartite agreement, Mr Williams emailed Mr Liu (using the WLL footer) and said:

> I think this works to protect GMHL and make sure that the principle of always taking action against the Borrower first is secure. Can you let me know if you agree and I will put it to them formally.

Again, in my view, Mr Williams is writing as WDLP not personally. In that context, he is seeking Mr Liu's response and letting GMHL know that WDLP believes the re-wording will ensure the tripartite agreement can continue.

(e) On 27 August 2014, before the second tripartite agreement was signed, Mr Williams (using the WLL footer), said:

> It is getting very urgent that we talk please. I wish to protect your interests. Can you call me?

Again, Mr Williams is said to be acting in a personal capacity. And again, I would regard this as inconclusive as to an assumption of personal responsibility. It is more consistent with the "voice" of the general partner.

(f) At the meeting in Taipei in October 2014, although Mr Williams used the WLL PowerPoint livery, he was said to have spoken as a friend of the Liu family, and in a way that used that relationship to under-emphasise the risks to GMHL. That said, it was clear in my view that the representations were being made on behalf of the general partner of WDLP, albeit through the conduit of a "friend".

(g) More concerningly, and probably the high-water mark in the argument as to Mr Williams' arguable assumption of personal responsibility, is his comment in an email of 5 May 2015. At that stage, difficulties were emerging regarding the signing of the first BNZ quadripartite loan offer and the necessary refinancing of the existing tripartite loan. Mr Williams wrote directly to Mr Liu. Mr Williams was obviously concerned that Mr Liu's then lawyers seemed to be raising theoretical difficulties which might stymie the process. He said:

> You and I have worked hard with a great deal of goodwill to take Weiti forward and you and I have created great value for GMHL. I understand your concerns and am happy to find a way through them. I am not sure it will be helpful to that process to do it through these lawyers but if you wish to do that I will of course seek to do the best by the project. They clearly do not understand the structure we have or the protections you have in this situation.

Mr Williams went on to say:

> You and I have both weathered some storms together and I hope we continue that.

In my view it was at the far end of legitimate fair comment, for Mr Williams to make those observations if he was speaking for WDLP. Even if he was not, Mr Williams did make clear that new lawyers would be required, and they were immediately put in place by GMHL.

It is worth noting that email was immediately preceded by an email from GMHL's lawyers which raised what WDLP obviously considered were illegitimate concerns raised by those lawyers. In a draft response sent to Mr Liu, Mr Williams said:

> The joint business plans, WDLP and GMHL have developed, and the personal relationship between them, and between Mr Liu and Mr Williams have been very much at the heart of the success of this venture to date. Mr Williams values those relationships highly and understood your client to do the same. Their business plans are not irrelevant and your letter does both clients a disservice.

Mr Williams goes on to say:

> WDLP believes it has created very substantial value for GMHL …

It is evident that Mr Williams' concerns, as subsequently expressed to Mr Liu, are in the context of the understood business relationship between WDLP and GMHL while noting that there is a parallel personal relationship between Mr Williams and Mr Liu.

Viewed in context, the subsequent comments to Mr Liu do not inappropriately cross the line and constitute an assumption of personal responsibility.

(h) On 23 June 2015, Mr Williams emailed Mr Liu beginning:

> I thought I should let you know that it is my considered assessment that if we do not clean the current document issues up today we are likely to lose this deal tomorrow.

Mr Williams went on to say:

> I am sure that you will understand that I rarely write you in this manner and I only do it because it is necessary.

However, Mr Williams did go on to say:

> I would appreciate it if you could instruct Mike Anderson accordingly.

Again, although not free from doubt, I would regard this interchange as equally consistent with Mr Williams speaking for WDLP.

(i) Similarly, Mr Williams' email of 14 August 2015 ("signed" with the WLL footer) does talk about valuing the relationship he has with Mr Liu. And it does note that the project is at risk unless the BNZ loan offer documents are signed. It is to be read in the context of Mr Williams, on behalf of WDLP, making clear the timing issues "which have been relayed to you and your advisers of the last two weeks".

(j) On 3 September 2016, Mr Williams emailed Mr Liu regarding the funding of the advisory fee payment. At the end of the email, Mr Williams adds:

> Please accept I am working very hard to not only keep the project moving forward at a fast pace to protect you and us but also to protect you from risk as much as I possibly can.

This email is simply in the context of paying the advisory fee to Mr Liu in his Advisory Board role and is clearly from general partner (and its delegated management entity). It used the WLL footer with Mr Williams described as director. In my view, it is plainly an assurance from WDLP that it will protect all parties, including GMHL, from risk.

[544] Relying on these communications, and emphasising how proximate the parties were, and the foreseeability that GMHL would rely and act on Mr Williams' statements, Mr Dickey was strongly of the view that a duty of care ought to be imposed on Mr Williams personally. In his view, the "special" relationship between these parties makes imposition of such a duty compelling, especially given Mr Williams' own financial interest in the outcome of GMHL's decisions. This puts him in an especially precarious position, as Mr Dickey reasonably argued, because, as in the case of *Cygnet Farms Ltd v ANZ Bank New Zealand Ltd,*[67] he was financially interested in the outcome. And throughout all of the development, Mr Dickey stresses that Mr Williams was all too aware of the dependence, reliance and trust reposed in him personally by GMHL.

[545] As I have observed, in Mr Dickey's view, there is no need to try to decipher what "hat" Mr Williams was wearing for each email. And the use of the work email did not suddenly afford him protection. Further, Mr Dickey argued that to suggest that all of Mr Williams' dealings with Mr Liu were under the guise of WDLP, ignores the truth of the relationship between the parties.

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[67] Cyg*net Farms Ltd v ANZ Bank New Zealand Ltd* [2016] NZHC 2838, [2017] 2 NZLR 538.

[546] I have considered this argument carefully. I accept that Mr Dickey has a serious and genuine argument. In the circumstances of this case, it is not a straightforward issue. It will be readily seen that Mr Williams walked something of a "tight rope" between relying on his personal relationship of trust with Mr Liu/GMHL and discharging his role as director of WMTL and director of WDLP's general partner.

[547] At the very least Mr Williams was, at times, unwise in the way he spoke to Mr Liu directly and personally. He did so, however, only on specific occasions when there were particular difficulties, or holdups. There is something of a double-edged sword in this because it could be said that he resorted to "use" of the personal relationship only when he really needed to—as his last card, so to speak. On reflection, even if there is some truth in this, it was always in the context of urgency when GMHL had known legal advisers involved. And, in my view, those instances were still quite consistent with Mr Williams speaking as and for the general partner and the WDLP development.

[548] In my view, the emails relied on by Mr Dickey were far from the norm. Seen in the context of substantial communication over the almost 10 years until the crucial first quadripartite agreements, they are isolated incidents. I would regard them as exceptions.

[549] Overall, I conclude that Mr Williams has not stepped outside the legal structure governing his involvement and assumed a personal duty of care. If on occasions he unwisely crossed the line, he did not do so irretrievably. In my view, he has always stepped back to the correct side.

[550] Much more frequently, when there were issues with legal implications, Mr Williams' myriad email correspondence was with GMHL's legal and other advisers. And in respect of the crucial 2015 quadripartite agreements, he was in frequent contact (on behalf of WDLP) with GMHL's lawyer Mr Anderson.

[551] The case cited by GMHL in support of its argument on this point, *Calvert v PriceWaterhouseCoopers* does not assist it.[68] The defendant in that case had been contractually engaged by the plaintiff as tax advisers. There is a world of difference between situations where a contractual or "client" relationship existed and those where it did not, as here.

[552] There are a number of other factors to raise supporting the conclusion that Mr Williams did not personally assume a duty of care, which I now address.

Mr Dempsey as Mr Williams' agent?

[553] Some of the financial models GMHL appear to be relying on were prepared by Mr Dempsey and sent specifically by Mr Dempsey as CFO and as a representative of WDLP's delegated management company. For instance, on 24 August 2015, Mr Dempsey in an email with the footer noting his capacity as CFO, provided Mr Liu all the current Weiti Bay financial models in two Excel spreadsheets with a comment about them both.

[554] I record Mr Dickey's argument that Mr Dempsey should be regarded as communicating on behalf of or as agent for Mr Williams personally. As the argument goes, Mr Williams' position as principal, directing his agent Mr Dempsey, can be implied from his conduct in the context of the circumstances. While I understand the argument, I do not agree. It is overly convoluted. Of course, as CFO, Mr Dempsey was subject to Mr Williams' directions, but strictly in the context of his employment with the WDLP management company, not as his agent.

[555] With respect, it is a strained analysis of the facts to conclude that Mr Dempsey was relevantly acting as an agent. Such an analysis is only necessary because of the allegation that Mr Williams had personally assumed a duty of care. The only way that Mr Williams can be liable for statements made by Mr Dempsey, is if Mr Dempsey is somehow transformed into the unpleaded role of his agent.

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[68] *Calvert v PriceWaterhouseCoopers* (2004) 21 NZTC 18,792 (HC) at [34]–[35].

WDLP communicated through its own lawyers

[556] There is also the point that two representations relied on, as alleged in the statement of claim, are described (in the "particulars" of the claim) as being contained in an email from Cathryn Barber (from Chapman Tripp). Chapman Tripp were not Mr Williams' lawyers personally. The firm acted for and was, therefore, speaking on instructions from WDLP. That would seem to point conclusively away from Mr Dickey's arguments, at least in respect of those two alleged misrepresentations.

The statement of claim (at times) is at odds with the allegation of personal liability

[557] To further "muddy the waters" regarding the claim of a personal assumption of a duty of care, the statement of claim pleads some representations alleged to be made by WLL. Crucially, the allegation at cl 7.5 regards the total loan covered in the first quadripartite agreements of $76,405,738. It is specified that WLL represented to GMHL that loan would fully cover the increased construction budget. It clearly indicates that any duty of care was assumed by WLL and not Mr Williams.

[558] That said, in most other parts of the statement of claim, Mr Williams is identified as making the representation.

Did Mr Liu treat Mr Williams as his personal adviser?

[559] The conventional legal approach to this tort, is that the presence and use of advisers is properly considered at the "reliance" stage of the analysis, which I discuss in the next section. But in these circumstances, it also seems of some (background) relevance to the issue of whether a personal duty of care should be imposed on Mr Williams.

[560] In his evidence, Mr Liu regularly recounted that he treated Mr Williams as his personal adviser, that he relied upon him, and that Mr Williams knew this. For instance, he claimed that "just like I think of Mr Williams as my adviser, I think Mr Williams thinks of me as his adviser". I regard that as simply an indication by Mr Liu of the close relationship between him and Mr Williams—but within the chosen structure for the development.

[561] Mr Dickey maintained that Mr Williams was all too aware of the dependence, trust and reliance reposed in him by GMHL. In my view, that overstates the position in this case.

[562] Yes, Mr Liu and Mr Williams had a close personal and business relationship. But I need to emphasise that the evidence does not show in practice that Mr Liu regularly treated Mr Williams as his adviser.

[563] Throughout the subdivision development, and certainty at all material times, GMHL/Mr Liu retained a succession of legal and financial advisers. This was well known to Mr Williams. Mr Liu referred to them as an "Armada." Advisers such as the lawyer Mr Michael Anderson of Lowndes Law, and the accountant Mr Dean Ellwood of Deloitte, were available to him during the immediate lead up to the signing of the pivotal first quadripartite agreements which locked in the large BNZ loan and the mortgage over the Weiti Bay land. As I have noted, in substance it is these agreements which, when enforced, were the mechanism causing the loss of GMHL's mortgaged land. Those advisers were his formal, contractually retained professional advisers, both legal and accounting, not Mr Williams. And Mr Williams regularly corresponded with them, provided them with information when sought, and often (but not always) copied Mr Liu into such communications. This is particularly evident in July and August 2015, in the lead up to the first quadripartite deed and associated contracts.

[564] Mr Liu's widespread use of advisers and Mr Williams' regular flow of information to and from them directly, is surely a relevant circumstance. Mr Williams knew that Mr Liu's advisers were in regular contact with Mr Liu. He knew, or was entitled to assume, that all the provided forecasts and opinions, would be checked and assessed by Mr Liu's experts – which goes to the reliance issue. But nevertheless, it was not as if Mr Williams knew that he was the only source of information, and more importantly that GMHL/Mr Liu were relying solely on him. All this makes it even harder to substantiate the argument that Mr Williams was GMHL's/Mr Liu's "overall" or "underlying" adviser which was the gist of Mr Liu's evidence.

Conclusion as to imposition of personal duty of care owed by Mr Williams to GMHL

[565] All that just goes to show how difficult it is to construct Mr Williams' personal liability for the statements.

[566] Irrespective of whether a duty of care arises for any entity involved in the development, I conclude that the Court should not impose such a duty of care on Mr Williams personally in these circumstances. It is not fair, just or reasonable to do so. And, in this case, it would be wrong in principle and policy.

[567] I now turn to the third element of this tort.

3. Was there reasonable reliance by GMHL on the statements made by Mr Williams

[568] As set out in *Carter Holt Harvey*,[69] there are two aspects to the question of reliance:

(a) First, was the statement reasonably capable of being relied upon? This is a question of law which includes considerations such as the reasonableness of the reliance.

(b) Second, did the plaintiff in fact rely on statements (and in doing so suffer loss)? This is a question of fact.

Were the statements reasonably capable of being relied upon?

[569] I accept Mr Chisholm's submission that this (first question, above) is related to the question of proximity in establishing the limits of the scope of any duty of care. A relevant consideration for this assessment is whether the person making the statement or giving the advice knows that it will be acted upon without independent inquiry.[70]

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69 *Carter Holt Harvey v Minister of Education,* above n 44, at [117].

70 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [189], citing *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 638.

[570] I have some sympathy with Mr Chisholm's argument that, here, WDLP knew that Mr Liu/GMHL would not act on the relevant information without independent inquiry.

[571] As mentioned previously, throughout all the relevant transactions that are said to have been the basis of GMHL's loss, GMHL had its own independent advisers—both legal and accounting/financial. Those advisers were mentioned regularly in the evidence and in the documents and feature prominently. I now provide more detail.

[572] In his opening, Mr Chisholm helpfully appended a list of GMHL's known advisers, setting out their capacity and the period during which they gave advice. They include, first in time, Mr Wigglesworth, who was the Liu family's representative in New Zealand and its "site manager" of the Weiti Bay land from 2005 to 2015; and second, Mr John Collinge, GMHL's lawyer, and former chairman of the Commerce Commission, from 1990 to 2019. Mr John Chamberlin is identified as GMHL's accountant, a former partner of Deloitte, advising GMHL from 1990 to 2019.

[573] There are 12 other lawyers, law firms, financial advisers and independent accountants who are named and who figure in the evidence. The overall list reads rather like a "who's who" of Auckland lawyers and accountants.

[574] I accept, apart from those that I have mentioned, other advisers acted in respect of specific projects or for a limited time. Mr Chisholm made much of the fact that none of them were called in evidence, and at least some of them must have had relevant evidence on the key issues.

[575] Indeed, Mr Chisholm made the position clear in cross-examination. He disputed Mr Liu's assertion that, even in June 2012 and at the age of 59, he was Mr Williams' "puppet". Mr Chisholm had Mr Liu confirm all of his advisers.

[576] Mr Liu said in cross-examination that when Mr Williams first came to him saying he had found money to buy GMHL's land, (before the first tripartite agreement), he (Mr Liu) consulted his accountants. He said that he:

> … told my accounting company which is Deloitte Touche, and then they said, 'well Mr Liu you had better make sure you have the best advisers and so forth', right and so with that I know that Deloitte's had also invited Charles Gable or Cable right, and they somehow got in Bell Gully and, so forth.

[577] Mr Liu then said, "so I called up the armada team". Mr Liu's own description of his advisers as the "armada" became often used and referred to in evidence by the parties, indeed 59 times. Whatever Mr Liu might say, I am quite sure that he was business savvy enough to know that he needed advisers. Although they might have been referred to him by others, including Mr Williams himself, Mr Liu made his informed choice to appoint each of them to advise GMHL.

[578] Subsequently, Mr Liu was at pains to emphasise that in the end it was Mr Williams' word that prevailed—not that of his advisers. I conclude he said this, clearly knowing the import of Mr Chisholm's questions and his likely submissions, in order to play down the reliance he in fact placed on his advisers. That became increasingly obvious during cross-examination.

[579] Again, I do not accept that he was an innocent "babe in the woods" manipulated by "the genius of Mr Williams." All his named advisers are powerful and experienced figures in the legal and financial/business world, quite capable of providing robust advice. And Mr Liu, himself, is a robust and experienced international businessman quite capable of testing and interrogating that advice.

[580] Neither will it do for Mr Liu to say that while his accountants were GMHL's advisers, he did not use them to assess the forecast and feasibility studies. I do not accept that because GMHL's accountants were provided with statements upon request before the crucial first quadripartite deed was signed. To that point, on 11 August 2015, Mr Ellwood wrote to Mr Williams, with Mr Anderson and Mr Wigglesworth copied in, asking for the background assumptions/details to be sent though "on the [forecast] $85m of revenue for stage 2." It may be, as Mr Liu maintained, that Deloitte was primarily providing tax advice. But the firm did ask for, and receive, the crucial forecasts.

[581] I also highlight that Mr Anderson, a senior financing lawyer with Lowndes & Associates (as it was then known), was both a lawyer for and director of GMHL from approximately 2015 to 2019. GMHL was therefore receiving, or was in a position to receive, some apparently high-quality legal advice.

[582] Mr Liu also said that "when we had assembled an armada of lawyers or whatever they, they just ended up being a big waste of money". He explained that he said armada "referring to my people, my lawyers, my accountants, my everyone, who was there to protect me, yes, like my armada or … you know, whatever". The reference to those people being "there to protect me" will not be lost on the reader. That, of course, was precisely their function. And Mr Williams could legitimately expect them to do so. The fact that in hindsight, Mr Liu is of the view that they were a waste of money, by implication suggests they were retained to advise GMHL, and (as is his wont) he blames them for its current predicament.

[583] In the way that I analyse GMHL's access to legal and financial advisers during the whole period, even given Mr Liu's none too subtle attempts in evidence to limit his/GMHL's stated use of them during the lead up to the important first quadripartite agreements, it is an inescapable conclusion that he did use them. In my view the facts are plain on this issue. Mr Liu's directions to Mr Williams, recorded at [99], make clear that Mr Liu had advisors whom he used. GMHL's advisers were intimately involved in advising him and drafting documents. Mr Williams knew that GMHL would carry out its own independent enquiries. That reason alone tells against the conclusion that there was reasonable reliance upon the forecasts/opinions by GMHL.

[584] Mr Chisholm argues that to remove any possible doubt (and he argues that there is none), GMHL could have called its advisers to give evidence. Mr Dickey emphasises that reliance on advisers was not pleaded in defence, and it is for Mr Williams to plead and to prove that GMHL was surrounded by advisers. Mr Williams could well have summoned Deloitte, Mr Chamberlain and the others referred to, but he has not done so. One obvious problem with that is the inevitable assertion of legal privilege and the necessity for GMHL to waive it.

[585] There is an impasse on this issue which I do not need to resolve. Mr Liu knew that the financial estimates/forecasts would be significant; he had access to legal advisers; and he and Mr Williams were equally "matched" and both were commercially experienced. The point is that Mr Liu knew that he had advisers who could protect him. The armada had been assembled. Even if he were to be believed (which I do not) that he did not greatly use his advisers preferring to rely on Mr Williams, he could have used, and could be legitimately expected to use them as and when needed. Specifically, WDLP would legitimately have understood its information to have been independently checked and analysed at the direction of GMHL.

[586] In this way, the pleaded reliance on GMHL's claim that "in or around 2013" it was "led to believe by Mr Williams there would be little risk associated with the land being used as security", could not be proved to be reasonable, particularly where it was independently represented by Bell Gully and Deloitte, as members of the so-called "armada". It is the same, in my view, for most, if not all, the pleaded subsequent representations—even though the identities of the advisers may have changed.

[587] A further relevant factor in considering reasonableness of reliance is whether the statement in question has been overtaken by updating information. As I have repeatedly observed, it would not be reasonable in such circumstances to rely on earlier statements. For instance, GMHL claims that various representations, made between September 2014 and May 2015, were negligent misstatements. But, as I have previously held, these representations must be considered to have been superseded by the information provided immediately before the first quadripartite agreements. It would not have been reasonable for GMHL to have ignored this new information, even more so to have relied on previous statements that had effectively been rendered obsolete.

[588] Finally, I acknowledge Mr Dickey's argument that the advisers highlighted by Mr Chisholm played discrete and limited roles. And that, in the circumstances of this case, the existence of these other potential advisers, or the ability for GMHL to take advice, does not excuse Mr Williams/WDLP's negligent misstatements. If necessary, I would probably reach the opposite conclusion.

[589] In the circumstances of this case, I would incline to the view that this limb of reasonable reliance could not be established. I go further than that.

Reliance in fact?

[590] In terms the analysing the second limb, I start by highlighting comments in *Carter Holt Harvey*:[71]

> In terms of the second limb, we acknowledge that actual reliance need not be proved; reliance can be inferred where reasonably supported by the facts and evidence. This is, however, distinct from a pleading of inherent or assumed reliance — that being reliance assumed from a relationship of such proximity, vulnerability, or an established practice of dependence on the statement-makers' accuracy that reliance need not be specifically proved. We are not dealing with such a case here …

[591] I say from the outset that there is no pleading here of inherent or assumed reliance. In any case, this is not a relationship of such proximity, vulnerability or an established practice of dependence, that reliance need not be specifically proved.

[592] As an introduction to consideration of this limb of reliance, a significant number of the alleged misstatements referred to by GMHL in its pleadings, must fall away. GMHL, as Mr Chisholm correctly submits, cannot establish they were actually relied upon by GMHL in entering a transaction to its detriment. Prime examples are those projections and forecasts between September 2014 and July 2015 which were superseded by updated information immediately prior to September 2015 when GMHL entered into the financing and security documents for the first quadripartite deal.

[593] However, I have to say there is much more fundamental difficulty for GMHL in establishing "reliance in fact". That is because Mr Liu frequently claimed in evidence that he often did not read documentation that was sent to him. There are many statements to this effect in his evidence. I agree with Mr Chisholm that reliance is an aspect of GMHL's case where there are significant, and in my view, too many, holes. I cite just a few revealing examples.

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[71] *Carter Holt Harvey v Minister of Education,* above n 44, at [123].

[594] Mr Liu repeated emphasis that he did not read documents became a mantra. It was a reasonably typical response in respect of question as to what he/GMHL relied upon. For instance, when pressed about his knowledge of relevant documents and any reliance on them Mr Liu said:

> Mr Chisholm I don't know what I'm going to say. I said I don't read and now I'm reading I am finding different things that I find a little bit shocking. Do you want me to point that out?

[595] Most importantly of all, when pressed under cross-examination, Mr Liu had difficulty identifying what "representations" in his brief of evidence he claimed to have relied upon in proceeding. He claimed he relied on various representations but gave evidence that he did not read documents throughout his cross-examination. He continued to obfuscate when the question was put to him, as can be seen in the following extract:

> **CROSS-EXAMINATION CONTINUES: MR CHISHOLM**
>
> Q. So is there anything else? What I'm trying to understand Mr Liu … precisely when you say "the representation" made by Mr Williams I want to know precisely what we're talking about so we can respond to it.
>
> A. You know you seem like you're not, you're still sleeping through this whole thing. We already said that Mr Williams make so many different representations, those numbers change and change and change. Which number change do you want? Maybe you should ask Mr Williams not me.
>
> Q. No it's you who are saying that you relied on the representation. I want to know what they are?
>
> A. Obviously I relied enough on his representation do what he wish so you can ask him.

[596] Similarly, when Mr Liu was cross-examined about the revised budget after the Taiwan presentation, the questioning was as follows:

> Q. The fact is Mr Liu and you refer to it in your evidence, he has provided with a revised budget and you expressly refer to it in your evidence and you say that in paragraph 3.86 again. Did you actually read the revised budget?
>
> A. Mr Chisholm I think I've always said I don't like to read, I don't read
>
> …
>
> And then a little later on:
>
> Q. Is it your evidence now that even though you referred to these budgets in 3.86 of your brief of evidence that were attached to this email, did you – you didn't actually read them at the time?

A. Look Mr Chisholm, you know, you know, you're really pushing an old man. What do you want me to do, commit suicide or something? I've already told you everything, what I've said.

THE COURT:

Q. Please can we just avoid this drama.

A. Look, but what do you exp –

Q. The question is simply did you read them or, not or you don't remember? It's all you need to say.

A. No but Mr — Your Honour, I have already said countless times I don't read. I don't [inaudible] and then if they've really brought to my attention I'm gonna read it.

…

CROSS-EXAMINATION CONTINUES: MR CHISHOLM

Q. But again the proposition that I'm going to put to you again Mr Williams is providing you with financial information and information generally regarding the development and you had an opportunity to consider it even if you didn't read it?

A. I don't remember.

[597] And on another occasion, during questioning about documents sent to him in 2013, he said:[72]

> A. Of course I need to have the confirmation Mr Williams to make sure that I will be protected. That's what I do. I, I, I said I don't read your Honour and that's — can I explain why, otherwise I'm gonna be the 59-year-old puppet that — your Honour, I got to the habit of not reading because one, I don't like to read and then as Mr Chisholm so eloquently pointed out all my problems in the United Kingdom, when all that happened you don't know to what extent I had to go through to even claw my way back into the legal whatevers to fight it. So with all those problems and all those things I had this hatred for reading and so to this point I don't read those things. When I receive it I don't bother opening it because I don't wanna be bothered with it. *What I do do is I ask all my people who are they when they read it.* You open it, you look at it, you tell me what it means. That's why all those letters I say I don't know I write to Mr — I say: "Mr Williams can you explain what you're talking? I'm not reading it. I don't know it," and then he, knowing my, my problems or my limitations you know use it to his advantage I would say, right.

[598] Mr Liu also does not mention documents which seem to have, in Mr Chisholm's words, "belatedly found their way into GMHL's case during trial". These include a cashflow projection from June 2012, ahead of WDLP's formation, and cost estimates in August 2014, which were put to Mr Williams in cross-examination.

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72 (emphasis added).

[599] Mr Chisholm also points out that, in a similar vein, items which neither Mr Liu nor GMHL's pleadings refer to there being reliance upon, gained prominence in cross-examination, such as the recharging issue.

[600] All that I set out because it shows the difficulties in precisely establishing actual reliance. However, equally, in fairness, it does not seem disputed that the updated overall financial table, which still applied before signing the documents, was known about and said to be relied upon. I cannot help but observe that Mr Liu's evidence on reliance, is most confusing, equivocal and unsatisfactory. If I were forced to make a decision on whether reasonable reliance had been proved, I have to say I would have found it very difficult, even on the balance of probabilities, to know what representations were specifically relied upon.

4. Was there resulting loss to GMHL?

[601] This is the fourth element to be proved. It too, is not without difficulty. Proof of harm being *caused* by the alleged misstatements is crucial to this cause of action. As was observed in *Carter Holt Harvey*,[73] "misstatements alone do not injure anyone directly."

[602] It will be recalled that the plaintiff is claiming damages or equitable compensation of $128,279,750.50—or such other amount as determined by the Court; interest; and costs. The statement of claim explicitly links that damages amount to what could have been expected under the development agreement amendment executed between GMHL, Williams Capital No.1 Limited and WDLP on 22 June 2012.

[603] In my view, there are two fundamental problems with this element.

[604] First, given my previous findings[74] and those set out in the analysis of third cause of action, any loss to GMHL was caused by its own actions. It was GMHL, and only GMHL, that brought the development to a premature end. In other words, the plaintiff broke any potential chain of causation.

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73 *Carter Holt Harvey v Minister of Education,* above n 44, at [124].
74 See the discussion under the Developing Business Relationship, previously.

[605] Second, GMHL appears to have advanced its case by reference to an incorrect measure of loss—that is, a claim for "expectation" damages rather than losses stemming from its alleged "reliance" on the pleaded misstatements. I deal with each of these in turn.

Did GMHL break the chain of causation?

[606] I discuss the "downfall" of the Weiti land subdivision development in much more detail in the third cause of action. Suffice to say at this point in the judgment, GMHL's case is that by February/March 2019, the Weiti Development project was a "failure". It is argued that by early 2019, more money had been borrowed than there were pre-sales. And that even Lambton Quay agreed that WDLP was bankrupt and had got itself into trouble from 2017 when sales slowed to a trickle and then dried up. Mr Dickey notes that Clearwater did not have any positive things to say about Mr Williams, as a developer. And clearly Sir Mark was also not impressed. These are all understandable arguments. But, in my view, they are a little simplistic and overlook at least two important factors.

[607] First, not all the Weiti Bay lots had then been sold. On Mr Hussey's calculations, confirmed in cross-examination, assuming sale of all the lots, and repayment of both the BNZ and Lambton Quay loans, there would still have been a surplus of $16 million from the Weiti Bay development as at March 2019.[75] Of course, this is less than WDLP forecasted. But it is not an insignificant amount.

[608] Second, as previously indicated, it was much more probable than not that Auckland Council approval for an extension of the Weiti land development as a whole to 1,200 lots would have been granted. This would have opened the possibility of a significantly greater development, not least in Village 1 and Village 2. GMHL was aware that this work was going on. In withdrawing its support for further development, it precluded the real chance of this extension (and profit) being brought to fruition.

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[75] Mr Hussey relies on the 2018 Savills valuations to establish this, and although Mr Chisholm is content to adopt the $16 million figure, he notes that the Savills valuation was not admitted to prove the truth of its contents. Even on GMHL's own case, as I understand it, GMHL would still have owned Village 1 and would have obtained some payment towards the purchase price for the Weiti Bay land, but for its decision to withdraw support for WDLP to further the development.

[609] The criticisms by others, highlighted by Mr Dickey, were made in the context of the Weiti Bay development as it then was. And without consideration of the prospects for development of Village 1 and Village 2. In my view Mr Liu/GMHL needed to consider the state, and future, of the development as a whole.

[610] I also note that the WDLP agreement contemplated it would have an 18-year life expectancy. Of course, agreed payments to GMHL were scheduled much earlier than this; and they were pushed back more than once. WDLP's then most up to date estimate was that there would be payment in late 2018. The fact that this was not honoured was the last straw for Mr Liu. The point I make is that the development at least contemplated the full 18 years might be required and a longer perspective was necessary.

[611] On that point, I accept Mr Lucas' assessment that irrespective of Mr Williams' assessment and expectations:

> for practical purposes, the best way to maximise returns was for WDLP to complete the Weiti Bay development as soon as possible and sell all the remaining lots. Any other course would have been value destructive.

[612] With Mr Liu deciding to withdraw support, so it proved to be.

[613] Mr Lucas's evidence makes this plain:

> Q. Well that's as it sits at December 2017?
>
> A. But wherever it was by then doesn't actually matter because the die was cast. You've spent a massive amount of money and the best thing you can do is get out as much as you can and if they'd done that, well on Mr Hussey's numbers they'd have taken out 16 or 17 million.
>
> Q, All right you could also stem that bleed couldn't you?
>
> A. You can't just stop once you've pressed go.

[614] I know that Mr Liu will find this a hard finding to swallow. But in my view, he made the deliberate decision on behalf of GMHL to bring the development to an end. It was part of a wider and destructive strategy set out in the third cause of action. Mr Liu is a man of commercial experience, who acts instinctively. He was angry at the time. He decided he had had enough. His instincts were to terminate the development. Having done so, he and GMHL can blame only themselves.

[615] And for the sake of fullness, I record that Mr Chisholm also argues that, in any event, GMHL cannot prove any causal link between many of the alleged misrepresentations and loss. As already discussed, those representations from 2012 to 2014; and April/May 2015 were rendered obsolete by the August 2015 forecasts prior to the first quadripartite deed. Then the development moved on, and there was a budget adjustment and refinancing/stage 2 financing leading to the February 2017 second quadripartite agreements. Those adjustments, as previously discussed, were in respect of delays and other events outside WDLP/Mr Williams' control.

[616] Going forward into 2017, the alleged misstatement in the letter dated 20 December 2017 from Mr Williams to Mr Liu (previously discussed) is a useful example of Mr Chisholm's argument. Even if this was established to be a misstatement, GMHL cannot show how it suffered any loss as a result. At the time, the debt had peaked at over $100 million, and the only way forward to avoid loss was to continue with the development to enable that debt to be paid down. Also, Mr Liu must have been aware by the time of the third quadripartite deed in July 2018, that WDLP had been unsuccessful in securing a $40 million payment for GMHL.

Claim for reliance loss?

[617] I accept the submission that GMHL's pleaded loss is plainly in respect of expectation/promissory damages. It is an attempt to recover post-development prices it expected to receive under a contract with WDLP (the development agreement). In other words, expectation loss. For this reason alone, Mr Chisholm submits GMHL's pleaded claim cannot succeed. He says that, on its face, the claim is wholly misconceived.

[618] More importantly, Mr Chisholm strenuously emphasises that GMHL has not provided any evidence of any actual loss it has suffered as a result of relying upon the alleged misstatements. I consider this to be a telling submission.

[619] Mr Chisholm submits that normally, to prove reliance loss in a case such as this, it would be necessary to establish GMHL's net position deteriorated in reliance on the misrepresentations made. It is said that GMHL's claim ignores that it still has significant financial benefit from the development work already completed including

the benefit to the balance land and Village 2. Not least, this benefit consists of the access road and infrastructure/services installation. He says it would never simply be a case of valuing the land that GMHL claims it has lost on reliance on the alleged misrepresentation. Detailed valuation evidence on the point would need to have been called. In other words, GMHL cannot sensibly expect a windfall from the added value to its Village 2 and balance land from the improvement already carried out.

[620] In Mr Chisholm's view, GMHL failed to lead any evidence of loss for the purpose of reliance damages.

[621] Finally, on this point, Mr Chisholm submits that GMHL is bound to its pleaded loss.[76] As it never sought leave to amend its claim, the pleaded (illegitimate) damages remain. In any event, it is said that Mr Williams would have opposed an amendment application on the basis of prejudice. Mr Williams, he said, would have led specific valuation evidence on this issue and would have prepared to meet a different case.

[622] Mr Dickey's submissions, at least by implication, accepted the correctness of Mr Chisholm's argument that in a tort claim such as this, reliance damages are to be considered the starting point.

[623] In his closing submissions, he therefore formally abandoned the claim for $128,000,000 and confirmed it was no longer pursued.

[624] Mr Dickey presented three (unpleaded) options in calculating the losses the Court could award. They are all lower than that originally claimed. He submitted that "ultimately, it's for the Court to exercise its discretion as it sees fit in the light of the evidence that is played out at trial." Mr Dickey submitted that Mr Williams was given adequate notice of the matters at issue and the numbers and calculations now relied upon by the plaintiff were all discussed in the evidence. There can be no prejudice to Mr Williams.

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76 *Hunt v New Plymouth District Council* [2011] NZCA 406.

[625] With respect, I am not sure that argument can be accepted. Such a pivot by GMHL must come perilously close to fundamentally (and illegitimately) altering the character of its claim. At the very least the defendants would be entitled to an adjournment and leave to introduce further evidence in response to these claims. Whether this should be done in the context of such a long trial with hearing time having run out, is moot.

[626] In any case, Mr Dickey argued that the "prayer for relief" in the statement of claim, referring to "such other amount as determined by the Court" enabled the plaintiff to alter its claimed measure of damages. If necessary, I would have held in these circumstances that stretches the flexibility of the prayer beyond breaking point.

[627] In case I am wrong in those conclusions, I turn to Mr Dickey's three reformulated damages options. As I say, none of these were pleaded.

[628] The first option is based on the payments GMHL would have been entitled to: $80 million for Weiti Bay (subsequently reduced to $60 million in August 2014 which reduction I regard as being satisfactorily explained), and $60 million for Village 1. GMHL says it lost out on its right to this amount due to Mr Williams' misleading statements. In Mr Dickey's view this is not properly characterised as expectation damages.

[629] With respect, were it necessary, I would take a different view. This calculation relies on a contractually agreed amount and represents a specific (contractual) expectation. I do not find Mr Dickey's attempt to characterise it as something other than expectation damages—as for instance representing a loss of opportunity, particularly convincing. Mr Chisholm characterised this option as plainly an expectation damage claim, based on an adjustment of the agreed post-development prices. I agree.

[630] As a second option, it was suggested that GMHL's loss could be calculated by reference to the peak debt that was secured against its land as a result of the various agreements signed. GMHL would have had no liability for this amount but for the misstatement (or misleading conduct under the Fair Trading Act claim). BNZ's debt

at its highest, in December 2017, was $95,148,851 before the first lots were settled and this debt significantly reduced thereafter. Similarly, Nomura at this time was owed $21,050,204. The loss suffered by GMHL therefore totals $116,199,055. Mr Dickey suggests this could be reduced by $12,623,000.99 being the amount owed to Westpac prior to the first quadripartite deed being signed. I am of the view that, as this was not the liability of GMHL at the time of the claim, it is an artificial and unattractive option.

[631] Third, and finally, an alternative assessment for damages could be referenced to the "undeveloped value" of Weiti Bay and Village 1—land that GMHL has now lost because of its alleged reliance on Mr Williams' allegedly misleading statements.

[632] Mr Dickey accepts that any new valuation commissioned on this issue, after the hearing, and given the significant time that has passed, would undoubtedly be objected to by the defendants. GMHL, therefore, invites a damages calculation with reference to the existing Savills' valuations that Mr Williams caused to be prepared over the years, which were relied upon at successive stages when utilising the land as security for WDLP's borrowing. It is as to the admissibility of these valuations that the parties are diametrically opposed.

[633] In Mr Dickey's view, these valuations are most certainly a business record, used and relied upon by Mr Williams, and he cannot now dispute their veracity. In any event, to the extent the Court considers these prior valuations as hearsay, Mr Dickey is clear that they are admissible under either ss 18(1)(b) or 19 of the Evidence Act 2006. Given Mr Williams' adoption of these valuations in the past, and WDLP's and GMHL's shared reliance on them for mortgage purposes, it is unnecessary and would cause undue delay to call Savills as a further witness to be cross examined.

[634] Mr Chisholm submits that what he calls the "grand claim" that GMHL can still rely on the Savills valuations is untenable. Those valuations are third party opinions; were provided to WDLP; and do not constitute an exception to the rules of evidence in ss 16-19 and 25-26 of the Evidence Act when a claim for damages (as here) is being brought by another party. Damages must be proved with admissible evidence including (normally) expert evidence which complies with ss 25 and 26. The valuers

could then be cross-examined as to their assumptions and the existing market conditions, among other things, bearing on the accuracy of their valuations.

[635] I would regard the competing arguments as finely balanced—though there is something in Mr Dickey's practical approach. Even so, it would surely be just to allow further valuation expert evidence to be called which would raise the complicated questions of delay discussed above.

[636] Assuming the valuations are admissible, Mr Dickey calculates the total appropriate damages as $49.7 million. This is a drop, I might say, of almost 2/3rds from the original claim. This is based on two valuations. First, the "as is" value of Weiti Bay of $28.7 million in the valuation obtained by WDLP in April 2015 for the Capital Group loan/mortgage. Second, $21 million for Village 1, based on Mr Williams' communication to Mr Liu in August 2016 that Savills had valued Village 1 at $33 million, which was an increase from the earlier $21 million, which lower figure Mr Dickey said should be accepted. Mr Dickey maintained the damages quantum could not be less than this $49.7 million amount.

[637] Without deciding the point, this is the most attractive of the options. Given the nature of the claim, it is reasonable to tie reliance "loss" to the value of the "lost" land—which is the most directly obvious loss GMHL suffered.

[638] But this approach is still not without problems. Leaving aside the hotly disputed issue of admissibility of the valuations, the two "valuations" are said by Mr Dickey to be "representative of the values of Weiti and Village 1 in 2015." Further evidence and cross-examination would surely have to be permitted. And the damages calculations would still have to take into account/factor-in the "windfall" arising from the increase in value to Village 2 and the balance land arising from the development work to date.

Conclusion as to fourth element of negligent misstatement

[639] If I had got to the stage of concluding that, but for the issue of quantum, GMHL had proved its claim, I would have been presented with a very difficult problem. I would have been reluctant to let difficulties in the pleadings stymie GMHL's case. But

those difficulties are fundamental. The nature of quantum would have completely changed. As indicated, it may have been a case of striking out the claim on that basis. Given the length and nature of the case I doubt whether I would have done so.

[640] Rather than strike it out, fairness and justice to GMHL would probably have pointed towards recall of witnesses to allow quantum issues in respect of this third option to be resolved. Even so, the practicalities of allowing the required further evidence may have been a bridge too far. Thankfully perhaps, given my previous conclusions, no final decision is required on that point.

Conclusion as to negligent misstatement

[641] The negligent misstatement claim, in my view, cannot and does not, succeed. The first element of that tort is clearly not established. It is likely that, the other three elements could not be proved either.

SECOND CAUSE OF ACTION: MISLEADING AND DECEPTIVE CONDUCT BY MR WILLIAMS UNDER THE FTA?

[642] This is the second pleaded cause of action. As Mr Dickey agrees, it overlaps with the negligent misstatement cause of action. Both rely on largely the same facts. Both rely on exactly the same pleaded "representations". Both seek identical damages. Mr Dickey made clear that GMHL regards this claim under the FTA as its primary claim. Mr Dickey examined this claim first in his closing submissions. I have found it easier to discuss it second, which also conforms with the pleaded order.

[643] Mr Chisholm makes the same point regarding the adequacy of the pleadings in this cause of action as for negligent misstatement claim, already discussed. There is no need to repeat that discussion nor my conclusions, which equally apply here. There is a time limitation argument here also, although it is governed by a different provision. I now turn to that question.

Preliminary point: limitation argument

[644] Section 43A of the FTA provides:

> **43A Application for order under section 43**
>
> A person may apply to a court or the Disputes Tribunal for an order under section 43 at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

[645] Mr Chisholm's argument is that, prima facie, the only actionable claims under the FTA are those in the three-year period leading up to 21 August 2020.

[646] This is obviously an extremely important issue. All, bar one instance, of the alleged misleading or deceptive conduct relied upon (the same as for the first cause of action) pre-dates 21 August 2017. Prima facie, all of this conduct is out of time except for the pleaded misstatement in the 20 December 2017 letter. That would be the sole surviving claim. And I have already concluded that the 20 December 2017 letter, even if it were misleading, did not and could not have caused any loss. So, Mr Chisholm argues, the whole claim must fall away. He says it is dead in the water from the outset.

[647] Mr Chisholm argues that in *Commerce Commission v Carter Holt Harvey Ltd,* the Supreme Court confirmed that "likelihood of loss or damage" as used in the section is forward-looking/prospective. Under s 43A, time starts running when the plaintiff discovers or ought to have discovered that loss or damage has already occurred or is likely to occur in the future.[77]

[648] Mr Chisholm's argument is that assuming that GMHL could prove its claims (denied), the only arguable "loss" suffered is the granting of its mortgages and the subordination of its rights to the lenders which occurred at the time of each financing, including in 2015. Any claims based upon the FTA are therefore well out of time.

[649] Even if that is not the case, Mr Chisholm's argument is that the "limitation clock" would, at the latest, start to tick when GMHL did know, or should have known, the alleged representations would not come to pass. To take the example of the 2015 projections, GMHL would have known that the forecast margins would not be achieved by late September/October 2016 when the stage 2 financing documents were circulated. So even on that interpretation the last day for filing for that loss was September/October 2019.

[650] On the other hand, Mr Dickey's argument is simply that the clock starts ticking on the date on which the loss or damage was discovered *solely* for the purpose of filing the claim. If it is filed within time, there is effectively no limitation on how far back into the past a claimant can go to establish the misleading and deceptive conduct that caused the loss.

[651] Mr Dickey's argument is that, in the absence of a late knowledge or longstop provision, the FTA must be taken as giving the Court a wide discretion to investigate all or any alleged deceptive or misleading conduct that could have caused the loss. Or, put alternatively, Mr Dickey's argument is strengthened inferentially, because there is no late knowledge provision or a longstop provision, as exists in the Limitation Act.

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[77] *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120, [2010] 1 NZLR 379 at [25]–[27].

[652] Much of Mr Dickey's detailed written submissions addressed the issue of when the clock started ticking, not whether, and to what extent, the Court could consider conduct well before the loss discovery date which may have contributed to that loss. As I understand Mr Dickey's argument, he conceded that it was a somewhat sweeping proposition that all conduct that was relevant could be considered, no matter how far back in time it stretched, provided that it materially and directly contributed to the loss. In fact, Mr Dickey confined the conduct to be investigated no further back in time than 2013, given the circumstances of this case and the pleadings.

[653] I have no real difficulty with the part of Mr Dickey's argument as to how far back one can reach to find misleading conduct so long as the claim complies with s 43A. His position would seem fair to a claimant. However, the fundamental question remains: whether GMHL discovered or ought reasonably to have discovered its loss within the three-year limitation period. Mr Dickey's view is that GMHL only became aware of the loss suffered in February 2019 when it found out that payment was not happening "anytime soon" notwithstanding most of the lots in Weiti Bay having been sold. This, of course, contrasts with Mr Chisholm's view set out above.

[654] This is a far from easy question. Somewhat surprisingly it does not seem to have been previously decided, at least counsel have not been able to locate any decisions. That may be because so few cases share the circumstances here—where the alleged misleading or deceptive conduct occurs so long before the alleged discovery of loss. At any rate, other than setting out the arguments and the difficulties associated in any final decision on the point, it is not necessary for me to provide a considered ruling. That is because of my conclusion, which I now set out, that this cause of action also cannot succeed.

Elements to be proved

[655] In this cause of action, Mr Dickey submitted, and I accept, that the Court needs to address five issues, specifically:

(a) the concerning conduct/statement, said to be individually and in combination, misleading and deceptive;

(b) why Mr Williams should be found to be personally liable—this includes those instances where Mr Dempsey (and, I add, Chapman Tripp) may have sent the relevant documents or email;

(c) causation of damage/loss;

(d) relevance (or otherwise) of other third parties at play, or the ability for GMHL to discover its own facts, and whether this breaks the chain of causation; and

(e) quantum of damages/loss.

[656] I address each of those "elements" in turn, although, given my findings in the first cause of action, I can be much briefer.

Did Mr Williams engage in conduct that was misleading or deceptive?

The claim

[657] Mr Dickey made clear in his introduction that GMHL's case at trial, focussed on the overarching complaints that Mr Williams assured GMHL:

(a) that it would be paid for its land before needing to transfer title away; and

(b) that agreeing to put its land up as security came with low risk as payment was assured.

[658] GMHL's evidence is that this twofold assurance was made numerous times over the years, orally and in writing, and there is no one isolated incident made on a certain date that is relied on. A very wide net is cast.

[659] I note, as with the first cause of action, that the representations in (a) above, were not specifically pleaded in that form. Indeed, at one point, the opposite is pleaded, where the statement of claim sets out a representation made to it that "following the repayment of the senior lenders, all net proceeds from the sale of lots

and all other income of WDLP would be paid to GMHL, in the sum of $60 million." Nevertheless, I deal with the alleged representations in the way submitted.

[660] Also, as I understand it, Mr Dickey did not abandon a further complaint regarding Mr Williams' assurances as to when GMHL would be paid the agreed $60 million for the Weiti Bay stage. Representations to this effect, were part of the first cause of action. I believe it is fair to GMHL to include those statements (conduct) here as well. I do so out of an abundance of caution, but note that the same conclusions apply as for the first cause of action.

The law

[661] Section 9 of the FTA provides:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[662] It is accepted that Mr Williams, involved as he was in the business of property development, was at all material times "in trade" within the definition set out in the FTA.

[663] As the Supreme Court observed in *Red Eagle Corporation Ltd v Ellis*:[78]

> It is, to begin with, necessary to decide whether the claimant has proved a breach of s 9. That section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected …

[664] I accept the essential requirement of s 9 is simply misleading or deceptive conduct. "Misleading" and "deceptive" are to be given their ordinary meanings.[79] The conduct in question must be assessed objectively taking a common-sense approach.

[665] The liability created by s 9 is strict. It is not necessary to prove an intention to mislead or deceive to establish a breach.

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78 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].
79 *Paper Plus NZ Ltd v Robert Mitchell Ltd* HC Auckland CL53/92, 10 March 1993.

[666] "Conduct" has a wider meaning than a bare representation, though of course it includes the making of a representation. The FTA also expressly provides that "engaging in conduct" includes "omitting to do an act".[80]

[667] "Likely to" means there was a real risk of the recipient being misled or deceived, not simply a mere possibility.

[668] The Court in *Red Eagle* went on to state:[81]

> Conduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer or, to take an extreme case, towards an individual known by the defendant to have intellectual difficulties. Richardson J in *Goldsbro v Walker* said that there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation — that is, with the characteristics known to the defendant or of which the defendant ought to have been aware — would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.

[669] In *Bonz Group (Pty) Ltd v Cooke,*[82] Tipping J held that:

> The words in s 9 "likely to mislead or deceive" import a lesser degree of likelihood than something which is more probable than not. The degree of likelihood must involve a real risk in the sense that the misleading or deception could well happen. The consequence must be more than a mere possibility.

Analysis and application

[670] I have set out Mr Dickey's submissions as to the applicable law and principles to demonstrate that it is clearly a different cause of action. But, as already observed, it relies on essentially the same factual basis—and the identical misstatements/conduct referred to in the first cause of action. There is little point in me rehearsing all that detailed analysis and my conclusions, which apply here also and for the same reasons.

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80 Fair Trading Act 1986, s 2(2).
81 *Red Eagle Corporation Ltd v Ellis* above n 78, at [28].
82 *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216 (HC) at 37.

[671] This first element of alleged misleading or deceptive conduct must fail for the same reasons, as set out previously.

[672] For the sake of clarity, I emphasise that no matter how many times Mr Liu says he was told by Mr Williams that GMHL would be paid for its land before needing to transfer title away, I simply do not accept it. Indeed, I actively reject it. Mr Liu was not misled on this point. Mr Liu knew, as a result of what Mr Williams told him, and what can be inferred from the emails and communications from his key legal adviser at the time, Mr Anderson, that GMHL's expected payment for the Weiti Bay land and indeed Village 1, was subordinated to the obligation to fully repay the first and second secured loans over the property. Nothing can be clearer. I accept Mr Williams' evidence and reject Mr Liu's evidence on this point. In my view, it is simply not possible to come to any other conclusion.

[673] Clearly, GMHL/Mr Liu always wanted to be paid for its land before transferring title. He made that point repetitively and it was a principle he constantly stated. But it could never be achieved. No major lender would allow it. And Mr Liu knew this, certainly before GMHL signed the mortgage securing the loan from the BNZ and Capital Group.

[674] I also accept that one of the three "sacrosanct principles", not specifically pleaded as misleading or deceptive, to the effect that GMHL would get its money when titles were issued, must be read as subject to the legal liability to first repay the loans secured by mortgages. Those principles cannot be understood in any other way. Frankly, it is fanciful for Mr Liu to suggest that in executing the mortgages, especially after inevitable legal advice, GMHL somehow thought at the same time, that it would receive priority payments first in line before the commercial lenders. It is equally fanciful to suggest that GMHL, through Mr Liu, did not understand that if the revenue for the Weiti Bay 150 lots was insufficient to repay the lenders, that GMHL would still receive its money at the agreed time.

[675] As to the alleged "assurance" that, "agreeing to put its land up as security came with low risk as payment was assured", Mr Williams' statements were not misleading or deceptive. As I previously concluded for the first cause of action, those statements

were based on forecasts/estimates which were themselves reasonably based. In my view, the risks were low, just as Mr Williams asserted. And that conclusion is borne out by the subsequent mortgagee sale—something only precipitated by GMHL's own ultimately disastrous strategy.

[676] Furthermore, and this is important, there was nothing that was misleading or deceptive or likely to mislead or deceive in Mr Williams' conduct and statements, or lack of them, immediately before the first quadripartite agreements as to the expected net proceeds and when GMHL could expect to be paid. All of the forecasts provided at that time were reasonably based and were not misleading. Indeed, the three scenarios provided in August 2015 were entirely reasonable, and two of them showed that there would not be money from the Weiti Bay development to fully pay GMHL.

[677] Having set out those conclusions, I need to cover one aspect of Mr Dickey's submission in that it relates to how those conclusions are reached. He made clear that GMHL identifies two categories of conduct/statements being:

(a) false statements as judged from the perspective of an ordinary person; and

(b) statements with material omissions including those designed to make or sway or person to make certain decisions.

[678] I conclude that neither of the two categories of statements/conduct identified by Mr Dickey above, as misleading or deceptive, or likely to be so, are established. I now set out my reasons.

[679] First, false statements, as judged from the perspective of an ordinary person, have not been proved. In the context of this case, where most of what is relied upon to establish this FTA claim are reasonably based opinions and forecasts there is not falsity.

[680] However, I accept that the same analysis as undertaken for the negligent misstatement *may* not be appropriate here. The possible difference in approach was specifically addressed by the Court of Appeal, as long ago as 2008. The Court referred to a narrow or orthodox view as to misleading or deceptive conduct that might apply to an interpretation of s 9, and also to a wider view. As to these two views, in *Premium Real Estate Ltd v Stevens*, the Court observed:[83]

> The orthodox or narrow view is that there must be some misrepresentation of a past or current fact to found liability. So, consistently with the common law as to misrepresentation, a person is liable as a result of the expression of an opinion which subsequently proves to be incorrect only where he or she does not honestly hold the opinion at the time it is expressed or (possibly) if there is no reasonable basis for it. That is, an expression of opinion may be said to involve two representations of fact – one that it is honestly held and another that there is a reasonable basis for it. The wider view is that s 9 should be approached in accordance with its terms, untrammelled by concepts such as "misrepresentation" imported from the law of tort or contract. The focus should simply be on asking whether in all the circumstances the impugned conduct was misleading or deceptive.

[681] The Court noted that while the wider view has the attraction of simplicity, there are difficulties in applying it in an unconstrained way to the expression of opinions—and in this case financial forecasts. In discussing this difficulty, the Court went on to say:[84]

> A person may, in trade, express an opinion that is honestly held and reasonably based at the time it is expressed or relied upon but which subsequent events show to be wrong … It is difficult to see why an honestly held, reasonably based opinion should be actionable under s 9 simply because it is not borne out by subsequent events. The person expressing the opinion may have done all that could sensibly be done to reach an informed view but would still be liable even if the subsequent events or circumstances were unforeseeable.

[682] The Court also noted that as it was not possible to contract out of the operation of FTA, and stated:[85]

> … the implications of imposing liability on the basis of the expression of opinion that is not demonstrably wrong at the time it is expressed or relied upon are significant. Accordingly, we consider there is a fundamental difference between asserting a present fact and expressing an opinion at least in the present context.

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83 *Premium Real Estate Ltd v Stevens* [2008] NZCA 82, [2009] 1 NZLR 148 at [51].
84 At [54].
85 At [54].

[683] It seems the Court does not make a final determination as to which view prevails.

[684] In my view, the narrower view is appropriate in this case. Every case must be analysed in detail in the context of its own circumstances and in the context of the relationship between the parties. Here, I conclude that, given the recurring use of forecasts, estimates and opinions over an extended time period, the narrow view is clearly to be preferred.

[685] Applying the narrow view, all the conclusions in the first cause of action are relevant. Here, the ordinary person would not regard the representations as false. The ordinary person, knowing that this was a complex commercial development lasting up to 18 years, would realise that the question of whether conduct is false, misleading or deceptive would have to be assessed in that context. Nothing could be asserted absolutely. The ordinary person would surely accept that estimates and forecasts could only be based on facts known at the present time, subject to unforecasted and unpredictable contingencies and events, affecting both costs and revenue. This is perhaps another way of saying the forecasts and estimates must be reasonably and factually based. Provided that is established, there is no misleading conduct or deception, nor falsity for that matter. And as previously discussed in the first cause of action, that the forecasts did not come true cannot by itself establish falsity or deception. It would be quite unfair, as a matter of policy in an FTA claim of this sort, that liability could be sheeted home on that basis alone.

[686] I add that Mr Williams clearly had every intention and belief that the forecasts would eventuate and that he would do all he could to bring them to fruition. They were not simply expressions of hope that Mr Williams knew, or ought to have known, could never have eventuated. Mr Liu does not seem to dispute that. After all, Mr Williams seems to have sunk millions of dollars personally into the development. That does not speak of a man playing fast and loose with the figures. He was deeply invested in the development, and he wanted it to work. He planned for it to work, through WDLP, as much as anybody. The financial models were not inherently defective (although their structure as to recharges may have changed) and the

internationally validated financial models were used in a reasonable way. Neither of the two expert accountants disputed that.

[687] In support of the need to adopt the narrower approach, I would hold that Mr Liu could not be misled in these circumstances, where he clearly knew it was forecasts/estimates were being provided. And that they were being constantly reviewed. He knew that the "bottom line" for the development was getting progressively smaller over the years preceding execution of the September 2015 quadripartite agreements. In my view, Mr Liu knew that what he was being provided with were reasonable forecasts. And that they were based on clear assumptions (such as the Paul Kelly Chinese investor purchase of some of the lots) which, like all the other previous estimates/forecasts, may with the possibility of unbudgeted costs and lower sales, also turn out to be not so positive as provided.

[688] Mr Liu knew exactly the situation and that risk could not be excluded, and, in my view, was nevertheless attracted to the reasonably forecasted profit for GMHL.

[689] The second category of statements/conduct identified by Mr Dickey—that is statements with material omissions including those designed to make or sway a person to make certain decisions—is more straightforward than the first category.

[690] The first thing to say is that, as with the first cause of action, the closest GMHL comes to pleading statements with material omissions, is the omnibus pleading that "Mr Williams failed to advise GMHL promptly or at all when he became aware that the pleaded representations did not present a true and fair view of the Weiti Development." That would seem to be a different allegation from alleging statements with omissions—that is half-truths or withheld information in the context of making a statement which rendered the statement false or misleading. As I would interpret the pleading, it refers to withholding information as it came to hand.

[691] Even if that is too strict a view of the pleadings, the allegation does not identify what information was withheld and when. Again, it is profoundly short of particulars as to what Mr Williams allegedly knew, when he came to know it and when and if he

passed it on. That makes judgment writing difficult and provided the plaintiff with a large net with which to trawl through the evidence.

[692] In my view, there was no pattern of withholding information, or any systemic and deliberate strategy by Mr Williams to do so. This is clear in all the interactions before the pivotal first quadripartite deed and the associated mortgages. All information was reasonably provided to Mr Liu/GMHL in a timely way. The provision of that information, particularly before September 2015 when the ever changing and more negative figures were presented to him, largely explains his evident frustration and anger.

[693] If information, on occasions, was delayed in being passed on by the WDLP management these were isolated and not material in the sense of causing loss to GMHL. Moreover, they relate to the period after construction had begun and sales were proceeding—which is the implication in the pleaded "omnibus paragraph". I do not need to make any specific findings about withholding information after September 2015. Few were pleaded. But more importantly, it is hard to see how any misleading or deceptive statements/conduct from that point on caused loss to GMHL. As I explained, the first BNZ/Capital Group mortgages locked GMHL into the security and from that point on the die was cast. The same logic applies to the second round of mortgage securities in February 2017 when Village 1 was additionally included. Although this increased the exposure of GMHL, this was required by the lenders. There was no way out. The development had to continue. Mr Liu did not seriously suggest otherwise.

[694] I finish this section with the observations Elias J (as she then was):[86]

> Some caution is perhaps proper in cases of commercial dealings between parties at arm's length. Section 9 is not to be turned into a general warranty by the vendor of the expectations of the purchaser …
>
> The Fair Trading Act is not designed to provide a guarantee to purchasers who fail to look after their own interests in a manner which is reasonable in the circumstances.

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86 *Des Forges v Wright* [1996] 2 NZLR 758 (HC) at 764–765.

[695] Where there are sophisticated commercial dealings between parties with similar education, skill and business acumen; who have contractually regulated their business relationship; and who have access to high-powered commercial and legal advice, real care should be taken in assessing the applicability of s 9. That is a detailed exercise. I undertook it in respect of the first cause of action. I apply it here in respect of these allegations also. In the circumstances of this case, no sensible distinction can be drawn between the allegations for the two differently worded claims—that is statements made without due care and skill and/or recklessly on the one hand and misleading or deceptive statements/conduct on the other.

[696] I add that, in my view, there would be something unsatisfactory in this case if the same facts, opinions, and forecasts do not qualify as negligent misstatements but yet are considered to be misleading or deceptive. I emphasise that I do not decide this cause of action on this basis. Obviously the two causes of action are conceptually different. But given the complex circumstances of this high powered and long-term development, which requires careful decision making based on forecasts and budget estimates, with a myriad of experts and advisers involved (on each side), it would surely be expected that each cause of action, which rely on exactly the same statements and representations, should, in principle, produce the same result.

Conclusion as to misleading or deceptive conduct

[697] The plaintiff has not established that Mr Williams engaged in conduct that was misleading or deceptive or was likely to mislead or deceive. Mr Williams' conduct and the pleaded representations said to be misleading, for the reasons outlined, were not misleading.

[698] For the record, I add that neither were they deceptive. In fact, I would say the evidence establishes the reverse. If I have not already been clear regarding the adjective "deceptive" in s 9, on most dictionary definitions the verb "deceive" means deliberately lying or deliberately causing someone (here GMHL/Mr Liu) to believe something that is not true, especially for personal gain. In that sense, dishonesty may be involved in the adjectival deception used in s 9. I specifically find that Mr Williams

acted honestly and genuinely, and he did not deliberately lie, let alone lie or deceive for personal gain.

[699] This finding is sufficient to dispose of the FTA cause of action. However, as with the first cause of action, I briefly address the remaining elements of the claim and offer preliminary views.

Should Mr Williams be found personally liable?

[700] This question, as developed by Mr Dickey, is whether Mr Williams should be found personally liable, including in instances where other parties may have passed on allegedly deceptive or misleading information?

[701] Mr Dickey submits that under s 45(2) of the FTA, any conduct engaged in on behalf of the body corporate by a director, servant or agent of the body corporate, "shall be deemed, for the purposes of the Act, to have been engaged in *also* by the body corporate."[87]

[702] Mr Dickey submits that the default position is, therefore, that the maker of the statement is personally liable. Section 45(2) provides that the principal of an agent could also be held liable. I do not understand Mr Chisholm to dispute this.

[703] The real problem with this element is the pleaded reliance on representation/information made or provided first by Mr Dempsey—the CFO of WLL, and second by Ms Barber from Chapman Tripp, WDLP's lawyers.

[704] Also, on some occasions, Mr Williams simply passed on information, effectively as a conduit. For example, at times he passed on information from Mr Dempsey and Mr McCracken, the finance broker from Reesby & Co. I would have thought that merely acting as a conduit or cypher should not attract liability, unless Mr Williams unequivocally adopted it. And I accept that there is argument that on those occasions involving Mr Dempsey's material, Mr Williams implicitly did adopt it.

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87 (emphasis added).

[705] The issue of whether Mr Williams is liable for statements made by Mr Dempsey and Mr Barber directly to GMHL is even more difficult for GMHL to satisfy.

[706] Mr Dickey provided a comprehensive submission as to how Mr Dempsey, and similarly Ms Barber, were acting on behalf of or as agents for Mr Williams. I do not need to decide this issue although my view is that, on the facts, it is difficult to establish.

[707] Outside those instances, in the context of the FTA , this issue of Mr Williams' personal liability seems not be nearly as complex as for the negligent misstatement claim. At any rate, if it were necessary to decide this issue, I am of the preliminary view that the FTA claim would not fail on this element, other than in the case where information was supplied directly to GMHL by third parties.

Causation of damage/loss?

[708] I accept that as long as the misleading conduct was one of the factors that resulted in the damage claimed, the causation element is satisfied. However, it must be an effective cause of any loss.

[709] I have already held there was no misleading or deceptive conduct. If there was, however, I would conclude that it was not causative of loss.

[710] I have addressed this issue in respect of the first cause of action and adopt those findings here. I add the following.

[711] To be clear, I am not simplistically suggesting that GMHL should have "stayed the course" for 18 years and all would have been well. But in the first instance, as set out by Mr Lucas, WDLP's accounting expert, to withdraw support for the development and withhold cooperation at the time GMHL did (before the completion of Weiti Bay), was far from a prudent course of action. As Mr Lucas said:

> … for practical purposes, the best way to maximise returns was for WDLP to complete the Weiti Bay development as soon as possible and sell all the remaining lots. Any other course would have been value destructive.

Relevance or otherwise of third parties?

[712] As Mr Dickey put it, the ability for GMHL to make further enquiries or take advice does not excuse Mr Williams' conduct. Mr Williams argues that GMHL was effectively surrounded by independent advisors and therefore did not rely on him.

[713] I have already discussed this matter in respect of the first cause of action. For this cause of action, I do not express a final view. But I would be inclined to the view that the presence of so many legal and other advisers, in these circumstances is highly relevant and would suggest there was not reliance on Mr Williams. Clearly, as set out at [99] previously, he wanted a direct relationship with his advisors and castigated Mr Williams for interfering.

[714] Again, Mr Dickey is extremely critical that the existence of advisers and reliance on them was not pleaded in defence. According to Mr Dickey, that is why GMHL never called them in evidence—as it had not prepared to meet this issue. A suggestion that the defence could have called the advisors seems unrealistic, not least for reasons of legal professional privileges which would have required informed waiver. The defence is strong it was not required to call such advisers and that the evidence is replete with reference to them and information provision to them by Mr Williams and Mr Dempsey for the WDLP senior partner. I do not need to decide between the competing claims as to the necessity of calling the advisers as witnesses.

[715] However, one example from the evidence is illuminating. GMHL was clearly being legally advised by Mr Anderson at the time of the first quadripartite deed and the execution of the loan and mortgage securities. I agree with Mr Chisholm that it is legitimate for Mr Williams to assume that the necessary legal advice as to the nature of a mortgage, invariably required by the banks and usually part of a solicitor's certificate, would have been given. This would have included advice as to priority ranking, and that GMHL could not receive its payments before the secured lenders were paid. Mr Chisholm did not believe it was necessary for Mr Williams to attempt to call Mr Anderson as a witness in those circumstances, even if the legal professional privilege hurdle could have been surmounted. I am inclined to agree.

[716] In the context of a FTA claim, it may be, as Mr Dickey submits, that "the existence of any relevant adviser or the ability for GMHL to take advice does not exculpate Mr Williams' misleading conduct." Mr Chisholm does not address this issue directly, in this cause of action, relying on his submissions for the first cause of action.

[717] I must say, that if ever there was a situation when departure from what Mr Dickey says is the clear principle regarding the ability to take legal advice not "excusing" the misconduct, it would be this case. I say that for several reasons. First, there was such a long period of development with so many legal agreements, with so many advisers available. Second, the mortgage security documents were executed for massive loans where the lenders required the provision of independent legal advice. Third, the advice was particularly important given that the size and value of the land was so great. I would have thought that whatever misconduct had been established, the presence and use of advisers could well relieve the misconduct actor of liability. This is not to excuse the misconduct. It is just to say liability should not follow in these complex circumstances. I know that Mr Liu consistently expressed the view that he was the innocent duped party, virtually tricked into relying on Mr Williams. But nothing could be further from the truth.

[718] Further than that, it is not necessary for me to go.

Quantum of damages/loss

[719] Mr Dickey conceded the present legal position is that the appropriate measure of damage in respect of FTA claims is loss suffered in reliance on the alleged misleading and deceptive statements—that is reliance damages, not expectation damages. In other words, the same approach as for negligent misstatement claims.

[720] Mr Dickey argued that this had not been the case before *Cox & Coxon* v *Leipst,*[88] but accepted the principles in that case, subsequently followed on many occasions, should probably be followed. I consider I must.

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88 *Cox & Coxon v Leipst* [1999] 2 NZLR 15 (CA).

[721] Mr Dickey entered into some argument that while the Court of Appeal may have construed s 43(1) as essentially excluding expectation loss—that is to give a representee a right to enforce a representation that is misleading,[89] that proposition is not without qualification. He developed this argument by referring to Australian authorities which take a more flexible approach and also to hints in New Zealand cases as to the difficulties with black and white labels applied to damages. Despite his invitation for me to blaze a new damages trail for FTA loss, I decline to do so. Moreover, this case is certainly not the place to do so. The contractual expectation loss approach would be particularly inappropriate given the complexity of the contracts and the ever-changing nature of the forecasts.

[722] In acceptance of the current legal position, as with the first cause of action, the pleaded claim, being for expectation damages, is no longer pursued by GMHL.

[723] I have already discussed this issue at some length. I have set out the three options suggested by Mr Dickey in place of the pleaded prayer for relief, discussed the rival positions, and expressed my tentative conclusion. There is no need for me to elaborate further on my comments in respect of the first cause of action.

Conclusion as to misleading or deceptive conduct

[724] This cause of action has not been established on the balance of probabilities and it fails.

THE FIRST AND SECOND CAUSES OF ACTION: CONCLUSIONS SUMMARISED

[725] Having dismissed both the first and second causes of action, a moment's reflection is worthwhile.

[726] It is important to remember that GMHL first purchased all the Weiti land in 1991 for approximately $4 million.

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89 *Cox & Coxon v Leipst*, above n 88, at 26.

[727] In 2004, it turned down a cash offer of $80 million for the purchase of that land.

[728] In 2005, it gave Mr Williams' companies a time limited option to purchase the Weiti land. The fee for the option was $5 million. The option was subsequently extended for a further fee of $1 million. The purchase price was based on a clear formula, relative to the number of lots that the Williams companies might develop during the period.

[729] As I set out in a previous section regarding the "Business and legal relationship between Mr Williams and Mr Liu …", the inescapable conclusion is that GMHL/Mr Liu were deeply attracted by the potential profits arising from the development of that land—over and above its cash value.

[730] GMHL did not want to be the developer. But GMHL clearly wanted post-development sale prices. Consistently, during cross-examination, Mr Liu refused to admit that GMHL was seeking these "after development" prices, despite it being recorded in numerous documents. In my view, it is fair to submit, as Mr Broadmore did, that Mr Liu eventually let this slip in cross-examination:[90]

> … right so the Spinnaker loan he then got us into it and he convinced me and my family that hey look it's only $6.8 million, it's nothing, it's peanuts *so you have a property that if you know developed out would be what about $200 million in sales and so forth,* what's $6.8 million so we stupidly said okay we will lend our property to be used as collateral.

[731] Mr Liu and Mr Williams are highly educated, commercially astute and sophisticated, and internationally experienced parties. They were no "neophytes". They were not "mum and dad" investors, or hapless consumers. Each, in their own way, are brilliant men. Their CVs speak for themselves.

[732] They utilised highly complex contractual and corporate structures to manage their affairs and demarcate risk and liability. This can be seen by the structures put in place to limit GMHL's potential tax exposure, or Mr Liu's use of his British Virgin Islands company, PDL (which pre-dated WDLP—having been incorporated in 2007),

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90 (emphasis added).

to act as trustee company through which to hold his 60 per cent stake in WDLP (via WTL).

[733] The formation and structure of WDLP, its nomination to be the development entity (and counterparty to GMHL) and WDGLP's delegation of management to WMTL are simply further examples of deliberate structures agreed between independently advised parties.

[734] Part of that contractual structure provided for annual advisory fees of $1 million to be paid personally to Mr Liu, to be uplifted to $1.2 million in 2014. That was something, I infer, he clearly wished to hide from his family. In all, he received $4,314,000 for his advisory services to WDLP.

[735] In that advisory role, and as director of GMHL, and the director of the majority limited partner of WDLP, Mr Liu met with Mr Williams regularly when Mr Liu visited New Zealand at least 18 times during the development period.

[736] Mr Williams himself assumed several distinct legal roles at the same time: as director of the WDGPL; director/CEO of a company appointed to manage the development; director of the 40 per cent limited partner; and as a member of the Advisory Board to WDLP.

[737] The point is, the parties carefully delineated and legally cemented their distinct and well understood roles into the development process in a mosaic of parallel contracts, deeds and trusts.

[738] GMHL was well and independently advised through the whole development by an "armada" of legal and financial advisers. At the very least, GMHL had the capacity to utilise their advice and counsel—and Mr Williams knew this, having communicated with them on countless occasions by email. These advisers were provided by WDLP, or at least the general partner of WDLP, with honestly made and reasonably based forecasts, estimates and opinions. Also, these were neither misleading nor deceptive in the FTA sense of those words. GMHL was always

reluctant to mortgage its land—and did so only after several years contemplation, in the knowledge that no development could take place without that happening.

[739] In my view, Mr Liu and GMHL made shrewd, calculated, and careful risk assessments. They elected to proceed—knowing full well that no forecasts could be guaranteed; that mortgaging the land came with risk to GMHL as landowner (albeit low risk based on the provided forecasts); believing, as did WDLP and Mr Williams, that it would be paid $60 million for the Weiti Bay development, with Village 1 and 2 still to come; and, all the while knowing that their payment would rank behind the priority they gave to the mortgagees/lenders.

[740] That, in one sense, is the nature, the essence, of property development. That the development did not play out as legitimately and reasonably anticipated, cannot and does not make WDLP, let alone Mr Williams, personally liable for GMHL's losses in the way alleged in the first and second causes of action. This is particularly so given Mr Liu's/GMHL's self-destructive strategy as the development slowed, to which I now turn in the third cause of action.

THIRD CAUSE OF ACTION: DID LAMBTON QUAY BREACH ITS MORTGAGEE'S DUTIES?

GMHL's general allegations about the mortgagee sale?

[741] Before I set out the facts relating to the mortgagee sale, it will be helpful to understand GMHL's general allegations and sweeping criticisms of the process. Then I will set out the pleaded allegations

[742] In early 2019, GMHL says that Mr Williams (and by implication WDLP) was facing a desperate situation — given the Weiti development's financial problems.

[743] GMHL alleges that Mr Williams eventually found a solution, in the form of Lambton Quay's own "misdirected energy as a mortgagee". It is said Lambton Quay became frustrated with Mr Liu's/GMHL's position during mid-2019, then became angry, and then set about finding a way to itself become the owner of GMHL's land.

[744] With Lambton Quay's loan left unpaid after the July PLA notices, Lambton Quay is said to have commenced "a performatory[91] mortgagee sale process" around late September 2019. Indeed, Mr Dickey describes it as a "charade". He submits that what took place displayed no characteristics of an orthodox "forced" mortgagee sale. He further submits that Lambton Quay did not have regard to GMHL's position, nor the need to obtain the best price, reasonably obtainable, for the land. From at least late 2019/early 2020, Lambton Quay ceased to genuinely engage with any offers, at least after a first offer which was eventually withdrawn.

[745] GMHL's case is that Lambton Quay initiated the charade to force a resolution against GMHL, and to end up with the mortgaged land being undersold. In turn, GMHL would face liquidation during which Village 2 and the balance land might be acquired also at below market value.

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[91] There was some debate about Mr Dickey's use of the word performatory. Defence counsel said it meant no more than to perform the requisite obligations in accordance with the law. In their view this is exactly what Lambton Quay did. However, I am content to adopt Mr Dickey's meaning that it refers to a superficial "show" of legality but without substantial compliance.

[746] It is alleged that Lambton Quay initially wanted to use the mortgagee sale mechanism to acquire the land for itself. This would give Lambton Quay the time and opportunity to maximise value on an eventual later sale, and to recover its lending. Because Lambton Quay was aware of the prohibitions on outright acquisition of the property itself, Lambton Quay conceptualised "straw man" entities to purchase the land, although it is accepted that these did not come to fruition.

[747] Furthermore, GMHL's case was adjusted after evidence from Lambton Quay. Its additional case is that Lambton Quay knew that it was not entitled to the full amount of the outstanding loan claimed against GMHL (due to the implications of the CCCFA by which its interest entitlement was reduced). It is said Lambton Quay never disclosed this to GMHL.

[748] GMHL's case is that after advertising and a superficial sale process, and without a concluded mortgagee sale, Lambton Quay then had to pivot to Mr Williams and Clearwater "to fully realise its loan recovery plans over the medium term." It is said that discussion between Lambton Quay, Mr Williams and Clearwater about a possible "deal" had begun at least by July 2019 and intensified from February 2020 onwards. I observe, in passing, that the difficulty with that submission is that it rather suggests that Lambton Quay genuinely wanted a good offer at the mortgagee sale, and, if that was the case, why would it have undertaken a "performatory" mortgagee sale.

[749] It is also alleged that during this time Mr Williams did all he could to secure a favourable outcome for himself at GMHL's expense. It is said that since at least 5 May 2019, Mr Williams was working to the distinct possibility of his entities purchasing the mortgaged land. During this time, Mr Williams put forward many proposals, possible solutions, and offers to Clearwater and Lambton Quay.

[750] It is said that Mr Williams wanted to acquire all the Weiti land, not just the mortgaged land. As part of his plan, he needed to acquire any residual debt owed by GMHL after the mortgagee sale. GMHL argues that Mr Williams understood that for every dollar by which the mortgagee sale purchase price for Weiti Bay and Village 1 was reduced, that would be a dollar by which the residual debt owed by GMHL would

increase. A larger residual debt would enable stronger financial leverage over GMHL for Mr Williams to secure Village 2 and the balance land.

[751] It is alleged that for its part, Clearwater, as the incoming financier, was allowed to dictate the price it set for GMHL's land and used that power to set an unreasonably low price. As a result, Lambton Quay entered into the June 2020 transaction and allowed the residual debt to be inflated to meet the requirements of Mr Williams and Clearwater, even though at the time, Lambton Quay believed some of the interest would be unrecoverable.

[752] Clearwater is assessed by Mr Dickey as not having "clean hands" and as having participated in a process to actively disadvantage GMHL. Clearwater cynically calculated how far the "price" could be distorted downwards to inflate the residual debt, as against the litigation risk of doing so. The eventual purchase price of $35 million was knowingly not a true assessment of value. As part of the June 2020 transaction, AWIL and Clearwater executed a loan management deed. This gave Clearwater control over the residual debt, and its enforcement, through control of AWIL's counterclaim against GMHL in this proceeding.

[753] Overall, it is alleged that the final June 2020 transaction, and the processes leading up to it from around mid-2019, was not an orthodox "forced sale" by a mortgagee. Other than Lambton Quay exercising its power to transfer titles to Mr Williams' companies, this was simply a complex commercial arrangement negotiated between three parties to the exclusion of GMHL and in breach of Lambton Quay's obligation as a mortgagee. It is also set against the backdrop of a growing "plot" to deprive GMHL of all its remaining land.

[754] I have set out these general allegations in the plaintiff's submissions to demonstrate that, on any analysis, they are extremely serious.

[755] During his opening, the parties challenged Mr Dickey as to whether fraud was being explicitly alleged. He was very clear that fraudulent behaviour was no part of his allegation. I must say however, that some of GMHL's case, and the inferences it asked the court to draw, became microscopically close to insinuations of fraud. I agree

with Mr Gordon for Lambton Quay on this point. Mr Gordon also emphasised that although Mr Dickey resiled from the use of the word "conspiracy" to describe the actions of the defendants—that is, a secret plan by a group to do something unlawful or harmful—in substance that was precisely what GMHL was alleging. I agree.

[756] It is also worth noting that Mr Liu himself said in evidence that he regarded New Zealand as "the land of thieves." Further, he said that Lambton Quay is just a "partner in crime at this moment" with Mr Williams and his companies, and that his land was stolen from him. Even making allowances for colourful language, in making these extreme allegations without facts to back them up, Mr Liu's credibility is stretched well beyond breaking point. They detract from the seriousness of his claims.

Summary of specific pleaded allegations

[757] In its most up-to-date statement of claim, the plaintiff identifies four duties Lambton Quay owed to GMHL (as a mortgagee exercising its power of sale), the alleged breaches of which I summarise.

Failed to exercise reasonable care to obtain the best price reasonably obtainable at the time of sale.

[758] It is alleged that throughout the mortgagee sale process, Lambton Quay knew the value of the mortgaged land was approximately $100 million. The 2019 valuations of $68.1 million for an open market sale, and less for a forced sale, obtained by Mr Williams, were unreliable.

[759] Six deficiencies are identified where Lambton Quay failed to exercise reasonable care. These included an unusually and unreasonably short 27-day marketing campaign, limited advertising and non-availability of due diligence packs at the time of advertising.

[760] As a result, the mortgagee sale price of $35 million was substantially below the $100 million market value of the mortgaged property. For example, the mortgagee sale agreements valued Village 1 at less than $15 million compared to the Savills 2018 valuation of $60.1 million.

[761] It is also alleged that the $35 million credited to GMHL was not the true sale consideration as Lambton Quay received a further benefit of $8 million.

Failed to act in good faith for the predominant purpose of obtaining repayment of the secured debt.

[762] It is alleged that at the time of advertising the mortgaged lots, Lambton Quay's predominant purpose was not to obtain repayment of its debt. Rather it was to prejudice GMHL and obtain access to GMHL's land not subject to securities. As a result, Lambton Quay took no enforcement steps against the principal debtors, WDLP, WDGPL or Mr Williams (as guarantor). This was all known to Mr Williams, Mr Williams' companies, and Clearwater.

[763] Absent a satisfactory mortgagee sale offer, Lambton Quay wished to take control of the development by a "straw man", and the defendants knew this. Further, the structure of the eventual purchase by the second and third defendants (AWDL and AWBDL) meant that they were not bona fide purchasers in good faith without notice.

Acted in a manner which unfairly prejudiced or wilfully and recklessly sacrificed the interests of the mortgagor, GMHL.

[764] The mechanics of the breach of this alleged duty were not specifically particularised in the statement of claim. I infer that it comes within the particulars of the breach of the good faith duty discussed above. That is, that the effect of the mortgagee sale was to deliberately sacrifice the interests of GMHL, and that GMHL was not informed of the negotiations between Mr Williams, Clearwater and Lambton Quay which acted in a way to prejudice its interests.

Breached its duty to enter into an independent and "arms-length" bargain with the purchaser, AWDL.

[765] It is alleged that following the initial deadline for tenders on 6 November 2019, Lambton Quay made no further efforts to attract interest from third party bidders. From 6 November onwards, Lambton Quay's sole or predominant focus was to obtain control of GMHL's land by a mortgagee sale together with Clearwater and/or Mr Williams.

[766] Lambton Quay's negotiations with Clearwater and Mr Williams for this purpose was without GMHL's knowledge and contrary to Lambton Quay's duties as mortgagee. The ultimate mortgagee sale transaction was therefore not a genuine independent bargain.

[767] Instead, it was intended to allow Lambton Quay to continue to receive "upside" from the development; to obscure the true consideration received by Lambton Quay under the mortgagee sale transaction; to fulfil the collateral purpose of liquidating GMHL; and to enable Lambton Quay to obtain an equity interest in the mortgagee sale proceeds.

Relief sought

[768] It will be seen that the facts and allegations relating to the four breached duties overlap.

[769] GMHL also alleges that all the other defendants knew of Lambton Quay's alleged breaches.

[770] GMHL claims against the first to sixth defendants:

(a) an order setting aside the transfer by way of mortgagee sales of the mortgaged properties;

(b) an order setting aside the purported transfer by way of assignment of GMHL's residual debt to the fourth defendant;

(c) alternatively, damages against the fifth defendant in an amount fixed by the Court;

(d) interest and costs.

[771] I will address each of those alleged duties, and their alleged breach, in turn.

[772] However, it is first appropriate to describe the key developments during the mortgagee sale process and to make findings as to the parties' involvements. Those findings inform the resolution of the pleaded breaches. As with the first two causes of action, credibility findings are important.

Key developments in the mortgagee sale process and findings as to the parties' "strategies" and intentions

[773] This section of the judgment describes the mortgagee sale process in detail. The length of this section mirrors the length of the build-up to the sale process and its eventual finalisation. I make findings about the parties' behaviour and intentions at the time. It is necessary to set out the factual basis for those findings in some detail. Counsel subjected the facts to significant scrutiny.

[774] Bearing in mind the allegations I have just summarised, it will become obvious that the findings I make mean that the plaintiff's claims cannot succeed. After setting out the whole of the process, I then resolve each of the claims as briefly as possible.

[775] It will be recalled that the "chronology" referred to earlier in this judgment, and attached as an Appendix, sets out the timing of the key events relating to the mortgagee sale. I will not repeat them. But it will be a helpful refresher to re-read it, as from the entry dated 12 November 2018 under the heading "After Lambton Quay Became Involved."

Lead-up to, and aftermath of, 4 February 2019 meeting

[776] As will be recalled from the chronology, the BNZ loan was to expire on 31 January 2019. Mr Liu claims that the 4 February 2019 face-to-face meeting with Mr Williams was when he first learned that the BNZ loan was in default and that there was no agreement in place to extend or replace it. He said the news left him in shock. He did not know the position was so dire. With respect, this should not have been a "Damascus Road" experience for him. I highlight the following.

[777] On 14 August 2018, Mr Williams, writing as the "principal" of the Williams Group, provided an email update to Mr Liu. It was largely positive in terms of completion of the road construction and noted extensions were in place with the BNZ. However, it noted that over the winter sales had been totally quiet. He also noted, "the capital restrictions in China on export of capital, combined with the new Overseas Investment restrictions in New Zealand have definitely put a dampener on sales." Mr Williams said it was important in respect of sales "not to lose our nerve (so to speak) and discount". Sales were the only means of income, so, in my view, a clear problem was being signalled to Mr Liu.

[778] On 12 November 2018, Mr Phillip Judge, a senior and specialist accounting adviser recently retained by GMHL, emailed Mr Williams, with copies to Mr Anderson and Mr Liu. This squarely addressed the looming issue of the BNZ facility coming to an end on 31 January 2019. Mr Judge noted this may not be an issue if all the sections were to be sold and cash received. But, if not, he noted "we should have an acceptable Plan B". He noted there were 28 lots still unsold and six sold lots where titles were yet to be issued (perhaps the lots where there had been a land slip). Thirty-four in total were available to generate funds. Total projected "cash in" was said to be $46.5 million. Current debts to the BNZ and Lambton Quay were $44 million. The total estimated liabilities (including current debts) and including the completion and sale of the remaining Weiti Bay lots, were $51.6 million. Therefore, Mr Judge suggested that, at this stage, there might be an overdraft of about $5 million that would be secured against the Village 1 property.

[779] Mr Williams replied two days later, copying in Mr Anderson and Mr Liu. He did not dispute the thrust of the figures. He made clear that the BNZ "have indicated they are not planning to extend beyond 31 January" as "the size and tenure of the loan appears too small" for the bank. He also noted a recent record lot sale had been encouraging.

[780] At the same time, Mr Liu would have been aware of the blunt reality, lurking in the background, that GMHL had not been paid its promised $60 million "before or in May 2018"—as was set out in the WDLP letter to GMHL on 20 December 2017. Also, he would have been aware that BNZ would not extend beyond its term.

[781] Mr Liu had all this information before him. I do not accept his claims that he first became aware that the BNZ loan was in default at the 4 February 2019 meeting. I am sure that he already knew.

[782] The other key aspect of the 4 February meeting was that Mr Williams presented Mr Liu with an indicative offer from a Singaporean investor for the Weiti land. I accept that the investor was showing serious interest in the Weiti project and this provided a potential "exit option" for GMHL. I also accept that Mr Liu and GMHL had previously suggested that (in general) this sort of buyout might be a solution. The Singaporean investor had visited New Zealand in August 2018 and had inspected the Weiti land.

[783] Prior to the 4 February meeting, on 29 December 2018, Mr Williams, in an email signed as the principal of Williams Group, informed Mr Liu that a firm overseas offer would be available in the third week of January. He wanted it to be in good shape for presentation. Therefore, he suggested that Mr Liu delay his then planned trip to New Zealand until 29 January.

[784] I accept Mr Williams' evidence that this was a genuine and not a "concocted or fanciful" offer on behalf of the Singaporean investor, Mr Maini, even though it was not on the letterhead of the offeror. It was an indicative offer of $50–$60 million, including taking on all WDLP's debt. At the time, WDLP's debt exceeded $40 million. It comprised "$12.4 million to BNZ and approximately $30.5 million to Lambton Quay".

[785] At any rate, at the "fateful" February meeting, Mr Liu rejected the indicative offer. He walked out leaving the letter on the floor. I accept Mr Williams' evidence that Mr Liu surprised and disappointed him particularly as to the "overwhelming malevolence that he expressed". In my view, this meeting marked the end of the personal relationship between Mr Williams and Mr Liu. I accept Mr Williams' evidence that Mr Liu said words to the effect of "how will you feel and what would your family feel when you go bankrupt without my support". This was when Mr Liu then described Mr Williams to his sons as being "worse than a snake." I infer that from this point Mr Liu lost the desire to work with Mr Williams.

[786] At this time, WDLP was negotiating with Lambton Quay to extend finance facilities beyond July 2019 but with a much-reduced loan. On 14 February 2019, Lambton Quay advised WDLP that the BNZ was prepared to accommodate Lambton Quay taking over the BNZ debt with settlement at the end of April. I accept Mr Williams' assessment that the project was still largely on track assuming the balance of the Weiti Bay sales were concluded. I also accept that WDLP was intent on obtaining a solution with the current lenders, which, in particular, would enable a further drawdown of up to $2 million to finish construction of the five subsidence sites that Weiti Bay needed rebuilt.

[787] Despite the end of Mr Liu and Mr Williams' personal relationship, all of the contractual and financing agreements remained in place. This was despite GMHL not yet having received a cent of the purchase price of the premium Weiti Bay 150-lot development, for reasons already discussed in the in the first cause of action. In short, the forecasts had not eventuated. And the immediate realities of the "negative gearing" of the development (with profit not possible until completion of Village 1 and 2 with the probability of up to 1200 lots) were becoming obvious.

[788] As I have already discussed at [229] — [236] and [606].—.[614], GMHL's decision was premature. It appears to have been made solely in the context of Weiti Bay. Even for Weiti Bay, there was the reasonable likelihood of $16 million being eventually available to GMHL. This was confirmed by its own accounting expert. All this was before the completion of Village 1 and Village 2, which were for higher density lots with predicted cheaper construction costs, albeit with the re-charges paid back. Thus, at the time GMHL/Mr Liu withdrew co-operation for the development in February 2019, the overall development was by no means doomed. And, if the additional lots, allowing a total of 1200 lots had been approved, the reasonable forecasts were still realistically positive. The potential and continuing overall profitability of the development (with its 18 year life span) should have been kept in mind by GMHL.

The February "ultimatum"

[789] On 19 February 2019, Mr Liu advised Mr Williams that he had become increasingly concerned. The project was causing him stress and anguish. He appointed Mr Thompson from a specialist property law firm to carry out a review together with a specialist finance lawyer, Mr John Paul-Rice, and a corporate adviser, Mr Michael Stiassny, to represent his interests. This was acknowledged and accepted to be a "high-powered" team.

[790] On 25 February 2019, GMHL's solicitor, Mr Thompson, advised by email that GMHL was no longer prepared to pass title to its land without some payment on account of a claimed "$180 million revenue pledge" for its land.

[791] GMHL refused to consent to a further $2 million being borrowed against the security to complete remediation of the subsistence sites unless certain conditions were met. These included "GMHL receiving 33 per cent of the net sale proceeds of the five lots as a payment on account of the $180 million". Mr Thompson noted this condition "will require a variation of the July 2018 quadripartite deed" and said "[we] will leave your client to negotiate that". Thereafter, GMHL withdrew its support of WDLP and did not agree to pass title to its land.

[792] I accept the correctness of Mr Williams' view that the payment sought by GMHL, together with the foreshadowed refusal by GMHL to pass title without being paid at the same time as the secured lenders (and effectively in priority to them), would be a clear breach of the 2018 quadripartite deed.[92] I also accept, at least by inference, that Mr Thompson and GMHL knew this, as Mr Thompson's email stated that GMHL's stance would require a variation of the 2018 quadripartite deed.

[793] Mr Williams quickly assessed a variation of the quadripartite deed as being "untenable." In his words, with which I agree, it was:

> … again, a silly position of brinksmanship that ultimately proved disastrous. The position that Mr Liu/GMHL took, in my view, placed the entire Weiti project at risk of default, distress and resulting loss for all parties.

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92 For further detail of two apparently clear breaches of the Quadripartite Deed, see the discussion under the fourth cause of action under the heading Analysis—*Dirty Hands*? at [1190].

[794] I assess GMHL's position as effectively constituting an "ultimatum".

[795] On the other hand, I accept the thrust of Mr Williams' evidence that his primary objective was to get GMHL back to the table to support the project through to a profitable conclusion. I also accept that Mr Williams was deeply concerned for other stakeholders in the project—the lenders, and the 100 plus purchasers of the Weiti Bay properties. The value of their investments depended on the completion of the Weiti development overall.

The development "stalls"

[796] By this time, Mr Liu had all but repudiated the limited partnership agreement which realistically ceased to operate from this point on. He effectively withdrew from ongoing involvement in WDLP, both as a limited partner and as a member of the Advisory Committee. GMHL would not allow further money to be advanced to the project, was continuing to demand specified payment in priority to the secured lenders, and was in breach of the quadripartite deed as mentioned five paragraphs previously. The development (and WDLP) effectively stalled in its tracks.

[797] Thirty-three Weiti Bay lots remained unsold at this point. They became "unsaleable". It was known that contractors were not being paid and sales stopped. The Weiti Bay Residents' Association was concerned. I accept Mr Williams' evidence that in "a green field development project" such knowledge destroys large amounts of confidence and value almost overnight. Work on the planned change for enabling development up to 1,200 lots had entirely stopped. Discussions with investors previously expressing interest were paused. I accept Mr Williams' assessment that the Weiti development was now a known "distressed asset". Lambton Quay was no longer willing to consider lending or extending loans. The options open to Lambton Quay, as lender, were narrowing to enforcement, thus further reducing value. In the meantime, the high finance costs continued to accrue. I accept Mr Williams' assessment that all the above factors combined very rapidly. They put the entire project into a precarious position.

[798] And, to make matters worse, before 20 June 2019, WDLP also lost four remaining lot sales totalling $6.2 million as the purchasers cancelled when their contracts hit their "sunset" date without completion of the work required for titles to be issued.

Further fruitless attempts to resolve the impasse

[799] On 10 April 2019, Mr Williams' solicitors sent an offer to buy out the GMHL interest in the overall development for $30 million, enclosing a term sheet to that effect. The offer contemplated Mr Williams establishing a new company or "newco", as purchaser in substitution of WDLP. The offer was self-evidently materially less than the February "in principle" offer from Mr Maini that Mr Liu had rejected, and which was now effectively at an end. The new offer was rejected without counteroffer.

[800] There was no agreement at the time between the parties as to whether GMHL was in breach of the quadripartite deed. However, by demanding payment in reduction of the agreed sale price, and indicating that GMHL would not allow all sale proceeds to be paid to the BNZ, nor co-operate in releasing titles, it was clearly in breach. The insisted renegotiation of the quadripartite terms was doomed.

[801] By this time, Mr Stiassny, advising Mr Liu/GMHL, had been in discussions with Lambton Quay. He assessed Lambton Quay as having the view that without more money being put into the project, a liquidator would soon be appointed. With that would go considerable value loss. That said, Mr Stiassny was clear that GMHL would consider realistic financial options. Equally clearly, despite requests through GMHL's advisers, Mr Liu declined to meet to talk with Mr Williams.

[802] By this stage, Mr Williams was also pursuing what he regarded as all possible salvage options, including discussions with Clearwater as to its possible involvement.

GMHL/Mr Liu's emerging strategy

[803] By this time, GMHL was beginning to develop a clear strategy of its own. In my view, it developed over the following months, as I set out below. It was a high-

risk strategy, and one that ultimately brought about a disastrous outcome for GMHL. The evidence for such a strategy was overwhelming.

[804] On 17 May 2019, at Weiti Bay, Mr Williams, his son, Asher, and his lawyer, Mr Alan Paterson, met with GMHL representatives Mr Thompson and Mr Stiassny. Mr Williams' detailed file note of that meeting, which I accept as generally accurate, and which was confirmed by Mr Paterson, is as follows:

> 1. Impasse with [Lambton Quay] holding the keys not GMHL (and Williams not part of the game).
> 2. [Mr Williams] persona non grata with [Liu] family.
> 3. Break down almost certainly irretrievable—([Mr Thompson]—ideally this may be an unhappy divorce where two parties have to live under the same roof —[Mr Stiassny] —but Liu will not permit that).
> 4. Liu regards Mark Dunajtschik as a high rate, short term opportunistic player who will cut and run—Liu will outlast [Sir Mark]—[Sir Mark] too old.
> 5. Liu playing long game here—will outlast everyone and does not care if everyone goes broke including project—Liu takes 50–100 year view.
> 6. [Sir Mark] needs to take a haircut to make this work for GMHL.
> 7. Liu can hold everyone up due to planning crossover and will not hesitate to block any development [Village 1].
> 8. Don't know what Liu really wants.

[805] In an email on 20 May 2019 from Mr Stiassny, following a meeting with Mr Thompson and Mr Liu, he confirmed that "to make sure our strategy, do little is still the right thing". The strategy was "to let the clock run down and see what [Lambton Quay] really wants". "We remain convinced", said Mr Stiassny, that "they lose so much by any form of insolvency. It cannot be their rational preference."

[806] My assessment is that, by this time, GMHL was quite prepared to wait matters out, and to not participate constructively unless there was an offer made that it considered acceptable. I conclude that Mr Liu knew exactly what he was doing. He deliberately adopted the strategy of doing nothing, with the view that the project would eventually become bankrupt. His view, perhaps not unreasonable, was that there was no realistic chance of any other party wanting to purchase the Weiti Bay and Village 1 properties in a mortgagee sale. This was because how intertwined Village 1 and 2 are from an engineering and construction point of view. Also, little future development

could occur without working very closely with GMHL which controlled Village 2 and the balance land. That being the case, with no one likely to be interested in any mortgagee sale, GMHL would force Lambton Quay to settle its loans for a much-reduced amount ("to take a haircut"). GMHL would then have its land back in its full control, unencumbered, and with it repaying a substantially smaller amount in satisfaction of the loans.

[807] This was an aggressive and high-stakes strategy. Mr Gordon colourfully, but I think fairly, described it as "playing chicken with the unpaid mortgagee."

[808] I need to say that while Mr Liu denied there being any "strategy," the sum total of his position, including discussions he had with his advisors, clearly amounted to a strategy. As but one further example, on 18 May 2019, the day after the site meeting with Mr Williams and others, Mr Thompson emailed a group including Mr Stiassny, Mr Rice, and Mr Liu. He said, amongst other things that:

> …a fire sale [of the Weiti Bay lots] would typically net only $20m so [Lambton Quay] is in one big hole. That leaves them with Village 1 to realize. There will be no buyers for that other than GMHL. The reason is that on its own right you would never develop it.
>
> …
>
> Williams world is about to come crashing down and only GMHL can avoid that by selling all its landholding to an investor Williams says he has in the wings.

[809] However Mr Liu sought to explain these emails in Court, I am confident there was a clear strategy.

Mr Liu and GMHL play "No ball"

[810] As if to emphasise that position, on 22 July 2019, at a meeting in Auckland with representatives of Lambton Quay, Mr Liu indicated he was prepared to offer Lambton Quay the remaining 33 Weiti Bay titles plus $100,000 on the basis that GMHL would keep Villages 1 and 2 and the balance land. Mr Williams was not aware of these negotiations. Later, on 8 August, Mr Liu reduced his $100,000 offer to one dollar.

[811] Under cross-examination and in answers to questions from the Court, Mr Liu appeared to confirm that he knew his offers of the remaining Weiti Bay lots plus $100,000 or $1 respectively would not be taken seriously. When asked by Mr Gordon whether he was prepared to play hardball with the mortgagee, Mr Liu responded "I wasn't playing hardball; *I was playing no ball*."[93] Mr Liu did say that he knew his advisors were continuing to negotiate with Lambton Quay. He was hopeful that there might be some deal that made sense but he never heard anything that made sense to him.

[812] The term "no ball" was then often used in several other situations and became shorthand, at least by defence counsel, for summarising Mr Liu's plain unwillingness to involve himself further in negotiations.

Further attempts at resolution

[813] It will be recalled that, on 9 June 2019, the BNZ novated all of its rights under its first mortgage security to Lambton Quay. By this time, Lambton Quay had made a formal notice of demand in terms of the default on the loans.

[814] On 24 June, Clearwater, provided a "key terms sheet" for a conditional offer of $50 million to purchase in full GMHL's interest in the Weiti land outright. That same day, Mr Liu's response was "can't you get more Mr Williams?"

[815] On 23 July, Mr Williams emailed GMHL/Mr Liu's various advisers with an options paper addressing four scenarios:

1. Formal enforcement by [Lambton Quay]
2. Sale to Fiera Subsidiary
3. Managed workout involving [Lambton Quay], GMHL, WDLP
4. Sale to other third party

[816] I accept the paper described the significant "value reduction" that would occur if the project went into a mortgagee sale. However, I note that GMHL/Mr Liu's stance had already triggered the commencement of enforcement proceedings.

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[93] (emphasis added).

[817] I also accept that, since 5 February 2019, Mr Liu had declined to speak to Mr Williams or respond to his approaches other than his response "can't you get more Mr Williams" in June 2019. Mr Liu's advisers had made clear that he would not deal with Mr Williams. Nevertheless, I accept that Mr Williams tried to act positively and constructively, although I realise it was self-evidently in his interests to do so.

Mr Williams' strategy

[818] I accept that from early 2019, first and foremost, Mr Williams worked hard to bring GMHL and Mr Liu back to the table to save the project. He was firmly of the view that this was the best option for all parties and stakeholders. I agree with this. Indeed, Mr Stiassny confirmed that negotiation and discussion between parties is always a better way to resolve things.

[819] Second, Mr Williams continued to explore the possibility of introducing a new investor to purchase GMHL's interest at an agreed price. Mr Liu had requested (in 2018) that Mr Williams explore this option.

[820] Finally, as an alternative, and from an early stage, Mr Williams explored whether he could obtain suitable finance from other potential lenders and form a new entity or entities to purchase the property. From Mr Williams' perspective, this was far preferable to an unknown third-party purchaser obtaining the property at a "fire sale" price at mortgagee sale. That would lock in certain and very substantial losses for all other parties. However, Mr Williams well knew that any "newco" purchaser would need leverage over GMHL given the "intertwined" nature of the adjoining land not subject to the mortgages.

[821] Mr Williams was very candid. He said that is why, when AWDL and AWBDL eventually purchased the properties, it was imperative that AWIL took an assignment of the balance of the debt left owing after the mortgagee sale. This was to create the necessary leverage to bring GMHL back to the table to support the completion of the development.

[822] Mr Williams was also very frank that the relevant parties gave serious consideration to the "newco" option throughout the course of 2019 and 2020 in various forms. He said it was necessary to consider this option. Mr Williams was equally clear that he would not have proceeded with AWDL and AWBDL's purchase of the properties for the $35 million price paid *without* AWIL also purchasing and taking assignment of GMHL's residual debt. In my view, all the correspondence involving Mr Williams is explicable in his pursuit of these options.

[823] But, during 2019, in my assessment, all of Mr Williams' plans and proposals came to nothing. This was despite his consistent involvement and manoeuvring to put all possible options before GMHL, Sir Mark and Lambton Quay, and Clearwater. In fact, my assessment is that Sir Mark and Lambton Quay became more than a little frustrated with Mr Williams' tireless efforts to save the project and his seemingly constant fruitless proposals. He became something of a dripping tap with proposal after proposal. The same attitude was shared by Clearwater. Indeed, Mr Bartlow, who gave evidence on behalf of Clearwater was clearly annoyed by Mr Williams' numerous term sheets, other offers, and suggestions. This led Mr Bartlow to advise that Clearwater would have nothing to do with further discussion until the mortgagee sale process had run its course.

[824] In all of this, I reach the view that Mr Williams tried to ingratiate himself into the "good books" of both Sir Mark and Clearwater. Critical as this sounds, it reveals no more than his desperation to find a solution that would save the project. For instance, when he said (around the time of the mortgagee sale) that "I regard myself as working for you Sir Mark", this was simply his way of saying he wanted to do all he could to get the best outcome and to predispose Sir Mark towards him. It did not reflect (as Mr Dickey would have it) any working relationship they had, or that the two were in cahoots with each other. Sir Mark certainly did not regard Mr Williams as working for him. In fact, Sir Mark had a fairly negative view of Mr Williams. This comment by Mr Williams, and others like it, I consider just reflected that Mr Williams was saying anything and everything he could to obtain support.

[825] I accept Mr Williams' assessment that all his dealings were typical of commercial negotiations. They were at arm's length. All parties were independently advised, and each was acting in their own best interests. In my view, all the correspondence and communication between Mr Williams, Lambton Quay and Clearwater can legitimately be explained and understood in the context of their ongoing exploration of all possible lawful options.

Mr Liu repudiates WDLP agreement; GMHL breaches 2018 quadripartite deed

[826] By this stage, I consider that Mr Liu had repudiated once and for all the WDLP agreement. He was actively refusing to co-operate with WDLP's development business in any of his WDLP capacities. It will also be recalled that Mr Liu was refusing to engage with Mr Williams personally.

[827] Mr Liu's email on 29 October is illustrative. He referred to Mr Williams as having betrayed him, blackmailed him, used him, lied to him, and not paid him a penny. Furthermore, in his view, the buy-out offers put to him by Mr Williams were unconfirmed and or too low; and his properties were being stolen from him.

[828] Mr Williams replied, in my view politely, refuting those false allegations. He set out, in my view accurately and correctly, his history of involvement and tireless efforts to try to make the development work.

[829] Again, on 1 November 2019, Mr Williams emailed Mr Liu to ask if he/GMHL were open to a meaningful dialogue, and his willingness to travel if necessary.

[830] On 6 November 2019, Mr Liu responded acknowledging the relationship had totally broken down. He accused Mr Williams of having "duped and conned" him and his family. He said the development "feels and looks like a Nigerian money scam." His concluding words were "GMHL will hold you to account for your deeds and deception."

[831] Mr Williams responded by email again refuting the serious allegations and describing them as an attempt to fundamentally rewrite history.

[832] Despite repeated efforts by Mr Williams, I accept it was clear that GMHL/Mr Liu would not deal further with Mr Williams or participate in constructive solutions with him, and inferentially WDLP. Indeed, as previously noted, GMHL's actions in demanding part payment of the Weiti Bay purchase price in priority to the lenders and refusing to consent to the issue of titles, were in breach of the 2018 Quadripartite Deed.[94]

[833] From this point on, Mr Williams, therefore, focussed on the option of putting together a deal where the Williams' interests could establish new companies with the requisite finance to purchase the properties. This entailed negotiations with Clearwater, Lambton Quay and other potential parties which had not up to that stage borne fruit.

Lambton Quay's strategy

[834] I regard Sir Mark, the sole director of Lambton Quay as a completely straightforward, honest, compelling and credible witness. I accept his evidence entirely. Where there is any difference between his evidence and Mr Liu's, I reject Mr Liu's evidence and wholly accept Sir Mark's evidence. There is one piece of his evidence that I cannot help but refer to. In late 2019, he became concerned as to the unmown lawns at Weiti Bay. On Boxing Day 2019, he loaded his ride-on lawn mower onto a trailer and drove from the central North Island to Weiti Bay. He spent most of the next three days mowing all the lawns. He said that gave him a good idea of the development and the difficulties in its topography.

[835] In my assessment, for a man then in his eighties, those actions speak of his roll up your sleeves/can do attitude. Indirectly, I believe it also speaks to his straightforward, self-made man character, his commitment to reduce financial loss, and his trustworthiness. As I discuss later, he is not a lawyer, and frequently sees things in a black and white way. He relied on his legal advisers, with Mr Anthony Staples playing a key role during this time, for advice to shape his blunt, pragmatic approach.

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[94] See the discussion under the fourth cause of action, under the heading Analysis – *Dirty hands?* at [1190].

[836] Mr Staples gave evidence for Lambton Quay, which I accept entirely. I accept that Sir Mark regards lending money for the purposes of the Weiti development as being one of the worst commercial decisions of his life. It was originally intended as a short-term loan. The money was earmarked for funding construction of the Wellington Children's Hospital but was not needed immediately.

[837] Lambton Quay was registered as a financial service provider on 20 July 2019. I will return to the relevance of this registration as it postdated the third quadripartite agreements by just over a year. There is a real issue, for later determination, as to whether Lambton Quay is entitled to interest prior to January 2020 (when a law change put the issue beyond doubt) because of its initial non-registration. This in turn effects the amount that AWIL can claim on the assignment of debt.

[838] From Lambton Quay's perspective, by late 2018, it had become clear there were serious issues with the development. WDLP was not successful in achieving new sales of lots and there were cash flow issues. While the first ranking BNZ debt had been reduced to around $11 million, the debt owing to Lambton Quay stood at roughly $30 million. I accept that Sir Mark reasonably concluded, on sound advice, that Lambton Quay should buy out the BNZ's first ranking loan and securities. This would materially strengthen Lambton Quay's position. In this way, Lambton Quay would have a better chance of getting all its money back.

[839] Lambton Quay paid around $12.8 million to the BNZ in June 2019. This was the full amount of the outstanding debt owed to the BNZ. While this meant the total debt owed to Lambton Quay increased to over $40 million, Sir Mark believed it gave the company a better opportunity of recovering what it was owed in full. It meant, that in the event of any enforcement action, Lambton Quay would control the process rather than be at the mercy of the BNZ.

[840] I accept, contrary to the submission for GMHL, that Lambton Quay's preference was always to negotiate a commercial solution. Sir Mark regarded a mortgagee sale as a far from ideal outcome, although it remained an option if Lambton Quay could not negotiate repayment. Ideally, he wanted the debt to be refinanced so that Lambton Quay was repaid and could exit the development.

[841] During 2019, I accept Sir Mark and his advisers tried everything they could to negotiate the refinancing and repayment of the outstanding debts Lambton Quay was owed. This included several efforts with GMHL directly which, in Sir Mark's words, repeatedly rebuffed his efforts to try to engage in a sensible commercial discussion.

[842] Such was Sir Mark's determination to settle the matter and find a commercial solution that he travelled to Auckland on 22 July 2019 to meet directly with Mr Liu.

[843] Following that meeting, which Mr Stiassny attended on speaker phone, GMHL's offer (as I have previously outlined) was that Lambton Quay should release its securities over Village 1 in return for the remaining Weiti Bay titles and a payment of only $100,000. This was in response to Sir Mark having said at the meeting, that Lambton Quay would agree to release its securities over Village 1 in return for payment by GMHL of $15 million. Sir Mark thought that the $100,000 offer was nonsense.

[844] I note that Mr Dickey considers this offer to be "not unreasonable", as it included leaving the unsold Weiti Bay sections to Lambton Quay, which Mr Dickey submitted were worth about $43 million. I must say, given the then distressed state of the development, the valuations confirmed later in the year would point to a value much less than that and perhaps as low as $13.9 million. At any rate, if this was the offer, it would have left Lambton Quay with the responsibility of attending to the subsided lots and then conducting and organising their sale. I do not accept Mr Dickey's submission. It was not a reasonable suggestion and Mr Liu knew it, and he as good as admitted it.

[845] Things did not improve at the second meeting on 8 August 2019. Then, GMHL suggested the same release of Lambton Quay's security over "Village 1 but now for $1.00".

[846] While Lambton Quay was trying to find a sensible solution with GMHL, Sir Mark (as did Mr Staples his lawyer) confirmed that he had numerous discussions and email exchanges with Mr Williams. Those discussions simply confirmed to Sir Mark that WDLP was in no position to repay its loans, that it was being pursued by other

unsecured creditors and that it seemed to him that it was effectively insolvent. He considered, reasonably in my view, that there was no real point in chasing it for that $43 million (principal) it did not have.

[847] Lambton Quay also made a "last ditch" suggestion to GMHL on 19 September 2019 of taking all its land to the open market, including Village 2 and the balance land. This was a pragmatic suggestion, thought to maximise the sale prices able to be achieved on the open market. Nothing came of it.

[848] After a lot of "backwards and forwards", the commercial discussions ultimately came to nothing. Sir Mark confirms he ran out of patience. In September 2019, he decided to proceed with a mortgagee sale. In his view, this seemed to be the only way in which he would get his money back.

Clearwater's involvement and "strategy"

[849] The second-named sixth defendant, is Clearwater NZ1 SMA Limited (Clearwater NZ1). Clearwater NZ1 holds a loan owed by NZ1 Holdings Limited, known as the "Tranche B" loan, which is discussed below, as part of the eventual mortgagee sale and settlement.

[850] As previously indicated, I use the descriptor "Clearwater" generically when referring to either of the sixth defendants or their management entities including Fiera HK. In the correspondence and communication, Clearwater is sometimes referred to as "Fiera" or "CCP".

[851] Mr Bartlow, the managing director for Clearwater, gave his evidence for the sixth defendants carefully, thoughtfully, and precisely. As I previously foreshadowed in the credibility section, he impressed me with his attention to detail. When necessary, he was clear that he needed to rely on documentary evidence at the time to refresh his memory. I formed the impression that he was reliable and accurate in his evidence and entirely credible and trustworthy. He made a very positive impression. I completely accept his evidence, and where it contradicts the plaintiff's case, I overwhelmingly prefer it.

[852] In May 2018, Clearwater was exploring new lending opportunities in New Zealand. At that time, development of the first 150 Weiti Bay lots was near completion. WDLP was looking to refinance its "mezzanine" facility with Pacific Dawn. Mr Bartlow prepared a term sheet which was eventually rejected. In his view, the Weiti development project overall was high quality which had significant funding requirements and opportunities. Clearwater made its ongoing interest known to Mr Williams.

[853] In late March 2019, Mr Williams' son, Asher, "reached out" to Clearwater. Mr Bartlow understood Mr Williams was brainstorming for funding solutions. Clearwater requested various information. Clearwater was not interested in refinancing the Lambton Quay debt because the project was, by then, financially stressed, and in Mr Bartlow's view, "over leveraged".

[854] Clearwater's preference was for financing as a senior lender to facilitate an acquisition of all Village 1, Village 2 and the balance land. Clearwater doubted that Mr Williams could bring GMHL and Lambton Quay together to finalise a transaction which proved to be the case despite various proposals advanced by Clearwater. This included a term sheet entered into between Clearwater and the Williams Group on 12 June 2019 for a proposed acquisition facility, provided by an investment fund or entity nominated by Clearwater, for $50 million. $25 million was to be used to acquire Village 1, Village 2 and the balance land. $15 million was to repay the existing debt to facilitate Lambton Quay's release of the mortgage on Village 1. And, $10 million was to fund the development costs going forward.

[855] The 11 June 2019 term sheet was not progressed. Clearwater learned that Lambton Quay had taken an assignment of the BNZ's loan facility, and that a formal demand on GMHL for repayment had been made.

[856] At this time, Clearwater correctly understood that GMHL was potentially seeking a full exit of the entire Weiti land and that Mr Williams was seeking to bring in a new equity investor. Clearwater's view was that a clean structure, avoiding the inter-connected planning issues already discussed, would be the ideal solution for Clearwater to provide senior debt funding. A clean structure would involve Clearwater

taking a first mortgage over Village 1, Village 2 and the balance land. At that stage, Clearwater was a little unsure as to what to do with the unsold Weiti Bay lots.

[857] Whatever Clearwater's preferences may have been, at this stage (mid 2019) and thereafter, I am quite clear that the motivation to obtain *all* the remaining Weiti land, was not out of some plot or subterfuge with others to deprive GMHL of its land. It was simply the recognition of a commercial reality that if Clearwater was to advance any money, the most sensible commercial solution for it was to provide a loan secured over all the property which would allow a clean and straightforward completion of the development. That was certainly Mr Bartlow's evidence and, despite skilled cross-examination to the contrary, I accept it.

[858] On 23 July 2019, Clearwater obtained from Savills, a valuation of Village 1 of $59 million. Clearwater also obtained a Savills valuation of Village 2 of $19 million and the balance land of $11.72 million. The combined valuation of the three sites, being $89.72 million, was slightly below the minimum $90 million valuation requirement Clearwater had outlined in the June 2019 term sheet.

[859] That said, Mr Bartlow emphasised that the valuations for Village 1 and Village 2 needed to be read together which highlighted the legal and planning challenges and the critical assumption that the valuations allocated 99 per cent of the 400 lots to Village 1. If the lots were divided proportionally, based on the land area across Village 1 and Village 2, as was generally planned to be the case, the total valuation would be less due to the additional costs of developing a larger land area with a similar yield. Mr Bartlow's position, which I accept, was that the $59 million valuation for Village 1 on a standalone basis could not be relied upon. The valuations also identified works that had to be completed including public walkways and extensive planting on the balance land. As a result, it was clear that Village 1 was interconnected with the development of Village 2 and the balance land. This simply reinforced Clearwater's position that it should look for a transaction with a simple structure where it had a first mortgage security over Village 1, Village 2 and the balance land, and an ownership structure that was commercially aligned to progress the overall development of that land. I accept this conclusion and that it was made solely to advance the interests of

Clearwater. I repeat it was not part of any plan entered into with any other party to deprive GMHL of its land.

[860] By the end of July 2019, it was clear to Mr Bartlow that Mr Williams had been unable to negotiate a deal with GMHL and Lambton Quay. Mr Bartlow noted that, nevertheless, Mr Williams persistently continued to work towards a transaction. Well into September he provided a series of indicative ideas that were, as Mr Bartlow put it, bounced around. In Mr Bartlow's opinion, these ideas often did not make commercial sense. While he entertained them, they caused him growing frustration.

[861] At this point, it was clear that there were significant unpaid contractors and other creditors for the Weiti Bay development. Thus, Lambton Quay's debt exceeded the value that was likely to be recovered in a distressed sale of the secured assets. In Mr Bartlow's view, it was inevitable that a residual debt would be owed and that debt recovery steps would need to be taken. I regard this as a realistic assessment, and, as discussed, I find it was the growing conclusion shared by Mr Williams.

[862] Clearwater was involved in further discussions with Mr Williams with various ideas for payment of critical creditors and providing cost to pursue GMHL for debt recovery, but no substantive progress was made.

[863] Mr Bartlow's view was that Clearwater should disengage at this point, despite the Williams' father and son team continuing to chase Clearwater. Beyond any doubt, I conclude that Clearwater no longer saw the possibility of any negotiated solution as being viable. Equally, Clearwater was open to reconsideration if that was "a possibility following an enforcement".

"Machinations" everywhere and by everyone, but to no effect

[864] The foregoing discussion of events to date makes clear that all parties were exploring every possible solution. At least for Mr Williams, and Lambton Quay, there was an air of desperation. On the other hand, GMHL was content, it seems, to adhere to its strategy. It would simply observe matters playing out to its advantage (all going to plan, that is).

[865] Indeed, as if to emphasise this, I am bound to record that in late September, one of Mr Liu's/GMHL's legal advisers wrote to Mr Liu and another of his advisers as to his current thinking, which was that we:

> (a) Use an unconnected 3rd party to get the tender documents to see how they are framed;
>
> (b) Develop a strategy together with … to hold onto Village 1. That maybe placing a tender or running interference in the tender process;
>
> (c) We know Hicks are owed circa $1.6m, Beca $1m and Russell McVeagh and Anderson Lloyd circa $1m between them. All unsecured. There are plenty of others;
>
> (d) Williams has a personal guarantee on the first facility of $1.3 m. [Lambton Quay] will doubtless enforce that. We should debate the merits of getting the media interested so the firestorm of value destruction is right out there.

[866] This discussion within the GMHL team certainly indicates how tense things had become and is indicative of the possible tactics that were being bounced around. In my view, such do not reflect well on those making them. The suggestions would seem very close to crossing the ethical line—particularly in suggesting the possibility of running "interference" in the tender process or deliberately assisting to create a "firestorm of value destruction". At any rate, I stress that none of this actually eventuated. It can probably be understood in terms of the pressure of the moment.

[867] As I also explain, all the parties were involved in discussions, some of which, if they had eventuated, might have been contrary to mortgagee sale duties. But the point is none of them happened.

[868] Mr Stiassny confirmed that these types of situations are difficult and intense. He agreed there is nothing unusual in the parties each considering wide ranging options and becoming involved in machinations (my word).

[869] In Mr Stiassny's view, in the end a therapeutic resolution/roundtable discussion (my words), is always in the interests of all the parties.

[870] I also record that GMHL, after consideration and advice, decided not to seek an injunction to prevent the mortgagee sale, which decision perhaps tells its own story.

"Straw man"

[871] The plaintiff's case made much of the term "straw man". As I understand it, the plaintiff argued that it meant a hidden entity, in reality owned by one or some of the parties, particularly Lambton Quay. The straw man entity was to be used to conceal the real purchaser in the mortgagee sales process. Apparently, the term was identified by the plaintiff in the discovered documents. It would seem that the plaintiff then constructed a theory built around the use of the word.

[872] Certainly, the straw man term was used by some of the parties throughout these discussions, particularly in November 2019. For instance, Sir Mark used it in the context of discussions about the involvement of other entities perhaps completing the mortgagee sale. The term was referred to by Mr Bartlow in some of his email correspondence to others, as early as September 2019—but often referencing the term as being used by Sir Mark. Mr Asher Williams also used the term, including when he wrote to his father saying in early September saying "Strawman - first draft for you to play with." Mr Evan Williams readily accepted the term was used in the commercial discussions with Lambton Quay and Clearwater. He understood that the term originated with Sir Mark. I accept that seems to be the case.

[873] The plaintiff views this as a sinister concept, inimical to its interests. As I indicated in the introduction to this section, the inference that the plaintiff urges the Court to draw (from the mention of a "straw man") is that there was a plot whereby a hidden entity, a straw man, known to all of the other parties would purchase the mortgaged land, and if possible all the Weiti land. This would hide from GMHL that the real entity was one or other or all the defendants themselves. I do not draw that inference. In fact, I am quite clear that this was not the case for the following reasons.

[874] It quickly emerged the term was understood very differently, and its meaning was the subject of disagreement.

[875] Mr Paterson, Mr Williams' long-standing and obviously experienced lawyer, gave significant evidence with Mr Williams having waived any legal professional privilege. As I foreshadowed in the earlier credibility section of this judgment, he impressed me as careful, considered and thoughtful. He was accurate, and reliable in

his recollection and, in my assessment, was genuinely trying to tell the truth. I regard him as a credible witness.

[876] I accept Mr Paterson's view that it is quite wrong to say that the purpose of Lambton Quay during the mortgagee sale process, was not to obtain payment of its debt, but instead was to obtain the benefit of future development of the mortgaged land and, specifically, to take control of the development via a "straw man". In his view, throughout his involvement (which ended in about March 2020 when the Covid-19 lockdown began), it was clear to him that every party was acting "100 per cent" in its own best interests and was dealing with the other parties at arm's length. In his view, all other parties were independently advised, by people all of whom he knew to be very capable advisers. In other words, there was simply no collusion or grand plan to take control of all GMHL's property, by way of a "straw man". In cross-examination, Mr Paterson said he found the concept "kind of a bizarre term". He said, "what is anyone suggesting that is supposed to mean?" And he said he never heard or saw of any plan to "get back" at Mr Liu. I completely accept his evidence.

[877] For his part, Mr Williams was aware that the term "straw man" was used in the discussion of options and proposals to resolve the issues facing the development. Mr Williams said he had always "understood the term to be a proposition in a debate or negotiation, to be tested and pushed over". I accept Mr Williams' view that it was never his intention (or wish) that Lambton Quay would form a company to purchase the properties. And to his knowledge, it never did.

[878] Sir Mark candidly conceded that he looked at other options using his own contacts in the wider business community whereby a newco might be established to buy out the WDLP loan and, perhaps, the whole development. I conclude that it was in this sense he used the term straw man. He was also prepared, as time went on, to consider partially funding a new owner into the purchase of the mortgaged land if this would increase the chances of Lambton Quay's debt being repaid in full. Also, he said, "I was prepared to consider doing a deal with anyone that offered a better outcome than the negotiations with GMHL and WDLP had produced to date". He was quite clear he could not, and would not, tell Mr Williams or his son anything about

what he was exploring behind the scenes. But, in any case, he was clear that none of these options came to fruition in 2019 or 2020.

[879] Sir Mark was also quite clear, in his understanding, as was Mr Staples the company's lawyer, that Lambton Quay's status as mortgagee prevented it from purchasing the land at the mortgagee sale (except in certain circumstances). However, this did not necessarily exclude the possibility of another quite independent entity doing so, and he accepted that he sometimes referred to this idea as a "straw man" idea. He was genuinely considering a SPV (special purchase vehicle) as a possible solution to the problem of Lambton Quay's unpaid debts. Ultimately, the idea never went anywhere. He never set up a new SPV company to be the purchaser. And nor did any entity in which he had any interest, acquire the land at Lambton Quay's mortgagee sale.

[880] I accept Sir Mark's evidence. I also accept that neither he nor his companies are related (directly or indirectly) to any of Mr Williams' companies, including the second, third, and fourth defendant companies that Mr Williams established as vehicles for the eventual mortgagee sale and loan settlement. He was also clear that neither he nor Lambton Quay at any stage controlled the Weiti Bay development behind the scenes. And, indeed, as Sir Mark tellingly remarked, and which I entirely accept:

> Frankly, if I was going to embark upon such a straw man arrangement here, it would not have been with Evan Williams. I would have chosen someone I trusted more than him.

[881] This may not be easy for Mr Williams to hear, but it certainly has the ring of truth about it. I accept it.

[882] Mr Staples accepted that Sir Mark may have used the term straw man, but in his view, it is a bit of a red herring. He accepted that Sir Mark may have used the term about a potential transaction whereby he would fund another entity to "buy out" the mortgagee sale. But Mr Staples said the term always "intrigued" him and that "it had no significance" to him.

[883] For his part, Mr Bartlow used the term differently. For instance, he described the 6 September 2019 proposal (funding towards payment of critical creditors and costs to pursue GMHL for recovery of debt), as a "straw man" because "it was a rough and preliminary draft idea that was being floated to see whether it might or might not be developed further." Clearwater recognised that for a debt recovery process, GMHL might need, or be required, to sell all the Weiti land. If so, there might be an opportunity for Clearwater to fund an acquisition of all that land. However, at that stage, Clearwater struggled to understand Mr Williams' logic to pay unsecured creditors from new funds when there was an imminent financial collapse. And I am quite sure Mr Bartlow's use of the term was not in a sinister way to disadvantage GMHL.

[884] All these different uses of the term reflect the different perspectives and understandings of those involved. It confirms my view that there was no grand plot, subterfuge, or behind the scenes dealing to deprive GMHL of part, or all, of its land using some form of hidden (straw man) entity.

The "Shed 5 meeting"

[885] Much was made by the plaintiff of the so-called "Shed 5"[95] meeting in Wellington on 21 November 2019 between Clearwater; Sir Mark and his advisers; and Mr Williams and his son Asher. Indeed, as I understand the plaintiff's case, this meeting represented the high point, or at the least a very important point, in the evidence said to point towards a developing plot to deprive GMHL of it land. (This meeting took place after the mortgagee sale process had been completed which I discuss under the next heading. Because the plaintiff's case is that the meeting is part of the straw man "plot", I consider it now, although slightly out of chronological order).

[886] The parties had flown to Wellington to meet with Sir Mark and his wife. Over a reasonably short dinner, a lot of ideas were discussed to how Lambton Quay's debt could be taken out. Indeed, Sir Mark suggested $43 million, representing the unpaid mortgage could be paid by Clearwater in two years' time. That was flatly rejected,

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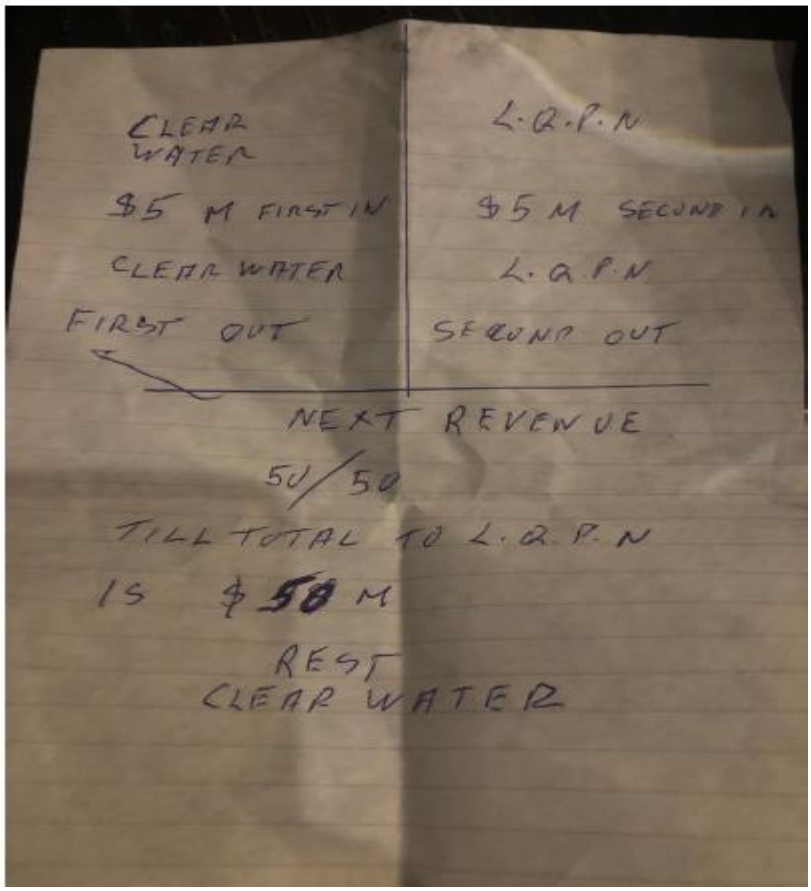
[95] Shed 5 is a well-known city waterfront restaurant on Wellington harbour.

with Clearwater making clear it would not pay "dollar-for-dollar" what Lambton Quay was owed.

[887] Another proposal emerged towards the end of the meeting, apparently initiated by Sir Mark, which he sketched out on a piece of paper. It was referred to thereafter as the "napkin offer". I include a photograph below:



[888] The suggestion, as it was explained in evidence, was that Clearwater would provide a $5 million loan, likely advanced to a new entity, and Lambton Quay would assign to that entity the debt owed by GMHL/WDLP. Clearwater would be responsible for the debt recovery process. Clearwater would have "first out" priority and first-ranking security over the debt owed by GMHL and WDLP. Lambton Quay would also provide a new $5 million with a "second out" priority. The $10 million lending would be used to progress development and funding enforcement steps against GMHL to recover the debt.

[889] After repayment of the $10 million of the investment, Clearwater would receive 50 per cent of any recovery thereafter and Lambton Quay would receive the other 50 per cent capped at $50 million. Clearwater would then receive all the remaining profit. Mr Bartlow expected that Lambton Quay would accept this proposal only if it was "very eager to walk away from the hassle of recovering the loan".

[890] This suggestion was reduced to a term sheet by Clearwater dated 26 November 2019.

[891] Not surprisingly, Mr Dickey devoted much cross-examination to this suggestion/proposal, especially as he saw it as the progenitor of the eventual (alleged) plan to unfairly deprive GMHL of all its land.

[892] Mr Staples was clear that Sir Mark's suggestion was off the cuff, and part of his constant brainstorming to extricate Lambton Quay from its difficult situation. Also, Mr Staples made the point that Sir Mark was not thinking from a legal position as Lambton Quay's role as first mortgagee and had not taken legal advice. In any case, he emphasised that the suggestion did not continue, and was put to one side. And from this time, I accept that Sir Mark said there was no future in dealing with Clearwater.

[893] It also took place when the mortgagee sale process had fruitlessly concluded—so it was part of the process when all options were being considered/suggested and put on the table.

[894] In an email to Mr Williams the day after the meeting, Sir Mark had no doubts that having Clearwater "fighting GMHL" had a better chance than Lambton Quay by itself. But, as he put it, he felt there was no upside to the suggestion, that there is nothing in it for Lambton Quay. He was wanting not only the $43 million principal but also some interest as well. He said, bluntly, the upside would have been he would have got some money, (above the $100,000 and then the $1.00 and the Weiti lots offered by Mr Liu) with Mr Liu getting nothing. I infer this was because of the way Mr Liu had previously treated him. Sir Mark's ongoing disrespect for Mr Liu and his $1.00 offer was abundantly clear. But the upside was not, as suggested by Mr Dickey, taking over the development at the expense of GMHL.

[895] Sir Mark also emphasised that, after this meeting, and quite separately to it, he also set up a SPV to perhaps purchase the mortgaged land. But nothing came of it. All this just shows the depth and intensity of discussions that were taking place with many options that were being considered.

[896] The plaintiff's submission is this meeting, its records and aftermath, show that the three parties were by then "in cahoots" to try to wrest away GMHL's land in a concerted, coordinated agreement. I reject that inference. After hearing all the witnesses, I am quite sure it was just one of many options that were being discussed to ensure payment of the debt. At most, it was an option focussing on "enforcement of the unpaid loan" rather than options to purchase GMHL's property.

[897] From this point on, Sir Mark saw no point in continuing negotiations with Clearwater.

Lambton Quay commences and undertakes mortgagee sale process

[898] Lambton Quay took advice from Bayleys Real Estate on the best way to list and market the secured properties. A written appraisal was provided. Lambton Quay accepted the recommendations.

[899] The principal Bayleys agents involved included Mr Gerald Rundle, who provided evidence. I accept his expertise as director of Corporate Projects and Development Land Sales and having been employed since 1997. He is clearly well qualified as a specialist in the marketing of significant properties and particular larger residential land transactions.

[900] Mr Rundle's appraisal came with a recommended marketing plan, including the methodology of sale, timeframes and a marketing strategy, the key components of which were:

(a) A five-week deadline private treaty campaign.

(b) Online advertising for both national and international buyers with print marketing in New Zealand. Signage and professional aerial

photography with sales "pushed" through Bayleys' extensive network of agents and other contacts.

(c) The already subdivided lots and Village 1 to be campaigned for sale simultaneously with the same deadline but to be marketed as separate offerings. Potential purchasers in respect of the remaining individual lots and Village 1 were likely quite different. Village 1 would most likely attract the attention of developers, whereas the individual lots would be more attractive to individual purchasers.

[901] I accept his evidence that the five-week deadline, in his experience, was best suited to these circumstances. The individual lots had been on the market for some time and there was a need to allow a sufficient period for engagement while also allowing time pressure to generate urgency. Any longer than this, and there would be a real risk in the market losing interest.

[902] I also accept his evidence rejecting any criticism that no, or no meaningful, international marketing was undertaken. Referrals through Bayleys' extensive database of agents involved contacting representatives of offshore investment parties. And online advertising was intended to, and would, capture both parties in New Zealand and international parties. For example, the mortgagee sale was heavily promoted online via the Juwai.com website and Hougarden.com website (the largest property portal in New Zealand targeting the Chinese-speaking market). Print advertisements were also placed in the NZ-Chinese Herald.

[903] Mr Rundle confirmed that a number of enquiries were fielded from overseas interested purchasers.

[904] I accept that Bayleys' advice was optimistic about the prices that might be achieved in the open market. I accept Sir Mark's evidence that he "genuinely believed at the time of the sale of the land would see the outstanding debts owed to Lambton Quay repaid in full".

[905] Bayleys campaign ran from 28 September 2019 through to the close of the private treaty date on 6 November 2019, which I understand to be 39 days—or five weeks and four days.

[906] Mr Williams offered to provide input into the mortgagee sale. He provided comments on the draft information memorandum. He was also involved in two other ways.

[907] First, Mr Williams made clear that, in his view, the description of the land being sold was misleading in that it described the total development and its surrounding area as comprising 860 hectares. This was factually correct. The concern was that not all that land was included in the mortgagee sale—which only related to the unsold Weiti Bay lots and Village 1. The advertisement was revised on 1 October as a result.

[908] Second, Mr Williams was contacted by *Stuff* about the mortgagee sale. He concluded, in the face of widespread rumours that Weiti Bay was insolvent, that the only way to minimise the market damage being inflicted by GMHL's actions was to describe the issue "as neutrally and accurately as I could"—as a difference in direction between one of the shareholders and the financiers. The 14 October 2019 article stated, "The sale was in order to resolve an issue related to the shareholding and land ownership, and was not a 'regular mortgagee sale'". Mr Williams said the landowner and the development company were separate. It went on to say that "Williams Land was the manager of the development company, Weiti Bay, and was assisting the lender with resolving issues with the ownership structure of the property".

[909] I can understand why Mr Williams did this. I accept his reasons for doing so.

[910] That said, Mr Williams' comments that the mortgagee sale was "not a regular mortgagee sale" surprised Mr Rundle. As far as he was concerned, this was definitely a regular mortgagee sale. In his efforts to help, Mr Williams obviously thought that the background circumstances meant this was not a regular mortgagee sale in the sense that the landowner and developer were two different entities, but it did cause some confusion. I consider that nothing turns on that.

[911] Despite suggestions from the plaintiff to the contrary, I do not regard what Mr Williams did, or the comments he made, as indicating he was actively assisting and involved in the process. His "assistance" was minimal and the interview with *Stuff* was well meaning. Nor does it constitute outside confirmation that Mr Williams and his companies were already involved in trying to achieve ownership of the land. In a general sense, when Mr Williams is quoted as saying, "It is essentially an issue about the future direction of the property and the development", he was correct.

[912] In Mr Rundle's view, those comments were certainly unhelpful in presenting the mortgaged land to market for sale. Mr Rundle let Sir Mark and Mr Staples know this.

[913] The preparation of an information memorandum is commonplace practice in large sales, and Bayleys did so here. It is normal that such an information memorandum be provided to potentially interested purchasers alongside access to an "online due diligence data room".

[914] Bayleys' records show the activity in the Weiti Bay data room recorded 2,542 entries involving 59 registered parties. The information memorandum was finalised on 8 October 2019, and was available for circulation from that time on. Mr Rundle noted that, at this stage, the process was still more than four weeks away from the close of private treaty and he did not see any timing problem in being able to circulate the information memorandum to potentially interested purchasers.

[915] Bayleys provided a first report to Lambton Quay on 8 October 2019. It recorded 42 registered interested parties at that relatively early point in time which was considered encouraging. On 9 October, the data room was released to the market—four weeks to the day until the close of the private treaty. I accept Mr Rundle's advice that, based on his experience, this was ample time for potentially interested purchasers to review its contents. Also, the data room is not "fixed and unchangeable". Relevant documents can be and were added. I accept this is not unusual.

[916] By 18 October, the second vendor report recorded that 59 parties had registered their interest. One of those interested parties was a lawyer acting for GMHL, which was not disclosed. The lawyer simply said, "he had a client who was overseas based and a potentially interested purchaser".

[917] On 30 October 2019, the third report was provided indicating an extensive database of 2,500 recipients had been directly contacted and 125 enquiries had been received from potentially interested purchasers.

[918] At the close of the deadline, there was a single $19 million offer for the Village 1 land made by Kvest Investment Partners Group Limited (Kvest). It was conditional upon satisfactory information after due diligence. There were also, as I understand it, six individual offers for individual lots or multiple lots ranging between $500,000 and $789,500. There were also offers of between $2.18 million and $2.26 million for Lot 300 which was the largest lot available and conveniently subdividable into four smaller lots.

[919] In Mr Rundle's view, Bayleys undertook a full and active marketing campaign. But he noted that the offers actually received on 6 November 2019 were more subdued than expected.

[920] Understandably, Lambton Quay was not pleased with the offers. They would come nowhere near repaying the outstanding debt owed in full.

[921] Lambton Quay requested that Bayleys contact all bidders on the basis they needed to revisit their offers before 14 November 2019. Only small increased offers were made, and Lambton Quay did not accept them.

[922] However, in relation to Kvest, Lambton Quay was prepared to make a counteroffer of $20 million.

[923] On 26 November 2019, Sir Mark met with the director of Kvest at Bayleys' offices and the parties generally agreed on a $21 million purchase price for Village 1, still conditional on due diligence, to be satisfied by 20 December 2019.

[924] Lambton Quay and Kvest continued to negotiate further without input from Bayleys.

[925] In summary, the conditional offer from Kvest was:

(a) purchase price $21 million;

(b) conditional upon due diligence being satisfied by an extended date of 17 January 2020;

(c) 10 per cent deposit to be paid when contract was unconditional; and

(d) settlement 19 June 2020.

[926] In the meantime, Bayleys continued to market the already subdivided lots. Bayleys recommended repricing and a new marketing plan starting in the second week of January 2020. Lambton Quay indicated that it was prepared to wait for more realistic prices to be achieved. The original pricing schedule continued.

[927] On around 20 December 2019, an indicative offer of $25 million for all the remaining subdivided lots was received but no formal offer ever eventuated.

[928] As to the Kvest offer, extensions were granted until 10 February 2020. At that date, Kvest confirmed it was unable to satisfy the due diligence clause and the Kvest deal ended. There was a potential backup offer on Village 1, proffered through Ray White Real Estate, but it did not eventuate.

[929] By 5 March 2020, the Bayleys agency agreement had expired. It was extended for a further three months. But Covid-19 then hit New Zealand. No further "in-person" viewings at Weiti Bay were possible. The agency agreement between Lambton Quay and Bayleys therefore came to an end on 26 April 2020.

[930] I accept Mr Rundle's evidence that there is no foundation to the view that the process Bayleys conducted from September 2019 onwards was nothing more than a sham. I accept his evidence when he says, "This is simply untrue. It was a genuine mortgagee sale process and Bayleys tried our very hardest to get the best prices we

could". Offers received on the individual lots when the private treaty closed were rejected by the mortgagee as the prices were too low. And, regrettably, the Kvest conditional offer in respect of Village 1 later fell over. Mr Rundle concluded those were the best offers actually able to be achieved on the open market at the time.

[931] During the time of Bayleys contractual involvement, I accept that agency did its conscientious and professional best to try to sell both the individual lots and Village 1. I accept that interest was "hot one minute" and then "disappeared off the radar the next." The stark reality was, despite holding open homes, Bayleys was unable to find any keen buyers.

Aftermath of the failed "advertised" mortgagee sale

[932] GMHL had complete visibility over the mortgagee sale process. Notably, one of its advisers (although his identity was apparently unknown to the defendants at the time) was even provided access into the data room with all the relevant documentation.

[933] Mr Williams was not surprised that Lambton Quay was unable to conclude the mortgagee sale. In his view, the $40 million hoped for was overly optimistic, given the intertwining of the Weiti Bay lots and Village 1 with Village 2 and the balance land. This was especially so, given that GMHL's consent was required for the ongoing development of Village 1. Mr Liu had made plain this would not be forthcoming. For example, in respect of the existing consents for 400 lots across Villages 1 and 2, the conditions of such consents, and compliance with the Auckland Unitary Plan precinct rules, required provision and completion of extensive amenities within the balance land (owned by GMHL), before any new titles could be issued. These included dedicating public reserves, construction of educational and recreational facilities, extensive walking and cycle tracks, public toilets, and extensive planting across substantial areas of GMHL's land. Without GMHL's consent and support, it was therefore impossible to complete any subdivision and issue new titles for the Village 1 lots. Similarly, any prospect of obtaining the necessary private plan change, and consents to increase the overall number of titles from 550 to 1,200, was impossible without GMHL's support.

[934] To repeat, Mr Williams' view was that due diligence by any third-party purchaser would quickly show the difficulty of developing and subdividing Village 1 without GMHL's support, which would substantially reduce the value of the mortgaged land.

[935] I accept that it was a matter of genuine regret for Sir Mark that the Kvest did not "go unconditional".

[936] Lambton Quay kept looking elsewhere. Sir Mark continued to contact businessmen and finance companies known to him who might help out Lambton Quay. The options included assistance by way of what Sir Mark continued to call a "straw man"—that is a separate independent entity independently formed to buy the land.

[937] Sir Mark confirms that he thought Nomura would make an offer on the subdivided lots and Village 1. It never eventuated. Sir Mark was contacted by a Nomura representative, with some form of offer that included a proposed loan for $20 million for Lambton Quay to buy the subdivided lots through another company at 16 per cent interest and a 50/50 share in the profits. The monetary figure, but not the structure, was attractive to Lambton Quay. Sir Mark tried to talk Nomura up to $24 million and to purchase the lots. On 13 January 2020, Nomura made clear the only basis upon which it was prepared to take an ownership position was on the basis that Lambton Quay lend it more than 100 per cent of the purchase price for the subdivided lots. But on the condition that Lambton Quay could not look to Nomura if sales of the subdivided lots failed to repay the debt owed in full. Sir Mark considered this offer would have put Lambton Quay in a worse position than it was already in, which is why it was rejected. There was never an unconditional offer of $24 million for the subdivided lots.

[938] Sir Mark had not "closed the door" to doing a deal with GMHL but inferred that GMHL was not interested.

[939] With there being no sales during the mortgagee sale process, the inference can be drawn, and I do draw it on the balance of probabilities, that with no purchasers, GMHL considered that its "strategy" was playing out, just as anticipated.

[940] After tenders closed, Mr Williams continued to put proposals to Clearwater, including his own proposed purchase financed by Clearwater. Mr Williams also wrote to GMHL/the Liu family advisers, to try and bring Mr Liu back to the table. Predictably, it was all to no avail.

[941] Sir Mark notes that Mr Williams kept pushing the Clearwater deal. Eventually, on 5 December 2019, Sir Mark and his wife wrote confirming that they were now "very reluctantly", prepared to take a "haircut" as part of achieving an exit for Lambton Quay. By way of counteroffer, Lambton Quay indicated it was prepared to agree for Clearwater to either:

(a) Purchase all the securities and mortgages for $38 million as an outright sale under the mortgagee sale; or

(b) Purchase the securities of the land under the mortgagee sale for Village 1 for $19 million. Lambton Quay to retain its securities over the subdivided lots.

[942] Sir Mark made this offer while noting that he was still very much focussed on the Kvest offer.

[943] On 30 January 2020, the Weiti Bay Residents' Association held its AGM. It was well attended by most of the parties in person. Mr Rice represented Mr Liu/GMHL who could not attend. The plaintiff regards this heated and well attended meeting as another important example of a conspiracy between the defendants to disadvantage GMHL. I accept that Mr Williams directly blamed GMHL and Mr Liu for the current problems, who, he said were rewriting history. Sir Mark made clear his current options including suing GMHL or, as Lambton Quay could not take control of the development directly, it could do so through another company. I see nothing sinister in the way of a conspiracy. GMHL was being branded the scapegoat—and Mr Williams and Sir Mark were articulating options for their individual benefit that were well known and previously discussed.

Valuations

[944] It is now necessary to consider the various valuations that were obtained prior to the mortgagee sale and after. An understanding of those valuations throws light on the discussions that took place about the offers made to Lambton Quay and the appropriateness of the eventual mortgagee sale price. I refer to what seem to me to be the most relevant valuations. The last set of valuations are retrospective, made about four years after the 12 June 2020 sale.

[945] Savills 7 December 2018 valuation was on an "as if complete market values (gross realisations) basis" for the unsold Weiti Bay lots and a market value direct comparison basis for Village 1:

(a) for the remaining (28) lots at Weiti Bay, $ 42.5 million; and

(b) for Village 1, $60.1 million

Totalling $102.6 million.

[946] The plaintiff maintains this is the benchmark valuation, against which to judge the fairness of the concluded mortgagee sale process. I disagree. The Weiti Bay lots were clearly valued on an open market basis. There was no distress element. Similarly, the Village 1 valuation was on an open market, with no distress element, and with all the 400 household units which were permitted across both Village 1 and Village 2, only placed on Village 1. The allocation of the 400 household units entirely to Village 1, was only practicably possible for so long as GMHL was willing to take all practical steps necessary to support and achieve such allocation. This was palpably not the case at the time of the mortgagee sale.

[947] Therefore, I accept that the assumptions underpinning this valuation were not valid in the mortgagee sales context of late 2019 and 2020.

[948] A further valuation was obtained for the property on 12 November 2019, from Savills, at Lambton Quay's request, arranged by Mr Williams. There were three types of valuations. First, a market valuation known as Adopted Market Value Gross Realisation (AMVGR). Second, a valuation of the individual lots and Village 1 taking

into account a forced or distressed sale—such as a mortgagee sale. And third, with all the lots and the land being sold in a single transaction.

Weiti Bay lots

Adopted Market Value Gross Realisation (AMVGR)	$39,100,000
Aggregate GR Forced Sale Estimate (FSE)	$22,913,000
Forced Sale Estimate in One Line	$13,970,000

Village 1

Adopted Market Value Gross Realisation	$29,020,000
Aggregate GR Forced Sale Estimate	$17,420,000
Forced Sale Estimate in One Line	$10,560,000

[949] Mr Williams' view was that the AMVGR values had little application for both Weiti Bay and Village 1. The Weiti Bay lot values were based on comparable market sales of individual lots that had not been in a distressed/forced sale context. These included previous sales of other Weiti Bay lots prior to the mortgagee sale process. The AMVGR for Village 1 was plainly based on the very shaky assumption that the necessary consents to enable subdivision of Village 1 from GMHL could be relied upon.

[950] In respect of the Weiti Bay Forced Sale Estimate in One Line, (the third valuation method) Mr Williams regards that as being the valuation method most applicable in this case, especially as that is exactly how the lots were eventually sold to the Williams' companies in June 2020. Equally, the Forced Sale Estimate in One Line for Village 1 was the most realistic as it assumed the serious potential risk that a purchaser might not obtain GMHL's support and, therefore, could not comply with the resource consent to enable release of titles.

[951] Mr Williams concluded that the 2019 valuations confirmed what he already knew. That is, GMHL's position in causing WDLP's default on its borrowing, leading to the mortgagee sale processes, and its withdrawal of support and hostility generally, had a devastating impact on the value of all the Weiti properties and on all parties to

the development project. I accept his conclusion that it was in everyone's best interests to do everything possible to save the project and preserve its value.

[952] The parties retained two valuation experts for trial. Their expertise was not disputed, and they were each impressive. They were helpfully able to provide some agreed evidence as to the relevant valuations as at 12 June 2020—the date of the mortgagee sale. The plaintiff retained Mr Smithies. Regrettably, in my view, he had only been instructed to provide a market valuation. On the other hand, Mr Colcord, the expert for the first to fourth defendants, had also been instructed to provide a forced sale price estimate. He was instructed to specify the appropriate discount that should be applied as a result of a forced sale.

[953] Their agreed valuation for the market value of the unsold Weti Bay lots was $23 million and for the complex Village 1 land was $22 million.

[954] As I have said, only Mr Colcord provided a forced sale valuation. In my view, for the reasons he set out, this valuation should be regarded as the more relevant. However, his valuation suffers from the disadvantage, as he concedes, of being retrospective—being made nearly four years after the eventual mortgagee sale.

[955] The concept of a forced sale is well recognised in the Australian and New Zealand Valuation Guidance paper. The valuation involves assessment of the probable price to be achieved in defined circumstances—most of which applied in this case. Mr Colcord also makes the important point that a forced sale is not a distinct basis of value. Due to a lack of comparable transactions, a form of "discount" to the valuation of the asset class on a market basis must be applied. He accepts the approach is "somewhat subjective". Also, there is the effect of Covid-19 to considered—which at the time meant that a market decline was predicted. However, with the benefit of hindsight, we know that the market rose significantly in 2021.

[956] Mr Colcord carried out a careful analysis, starting with the unsold Weiti Bay lots, where he started with a total gross realisation of $33.050 million. This was reduced to $22.244 million if "sold in one line"—that is, as a job lot. I note that figure is less than the $23 million compromise valuation agreed with Mr Smithies. It is to

that agreed figure that Mr Colcord's suggested forced sale discrete discounts of 20 per cent and then of 15 per cent could be applied. I accept his reasoning for applying those discounts. He reached a forced sale in one line value of $18.4 million and $19.55 million respectively.

[957] In respect of the Village 1 land, adopting a similar general approach, with cross checking as to his methods, he adopted a market value for Village 1 of $19 million. This, of course, was less than the compromise valuation agreed with Mr Smithies of $22 million. Applying a forced sale discount of 25 per cent and 30 per cent, the reasons for which I accept, to the compromise valuation, resulted in a forced sale estimate of $16.5 million and $15.4 million respectively.

[958] Mr Colcord's combined value, under a forced sale estimate therefore ranged between $33.8 million to $36.05 million. He notes that the land eventually sold for $35 million. Mr Colcord therefore concludes that the price recorded as having been paid as at 12 June "can be considered a good result given the complexities of the land and the uncertainty of the market due to Covid-19."

[959] Taking into account all the cross-examination, I am satisfied that Mr Colcord's very careful methodology and end figures are fundamentally sound. And I accept them.

Concluded mortgagee sale and its structure

[960] When the Kvest offer finally "fell over" on 10 February 2020, Mr Williams quickly contacted Clearwater and explained that the Williams/Clearwater financing project was the only existing live "deal". Mr Williams indicated that the Weiti Bay development was at a tipping point and requested Clearwater's support. Mr Williams had clearly been waiting anxiously on the fate of the Kvest deal, and as soon as it evaporated, he sprang into action making more last-ditch proposals. In the end, as it transpired, one was ultimately successful. This is how it happened.

[961] On 12 February 2020, Mr Williams provided a basic term sheet said to be for the acquisition of a 100 per cent of Lambton Quay's interest in the Weiti Bay development which Sir Mark signed on the 13 February. Later in the month, I accept

that Sir Mark learned that Clearwater was the funder behind the Williams' proposal. I might say this hardly speaks of a grand plan and supports my conclusion that the parties were always acting in their own interests.

[962] Following receipt of the term sheet between Lambton Quay and the Williams Group, Clearwater took steps to provide financing for a potential transaction.

[963] On 26 February, Clearwater received copies of the Savills valuation prepared for WDLP dated 12 November 2019. Those valuations outline the Village 1 "forced sale estimate without GMHL's consent" at $10.56 million and the Weiti Bay lots at "forced estimate as is in one line" at $13.97 million. The total amount for the combined assets was $24.53 million. Mr Bartlow's view was that the combined estimate of $24.53 million reflected the then current state of the assets prior to any negative valuation impact arising from the Covid-19 crisis.

[964] By March 2020, and probably much earlier, Mr Bartlow noted that Mr Williams had warned Clearwater that GMHL was litigious, and Clearwater had a heightened business awareness of the potential for litigation if they did not act prudently and fairly.

[965] In early March, Mr Bartlow and his boss, Mr Gupta, had discussions about the value of all the Weiti mortgaged land. At that stage, Clearwater understood that Lambton Quay had received offers of $43 million for the assets, comprising the conditional offer of $21 million for Village 1 (which fell through) and an apparent cash offer for the Weiti Bay lots of $22 million (that never eventuated).

[966] In Clearwater's opinion, the sale price of the mortgaged properties that it would support in any term sheet was clearly below $43 million for the so-called previous offers. Afterall, they were the total of previous offers (thought to have been received) which after due diligence could *not* be completed.

[967] Mr Bartlow and his boss discussed potential sale prices at "$25/35/43 million". Mr Bartlow was aware that his boss was not certain that the mortgagee sale price should be more than $25 million which would have been in line with the November

2019 Savills valuations. However, Mr Bartlow's view, was that Clearwater should support a sale price of up to $35 million. That price seemed fair and reasonable to Mr Bartlow. First, it was less than 20 per cent below the indicative interest Clearwater understood Lambton Quay had received in the unsuccessful mortgagee sale process. And second, it was over 40 per cent above the November 2019 Savills valuation of $24.53 million. Mr Bartlow also believed that a sale price of $35 million, rather than $25 million, would substantially reduce the risk of any form of challenge by GMHL.

[968] Clearwater then agreed it should support (in the term sheet) a sale price of $35 million, and not more, for the mortgaged properties. Moreover, Clearwater was only willing to disperse $20 million towards the acquisition price with the residual required as vendor finance due to Clearwater's view on the risks associated with the assets.

[969] Clearwater's assumptions behind the $35 million assessed value were communicated to Mr Williams. This included a $23.47 million purchase price for the Weiti Bay lots, which Clearwater understood to be in excess of the apparent cash offer that was previously made to Lambton Quay. Village 1 was $11.53 million which was an amount in excess of the November 2019 Savills valuation. Clearwater's view was that the Village 1 sale price should be significantly discounted given the planning challenges relating to GMHL's ownership of Village 2 and the balance land.

[970] I completely accept Clearwater's assessment as being reasonable from its perspective. I find that in no way was its view reached with the purpose of reducing the purchase price so as to inflate the residual debt owed by GMHL. I also find that price was not the result of a three-way plan to deprive GMHL of its land. Clearwater also saw the advantages in the residual debt that would be owed by WDLP and GMHL to Lambton Quay following the mortgagee sale, in terms of leverage, among other things, against GMHL. However, I find that awareness did not cause it in any way to unfairly or unreasonably reduce the sale price so as to increase the level of the residual debt.

[971] It is also necessary to note that in late March, Mr Williams emailed Mr Bartlow about what he called the "stabilised post-closing valuations" for both Weiti Bay and Village 1. He said that for the purpose of estimating a potential outcome in an

investment case model, he was considering using a value of about $34.66m for the 28 Weiti Bay lots, $5.7m for the 5 Weiti Bay lots without titles, and $21m for Village 1. He suggested a total of $69m. Not surprisingly he was taxed in cross-examination as to whether this reflected his true understanding of the value of the mortgaged land. He emphasised that he was not talking about the then current value of a distressed sale but what a stabilised value might be following a cash injection for development purposes. I accept his explanation. I discard this as being a relevant value in the analysis of the best obtainable price.

[972] On 10 March, what Sir Mark correctly described as a complicated term sheet from Clearwater was provided. Sir Mark required advice to fully understand what was going on and he tried unsuccessfully to negotiate more straightforward terms. As the term sheet and eventual agreement was being explained to me, I can only agree with Sir Mark.

[973] Ultimately, and at its simplest, Lambton Quay would be paid $20 million upfront for a sale of all the mortgaged land; and the residual debt securities it held would be assigned. The unpaid balance of its loans of $23 million (principal alone) would be repaid in up to five years' time. Lambton Quay's security would sit (in priority) behind Clearwater's first ranking security for its advances. There were no guarantees that Lambton Quay would actually be repaid, beyond the initial $20 million it received up front.

[974] I accept that Sir Mark did not like the deal, but he was influenced by the uncertainties of Covid-19. He accepted his wife's view and the advice of his close advisers that it was better to take what was actually on offer at the time, accepting that $20 million was still lot of money. I accept Sir Mark was concerned that there was no obvious "upside" for Lambton Quay. I also accept that he made a pragmatic decision to make best of the bad situation.

[975] What then followed was a series of negotiations resulting in a very complex financial arrangement supporting the basic agreement that Sir Mark outlined.

[976] In an already detailed laden judgment, it is impossible to fully set out the intricacies of the deal in full. I am quite satisfied it is what the parties negotiated, that it suited their individual needs, and was made with professional advice and sound judgement.

[977] One thing I am quite sure about is that it was not a deceitful or deceptive attempt to go behind GMHL to deliberately deprive it of its mortgaged land at an unreasonably reduced sale price.

[978] As Mr Bartlow explained, which I accept, the 9 March term sheet provided the essence of the final agreement as follows:

> (a) The borrower, [an unidentified "Holdco" at that stage] would purchase for $35 million the remaining Weiti Bay lots and Village 1.
>
> (b) The purchase price would be satisfied by $20 million from the borrower and vendor finance of $15 million from [Lambton Quay].
>
> (c) Clearwater Direct Lending would provide the borrower a senior facility with a $30 million limit, secured by (among other things) a first ranking mortgage over Weiti Bay and Village 1 and senior security over the Existing Loans. $20 million of the senior facility would be used to settle the acquisition of Weiti Bay and Village 1, with the balance to fund costs, interest, fees and expenses.
>
> (d) The Existing Loans, together with the $15 million of vendor finance, would be acquired at face value, with the acquisition of the debts financed by two loans from [Lambton Quay]. One of those loans would be a $23 million loan owed to [Lambton Quay] for up to five years and with no interest for the first three years (Tranche A Loan). The other loan (Tranche B Loan) would be sold to a Clearwater entity for $1 as part of the commercial agreement for Clearwater managing the ongoing enforcement of the Existing Loans. The Tranche A Loan would be repaid in priority to the Tranche B Loan.
>
> (e) The security structure contemplated that the Tranche A Loan would have mortgage security over both Village 1 and the Weiti Bay lots.

[979] In early May, AWDL and AWIL were incorporated as companies. A week later AWBDL was incorporated. AWDL and AWBDL were incorporated for the purpose of purchasing the mortgaged Weiti Bay and Village 1 priorities pursuant to the arrangement I have outlined. The companies were ultimately beneficiary-owned, through trust structures by Mr Williams' family members, but he had no beneficial interest himself.

[980] The arrangement was originally due to settle on 18 May 2020. However, the lawyers were unable to facilitate this. Sir Mark was angry and, indeed, I accept that he had to be restrained by his advisers from walking away from the deal. Further negotiations concluded with settlement to proceed on 12 June 2020.

[981] On 12 June 2020, there was $54,846,880.77 due and owing by WDLP and GMHL to Lambton Quay under the 2015 BNZ facility agreement (which had been previously novated to Lambton Quay) and the 2018 term loan agreement. Interest on such debt had grown substantially since Lambton Quay had issued its PLA notices in mid-2019. At the time of the PLA notices in July 2019:

(a) BNZ facility agreement debt stood at $12,866,070.31.

(b) The 2018 term loan agreement with Lambton Quay, with interest at 21 per cent per annum, stood at $33,679,824.

[982] In respect of the concluded mortgagee sale and associated agreements, its complexity arose because the overall "deal" was a combination of what was essentially three separate transactions that were inter-conditional upon simultaneous settlement.

[983] I set out the three contemporaneous transactions, as explained by Mr Bartlow. I also acknowledge Mr Broadmore's help in painstakingly explaining the transactions:

> *Mortgagee sale transaction*
>
> [88] First, there was a mortgagee sale of Village 1 and the Weiti Bay lots. This was relatively straightforward. The terms of the mortgagee sale were recorded in the Particulars and Conditions of Sale dated 12 June 2020**.** Under that agreement, Ara Weiti Development Limited (AWDL) acquired from [Lambton Quay] as mortgagee the 32 titles of the Weiti Land. This consisted of the 29 remaining Weiti Bay lots and two access lots together with Village 1. The purchase price was $35 million.
>
> [89] The other two contemporaneous transactions were financing transactions, namely senior debt financing from Clearwater Direct Lending and vendor financing. These were required because the $35 million mortgagee sale purchase price was funded by:
>
> (a) Senior debt financing from Clearwater Direct Lending, $20 million of which was applied towards the purchase price; and

(b) A $15 million vendor finance from [Lambton Quay], which was unsecured (Settlement Loan). The terms of the Settlement Loan are recorded in the Settlement Loan Agreement dated 12 June 2020.

Senior debt financing transaction

[90] The second transaction was the senior debt financing from Clearwater Direct Lending. This had some additional complexity because of the vendor financing element, and the initial requirement for $20 million of presales of Weiti Bay lots that had been amended to a second senior facility outside of the [Lambton Quay] security pool.

[91] As a result of this structure, contemporaneous with the mortgagee sale, AWDL sold to Ara Weiti Bay Development Limited (AWBDL**)** 28 lots of the Weiti Bay lots for $20 million. The net amount payable by AWBDL to AWDL was $16 million, after accounting for $4 million that AWDL was required to pay to AWBDL in consideration for AWBDL carrying out certain stabilisation works. AWDL continued to hold Village 1, Lot 300 and the two access lots. The sale and purchase agreement contained [a] call option … to enable AWBDL to purchase Lot 300 from AWDL for $2 million in the future, and remove it from [Lambton Quay]'s security pool.

[92] This structure also required two senior loan facilities—one for AWBDL secured over AWBDL's assets (which was not subject to [Lambton Quay]'s security) and one for AWDL secured over AWDL's assets (which was subject to [Lambton Quay]'s second ranking security). The $20 million of senior debt financing towards the mortgage sale purchase price was financed by:

(a) $16 million from an initial drawdown under the $25 million Senior Acquisition and Development Facility dated 12 June 2020 (AWBDL Facility) between Clearwater Direct Lending and AWBDL as borrower; and

(b) $4 million from an initial drawdown under the $10 million Senior Acquisition Facility dated 12 June 2020 (AWDL Facility) between Clearwater Direct Lending and AWDL as borrower.

Vendor financing transaction

[93] The third transaction was the vendor financing provided by [Lambton Quay], including the assignment by [Lambton Quay] of the Existing Loans. This was a bespoke financing that was structured to meet the commercial requirements of each party. Clearwater had several specific requirements for this part of the transaction, including management of the Existing Loans and a call option in connection with the Existing Loans.

[984] Following the application of the mortgagee sale proceeds of $35 million, as at 12 June 2020 there was a residual debt of $19,846,881.77 owed by WDLP/GMHL to Lambton Quay. Under the "loan sale" agreement, Lambton Quay assigned the existing loans to AWIL.

[985] As Mr Bartlow further explained, which I accept:

> [96] The consideration for the sale and assignment of the Settlement Loan and the Existing Loans was:
>
> (a) A $23 million loan from [Lambton Quay] as lender in favour of NZ1 Holdings as borrower (being the Tranche A Loan); and
>
> (b) A $12 million loan from [Lambton Quay] as lender in favour of NZ1 Holdings as borrower (being the Tranche B Loan).
>
> [97] Accordingly, NZ1 Holdings (the parent company of AWDL, AWBDL and AWIL) provided $35 million consideration to [Lambton Quay] (financed through the Tranche A and Tranche B loans) for [Lambton Quay]'s assignment of the approximately $20 million Existing Loans and $15 million Settlement Loan. This arrangement created two separate debts owed by NZ1 Holdings —the Tranche A Loan owed to [Lambton Quay] and the Tranche B Loan that would be assigned to Clearwater NZ1.
>
> [98] The Tranche B Loan was contemporaneously assigned to Clearwater NZ1 under the Separate Managed Account Deed between [Lambton Quay] and Clearwater NZ1. Under that Deed, as a performance incentive for Clearwater NZ1 based on performance of the Tranche A Loan, [Lambton Quay] assigned to Clearwater NZ1 the (subordinate) Tranche B Loan and security for $1. The Tranche B Loan provided an incentive for Clearwater NZ1 to recover value for [Lambton Quay] under the Tranche A Loan.

[986] I completely accept these transactions were not designed to obscure the consideration received by Lambton Quay. They were simply necessary for the agreed structure. In short, Lambton Quay sold the mortgaged properties for $35 million, receiving $20 million cash and the $15 million settlement loan. Lambton Quay assigned the settlement loan and the existing loans and received the $23 million Tranche A loan.

[987] Mr Bartlow said if he was required to summarise it at a higher level, he would say that, in essence, Lambton Quay received $20 million cash, $15 million of vendor finance from the sale of the mortgaged properties and $8 million of vendor finance from the sale of the existing loans. Lambton Quay's combined vendor finance was reflected in the Tranche A loan. Lambton Quay also received the Tranche B loan but that was simultaneously assigned to Clearwater/NZ1 for $1.00.

[988] There was no future potential upside for Lambton Quay, other than the potential recovery of the Tranche A loan. But even that would not enable Lambton Quay to receive all the amounts it had been owed by GMHL and WDLP. In addition,

the Tranche A loan was not repayable for up to five years and interest did not accrue for the first two years. Lambton Quay could not demand payment of any of the Tranche A loan or interest before Clearwater Direct Lending received its $10 million priority amount under the AWDL facility.

[989] Mr Bartlow's view, which I accept, is that these terms were unfavourable to Lambton Quay.

[990] As it happened, Sir Mark confirms that no interest was paid on Lambton Quay's $23 million when it fell due some years later. Later a new amended deal was negotiated in 2023, whereby Lambton Quay was paid a further $7.5 million by Clearwater and effectively ceded all priority to it.

[991] The $27.5 million paid by Clearwater is all that Lambton Quay has ever been repaid out of the $43 million principal of its unpaid loans.

[992] Again, Sir Mark emphasised there was and is no upside to Lambton Quay in the Williams/Clearwater deal. But, quite simply, it was the best that could be arranged at the time. I accept his evidence on that point.

[993] Sir Mark understands that theoretically, at least, there is still the potential for a further $5 million to be repaid to Lambton Quay out of the amended June 2020 transaction. Frankly, he emphasised, he does not expect Lambton Quay ever to be repaid. And even if it was, Lambton Quay would still have suffered a huge loss of the loan that it advanced.

[994] For the sake of completeness, I also note that Clearwater understood that to settle the various transactions, it would need to pay $20 million but would not immediately have the benefit of registered mortgages. It was agreed that none of the transactions described previously would occur until the relevant e-dealing and mortgage securities had been registered.

[995] I also record that in terms of Clearwater's heightened awareness of litigation risk, as I have previously discussed, its evidence was that it did not know of any basis for GMHL to challenge the mortgagee sale. As will emerge shortly in this judgment, I agree with them.

[996] I accept Mr Bartlow's emphatic denial of any allegations that either of the two Clearwater companies took their mortgages with knowledge of any breaches by Lambton Quay of its duties when selling the Weiti Bay lots in Village 1.

[997] From Mr Bartlow's perspective, Lambton Quay was trying to recover as much of its outstanding debt as was possible and negotiated the best deal that it could. Mr Bartlow does not believe that Lambton Quay had any other purpose for the mortgagee sale. To the extent that it might have, Mr Bartlow is clearly unaware of it. In his assessment, the only benefit to Lambton Quay is the partial recovery of its debt. In his view, Lambton Quay could not achieve a better return than the offer from the Williams Group, financed by Clearwater.

[998] Mr Bartlow also confirms that, as a result of the renegotiated agreement and partial settlement of the Tranche A loan, Lambton Quay received a further immediate payment of $7.5 million. He confirmed that Lambton Quay could recover a further $5 million. Lambton Quay's total recovery might be, but could be no more than, $32.5 million.

[999] I have endeavoured to set all these matters out as clearly as possible. As complicated as they are, I see no basis for any conclusion that they were entered into in breach of Lambton Quay's duties as mortgagee, as a means of unfairly and unlawfully depriving GMHL of its mortgaged land and perhaps its remaining land, and providing an upside. All that Lambton Quay received was a reduced payment of the amount owed to it.

[1000] The Williams companies now have an opportunity to conclude the development at least of the unsold Weiti Bay lots and Village 1. And, Clearwater, theoretically, stands to benefit from the completed development of the Weiti Bay project through the full repayment of all its loans.

[1001] In my view, each party received what they wanted after negotiation and for each of them it was the best deal that could be obtained in all the circumstances. I cannot help observe that the biggest loser in all of this was GMHL. Its strategy, deliberately adopted, backfired on it with disastrous consequences.

Key factual findings about the mortgagee sale

[1002] I make the point that the previous findings are based on my very positive credibility findings in respect of Sir Mark, his legal adviser Mr Staples, Mr Williams, his lawyer Mr Paterson, and Mr Bartlow. Each in their own way was impressive and utterly believable.

[1003] They were each subjected to extensive, searching and expert cross-examination by Mr Dickey. In fact, I record that he could not have done more to advance GMHL's case in this respect. Given that GMHL's case depended upon the discovered documents and what emerged in cross-examination, and on what concessions defence witnesses made (because GMHL was not calling its own evidence on the issues other than the expert valuer), this is not surprising. But, in my assessment, the defence witnesses were not shaken in their evidence.

[1004] In this third cause of action, I also emphasise there were enormous advantages in seeing and hearing the witnesses. I could point to many examples including Mr Paterson's and Mr Staples' careful and considered answers and concessions they were prepared to make; and Mr Bartlow's efficient, precise, and internally consistent answers which were compelling and persuasively delivered. In respect of Sir Mark, there is one example that sticks in my mind. At one stage, when giving evidence, he was in tears in the face of the enormity of the allegations being suggested against him and his company. Having observed him, I am quite sure this was not the reaction of a guilty man—or one who had been found out. Far from it. It was the reaction of a man profoundly upset and baffled as to why his reputation was being attacked and why he was facing untrue allegations.

[1005] Some key factual findings emerge from the previous discussions:

(a) There was no plan, plot or conspiracy between Lambton Quay and Mr Williams, and Clearwater, to deprive GMHL of all its land or steal it behind GMHL's back. The defendants were not in cahoots with each other. This allegation is at the heart of GMHL's case. There may be aspects of evidence (sometimes taken out of context and/or suggestions never acted upon) which might support such a suspicion, but I am quite sure there is no foundation to the allegation.

(b) Specifically, I reject the submission that Lambton Quay, rather than acting to recover the secured amount, entered into the arrangements for improper collateral purposes, seeking to take control of the development, participate in the development upside, and/or take enforcement steps against GMHL with a view to purchasing Village 2 and the balance land.

(c) Lambton Quay's preference was always to negotiate a commercial solution. A mortgagee sale was the last resort.

(d) Lambton Quay did not use a "straw man" or SPV to purchase the mortgaged land to hide the true owner from GMHL. It had no interest in the companies that did purchase that land (as discussed under the headings "*Straw man*" and "*Shed 5 meeting*", previously).

(e) Lambton Quay did not deliberately attempt to sell the land at undervalue, and nor did any of the other defendants assist in such alleged attempts.

(f) The mortgagee sale price was not artificially distorted downwards. $35 million was a reasonable price for the land. There was no "understanding" or "concealed agreement" that the real price of the mortgaged land was $43 million.

(g) Mr Williams did not act as Lambton Quay's "agent" or an "insider" aiding and abetting the company and Sir Mark. Nor did he assist, as alleged, in manipulating (downwards) the mortgagee sale price.

(h) Clearwater (nor Mr Williams) did not cynically calculate how far the price could be distorted downwards to elevate the residual debt as against the litigation risk of doing so. The residual debt arrangements were not designed to obscure the true consideration for the mortgaged land.

(i) All the defendants, in substance, acted in good faith.

[1006] With those findings in mind, I now turn to specifically analyse the plaintiff's claims.

Mortgagee's statutory and equitable duties generally

[1007] A mortgagee owes a mortgagor a duty of reasonable care to obtain the best price reasonably obtainable. Such duty arises under s 176(1) of the Property Law Act 2007 (PLA), which provides:

> **176 Duty of mortgagee exercising power of sale**
>
> (1) A mortgagee who exercises a power to sell mortgaged property, including exercise of the power through the Registrar under section 187, or through a court under section 200, owes a duty of reasonable care to the following persons to obtain the best price reasonably obtainable as at the time of sale:
>
> (a) the current mortgagor:
>
> …
>
> (2) A mortgagee who exercises a power to sell mortgaged property may not become the purchaser of the mortgaged property except in accordance with section 196 or an order of a court made under section 200.

[1008] Parallel to its s 176(1) duty, the mortgagee owes an equitable duty of good faith towards the mortgagor.[96] Mr Dickey submits that the mortgagee's equitable duty encompasses, but is wider than, s 176(1). In particular, the mortgagee's power of sale must be exercised for the predominant purpose of obtaining repayment of its debt and

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96 *Whitford Properties Ltd (in liq) v Bruce* [2017] NZHC 625 at [72].

not for some other purpose: "[t]he ultimate question is whether a mortgagee has acted primarily for the purpose of recovering its debt".[97]

[1009] In most cases, the s 176 statutory duty of care will be the more onerous obligation on a mortgagee.[98] I accept however that in this case, because of the nature of the allegations being made, the alleged breaches of the equitable duty take on important significance.

[1010] The plaintiff's submissions tended to deal with the two duties at the same time, given there is some overlap between them. All the defendants' counsel structured their submissions by addressing the two duties separately in the context of the claims made in the second amended statement of claim. That is the approach I will take. In so doing, I mean no disrespect to the plaintiff's approach.

[1011] Before I deal with alleged breaches of each duty, I address some preliminary issues.

Preliminary issues

Default notices all properly served

[1012] It is common ground that by the time the mortgagee sale process commenced, WDLP and GMHL were in default of their repayment obligations under the terms of both the initial Lambton Quay loan and the, by now, assigned BNZ loan.

[1013] Nor is there an issue regarding compliance with the various notice requirements under s 119 of the PLA and the third quadripartite deed itself.

Onus of proof reversed?

[1014] Ordinarily, the mortgagor bears the burden of proof to show that the mortgagee breached its duty under s 176(1) of the PLA. However, the burden shifts to the mortgagee if the property in question was sold to a related party.

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97 *Coltard v Lepionka & Co Investments Ltd* [2016] NZCA 102, [2016] 3 NZLR 36 at [65].
98 *Apple Fields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 (CA) at [47].

[1015] The plaintiff seems to confine the reversal of onus submission to the s 176(1) duty. But Mr Chisholm, for the first four defendants, seemed content to accept in this case that there would be no reason in principle why that burden would not also shift in terms of the parallel equitable duties. In my view, it would add unnecessary complexity not to take that approach, when, as here, simultaneous breaches of each duty are strenuously advanced by the mortgagor.

[1016] It is important to emphasise that there is no general prohibition on a mortgagee selling to a related party. This is now well established in the cases.[99] Indeed, Mr Paterson and Mr Staples, who are both highly experienced commercial lawyers, gave evidence that sales by mortgagees to related parties were both common place and entirely lawful, subject to the following qualifications.

[1017] If a mortgagee does sell to a related party, its conduct will be closely scrutinised. The mortgagee in such cases bears the onus of satisfying the Court it has complied with its duties.[100] Greater scrutiny is required because of the risk of the mortgagee disposing of the property at an "undervalue" to the advantage of the related company. The usual assumption—that a mortgagee risking a shortfall will seek to maximise the sale price—may not apply in the case of a related party.

[1018] I accept Mr Chisholm's submission that, while the mortgagee does not necessarily require an equity interest in the purchaser to shift the onus, the relationship must give rise to a genuine conflict between the mortgagee's interests as mortgagee and its interests in the purchaser.

[1019] In its opening, GMHL alleged that Lambton Quay retained an interest in the purchase and entities although, at that stage, did not specify the nature of this alleged interest. It is now clear that GMHL's position is that by providing vendor finance, Lambton Quay retained a commercial interest in the ongoing development, placing a burden on Lambton Quay to justify that transaction.

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99 See for example *Apple Fields Ltd v Damesh Holdings Ltd*, above n 98, and *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 (PC).

100 *AFI Management Pty Limited v Lepionka & Company Investments Ltd* [2017] NZHC 3116, at [285(i)] and *Tse Kwong Lam v Wong Chit Sen*, above n 99.

[1020] GMHL's case is that Lambton Quay *contemplated* the purchase of the land via a company it controlled. It is alleged that Lambton Quay *contemplated* outright ownership via a "straw man" prior to, during, and after the Bayleys' marketing campaign. It is also alleged that Sir Mark incorporated an SPV for that purpose (although nothing came of it). Indeed, Mr Williams accepts that he was, at one stage, working on a SPV/"straw man" proposal for Lambton Quay.

[1021] These proposals included discussions of possible transfer to a Mr Reeves, the sole director and shareholder of Valhalla Holdings Ltd, incorporated in November 2019, and said to be a straw man. I have not previously mentioned this company. This, the plaintiffs say, was designed to give Sir Mark the possible opportunity to own the lots through another company.

[1022] As I have already set out, in some detail, all these were possibilities that I accept were contemplated. But they amounted to nothing, and no such transaction ever took place. All parties contemplated many options. In this respect, I would be very reluctant to hold that the burden of proof would shift simply by virtue only of a mortgagee's "thoughts" or "contemplations"—none of which were ever actioned.

[1023] Mr Dickey relied on *Australia and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd.*[101] In the circumstances of that case, the High Court of Australia considered it appropriate that the burden of proof sat with the mortgagee. Indeed, the mortgagee conceded that point at the prior trial. Mr Dickey drew my attention to the following comments, submitting they constituted support for his argument that thinking about and planning a possible sale to a related party is sufficient, in and of itself, to reverse the onus:[102]

> A further factor leading to that conclusion is that the case cannot be described as an ordinary case of a mortgagee exercising his power of sale to recover his principal and outstanding interest. At the very least the *possibility* of an auction sale and a purchase by another company controlled by the Halls [the natural persons behind mortgagee and purchaser] was in mind… It does not…matter whether it was a "plan" or a "proposal", whether it was "final" or "tentative", or whether it was "a contingency plan" or a "firm decision".

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101 *Australia and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1978) 139 CLR 195.

102 At 228 (emphasis added).

[1024] That was the only excerpt to which I was referred. With respect, *Bangadilly* is not authority for that proposition. The quoted extract begins with the words "A further factor leading to that conclusion". In *Bangadilly* the primary factor reversing the onus was that the mortgagee and purchaser were related parties. Indeed, before making the comments highlighted by Mr Dickey the Court listed, on my count, eight factors that rendered the mortgagee sale far from independent. It would be hard to imagine a more unfair sale. The "further factor" referred to simply bolstered that already reached conclusion. But, in any case, the facts in *Bangadilly* went light years beyond what has occurred in this case.

[1025] In *Bangadilly*, the directors of the purchaser company (Mr and Mrs Hall) had used another company, of which they were directors, to acquire the first mortgage over the property. That company subsequently conducted a mortgagee sale. The (at least) eight factors that made the sale quite unfair were as follows:[103]

> The deciding minds were those of Mr and Mrs Hall and of no one else. They were the only directors of the mortgagee (Halco Products); they were the only directors of the purchaser Bangadilly Pastoral Co. They fixed the reserve; they, with their agent Pritchard, were the only bidders, and they fixed the maximum price which the purchaser was prepared to pay. As controllers of the vendor, they knew that a prospective purchaser was prepared to pay $303,000, and as controllers of the purchaser they knew the reserve. In such a situation it seems to me that a purchase at or close to the reserve cannot be an independent bargain.

[1026] So, the Judge's concern in the passage relied on by the plaintiff was that it appeared that Mr and Mrs Hall, from the moment they set out to acquire the first mortgage, had been intending to use that position to sell to themselves at a subsequent mortgagee sale. And, crucially, the Hall's went through on their contemplated plan in that case. That is a far cry from what occurred in this case. In my view, it is certainly not authority for the proposition that considering selling to a related entity (without then following through on that plan) is enough to reverse the onus. And, as I say, the mortgagee conceded the reversal of onus.

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[103] At 227.

[1027] In *Agio Trustees,*[104] the mortgagee sold the land to the principal of the real estate agency that previously marketed the property. In that case, no equity interest on the mortgagee's part in the purchaser's entity was required to shift the burden. But that is a quite different case from here.

[1028] I also accept that Mr Williams, whose related entities acquired the mortgaged land, at times described himself as "working for" Sir Mark and working to find a favourable outcome for Lambton Quay. But that was his own self-styled role. It was his attempt to persuade Sir Mark to trust him and to ingratiate himself to his trust. In no sense can those comments constitute creating some form of agency. In any case, Sir Mark made clear he had little confidence and trust in Mr Williams. There is absolutely no evidence that Sir Mark appointed Mr Williams as his agent.

[1029] Also, on 17 May, Mr Williams emailed Sir Mark seeking to extend the settlement date for completion of the mortgagee sale. Amongst other things, Mr Williams said, "I regard it as a matter of personal honour to return that $43m to you. I promise you that I will go to work every day to get your balance $23M." Again, that is an expression of moral duty, not the creation of a "related interest" sufficient to displace the onus.

[1030] Neither in my view does the case of *Whitford Properties (in liq) v Bruce*[105] assist GMHL. There, the mortgagee and the purchaser were indirectly tied together by a deed. There was a documented legal relationship, and a clear personal benefit to the mortgagee, which created a clear conflict of interest when it came to selling the land as mortgagee. This is simply not the case here.

[1031] In my view, the evidence clearly establishes that Lambton Quay did not and does not have any interest in the Ara Weiti companies, beyond any ordinary debtor/creditor relationship. And Lambton Quay nor any of its principals or associates had or has any shareholding or ownership interest in those companies. Neither does Lambton Quay stand to gain any share of any profit that might, or might not, ultimately

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[104] *Agio Trustees Company Ltd v Hart Contributory Mortgages Nominee Company Ltd* (2001) 4 NZ ConvC 193,480 (HC).

[105] *Whitford Properties Ltd (in liq) v Bruce,* above n 96.

be achieved out of the development once debts are repaid. I note, having loaned a total of $43 million in principal, Lambton Quay has recovered only $27.5 million of that debt, and stands to recover, at most $32.5 million.

[1032] In my view, the key issue is whether there was a genuine conflict between Lambton Quay's duties as mortgagee and any interests or connection it had in or to the purchaser. Here, there was no such conflict. Lambton Quay had no interest in or connection to the purchasing companies.

[1033] Lambton Quay's decision to finance part of the purchase price, which was plainly motivated by its desire to recover as much of the secured debt as possible, is a more difficult issue.

[1034] The starting point is that the provision of vendor finance does not by itself create an interest which displaces the onus. This analysis is consistent with the authorities which confirm there is nothing illegitimate about a mortgagee financing part (or even all) of the purchase price.[106]

[1035] However, this case is not just simple vendor (mortgagee) financing. Here, the financing would presumably enable the purchasing companies to finish developing the planned subdivision. That means Lambton Quay is reliant on the purchasing companies being able to stay solvent and to eventually pay back that debt in order for Lambton Quay to get its full $35 million. In these circumstances, the success of those companies in developing the land and generating revenue through which they might be able to pay back the vendor finance is at least somewhat tied to the quantity of the residual debt through which AWIL can exercise leverage over GMHL. An outside observer might conclude that the relevance of the residual debt, and the temptation to inflate it, might create a possible conflict, justifying reversing the burden of proof. The point, in the abstract, is not without difficulty.

[1036] Here, what is crucial is my findings that the residual debt was not artificially and unfairly inflated. The debt arose appropriately as a result of a reasonable price being paid.

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106 See for example *Almona Pty Ltd v Parklea Corporation Pty Ltd* [2021] NSWCA 171 at [306].

[1037] If I had to decide the point, I would hold that the relevant principle is not engaged, and the onus remains with GMHL throughout to establish the alleged breaches of mortgagee duties.

[1038] In any case, I am not sure that in this case it makes any difference. GMHL is alleging the breaches, but it is not calling any substantive evidence itself, other than a valuer who has reached an agreed position with the defendants' valuer. The point is, the plaintiff is analysing the defendants' evidence and scrutinising it carefully. In a practical, but I accept not a legal, sense it is the defendants, particularly Lambton Quay, who are effectively having to establish their compliance with their relevant duties.

[1039] Most importantly of all, as I now set out, even if I am wrong that the onus does not shift to Lambton Quay, in my view, Lambton Quay has clearly established well beyond the balance of probabilities, that it complied with its mortgagee obligations.

Breach of s 176 of PLA?

Preliminary point: three separate but related transactions—but only one attracts mortgagee's duties

[1040] There is an important preliminary point to address. This arises because while there were three separate, but related, transactions that were finalised in June 2020, not all of the three carried with them the same legal implications. It will be remembered that I accepted Mr Bartlow's evidence, as also helpfully explained by Mr Broadmore, that those three transactions were:

(a) the mortgagee sale by Lambton Quay to AWDL of the mortgaged land for $35 million;

(b) the senior debt financing transaction under which Clearwater loaned $20 million towards the agreed purchase price of $35 million; and

(c) the vendor financing transaction, including assignment, by Lambton Quay to the fourth defendant, of the residual debt owed to it by GMHL.

[1041] Mr Gordon emphasises that the s 176 duty, on its own terms, applies to a mortgagee *who exercises a power to sell mortgaged property*. To put the point simply, Mr Gordon emphasises that it is only the first of the three separate, but related, transactions which can possibly attract mortgagee's duties. The sale of the residual debt owned by Lambton Quay does not. Lambton Quay's assignment of the residual debt that remained owing to it by GMHL was simply its commercial decision on the sale and purchase of an asset—that is a debt belonging to it. It was not a power of sale of land. Parties transacting the sale and purchase of assets are entitled to reach as good, bad, or indifferent a bargain as they wish.

[1042] So far as it goes, in respect of the breach of the statutory duties, I accept that the focus must be on the sale of the mortgaged land, rather than the related transactions. This is because I am quite satisfied that the related transactions were not designed to obscure the true mortgagee sale price.

Law: s 176 is an extremely well litigated statutory provision

[1043] There are a great many authorities to guide the Court's decision-making. There is little point in rehearsing them all.

[1044] It is sufficient that I emphasise the following principles.

[1045] First, the duty on a mortgagee under s 176 is not a duty *to obtain* the best price reasonably attainable at the time of sale. There is no duty to actually achieve any particular price, rather an obligation *to take reasonable care to obtain* the best price reasonably attainable at the time of sale.[107] The statutory duty is one of reasonable care, and the Court's enquiries are focussed on the sale process itself.

[1046] Second, as set out in *Taylor v Westpac Banking Corp,*[108] the exercise of a power of sale by a secured lender is not, of itself, inherently unreasonable or oppressive. I add that the exercise of a s 176 power of sale will almost always be prejudicial to a mortgagor. Provided the relevant duties are complied with, the mortgagor can have no complaint.

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107 *Long v ANZ Bank New Zealand Limited* [2012] NZCA 132 at [21].
108 *Taylor v Westpac Banking Corp* (1996) 7 TCLR 177 (CA).

[1047] Third, it is well settled that a mortgagee's duty of care does not qualify the mortgagee's right to decide, in its own interests, if and/or when to sell the mortgaged property. A mortgagee is entitled to make its own commercial decision about whether, and if so, at what time, to sell the mortgaged property. Nor is it obliged to expend further monies, (as it might be said could have been done in this case), in order to improve or further the mortgaged land before undertaking such a sale.[109]

[1048] There seem to be four commonly cited authorities which, themselves, summarise other leading authorities. They are: *Harts Contributory Mortgages Nominee Co Ltd v Bryers,*[110] *Public Trust v Ottow,*[111] *Southland Building Society v Austin*[112] and *Westpac New Zealand Ltd v Lamb.*[113]

[1049] In *Ottow*, Asher J emphasised:[114]

> [17] When a mortgagee does exercise the power of sale, that power of sale must be exercised in accordance with s 176. … Given the wide-ranging complaints of Mr Ottow concerning the sale, it must be observed that a mortgagee is "not a trustee of the power of sale of the mortgagor". It can be noted that:
>
> (a) A mortgagee has no duty at any time to exercise the powers of sale or possession. In default of any provision to the contrary in the mortgage, the power of sale is for the benefit of the mortgagee, who can sell at any time in accordance with the mortgagee's convenience.
>
> (b) The mortgagee's duty of care is to take reasonable care to obtain the best price reasonably obtainable at the time of sale.
>
> (c) It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained.
>
> (d) A mortgagee is under no obligation to improve the property or increase its value.
>
> (e) A mortgagee sale for a price less than the current market value assessed by valuers does not, of itself, establish a breach of duty, although a large discrepancy may indicate a failure to take reasonable care.
>
> (f) A mortgagee does not have any general duty to maintain properties prior to sale.

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109 *China & South Sea Bank Ltd v Tan* [1990] 1 AC 536 (PC) at 545; and *Apple Fields Ltd v Damesh Holdings Ltd*, above n 98, at [49].

110 *Harts Contributory Mortgages Nominee Co Ltd v Bryers* HC Auckland CP403-IM/00, 19 December 2001.

111 *Public Trust v Ottow* (2009) 10 NZCPR 879 (HC).

112 *Southland Building Society v Austin* [2012] NZHC 497.

113 *Westpac New Zealand Ltd v Lamb* [2012] NZHC 319.

114 (citations omitted).

(g) Following the service of a Property Law Act notice there is no duty on a mortgagee to keep a guarantor informed of sales activities.

(h) The mortgagee is not entitled to sell in a hasty way at a knock-down price sufficient to pay the debt, which because of the speed of sale leads to a lower price than could otherwise be obtained.

(i) Proper care must be taken to expose the property to the market and to obtain the best price reasonably obtainable.…

[31] The following steps indicate that a mortgagee has made reasonable efforts to obtain the best reasonably obtainable price:

(a) The appointment of a reputable real estate agent to market the property.

(b) Obtaining a valuation report from an experienced valuer as a guide to what could reasonably be expected for the property.

(c) Marketing over a reasonably long period of time.

(d) An extensive advertising and promotional campaign.

(e) A properly conducted auction.

(f) A sale price that, given all the circumstances, can be reconciled with expert opinion as to value.

[1050] Referring to *Ottow,* and developing those principles, Wylie J explained in *Westpac*:[115]

[34] I hesitate to supplement [Asher J's] careful analysis, but would suggest as follows:

(a) The statutory obligation is not to obtain the best price reasonably obtainable, but to take reasonable care to obtain the best price reasonably obtainable.

(b) A property is only worth what somebody is prepared to pay for it at the time of sale.

(c) Valuations lose much of their significance if reasonable care is taken, there has been a properly advertised and conducted auction, and the property has been sold at auction *or by negotiation after the auction.*

(d) If reasonable care is taken, it does not necessarily follow that the best price reasonably obtainable will, in fact, be achieved.

(e) What constitutes reasonable care will always turn on the facts of the case. The steps taken by the mortgagee in fulfilling the statutory duty have to be looked at in the round.

(f) In considering the reasonableness of the care taken, *the courts should be slow to second-guess the actions of a mortgagee acting on apparently sound professional advice*.

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115 (footnotes omitted and emphases added).

[1051] I also accept, in terms of the plaintiff's argument, the relevance of the following from *Southland Building Society v Austin*:[116]

> …
>
> 5. When deciding whether reasonable steps have been taken by the mortgagee to obtain the best price, the steps taken by the mortgagee and those acting for it must be looked at in the round. The issue is a commercial one to be viewed in practical commercial terms.
>
> 6, Where the security is substantial, or specialised property is involved, it will usually be necessary for the mortgagee to obtain and act upon specialised advice as to the method of sale. Appointing a competent agent to sell does not discharge the mortgagee's duties, but since its duty is ultimately only one of reasonable care, putting the matter in the hands of a competent agent will usually go a long way towards discharging the mortgagee's duties.
>
> 7. In the normal course, the proposed sale will need to be advertised with adequate description of the property's attributes and within reason while wanting to attract all possible purchasers. In some cases this will need to extend to both general and specialist publications.
>
> 8. There is no obligation to postpone the sale in the hope of obtaining a better price later. Nor is there an obligation to break up the assets to sell in a piecemeal manner, if this can only be carried out over a substantial period or at a risk of loss.
>
> 9. When assets are sold by tender or auction, *a reasonable period must usually be allowed* for purchasers to inspect the property and arrange finance before submitting bids.
>
> …
>
> [31] Evidence proving these steps go towards showing compliance with the duty under s 176. However, a warning must be given. *While mortgagees such as banks, building societies, finance companies and similar lenders may follow these steps as a matter of routine, it is still necessary to check whether these steps are appropriate in the particular circumstances of the case.*

GMHL's pleaded complaints/flaws regarding the mortgagee sale process

[1052] As best as I can ascertain, GMHL's claim particularises six flaws where it is said Lambton Quay failed to exercise reasonable care to obtain the best price reasonably attainable at the time of sale. I deal with them all.

[1053] But before I address them, I record that I agree with Mr Gordon that it is striking that GMHL called no evidence of its own going to the public sale process that was undertaken. I accept his submission that GMHL has proceeded with this course of action based on the valuation evidence of its expert witness, Mr Smithies, who was

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[116] *Southland Building Society v Austin*, above n 112, at [29] and [31] (emphases added by plaintiff).

not instructed by GMHL to provide a forced sale valuation. I accept that GMHL was hoping to "back fill" the absence of any positive evidence to support its case with whatever concessions it might extract during cross-examination by reference to the discoverable documents.

[1054] In that context, I have already indicated that I accept the credibility of all the defendants' witnesses, including Mr Williams, Sir Mark, his legal adviser Mr Staples, and Mr Bartlow. In my view, they have painted a consistent and convincing description of a genuine mortgagee sale which is far from the "charade" suggested by Mr Dickey. In my view, all the witnesses have been unshaken in their evidence that this was an "arms-length" commercial deal during the bargaining for which all parties were clearly looking out for their own interests.

[1055] As I turn to the alleged failures in the mortgagee sale process, said to be "limited and inadequate steps to sell the 2018 mortgaged Weiti land on the open market", I conclude that none of the complaints withstand scrutiny.

[1056] The first pleaded allegation is that:

> No proper timeframe was allowed for the marketing of the 2018 Weiti mortgaged land and the 27 working day marketing period was unusually and unreasonably short for a development of the scale and complexity of Village 1.

[1057] The plaintiff contends that the Bayleys' campaign was too short. It also argues that the window to prepare its campaign was too short. In this respect, the plaintiff referred to *Tse Kwong Lam*[117] where it was said, amongst other things, that the reader of the first advertisement in that case had just 15 days in which to make detailed enquiries and investigations. That was a different case, and the timeframe was to conclude with an auction—which was not the case here. Here, there was up to 40 days.

[1058] I accept Mr Gordon's submission that there are two complete answers to this allegation—factual and legal.

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117 *Tse Kwong Lam v Wong Chit Sen,* above n 99.

[1059] First, as to the facts, they are set out previously under the heading *Lambton Quay commences and undertakes mortgagee sale process.* The reality is that a minimum five-week marketing campaign was recommended to Lambton Quay by Bayleys. Bayleys is, unquestionably, a reputable real estate agent company. Mr Rundle's rationale was that such period was long enough to engage with potential purchasers but short enough to generate a sense of urgency. He said "any longer than this then, in my experience, there is less sense of urgency, and a real risk that the market may lose interest in the offering". He regarded the time period as perfectly normal and took into account the fact that the Weiti Bay lots had already been for sale for many months, if not years, and were known to the wider marketplace. I completely accept his evidence.

[1060] As the cases make clear, it is not for this Court to "second-guess" the actions of a mortgagee acting on apparently sound, professional advice. Here, Bayleys were experienced in selling large scale developments and were already familiar with the Weiti Bay development.

[1061] There is also the legal reality that there are many authorities on the timing point, all apparently to the same effect that four weeks is a normal timeframe to conduct a mortgagee sale campaign. Mr Gordon provided four relevant examples.[118]

[1062] In each, land subject to sizeable property developments was sold at mortgagee sale after advertising periods of between three and six weeks. In every case, there was no breach of the duty of reasonable care by the mortgagee. Notably, *Hart v ANZ National Bank* involved a subdivision development comprising a little over 970 hectares of rural land. A six-week advertising period was held to be reasonable and the Judge noted that authorities have held four to six weeks to be an acceptable period.[119]

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118 *Mitchell v Trustees Executors Ltd* [2011] NZCA 519, (2011) 12 NZCPR 659; *Hart v ANZ National Bank Ltd* [2012] NZHC 2839; *Price v Killarney Capital Ltd* [2023] NZHC 2753, (2023) 24 NZCPR 574; and *Hannon v Senior Trust Capital Ltd* [2023] NZHC 16.

119 At [50(e)].

[1063] In my view, four weeks would have been a perfectly adequate timeframe for this mortgagee sale. Here, the actual time period, from Saturday, 28 September 2019 until Wednesday, 6 November 2019, was little under six weeks.

[1064] In my view, there can be no sensible suggestion, in following this orthodox timeframe as it was advised to do, that Lambton Quay breached its duty of reasonable care.

[1065] The second pleaded allegation is that:

> No, or no meaningful, international marketing was undertaken.

[1066] I have previously set out what steps were taken with international marketing and on what basis. Mr Rundle's evidence is clear that the sales campaign included Bayleys' agents contacting offshore contacts, and representatives of offshore investment parties, with the information regarding land at Weiti Bay which was up for mortgagee sale. This direct marketing was in addition to website and print advertisements targeted to both the domestic and international markets. As Mr Gordon submitted "the proof of the pudding is in the eating". A number of enquiries were fielded during the course of the mortgagee sale campaign from interested overseas purchasers or parties located in New Zealand representing overseas purchasers and/or investors.

[1067] I accept that the Bayleys' Vendor Report did not specifically itemise which of the more than 2,500 contacts were overseas parties—but in light of the clear evidence, there was overseas interest, I see nothing in this point.

[1068] The third pleaded allegation is that:

> From 6 November 2019 until 12 June 2020, Lambton Quay took no meaningful steps to continue to market the mortgaged land to "arms-length" third parties and Lambton Quay made no further efforts to attract interest from third party bidders.

[1069] In my view, this allegation fails for want of evidence.

[1070] Lambton Quay instructed Bayleys to continue to negotiate with tenderers to obtain better prices, up to 14 November 2019, which was ultimately unsuccessful. Lambton Quay did withdraw the lots thereafter from that process, but it did so for the purpose of Bayleys continuing to market them to the open market for sale by way of negotiation, in the hope of achieving better offers than the deadline private treaty had achieved.

[1071] This was part of the subsequent marketing plan advised to Lambton Quay by Bayleys. There was to be shorter and lower intensity marketing pre-Christmas 2019 before a fuller renewed campaign began from the second week in January 2020. This included renewed advertising and marketing and renewed conduct of open homes at Weiti Bay itself. There was some subsequent interest but at low price levels.

[1072] As for Village 1, Lambton Quay had duly sought a valuation report from Savills. Advance notice of the valuation was provided on 29 November 2019 and the finalised report on 4 December 2019 with the lower "forced sale" values as previously described.

[1073] During the post 6 November 2019 time period, Lambton Quay and Bayleys continued to negotiate with the interested purchaser of Village 1 land—Kvest. Those efforts led to an agreement for sale and purchase, albeit conditional, executed on 17 December 2019 for a negotiated increased purchase price of $21 million. The due diligence condition was a long one and extended twice. It was Kvest that cancelled the contract on 10 February 2020, being reluctant to proceed. Its lawyers advised it had been unable to satisfy the due diligence condition.

[1074] GMHL's case is that Lambton Quay bought the potential agreement with Kvest to a premature end and did not seriously consider it. I take the opposite view. I am quite sure that Lambton Quay would have readily completed that sale if it had become unconditional. Sir Mark emphasised that would have been a step in the right direction.

[1075] It was only then that the Williams' interests, funded by Clearwater, emerged as the most likely purchaser of the secured land at mortgagee sale. Indeed, by this point of time, they were the only remaining interested purchaser. The price that they were

willing to pay was well in excess of all other offers that had been received and the "forced sale" valuations of the land assessed by Savills.

[1076] GMHL's allegation that no further sales efforts were made after 6 November 2019 is without foundation. The opposite is the case. There was no breach of Lambton Quay's duty of reasonable care in this respect also.

[1077] Finally, in assessing the mortgagee's performance, it is highly relevant that the global Covid-19 pandemic emerged in late January/February 2020 and the whole country was placed in lockdown on 21 March 2020. No visits to the mortgaged land were permitted. Lambton Quay's agreement in principle to the Williams/Clearwater offer was reached during this time.

[1078] The fourth pleaded allegation is that:

> In or about February 2020, Lambton Quay rejected an unconditional offer of $22 million for the individual lots at Weiti Bay.

[1079] I am not sure that this allegation was developed in evidence or in submissions. I accept that no such unconditional purchase offer ever existed. If it had, I am sure Lambton Quay, as Mr Gordon put it, "would have grabbed it with both hands".

[1080] The fifth pleaded allegation is that:

> The mortgagee sale advertisement misdescribed the sections for sale.

[1081] GMHL argues that this advertising error compromised the already too short marketing campaign. It will be remembered that Mr Williams was concerned that the original advertisement might be seen as referring to the Weiti property overall, carrying with it the wrong implication that all of the Weiti Bay development was up for mortgagee sale including Village 2 and the balance land. I infer Mr Williams was concerned that any looseness in the wording, might open the mortgagee sale up for attack. This was a technical concern. I am not at all sure that the wording was, in substance, misleading. Bayleys did not believe that the advertisement carried a false implication. And it cannot be said, on its face, to have had the ability to restrict interest in the marketplace.

[1082] Regardless of the potential implications in the original wording, the advertisement was promptly amended as from 1 October 2019. Bayleys were never labouring under any misapprehension of what land was being sold—and no potential buyer would have been misled in any discussions with Bayleys.

[1083] I regard this alleged failure as being of the "pin-pricking" kind. Mr Gordon says it is a "red herring". It does not even come close to suggesting a breach by Lambton Quay of its duty of reasonable care. I agree.

[1084] The sixth pleaded allegation is that:

> No due diligence packs had been prepared at the time the property was advertised.

[1085] It will be remembered that while the first advertisements were published on 28 September 2019, the information memorandum was completed on 8 October. That was more than four weeks before the close of private treaty on 6 November.

[1086] Bayley's due diligence data room was open as from 9 October. Already there were many relevant documents available and adding the information memorandum was part of a typically developing process. As I understand it, the memorandum was available for circulation to potential purchasers who had expressed interest prior to 9 November.

[1087] In these circumstances, I regard this complaint as little different from the previous complaint. It does not constitute a failure to take reasonable care.

Best price reasonably obtainable at the time of sale?

[1088] GMHL claims that, throughout the mortgagee sale process, the value of the Weiti land was approximately $102.6 million and that Lambton Quay and Mr Williams knew this. I am not sure that even the plaintiff still persists with that allegation.

[1089] I have already concluded that the 7 December 2018 valuation simply cannot form a benchmark by which to judge the adequacy of the concluded mortgagee sale price. Under the heading *Valuations,* previously, I set out why that must be the case,

including that the lots were valued on an open market basis with no distress element, with Village 1 holding all the permitted 400 household units (which in reality were to extend across Village 1 and Village 2). The assumptions underpinning this valuation were simply not valid during the mortgagee sale process.

[1090] The claim then refers to the 12 November 2019 Savills valuation of the mortgaged land. Using an adopted market value gross realisation approach, this valuation totalled $68.12m for the mortgaged land. The plaintiff has claimed that valuation did not provide a reliable guide to the value of the mortgaged land—that is, the value was much higher. I agree that the open market valuation was not a reliable guide. But that is because the realistic value, which must be assessed in the circumstances of sale, was actually much less. The agreed evidence of the two opposing experts would rather suggest that the 2019 valuation was unreliably high. It will be remembered that their agreed valuations were $23 million for the unsold Weiti Bay lots and $22 million for Village 1.

[1091] As I have already remarked, GMHL's valuation expert was not asked for a "forced sale" valuation, something I must say is perplexing. I am, therefore, reliant on Mr Colcord's careful analysis where, for the reasons that I have already accepted, he adopts a total "forced sale" estimate range between $33.8 million and $36.5 million.

[1092] I unhesitatingly accept his conclusion that the eventual $35 million sale price on 12 June can be considered a good result given the complexities of the land and the uncertainty of the market due to Covid-19.

[1093] Nevertheless, GMHL submits that the $35 million sale price cannot be reconciled with expert opinion as to value, after taking into account of the circumstances. I disagree.

[1094] Mr Dickey also submits that Weiti Bay and Village 1 "were not being sold in circumstances where 'forced sale' values apply." In my view, they most certainly were. I do not find his arguments on this point at all persuasive. Of course, "forced sale" estimates are an art, not a science, and are fact specific. But I do not accept his submission that Mr Colcord's assessment was made in a vacuum "devoid of the

pertinent facts as existed here." In fact, Mr Colcord's assessment was careful, and I accept it. It is all very well to emphasise that the post-Covid market was, in fact, much stronger than expected. But, I accept that there was room for much uncertainty during, and immediately following the first Covid-19 lockdown. This was when the final sale price was negotiated and completed. I accept Mr Colcord's evidence which on this point was effectively unchallenged by other experts.

[1095] GMHL argues that there is a shortfall of $10m between the valuers' agreed market value (of $45 million) and the $35 million June 2020 sale price. But that argument rests on "market value" being the correct value to use—whereas I consider the forced sale estimate is clearly the more appropriate. I am quite satisfied that a "forced sale" discount is appropriate. And in my view, usually that must be, but I accept may not always be, the correct approach in these types of circumstances.

[1096] As I discuss later, despite the complicated mechanics of the overall sale and related transactions, I am quite certain that the true and genuine sale price for the mortgaged land was $35 million.

[1097] The deal that Lambton Quay ultimately accepted was undoubtedly, and by some margin, the best it could reasonably obtain.

[1098] Frankly, this conclusion is fatal to any suggestion that Lambton Quay breached its duty to take reasonable steps. Generally, if a property, as here, has been exposed to the market under adequate marketing campaigns, then the highest (unconditional) offer received will invariably be the best price reasonably obtainable at the time. Lambton Quay did not receive any offers, that even in aggregate came anywhere close to the $35 million ultimately received.

[1099] I also reject any suggestion that because the sale price was the result of extended negotiation between Lambton Quay, Mr Williams and Clearwater that it somehow was at the expense of GMHL's interest as mortgagor.

[1100] In my view, far from being "at the expense of GMHL's interests as mortgagor", the negotiations led to an overall price well in excess of any of the offers submitted by, during, or following the mortgagee sale process. To some extent that is because, as I assess it, Clearwater and Mr Bartlow in particular, were under a misapprehension that an unconditional offer had been made for $22 million for the unsold Weiti lots. If the true picture had been known to Clearwater, it may not have been prepared to finance even the $35m offer.

[1101] Also, the logic of GMHL's submission is that if Lambton Quay had accepted an offer from someone other than the Ara Weiti companies, then a "forced sale" discount would be appropriate, suggesting the properties could legitimately be sold for a combined sum as little as $25m.

[1102] When assessing the best price reasonably obtainable, it is also necessary to take into account that the general planning consents that had been obtained for the increased development for up to 1,200 lots certainly required the ongoing support of GMHL to be finalised. Moreover, a prospective developer could not complete a profitable development without the ongoing cooperation and support of GMHL and that would have been obvious to any competent development completing due diligence.

[1103] It is, therefore, unsurprising that Lambton Quay did not receive any viable offers for Village 1 beyond Kvest's $21m conditional offer which was terminated following due diligence.

[1104] I also specifically reject any suggestion that the purchase price was manipulated to "appear" lower than the true consideration provided to Lambton Quay. Neither was the true consideration obscured to artificially increase the residual debt. The purchase price was the highest price Clearwater was willing to finance, leaving a residual debt of close to $20 million following the mortgagee sale.

[1105] I agree with Mr Chisholm that GMHL conflates two separate transactions that each entail purchases of separate property owned by separate parties and purchased by separate parties.

(a) First, the $35 million purchase price was used to purchase GMHL's property, namely the land over which it had granted mortgage security. Thus, the $35 million reduced WDLP/GMHL's $55 million debt to about $20 million. The purchaser was AWDL—who later transferred some of the titles to AWBDL. In respect of this sale the s 176 obligations were complied with.

(b) The additional $8 million was used to purchase Lambton Quay's property, namely a contractual right to enforce the residual debt that remained following the mortgagee sale. Thus the $8 million did not reduce GMHL's debt; it simply purchased from Lambton Quay the rights to enforce that debt. The purchaser, or more correctly, the assignee, was AWIL.

[1106] I also accept that there was nothing improper or unusual about Lambton Quay accepting a substantial discount from the face value of the residual debt. Indeed, GMHL's own strategy which predicated on the assumption that Lambton Quay would agree to a "haircut". I accept that Lambton Quay's was a rational commercial decision, reflecting the risks, costs, and the delays inherent in pursuing in GMHL for the full $20 million.

[1107] Finally, Mr Dickey provided his assessment of the loss suffered by GMHL. He suggested the shortfall could be calculated in three ways and was at least:

(a) $8 million, using the $43 million value Lambton Quay, Mr Dickey submits, it actually received. I have already indicated this is not the correct analysis and the amount Lambton Quay obtained through the sale was $35 million; or

(b) $10 million using the valuers' agreed market value. I have already indicated that the market value was not the appropriate measure. It is the stressed sale discount value that is appropriate; or

(c) $20 million using the $63 million amount that Mr Williams had concluded was the true value of the deal reflecting the true consideration given. Neither do I accept that amount. As previously noted, at one stage Mr Williams discussed with Clearwater that the "stabilised value of the properties" (after further capital injection from Clearwater) might be as high as $63 million. But that is quite different from the distressed nature of the properties (and their value) at the time of the mortgagee sale.

[1108] With respect, I do not accept the analysis of the losses suffered by GMHL through the mortgagee sale. On the evidence which I accept, there were no losses—at least for the purpose of calculating damages.

Conclusion as to s 176 failings

[1109] The statutory obligation is not to obtain the best price reasonably obtainable but to take reasonable care to do so. That price might not necessarily be obtained.[120] Here, however, in my assessment, Lambton Quay has actually obtained the best price reasonably obtainable.

[1110] I agree, despite GMHL's submissions to the contrary, that overall it is hard to see how Lambton Quay and Bayleys could have been more diligent. Their actions were entirely consistent with a mortgagee's obligation to adequately market the properties on the open market for sale.

[1111] None of GMHL's alleged process failings withstand scrutiny. They certainly do not disturb the clear evidence given to the Court of an orthodox public and genuine mortgagee sale process. Lambton Quay plainly exercised reasonable care so as to obtain the best price reasonably obtainable at the time of sale. Indeed, it was in its own interest to do so. Indeed, they actually obtained the best price that could ever have been reached.

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120 See *Long v ANZ National Bank Ltd*, above n 107, at [21].

Equitable duty to act in good faith for the predominant purpose of obtaining repayment of the secured debt

[1112] This is an equitable duty specifically pleaded by GMHL. It is accepted by all counsel that a mortgagee must exercise its power of sale in good faith and for the predominant purpose of obtaining its debt. Put another way, the power should not be used for some other purpose entirely unrelated to the reason the mortgage was taken in the first place. This equitable principle was given authoritative expression by the Privy Council in *Downsview Nominees Ltd v First City Corp Ltd*:[121]

> Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower.

[1113] A very useful summary of a mortgagee's equitable duty is provided by Fitzgerald J in the *Lepionka* case.[122] Given their relevance, I set them out in full, as follows:[123]

> (a) At common law, when exercising its power of sale, a mortgagee owed both an equitable duty of good faith and a duty to take reasonable precautions to obtain the true market value of the mortgaged property.
>
> (b) The equitable duty requires a mortgagee to exercise its powers for the purpose of obtaining repayment of the secured amount and, while entitled to give priority to its own interests, to act fairly and equitably to those having an interest in the equity of redemption.
>
> (c) Purity of purpose is not required. But when exercising its power of sale, a purpose flowing from interests outside the functions of a mortgagee must not prevail.
>
> (d) The duty of care owed by a mortgagee is now encapsulated within a mortgagee's statutory duty under s 176 of the Act to obtain the best price reasonably obtainable as at the time of sale.
>
> (e) The equitable and statutory duties co-exist, but in most cases, the statutory duty will be the more onerous obligation.
>
> (f) The statutory duty will not be breached without proof of damage on the part of the mortgagor.

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121 *Downsview Nominees Ltd v First City Corp Ltd* [1993] 1 NZLR 513 (PC) at 522.

122 *AFI Management Pty Ltd v Lepionka & Company Investment Ltd*, above n 100, at [289].

123 (emphases added and footnotes omitted).

(g) The duties apply from the time a mortgagee decides to sell. A mortgagee is accordingly free to determine when to exercise its power of sale and "it matters not that the moment may be unpropitious and that by waiting a higher price could have been obtained." Similarly, a mortgagee is "not … bound to postpone the sale in the hope of obtaining a better price".

(h) The point at which compliance with the duty will be assessed is as at the time of sale.

(i) While there is no prohibition on a mortgagee selling to a related party, a mortgagee's conduct in doing so will be closely scrutinized.142 The mortgagee in such cases bears the onus of satisfying the court that it has complied with its duties. Nevertheless, compliance with the duty must be judged "in a realistic way having regard to all the circumstances in which the power of sale came to be exercised" and "having regard to relevant commercial dynamics".

(j) In considering whether the best price reasonably obtainable has been achieved, any other benefits flowing to the mortgagor from the mortgagee's sale are to be taken into account.

(k) If a mortgagee fails to persuade the court that reasonable precautions were taken and the interested party bought at the best price reasonably obtainable, the remedy will, as a general rule, be to set aside the sale. However, if such a remedy would be inequitable, the remedy will be confined to damages. When considering damages, a court will need to consider the likely outcome had the duties been complied with.

(l) At least in the case of a breach of the equitable duty, and where there is more than one party with an interest in the equity of redemption, damages payable to the mortgagor may not be the appropriate remedy. Rather, the appropriate remedy may be an order that the mortgagee account to those interested in the equity of redemption on the basis of what "should have been received". A similar approach was discussed (with approval) by the Privy Council in Downsview Nominees, in circumstances where a first mortgagee's breach results in damage to the second mortgagee (and any subsequent encumbrancers and the mortgagor). In those circumstances, any damages award will be ordered to be "taken into the accounts" of the first mortgagee.

(m) Finally, an assessment of the likely outcome had the mortgagee complied with its duties, and in particular, consideration of alternative offers made for the mortgaged property, is not to be analysed by reference to a loss of chance or opportunity in relation to those offers. Rather, the court must form a view, based on the evidence before it, of what the best price reasonably obtainable at the time of sale was.

[1114] Mr Dickey also relied on *Whitford Properties*[124] to the effect that "equity looks to intent rather than to form" and that "equity will give effect to the substance of a transaction rather than merely to its surface appearance". I accept this is the case.

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124 *Whitford Properties Ltd (in liq) v Bruce,* above n 96, at [80].

[1115] GMHL's case is that Lambton Quay plainly and obviously had a predominant purpose of securing collateral advantages for itself out of the mortgagee sale. In my view, the evidence adduced at trial, as I have summarised previously, comes nowhere near establishing this. Lambton Quay quite simply wanted its money back. It explored numerous opportunities. In the end, it cannot now be criticised for undertaking a mortgagee sale process for this obvious and entirely proper purpose.

[1116] GMHL's allegation of "bad faith" rests principally upon the so-called "straw man" discussions and the "Shed 5" discussion and subsequent negotiations.

[1117] I have carefully analysed these claims previously and clearly concluded that there is no basis for any suggestion of collusion between the parties. Nor did the defendants manipulate the process to GMHL's disadvantage. Moreover, there is no basis for suggesting Lambton Quay obtained an "upside" through the whole process or that it was (an extreme claim) somehow claiming its inheritance. The claim alleges the predominant purpose was to prejudice GMHL and obtain access to GMHL's additional unmortgaged land, so it could derive a profit from funding or investing in further development.

[1118] It may well be that Lambton Quay was unhappy and, indeed, angry with Mr Liu and felt insulted by him. For instance, it was suggested in submissions that, during the mortgagee sale process, Lambton Quay was already negotiating with Mr Williams and/or Clearwater on how to structure a deal. This is alleged to have included the "straw man" proposal since at least September 2019. It is also submitted, quite contrary to the evidence, that Lambton Quay eventually refused to extend Kvest's due diligence conditions in February 2020 and swiftly entered into an exclusivity arrangement with Mr Williams. In fact, Kvest could not continue and communicated a termination of the agreement to Mr Staples on the basis that it could not satisfy the due diligence condition. Mr Williams/Clearwater was then the only option that was realistically left.

[1119] Neither do I accept that there were "blatant price fixing" negotiations with Lambton Quay and Mr Williams/Clearwater which resulted in a larger residual debt created against GMHL. As I have already concluded, the $35 million was the best

obtainable price in all the circumstances. Mr Bartlow's evidence in this respect is compelling.

[1120] The other details for my conclusion are already set out and there is no need to repeat them.

[1121] Suffice to say, I do not accept that the ultimate mortgagee sale transactions "were not a genuine independent bargain" in that, as pleaded, they were intended to:

(a) Permit Lambton Quay to continue to receive "upside" from the development (I do not see what "upside" Lambton Quay obtained other than a loss on enforcing its loan);

(b) Obscure the true consideration received by Lambton Quay under the mortgagee sale transactions. (I hold the true consideration for the sale was $35 million as I have already held);

(c) Fulfil the collateral purpose of liquidating GMHL. (It might be inferred that GMHLs liquidity or otherwise may have been part of the discussions/machinations that I have already discussed, this was not the intention behind the mortgagee sale. It was not Lambton Quay's intention and I reject the claim); or

(d) Enable Lambton Quay to obtain an equity interest in the mortgagee sale proceeds. This is said to be via the AWIL call option or otherwise. (Again, I do not accept this was the purpose of the mortgagee sale. It was an element of its structuring which the parties were free to enter into. I also reject the claim that Clearwater, Mr Williams, AWDL, AWBDL and AWIL had knowledge of Lambton Quay's breaches as set out. That is because there were no breaches).

Breach of equitable duty – failure of mortgagee to reach an independent "arm's-length" agreement on the mortgagee sale

[1122] This is the fourth pleaded duty that the plaintiff says is imposed on Lambton Quay. I am not at all sure that there is an equitable duty to reach an "arm's-length"

agreement on a mortgagee sale. I received no detailed submissions on that point. For instance, it is quite lawful for a related party to purchase mortgaged land, provided this is clearly disclosed and it will, as discussed, result in a reverse onus.

[1123] Here, the allegation seems to be a repeat, in different ways of the allegation of lack of good faith and the use of the mortgagee sale for illegitimate purposes—all of which I just discussed in the immediately preceding section. Perhaps it is a subset of the duty just discussed but it is not pleaded in that way. At any rate, (assuming it exists) I am quite satisfied that it was not breached.

[1124] For the sake of completeness, there is also a pleading that "The ultimate Mortgagee Sale Transactions were negotiated between Mr Williams, Clearwater and Lambton Quay, without GMHL's knowledge, between August or October 2019 and 12 June 2020." Although the pleaded start time of that period is a little early, that seems to be no more than a statement of uncontested fact. I am not sure that in the circumstances of this case, especially given Mr Liu/GMHL's chosen stance, that there was any duty to inform GMHL of the negotiations.[125] It may be within the confines of the WDLP agreement there was some sort of duty (outside fiduciary duties which were excluded in the agreement) that the general partner had a duty of disclosure to the limited partners, but that was not pleaded and is obviously not part of this case.

[1125] It was also pleaded under this heading that, from about 6 November, Lambton Quay's sole or predominant purpose was to obtain control of GMHL's land via a mortgagee sale. I have already rejected that assertion. It is not established by the facts as I find them to be.

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[125] I was not referred to any New Zealand case which stood for that proposition. However, as long ago as 1977, the Court in *Bangadilly*, above n 101, at 229 that "It is no doubt true that a mortgagee is not normally under a specific obligation to inform the mortgagor, or those known to be claiming under him, of a proposed sale, apart from the general notice of default which is a pre-requisite to exercise of the power of sale." The Court went on to observe that, "nonetheless, failure to inform the mortgagor may be a relevant factor in establishing bona fides." But in this case, I would not consider the failure to be remotely relevant, given that GMHL had set its face against cooperation with WDLP, had breached the relevant quadripartite deed, and was employing a strategy based on its assessment that there would be no purchasers.

[1126] It may also be that this "duty" of failing to reach an arm's-length sale is said to arise out of Lambton Quay's conduct with the other defendants. This is certainly Mr Liu's view. For instance, his evidence was consistent that Lambton Quay is just a "partner in crime at this moment" with Mr Williams and his companies, and that his land was stolen from him. These grave allegations are quite without foundation, and I reject them. I accept the defendants' evidence to the contrary.

Breach of equitable duty acted in a manner which unfairly prejudiced or wilfully and recklessly sacrificed the interests of the mortgagor, GMHL

[1127] This was effectively the second alleged breach of an equitable duty. In fact, it was not particularised in the statement of claim, nor directly addressed in the terms pleaded. I take it, that it is subsumed in the submissions made in respect of the other allegedly breached equitable duties.

[1128] Mr Chisholm submits that its challenge to the mortgagee sale, not pleaded until two years after the transactions, should be seen for what it is: "the latest iteration of its cynical and destructive ploy to 'outlast everyone'".

A problem with the equity of redemption?

[1129] There is one further allegation about the mortgagee sale which arose for the first time in evidence. Thus there can be no criticism of it not being pleaded. In fairness to the plaintiff, I need to discuss it, and do so as follows.

[1130] A mortgagor is entitled to redeem mortgaged land "at any time before it has been sold, under a power of sale, by the mortgagee … under a power of sale." This is known as the "equity of redemption" and is set out in s 97 of the PLA.

[1131] In this respect, Mr Dickey points to the "remarkable" fact, not known to GMHL until the cross-examination of Sir Mark which, it says, colours the whole of the mortgagee sale process. Sir Mark said in evidence:

> I was aware that I will not be able to claim interest and we've never done it.

[1132] This issue arises out of Lambton Quay's non-registration under the FSP and is discussed further under the counterclaim.

[1133] Lambton Quay did not disclose this to GMHL. It did not offer GMHL the opportunity to exercise its equity of redemption without interest charges.

[1134] This is a matter that I have considered carefully. On Mr Dickey's submission, it goes to good faith in the exercise of mortgagee powers. I accept that in some situations providing misleading details as to the amount required to redeem the mortgage, could well infringe equitable duties and amount to bad faith. However, there are a number of things to be said about this situation and Mr Dickey's submission.

[1135] First, in my view, the complete answer to this submission is that, as the facts emerged, Mr Liu/GMHL had not the slightest interest in exercising its equity of redemption. Mr Liu did not have a chance to respond to Sir Mark's evidence, as it came after he had completed his evidence and left New Zealand. However, I am in not the slightest doubt that, as part of GMHL's strategy, at the time it had no interest in exercising its lawful redemptive rights. Mr Liu made this crystal clear under cross-examination when he said that his strategy was "no ball". That is, as his strategy developed, he was committed to "toughing it out" on the basis that there would be no chance of any meaningful purchasers in the mortgagee sale process.

[1136] So, while there may be merit in Mr Dickey's submission, in this case and in these particular circumstances, it was clear that Mr Liu was not interested in paying anything. Frankly, his answers in cross-examination, could not be interpreted in any other way. Having seen and heard him give evidence, I am very clear in this view.

[1137] Secondly, it simply cannot be the case, whatever Sir Mark said, that Lambton Quay believed it had *no* entitlement to claim *any* interest and, therefore, only sought to recover its principal. That might have been a literal translation of what Sir Mark said in evidence but it is not the intent. The most he could have meant is that interest prior to the amendment of the CCCFA in January 2020 (amounting to approximately $10 million) could not be claimed.

[1138] Third, I interpret Sir Mark's answer, in his typical forthright and blunt way, as conveying generally what his personal view was. But I draw the inference it was clearly not the view of Lambton Quay's advisers who had quite a different view, and proceeded all along on the basis that interest was payable.

[1139] Finally, as I will later set out, whatever Sir Mark's view, the legal position was that his company *could* charge interest. In my view, Sir Mark was talking as a matter of straightforward personal morality. However, the law allowed for Lambton Quay to charge the interest. That being the case, there is no error in the PLA notices, nor in the legal position underlying the issue of those notices.

[1140] And, to make the reasoning crystal clear, GMHL's offer, through Mr Liu, at the Auckland July meeting to transfer to Lambton Quay the unsold Weiti Bay lots plus $100,000 was not an offer that would have been sufficient to satisfy the principal sum, at the time, of $40.2 million.

[1141] It was not as if Mr Liu was offering to pay that amount of money. He was offering to "gift" in effect the lots, leaving Lambton Quay to organise (in some cases their remediation) and their sale. In any case, it was not a situation where the market value gross realisation, as at 12 November 2019, of $31.9 million would have been obtainable. In my view, given the known distressed assets, or at least assets that would have become known to be distressed, the "forced sale" estimate in one line could have been as low as $13.9 million.

[1142] All in all, having carefully considered and reflected on the submission, I reject it.

Conclusion as to breach of mortgagee sale duties

[1143] Mr Liu was doubtless concerned and shocked to learn of the outcome of the mortgagee sale process. No doubt, as I set out in the opening overview to this judgment, he quickly "smelt a rat".

[1144] But the reality is, GMHL stubbornly persisted with its 2019/2020 strategy under several assumptions that, in the end, proved to be either misconceived or

unrealised. Its strategy, as I have found it to exist, disastrously backfired. As hard as this may be for GMHL to accept, its own conduct is the reason for its loss. And it is GMHL that bears responsibility for that loss.

[1145] After the mortgagee sale, I have no doubt that GMHL and its advisers have constructed a theory from the available evidence. The theory is largely circumstantial, built on suspicion. Indeed, Mr Dickey cross-examined as well as anyone could have done in an attempt to concoct the circumstantial case showing breach of mortgagee duties. But, as is clear in this part of the judgment, the case does not stand up. It does not withstand scrutiny. GMHL has not proved its allegations.

[1146] Mr Gordon, in his colourful way, in both opening and closing, recounted Benjamin Franklin's famous remark—that there is "nothing worse than the murder of a beautiful theory by a gang of brutal facts".[126]

[1147] Mr Gordon submitted, and I do not disagree, that after more than seven weeks of evidence, "this case provides an apposite example of the maxim". In short, this is a classic case of a theory looking for evidence.

[1148] GMHL cannot obtain the significant relief and monetary judgment it seeks against Lambton Quay based simply upon suspicions, no doubt fuelled by Mr Liu's animosity, particularly towards Mr Williams but also in respect of Sir Mark.

[1149] I conclude that GMHL's serious and sometimes extreme allegations against Lambton Quay are, in Mr Gordon's words, "completely unproven." Even if the onus should shift to Lambton Quay in these circumstances, it has clearly discharged that onus, well beyond the balance of probabilities, to establish it has not breached its duties as mortgagee.

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126 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [93]; and *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [399].

[1150] All three defence counsel were emphatic that the third cause of action was not only wholly without merit, as I have found, but also vexatious. At this stage, I make no finding on that allegation, although it may be relevant to my assessment as to appropriate costs in this matter.

Relief

[1151] Even if I am wrong in all my conclusions that Lambton Quay did not breach any of its mortgagee duties, then there would be some very important issues then arising as to relief.

[1152] It will be remembered that three types of relief are sought. First the setting aside of the transactions arising from the mortgagee sale including the subsequent mortgages. Second, the setting aside of the assignment of the residual debt. And third, additionally, or in the alternative, damages as fixed by the Court. I need only express a very summarised and preliminary view on these claims, particularly setting aside the mortgagee sale and the subsequent mortgages.

[1153] Setting aside the transaction would, in Mr Broadmore's view, be an extraordinary remedy. He submits it has never been granted in New Zealand. His argument is that the ability to set aside is subject to three important qualifications, none of which are made out here.

[1154] First, there must have been more than a breach of s 176 of the PLA. There must have also been a failure to enter into an independent arm's-length bargain.

[1155] Second, Clearwater's mortgages are indefeasible and cannot be set aside. The order sought to undo the sale—to the extent of returning ownership to GMHL and correcting the title, in the absence of fraud or any in personam claim, cannot surmount the indefeasibility of title.

[1156] Third, it would be inequitable to set aside the mortgages and other security. There are many factors which Mr Broadmore submits would constitute inequity and would strongly tell against such an order. Some of these include that GMHL knew all about the mortgagee sale and has therefore already had ample opportunity to repay the

loan during the extended lead up to the sale; Clearwater as an innocent third party would be significantly prejudiced; four years have elapsed since the mortgagee sale; and Clearwater's ongoing funding will have increased the value of the mortgaged land. And it is said, Mr Liu/GMHL's conduct means they themselves have dirty hands which preclude it receiving equitable relief.

[1157] My preliminary view would be that setting aside the transactions would be a legal bridge too far.

[1158] In that case it may well be that the most appropriate available remedy would be damages. But then, the defendants' argument is that GMHL would be indebted for and obliged to pay the due debt at the time of the mortgagee sale (June 2020) plus ongoing default interest to date. That is what Mr Broadmore persuasively outlined. Such payment would be complicated and would need to be made to Clearwater as the party with the first ranking security over the assets that were the subject of the June 2020 transactions. Or, in the first instance, the payments might be to AWDL as the purchaser—but subject to Clearwater's security. The damages issue is not without difficulty also. In that respect, Mr Liu's evidence was unequivocal—GMHL does not intend to pay its debts.

Conclusion as to mortgagee sale cause of action

[1159] For the reasons outlined, this third cause of action must, and does, fail. It has not been proved.

[1160] Even if the onus shifts to Lambton Quay, it (and the other defendants) has comfortably established, well beyond the balance of probabilities, that there has been no breach of Lambton Quay's duties as mortgagee.

FOURTH CAUSE OF ACTION: EQUITABLE CONTRIBUTION BY MR WILLIAMS

The claim

[1161] GMHL's fourth and final cause of action is for equitable contribution by Mr Williams under the deed of personal guarantee he executed in respect of the BNZ's senior loan facility. This deed was part of a suite of agreements signed on 26 August 2015 in the lead up to the first quadripartite deed.

[1162] This cause of action was originally pleaded as an alternative to the third cause of action. In his submissions, Mr Dickey said that GMHL also sought to pursue it if the third cause of action was successful, but only damages were awarded. In any case, it falls to be decided because I have dismissed the third cause of action.

[1163] GMHL's position is that because its mortgaged land was sold to pay off WDLP's remaining indebtedness under the senior loan facility, Mr Williams is liable in equity to contribute as a "co-surety".

[1164] Mr Williams raises three defences, which I outline later. Suffice to say at this stage, I am satisfied that Mr Williams' affirmative defence—that GMHL is disqualified from an equitable contribution because of its own "dirty hands" must succeed.

Factual background

[1165] As will be recalled, under the 2015 senior loan facility, the BNZ advanced funds to WDLP. On the same date, Mr Williams executed a deed of guarantee. Under that guarantee he personally guaranteed WDLP's debt under the senior loan facility up to a maximum amount of $1.5 million.[127]

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[127] I record that Mr Liu also later requested that Mr Williams give a personal guarantee to GMHL so that he had "skin in the game". Mr Williams declined. Among other things, he pointed out that he had already provided a personal guarantee to the BNZ.

[1166] Initially, the junior loan facility was with Capital Group. However, for this cause of action, the important junior loan is from Lambton Quay. This was entered into on 20 July 2018 as part of a successful refinancing. The BNZ facility agreement was amended around that time to reflect the refinancing. However, the basic obligations remained the same.

[1167] Also, on 20 July 2018, a quadripartite deed was executed between the BNZ, Lambton Quay, GMHL and WDLP. That deed records "the agreement between the parties in relation to (among other things) the Land [as defined in the Deed]." Specifically, it records that in consideration of the BNZ and Lambton Quay providing funding, "GMHL has entered, or will enter into, the GMHL Documents". The "GMHL Documents" included both first and second mortgages over the "Development Property", being the Weiti Bay lots, and Village 1.

[1168] The first mortgages were in favour of the BNZ and limited to an amount equal to the "Senior Loan Amount" at the relevant time. The second mortgages were in favour of Lambton Quay and limited to an amount equal to the "Junior Loan Amount" at the relevant time.

[1169] Under the mortgages, GMHL covenanted to pay all monies due, owing, or payable by WDLP under the senior and junior loan facilities. Although this was not strictly a guarantee, the BNZ and Lambton Quay could not enforce the mortgages unless there was an "Event of Default" as defined under either of the term loan agreements. In this way, GMHL's obligations under the mortgages effectively functioned as guarantees.

[1170] Importantly, under a deed of priority and subordination entered into in accordance with the quadripartite deed, the amount owing under the senior loan facility took precedence over the amount owing under the junior loan facility.

[1171] To summarise, GMHL had essentially guaranteed all of WDLP's obligations under both the senior and junior loan facilities up to the maximum of the amounts owing under those loan facilities. On the other hand, Mr Williams had personally

guaranteed WDLP's debt under the senior loan facility only, up to a maximum amount of $1.5 million.

Subsequent events

[1172] The key factual events that occurred after 20 July 2018 bearing on whether Mr Williams owes a contribution to GMHL have been previously discussed and analysed. I set them out here in the briefest form possible.

[1173] First, in February 2019, Mr Liu and GMHL withdrew support for the development. GMHL would not release title for any lots that were sold, nor support further borrowing—at least not without receiving a payment of 33 per cent of the net proceeds of five Weiti Bay lots, on account of the total purchase price, in priority to the BNZ. Such payment would require a re-negotiation of the entire quadripartite arrangement including the mortgages. Realistically, GMHL, through its advisers, knew this could never happen.

[1174] GMHL/Mr Liu then developed their own strategy. As a result, GMHL's actions, deliberately undertaken, put WDLP into default under the respective term loan agreements.[128] Mr Liu's actions amounted to a repudiation of the limited partnership agreement. As I have found, this "tanked" the development and it became obviously distressed.

[1175] Second, on 7 June 2019, Lambton Quay obtained the BNZ's rights under the senior loan facility by novation.

[1176] Third, Lambton Quay exercised its powers as mortgagee to sell the mortgaged land for $35 million, which partially recovered the combined debt owing under the senior and junior loan facilities. This sale had the effect of fully clearing the amount owing under the senior loan facility and partially clearing the amount owing under the junior loan facility.

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[128] In particular, see that part of the judgment, previously, under Third Cause of Action, and the headings "The February ultimatum"; GMHL/Mr Liu's emerging strategy"; and, "Mr Liu repudiates WDLP agreement".

Legal principles

[1177] A creditor is not bound to take steps against all sureties in enforcing a debt.[129] However, where one surety (here GMHL) makes payment to either fully or partially absolve a co-surety of its liability under a guarantee (or similar) an equitable right of contribution may arise.

[1178] If a right of contribution does arise, the normal rule is that there should be equal sharing of the relevant obligation between co-guarantors.[130] However, as the right to contribution is founded in equity, the ultimate question is what the just apportionment should be.[131]

[1179] It is worth noting that Mr Williams argues, as a variation of the above general principle, that when guarantees are for varying or limited amounts, there is a dominant view (in the texts) that liability is shared proportionately to the guarantors' maximum limit of liability.[132] The result, in this case, as I discuss later, would be to limit any potential contribution from Mr Williams to $438,244.81.

[1180] What is not in dispute is that as an equitable doctrine, the party claiming the contribution needs to come to the Court with clean hands. In *Milloy v Dobson,* in the context of a claim for equitable contribution, the Court stated:[133]

> The equitable principle is that "He who comes into equity must come with clean hands". The essence of clean hands is that if the petitioner is guilty of impropriety in a matter pertinent to the suit, equity may refuse the decree sought.

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129 *McLean v Discount & Finance Ltd* (1939) 64 CLR 312 at 328.

130 *Milloy v Dobson* [2016] NZCA 25 at [1], citing *Trotter v Franklin* [1991] 2 NZLR 92 (HC); and *Scholefield Goodman & Sons Ltd v Zyngier* [1986] AC 562.

131 *Milloy v Dobson,* above n 130, at [1] citing, *Trotter v Franklin,* above n 130; and *Scholefield Goodman & Sons Ltd v Zyngier*, above n 130.

132 In John Phillips, James O'Donovan and Wayne Courtney *The Modern Contract of Guarantee* (4th ed, Sweet & Maxwell, London, 2020) at [12-218]–[12.221] several cases are cited in support of the proposition this is the "dominant view". Similarly, it is submitted that Geraldine Andrews and Richard Millet *Law of Guarantees* (7th ed, Sweet & Maxwell, London, 2015) at [12-013] supports this.

133 At [99] (footnote omitted).

[1181] Both that case and *FTG Securities Ltd v Crown Asset Limited*,[134] referred to by GMHL, refer to a passage in Andrew Butler's text, *Equity and Trusts in New Zealand* reproduced as follows:[135]

> The basic notion behind the maxim is that where a person seeks to invoke equitable relief in relation to a particular transaction, he or she must not have acted improperly in relation to that transaction. Hence, even if the plaintiff can show a violation of his or her equitable rights, relief to give effect to those rights may not issue if it would allow the plaintiff to derive a benefit from his or her wrong.

[1182] That is at least the general principle, which I will discuss in more depth when considering Mr Williams' allegation of GMHL having unclean hands.

The essential arguments

GMHL

[1183] GMHL relies on the following in support of its claim. First, Mr Williams' guarantee was novated to Lambton Quay at the same time as the senior loan facility, on or about 7 June 2019. Subsequently, Lambton Quay exercised its rights as mortgagee to sell the mortgaged property. At the time of the mortgagee sale, the debt under the senior loan facility sat at $13,346,186.[136] This was paid off by the mortgagee sale of GMHL's land.

[1184] Applying the usual rule of equal sharing between co-sureties, Mr Williams would be liable for roughly $6.67 million—that being half the $13.35 million debt under the senior loan facility. However, his guarantee is capped at $1.5 million and is the maximum limit of liability.

[1185] On this basis, GMHL submits that Mr Williams, as a co-surety, should contribute by compensating GMHL to the full extent of his guarantee.

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134 *FTG Securities Ltd v Crown Asset Limited* [2020] NZHC 2007.

135 Andrew S Butler and James Every-Palmer "Equitable Defences" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [38.2.1].

136 This figure excludes the costs of borrowing. The figure including the costs of borrowing is $14,120,248.97. In either case, the amount was well extinguished by the mortgagee sale.

Mr Williams

[1186] Mr Williams does not appear to dispute the general thrust of that analysis, however his response is threefold.

[1187] First, GMHL does not come with clean hands and is therefore not entitled to rely on the equitable doctrine of contribution. Mr Chisholm submits that by refusing to release titles without payment in priority to the BNZ; refusing to consent to further (necessary) borrowing; requiring Mr Williams to negotiate changes to the 2018 quadripartite deed; and, taking an extreme negotiation position with Lambton Quay and Mr Williams' interests, GMHL (and Mr Liu) caused significant loss to themselves. GMHL was effectively reneging on WTL's agreement (as the 60 per cent "junior partner" of WDLP) to assist with the financing of the development. Equally importantly, however, Mr Liu was effectively repudiating the substance of the limited partnership agreement by adopting an extreme strategy.

[1188] Second, the need for equitable contribution has not yet arisen as the mortgages securing the senior loan facility have not been discharged (largely because GMHL challenged the mortgagee sale and sought to unwind it in this litigation), and there is still money owing under the junior loan facility. Mr Chisholm submits that the relevant facility and security documents, in context, suggest that there was either an agreement or a common intention that GMHL could not pursue Mr Williams under his guarantee until *all* secured lenders had been repaid.

[1189] Third, even if a contribution does arise, Mr Williams' maximum liability would be only $438,244.81. This being the share of the amount paid off the senior loan facility by the mortgagee sale proceeds proportional to Mr Williams' maximum potential liability under his guarantee.

Analysis

Dirty hands?

[1190] As highlighted previously, a plaintiff generally cannot claim the assistance of equity if it comes to the table with dirty hands. The basic notion of the maxim is that

where a plaintiff seeks equitable relief in relation to a particular transaction, they must not have acted improperly in relation to that transaction. The Supreme Court has noted that the operation of the clean hands doctrine is well understood.[137]

[1191] However, the doctrine of clean hands is not unlimited in scope. In order to prevent relief, the plaintiff's wrong must be directly related to the equitable claim against the defendant.[138] The plaintiff referred to a range of authorities emphasising that point. *FTG Securities Ltd v Crown Asset Management* outlined that the alleged wrong must be a "depravity" in both a legal and moral sense.[139] The following passage from *Snell's Equity* as cited in *Detection Service Pty Ltd v Pickering* helpfully sets out that:[140]

> Again, the question is not whether any general moral culpability can be attributed to B, the party seeking relief, but is rather whether relief should be denied because there is a sufficiently close connection between B's alleged misconduct and the relief sought. The maxim is therefore applicable only in relation to conduct of B which has "an immediate and necessary relation to the equity sued for" and is not balanced by any mitigating factors.

[1192] Turning to the specific facts of this case, Mr Chisholm's submissions rest on the finding that Mr Liu and GMHL tanked the development from February 2019 onwards by, among other things, refusing to sign documentation to allow titles to be issued unless certain concessions (which were in reality impossible to obtain) were made in their favour. A range of this conduct was in breach of the 2018 quadripartite deed.

[1193] GMHL strongly denies this allegation and submits that it fulfilled its obligations under the 2018 quadripartite deed and did not tank the development. As will be apparent from my previous conclusions, I reject these submissions. I am satisfied that GMHL's conduct breached cl 10.3 of the 2018 quadripartite deed which required, among other things, that GMHL not demand or take steps to recover the

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137 *Pickering v Detection Services Pty Ltd* [2020] NZSC 35 at [19].

138 *Detection Service Pty Ltd v Pickering* [2019] NZCA 575 at [51]–[52].

139 *FTG Securities Ltd v Crown Asset Management,* above n 134, at [192], citing *Dering v Earl of Winchelsea* [1775-1802] All ER Rep 140 (Exch).

140 At [52], citing John McGhee (ed) *Snell's Equity* (33rd ed, Sweet & Maxwell, London, 2015) at [5–010].

"Indebtedness to GMHL."[141] The defined indebtedness included indebtedness by the borrower (WDLP) to GMHL including the purchase price of $60 million for Weiti Bay stage 1 and 2. GMHL's demands and attempts to be paid a specified sum before the lenders were paid off surely amounted to a breach of this provision.

[1194] It would also appear that GMHL's conduct breached cl 4.10 of the 2018 quadripartite deed. That requirements included, but were not limited to, that GMHL would do everything reasonably necessary to enable (and would not do anything that would prejudice) the issue of the Weiti Bay titles, the construction and vesting of the access road, the subdivision of Weiti Bay, and the settlement of the sales of lots on the development property. It will be recalled that GMHL represented that it would not release further titles until it had been paid a specified sum in priority to the lenders. Surely that constituted a breach of this provision.

[1195] I conclude that GMHL does not come to the Court with clean hands. By breaching the provisions of the 2018 quadripartite deed, GMHL has committed both a moral and a legal wrong in the way *FTG Securities* envisages. GMHL clearly acted improperly in the transaction for which it seeks equitable relief.

[1196] In light of this, I must now consider whether there is sufficient nexus between the dishonest conduct attributable to GMHL and the equitable claim against Mr Williams. I disagree with GMHL that there is no material connection. Put another way, I am of the view that GMHL's conduct is sufficiently material such that relief should be denied.

[1197] As Mr Chisholm submits, Mr Williams' guarantee was only in respect of the senior loan facility. The principal debtor was WDLP.

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[141] Defined in the 2018 quadripartite deed as at any time, all indebtedness of the Borrower and/or the General Partner to GMHL or incurred by GMHL on behalf of the Borrower and/or the General Partner or sustained in any way by GMHL in connection with any such indebtedness (or the enforcement or attempted enforcement of any such indebtedness), including, without limitation:

(a) any indebtedness of the Borrower and/or the General Partner to GMHL under the GMHL Loan Agreement or any other GMHL Borrower Document; and

(b) any amount payable by the Borrower and/or the General Partner to GMHL under any GMHL Borrower Document (or otherwise agreed between GMHL and the Borrower and/or the General Partner) in connection with the Land or the Development (including, without limitation, the Purchase Price).

[1198] I have previously concluded that as of February 2019, the project in the long term remained viable (albeit only just) with GMHL's cooperation. WDLP's default and failure was not inevitable such that the sureties would have been activated. However, at this stage, GMHL withdrew its support from the project. Specifically, it refused to release the remaining Weiti Bay titles upon settlement of completed sales. If GMHL had not done so, revenue generated from the completed sales would likely have been sufficient to extinguish the senior debt. By refusing to release the titles, WDLP's failure, and subsequent enforcement by the lenders became inevitable. As I have said, withdrawing support was a breach of the 2018 quadripartite deed.

[1199] At the very least, I find it more likely than not, that but for GMHL's breach, the senior loan facility would have been paid off by WDLP without any recourse to the security or guarantees. Accordingly, any liability arising from Mr Williams' guarantee is because of GMHL's breach. The two cannot be fairly separated. GMHL's dirty hands are substantially material to the equitable claim it has pursued. Therefore, I dismiss this cause of action on that ground alone.

[1200] Given that conclusion, strictly, I do not need to consider Mr Williams' other defences/responses to GMHL's claim. However, I briefly address them both without reaching a final conclusion on either.

Contribution not yet arisen?

[1201] Mr Williams' second response to the claim for equitable contribution is that no contribution can arise until both the senior and junior debt facilities are paid off.

[1202] As for the senior loan facility, Mr Williams acknowledges that it has been paid down to zero. However, the mortgages securing that debt have not yet been discharged. This means that future liability may arise under that facility by way of Mr Williams' guarantee. Mr Williams argues it would be inappropriate to order a contribution where the risk of personal liability remains due to an undischarged mortgage. He emphasises GMHL's right to claim a contribution does not arise until he has been absolved of at least some of his primary liability under the guarantee.

[1203] The amount owing under the senior debt facility was paid off following the mortgagee sale, but the mortgage was not discharged because GMHL's proceedings sought to unwind it. While the risk of the mortgagee sale being unwound existed, it was appropriate for the mortgages securing the senior loan amount not to be discharged. Therefore, I entirely accept the argument that up until this point, no right to a contribution from Mr Williams had arisen.

[1204] However, now that I have rejected the third cause of action, that risk no longer remains. It would appear appropriate for the mortgages securing the senior loan to be discharged. Mr Williams has accordingly been absolved of his liability under his personal guarantee and a right to contribution would now arise.

[1205] Mr Williams also submits that a contribution cannot arise until the junior loan facility is paid off in full. His submissions on this point revolve around the idea that there was an agreement or common intention that GMHL could not pursue Mr Williams under his guarantee until all of the secured lenders had been repaid. Mr Williams points specifically to clauses in the 2018 quadripartite deed which subordinate the "Indebtedness to GMHL" to repayment in full of the senior and junior loan facilities.

[1206] I have significant reservations about this argument. In particular, I note that the "Indebtedness to GMHL" was indebtedness of WDLP and WDGPL. GMHL therefore, in my view, did not agree to forego recovery of debt from other parties. In this case, it is attempting to recover against Mr Williams personally. I do not think there was any common intention that GMHL could not do so until the junior facility was repaid. Accordingly, I likely would have rejected this argument.

Proportionality

[1207] Mr Williams' final response to the claim for equitable contribution was that his maximum liability to contribute would be $438,244.081.

[1208] He notes that under the mortgages, GMHL was liable for the full extent of the senior loan, as agreed under the 2018 quadripartite deed to not exceed $48,330,000. His own guarantee was limited to $1.5 million. On that basis, prima facie his

proportion of the guaranteed debt would be approximately three per cent. Taking three per cent of the $14.1 million ultimately paid off the senior loan facility by the mortgagee sale would, on this analysis, result in a maximum liability of $438,244.081 for Mr Williams.

[1209] Mr Williams relies on comments in *Equity Doctrines and Remedies,* to the effect that:[142]

> if three sureties were liable for €5000, €3000 and €1000, that is, 5/9, 3/9, 1/9, they should, as between themselves, bear the debt in the ratio of 5:3:1, provided that the liability of each is not to exceed €5000, €3000 and €1000 respectively.

[1210] He submits that this approach is backed up by the following comments from Fry J in *Steel v Dixon*:[143]

> Where the same default of the principal renders all the co-sureties responsible, all are to contribute; and the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionately to the amount that each is a surety.

[1211] This is an interesting issue and not free from difficulty.

[1212] I have some reservations about Mr Williams case on this point. I fully accept that in a scenario such as that proffered two paragraphs previously, proportionate sharing is appropriate. However, I am just a little hesitant to accept that is the case where one surety guarantees the whole of a very significant debt and another surety (Mr Williams) guarantees just a very small part of it.

[1213] That said Mr Williams guaranteed $1.5 million out of $48.3 million. Why should the proportionality principle not apply? Arguably, it is disproportionate that Mr Williams would have to contribute $1.5 million—the full extent of his guarantee. This would equate to approximately 10 per cent of the debt recovered from GMHL, well above his 3.1 per cent proportionate guarantee of the total liability. Why is proportionate sharing inappropriate simply because one surety guarantees a significant

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142 JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (5th ed, LexisNexis, Wellington, 2015) at [10-125].

143 *Steel v Dixon* (1881) 17 Ch D 825 at 831.

proportion, and another guarantees a much lesser? For example, if we take the example two paragraphs previously, and change the numbers so the three sureties were liable for €500,000, €3000 and €10, there is nothing unjust in the liabilities for each reflecting this ratio.

[1214] But I come back to the point that what makes this case different is that GMHL is a co-surety for whole debt—not just a proportion of it. As I say, it is not a straightforward issue.

[1215] The ultimate question is what a just apportionment would be?

[1216] In my view, were it not for GMHL's dirty hands, a just apportionment might have seen Mr Williams liable for the proportionate share of his guarantee. This, even given that GMHL still paid off far more than 50 per cent of the debt left owing on the senior facility. However, as I say, the question does not need to be finally decided given the conclusions already reached.

Conclusion

[1217] The fourth cause of action is dismissed.

COUNTERCLAIM BY AWIL FOR THE RESIDUAL DEBT

[1218] The final cause of action is AWIL's counterclaim against GMHL for the residual debt owing on the Lambton Quay loan following the mortgagee sale. It will be recalled that Lambton Quay assigned the residual debt to AWIL at the time of the mortgagee sale.

Summary of claim

[1219] AWIL claims:

(a) Judgment in the sum of $20,133,278, comprising of the unpaid principal and outstanding interest as at 7 July 2020;

(b) interest from 7 July 2020 (the date on which AWIL served a statutory demand on GMHL) to the date of payment in full on the sum of $20,133,278 at the rate of 21 per cent per annum (and compounding monthly in accordance with the loan documents);

(c) a declaration that the plaintiff's liability may only be discharged from the assets of GMHL specified in clause 3 of the Lambton Quay mortgages, now being any proceeds or other amounts arising out of the Village 2 land, the balance land, and the "Assigned Property"; and

(d) costs.

[1220] In short, the claim relies on Lambton Quay having assigned to AWIL all of its rights, title and interest in and under (among other things) the BNZ facility agreement, Lambton Quay facility agreement, an overdraft agreement, the 2018 quadripartite deed, the BNZ mortgages, and the Lambton Quay mortgages. All these were separate agreements.

[1221] As at 7 July 2020, AWIL submits that $20,133,278 was outstanding under the Lambton Quay facility agreement. Under the personal covenant to pay contained in the Lambton Quay mortgages, GMHL was liable for that amount.

[1222] On or around that date, AWIL served statutory demands for that amount on both WDLP and GMHL. Despite these demands, GMHL has failed or refused to pay AWIL the amount outstanding which is due and owing.

[1223] The default interest rate applicable to the amount outstanding is 21 per cent per annum, compounding monthly in accordance with the Lambton Quay facility agreement.

[1224] The documentation, the calculations of the sums involved and the essential facts necessary to prove this claim (such as BNZ's novation of its mortgage and loan rights to Lambton Quay, and the subsequent assignment of the residual debt to AWIL) are not in dispute. In any case, all evidential matters necessary to establish this claim have been proved. I proceed on that basis. The real issues relate to the defences raised by GMHL.

GMHL's defences

[1225] By the time of closing submissions, GMHL sought to raise two defences to this claim. Implicit in those submissions was acceptance that the claim is otherwise proved.

[1226] The first was to argue that under contractual and equitable principles, an assignment of contract (a debt in this case) cannot be used to benefit a wrongdoer. AWIL cannot seek to use the improper June 2020 transaction against GMHL. Mr Dickey submitted that this argument is better determined under equitable principles. Given my conclusions on the previous causes of action, I am quite satisfied that any party which stands to benefit from the assignment, including AWIL, is not a wrongdoer. The reverse is true: the "wrongdoer" is GMHL. I need not repeat all my previous conclusions. Suffice to say, there was nothing improper about the June 2020 mortgagee sale transaction. Therefore, this defence fails.

[1227] The second was to assert that Lambton Quay was not entitled to charge *interest* (the cost of borrowings) for some of the period of its loan. The defence is that Lambton Quay failed to comply with registration and notification requirements as a financial services provider which precluded it from charging interest (until a law change as from

January 2020). This allegedly illegitimate interest totals approximately $10 million and significantly reduces the amount claimed. The resulting reduction should be set off against the residual debt that AWIL seeks to enforce. The precise issue is whether that interest said to have accrued on the loan prior to January 2020 (when the CCCFA was amended), can be claimed. This emerged as the primary issue under the counterclaim. It is a difficult question.

[1228] GMHL submits that because Lambton Quay was not registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP) until 20 July 2019 the interest is not payable and cannot be claimed. GMHL relies on s 99B of the CCCFA as it was at the relevant time prior to January 2020.

[1229] AWIL, Lambton Quay, and Clearwater all submit that the interest is payable. However, each advances a different and complicated argument as to why.

[1230] First, I summarise the key facts relevant to this issue. Then I set out each parties' arguments, and then determine the issue.

Facts

[1231] The third and final quadripartite deed was finalised on 20 July 2018. At the time, there were two main loans in existence. First, there was the 2015 BNZ facility agreement, originally executed on 26 August 2015, under which the BNZ was lender. This was amended and updated on 27 July 2018 to bring it into line with the 2018 refinancing. Second, there was a junior facility agreement under which Lambton Quay advanced funds. This was executed on 20 July 2018. There were also various mortgages and encumbrances entered into, as well as a general security deed and a deed of priority and subordination.

[1232] This quadripartite deed essentially governed the relationship between the various parties from this point forwards.

[1233] On 7 June 2019, BNZ novated all of its mortgage and loan rights to Lambton Quay.

[1234] On 12 June 2020, the mortgagee sale was concluded. On the same day, Lambton Quay assigned approximately $20 million of residual debt to AWIL. This debt, and further interest which is said to have accrued on it, is what AWIL seeks to enforce.

Competing arguments

[1235] The competing arguments are complex and need to be set out in detail.

GMHL

[1236] As foreshadowed, GMHL relies on s 99B of the CCCFA (as it was) in support of its argument that the interest is *not* payable. I set out in full s 99B as it was from 6 June 2015 (when it was inserted into the CCCFA) until 13 January 2020:

> **99B Enforcement prohibited if creditor unregistered**
>
> (1) If a creditor who is required to be registered under Part 2 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 is not registered under that Act,—
>
> (a) neither the creditor nor any other person may, in relation to a credit contract to which the creditor is a party,—
>
> (i) enforce any right in relation to the costs of borrowing; or
>
> (ii) require the debtor or any other person to make a full prepayment or a part prepayment on the basis of a failure by the debtor or other person to pay the costs of borrowing; and
>
> (b) neither the debtor nor any other person is liable for the costs of borrowing under such a contract in relation to any period during which the creditor is unregistered.
>
> (2) However, subsection (1)(b) does not apply in relation to fees or charges payable to another person, body, or agency as referred to in section 45 unless that person, body, or agency is an associated person of the creditor.
>
> (3) On becoming registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008, the creditor may enforce the creditor's rights in relation to the costs of borrowing, but only—
>
> (a) if the creditor has given written notice to the debtor, containing the information specified in subsection (5); and
>
> (b) in relation to the costs of borrowing directly attributable to periods after such notice has been given to the debtor.
>
> (4) Subsection (3) is subject to any other provision of this Act that prohibits enforcement of the credit contract.

> (5) The notice required under subsection (3)(a) must clearly inform the debtor—
>
> (a) that the creditor is now registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008; and
>
> (b) of the date on which the creditor became registered; and
>
> (c) of the name and contact details of the dispute resolution scheme of which the creditor is a member; and
>
> (d) that the debtor is, from the date on which the notice was given, liable for the costs of borrowing; and
>
> (e) that the debtor has no liability for the costs of borrowing that would otherwise have accrued before the date on which the notice was given.

[1237] It is common ground that Lambton Quay was required to be registered under the FSP and did not register until 20 July 2019. It is also common ground that at no point did Lambton Quay give notice to GMHL that it had become registered as required by s 99B(3)(a).

[1238] Therefore, on GMHL's argument the "cost of borrowing" being the interest under the loan is unenforceable according to s 99B(1)(a)(i) up until the CCCFA was amended in January 2020. This conclusion, it is said, is unarguable on a plain reading of the legislation.

[1239] "Costs of borrowing" was defined in s 5 of the CCCFA as:

> in relation to a consumer credit contract or a credit contract to which Part 3A applies, means any or all of the following costs:
>
> (a) a credit fee:
>
> (b) a default fee:
>
> (c) interest charges

[1240] On its face, this definition applies to two types of contracts. First, to a consumer credit contract and second to a credit contract to which Part 3A applies.

[1241] A consumer credit contract is defined in s 11 of the CCCFA.[144] It is common ground that the loan *is not* a consumer credit contract. Credit contract is defined in s 7. It is common ground that the loan *is* a credit contract. However, it is agreed that the loan *is not* a credit contract to which Part 3A applies.[145]

[1242] Despite that specialist definition of costs of borrowing, Mr Dickey's submissions proceed on the basis that costs of borrowing must nevertheless retain its ordinary meaning in relation to credit contracts generally. It is obviously not restricted to its narrow meaning as defined, and the plain meaning of costs of borrowing must include interest.

[1243] When s 99B was amended in January 2020, "credit contract" in subs (1)(a) was replaced with "consumer credit contract". The definition of costs of borrowing was also amended to remove the reference to credit contracts to which Part 3A applied. Under the amended section, it is agreed that interest would be payable on this loan. The issue though is whether interest was enforceable under the section as it previously stood.

[1244] It is fair to observe that the issue arising is historical, has not been the subject of previous argument, and will likely never arise again. Nevertheless, it raises important points of principle and statutory interpretation, and it has significant implications for the parties.

[1245] Mr Dickey's argument in support of GMHL's position is that basic principles of statutory interpretation irresistibly point to the conclusion that interest is not payable. Interest is clearly part of the costs of borrowing. Under s 99B, it is unenforceable because Lambton Quay did not comply with the registration and notice requirements imposed by that section.

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144 Among the requirements is that the debtor must be a natural person, which is self-evidently not the position here.

145 The explanation as to why this credit contract is not a credit contract to which Part 3A applies is quite complex. It relates to the passing of the Regulatory Systems (Economic Development) Amendment Act 2019. To this effect see Schedule 1AA, cl 5 of the CCCFA. Suffice to say, the parties agree it does not apply and no further explanation is necessary.

[1246] He submits that no amount of ingenious technical arguments will surmount that obvious conclusion. It is not the Court's job to rewrite the statute, nor to subvert its plain meaning.

Clearwater

[1247] Mr Broadmore, for Clearwater, argues that prior to 13 January 2020, on the words of the statute itself, interest was payable on the loan. This is because Clearwater argues that the "costs of borrowing" referred to in s 99B should be narrowly confined to the costs of borrowing as explicitly defined in the CCCFA. Given costs of borrowing is only defined in relation to consumer credit contracts and credit contracts to which Part 3A applies, Clearwater argues that s 99B only prohibits enforcement of the costs of borrowing in relation to those two species of credit contracts. Beyond that, it has no effect.

[1248] Clearwater submits that this interpretation of the provision would be entirely consistent with the purpose and context of the CCCFA. Mr Broadmore's argument was careful and thoughtful.

[1249] First, as to purpose, Clearwater notes that the primary purpose of the CCCFA is to protect the interests of *consumers* in connection with credit contracts, consumer leases, and buy-back transactions of land. While Clearwater acknowledges that some of the purposes of the CCCFA, such as to promote and facilitate fair, efficient, and transparent markets for credit, do not explicitly refer to consumers, it submits that the rules around interest charges are specifically for the protection of consumers. This is because s 3(3)(c) of the CCCFA states that to achieve the purposes of the Act, the Act provides rules around *interest charges*, credit fees, default fees, and payments in relation to *consumer credit contracts*.[146]

[1250] Clearwater also notes that when s 99B and the definition of "costs of borrowing" were inserted into the CCCFA, the departmental report on the Bill recorded that one of the key changes being made to the Act was "prohibiting

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146 (emphasis added).

unregistered creditors from enforcing the costs of borrowing under *consumer* credit contracts".[147]

[1251] Second, as to context, Clearwater notes that the Bill which inserted the relevant provisions into the CCCFA originally defined costs of borrowing in relation to all credit contracts. However, this was later amended to confine it to consumer credit contracts and credit contracts to which part 3A applied. Clearwater submits that this suggests that Parliament intentionally limited the definition of costs of borrowing and s 99B should be interpreted in accordance with that obvious intention.

[1252] As for internal context, Clearwater points to s 99B(5) which sets out the content of the notice which the creditor must give to the debtor upon becoming registered under the FSP. That notice includes the name and contact details of the dispute resolution scheme of which the creditor is a member. Given that, under the FSP, creditors without "retail clients", as defined in that Act, do not need to be members of a dispute resolution scheme, Clearwater says that the phraseology of s 99B(5) strongly supports its interpretation that the costs of borrowing in s 99B only covers consumer credit contracts or credit contracts to which Part 3A applies.

[1253] Clearwater acknowledges that the distinction between s 99 and s 99B of the Act could be said to be against its argument. Section 99, which prohibits enforcement of contracts in certain circumstances, is expressly confined to consumer credit contracts. It could therefore be argued that perhaps s 99B could be expected to have used the same or similar words of restriction. As an answer to that difficulty, Clearwater submits that s 99B could not have been drafted in this way because it also applies to credit contracts to which Part 3A applies.

Lambton Quay

[1254] In contrast to Clearwater, Mr Gordon for Lambton Quay strongly submits that the Court should recognise the drafting of s 99B as constituting a clear error. Lambton Quay submits that s 99B(1)(a) was always intended to refer to a consumer credit contract and not a credit contract. Therefore, the reference to a credit contract prior to

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147 (emphasis added).

the January 2020 amendment (which Mr Gordon submits was an overdue correction) was a clear error. Lambton Quay submits that the Court can remedy that error by interpreting the pre-January 2020 version of the provision as being limited to consumer credit contracts—just as is now the position after 13 January 2020.

[1255] Lambton Quay submits that the Court is well able to correct drafting errors. It relies on Tipping J's comment in *Air New Zealand Ltd v McAlister*:[148]

> The powers of the Court in the case of drafting errors are helpfully discussed in Burrows and Carter's *Statute Law in New Zealand*. The Court can correct a drafting error by addition, omission or substitution of words if three conditions are satisfied: (i) the Court must be sure that there is a drafting error; (ii) the Court must also be sure what Parliament was trying to say; and (iii) the necessary correction must not involve too great a re-writing of the defective language. This last consideration is obviously a matter of degree and will often depend on the Court's assessment of whether, in the light of the overall interests of justice, when balanced against the proper role of the courts, the redrafting exercise should be left to Parliament. Indeed, the more elaborate the necessary redrafting, the less likely it is that the first two conditions will have been fulfilled.

[1256] Lambton Quay cites no fewer than 16 judgments in which the Court has corrected clearly identified legislative drafting errors. As but one example, Lambton Quay highlights O'Regan J's comments in *Brambles New Zealand Ltd v Commerce Commission.*[149] There, after concluding that the wording of a provision in the Commerce Act 1986 was contrary to its purpose and was a clear error he said: "In order to achieve that purpose, it is necessary to interpret the words 'would be likely' as 'would not be likely'."

[1257] Lambton Quay relies on a range of comments in parliamentary materials that emphasise the consumer protection purpose of s 99B. Lambton Quay also relies on the making of a later regulation which exempted certain credit contracts from the effect of s 99B. I will return to that regulation later—as AWIL submits that the regulation itself exempts the credit contract in issue here.

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148 *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [96] (citations omitted).
149 *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 (HC).

[1258] However, for the purpose of Lambton Quay's argument, it notes that the statement of reasons for the regulatory exemption noted that "debtors under exempted credit contracts are relatively sophisticated borrowers that do not need the protections of the Act".

[1259] Lambton Quay also notes that when the CCCFA was amended in 2020 to change the reference from credit contracts to consumer credit contracts, the departmental report on the amendment Bill stated:

> The current Regulation 18A was introduced in 2015 as a short-term measure to address issues in the credit markets with loan securitisations. At the time the change was made, it was recognised that applying section 99B to all credit contracts (including business and investment contracts) was inconsistent with the overall scheme of the Act, and was likely to cause difficulties in securitisations and similar situations. However, the regulation-making powers in the Act could not be used to exempt all non-consumer credit contracts from section 99B. It was therefore decided that this exemption would occur in primary legislation at the next available opportunity …

[1260] Lambton Quay therefore submits that s 99B, as enacted in 2015, contained a clear drafting error and the Court ought to interpret the provision as referring only to credit contracts. Therefore, interest in full is payable by GMHL under the loan.

AWIL

[1261] AWIL's argument is the most complex. It is multi-faceted and includes a number of alternative arguments. AWIL begins by giving support to the arguments of Clearwater and Lambton Quay respectively. However, AWIL raises two additional arguments in favour of its position that interest is payable under the loan.

[1262] First, it submits that reg 18A of the Credit Contracts and Consumer Finance Regulations 2004 exempted this loan from the prohibition on enforcing interest charges under s 99B.

[1263] Second, as a fallback position, AWIL submits it is entitled to interest, but only from the time that Lambton Quay registered under the FSP. Post registration, s 99B, as it was, prevented enforcement of interest but not the interest accruing. When the CCCFA was amended, it removed the prohibition on enforcement allowing the interest that had accrued post registration to be enforced.

[1264] I turn to AWIL's first argument.

[1265] Regulation 18A came into force on 28 August 2015. It was made pursuant to s 138 of the CCCFA. It provided:

> A credit contract is exempt from the application of section 99B of the Act (enforcement prohibited if creditor unregistered) if–
>
> (a) the contract is not a consumer credit contract; and
>
> (b) the debtor is–
>
> (i) a body corporate; or
>
> (ii) the Crown, a Crown entity, or a local authority (as those terms are defined in section 2(1) of the Public Finance Act 1989); and
>
> (c) there are 2 or more creditors under the contract.

[1266] AWIL submits that the three qualifying criteria are plainly met. First, it submits that the relevant credit contract was clearly not a consumer credit contract. There is no dispute about this. Second, it submits that the relevant debtors under the contract being WDLP and GMHL are body corporates. Referring to the Dictionary of New Zealand Law,[150] AWIL submits that a body corporate is an association of persons regarded in law as a single legal person and that both a company (GMHL) and a limited partnership (WDLP) are such. AWIL also highlights that the CCCFA appears to use the term body corporate in contrast to the term "individual".

[1267] Finally, AWIL submits that the relevant credit contract includes two or more creditors being BNZ, Lambton Quay, and GMHL itself. On this point, AWIL submits that a credit contract can comprise multiple documents. In *Harmoney Ltd v Commerce Commission*,[151] the Court accepted that where, on an objective analysis, a reasonable person in the position of the parties would have understood the terms to operate together then the credit contract can be contained across more than one contract. AWIL also notes that s 7(2) of the CCCFA which is part of the definition of credit contract extends the definition of credit contract to any transaction which is in substance a credit contract even if none of the individual documents are credit contracts.

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150 *Dictionary of New Zealand Law* (online ed, LexisNexis).

151 *Harmoney Ltd v Commerce Commission* [2020] NZCA 275, [2020] 3 NZLR 552.

[1268] AWIL's submission is therefore that the credit contract in issue goes beyond the 2018 Lambton Quay facility agreement under which the residual debt is owed and includes the whole suite of 2018 refinancing documents including both the senior (BNZ) and junior (Lambton Quay) lenders. AWIL also submits that GMHL was a creditor under the 2018 quadripartite deed which, on its submission, is included in the credit contract.

[1269] Under the CCCFA at the time, a creditor was a person who provides, or may provide credit under a credit contract. Credit was defined as being provided if a right was granted by a person to another person to, among other things, defer payment of a debt or incur a debt and defer its payment. Under the 2018 quadripartite deed, GMHL agreed to subordinate "the Indebtedness to GMHL" in favour of the senior and junior loan amounts in full. AWIL says this demonstrates that GMHL deferred payment of a debt satisfying the definition of credit and thus is a creditor under the credit contract. AWIL also says that the wide definition of "Indebtedness to GMHL" means that any future debt incurred to GMHL would also be subordinated. Thus, GMHL also provided credit by granting a right to incur a debt and defer its payment.

[1270] AWIL further submits that the credit contract continued to have two or more creditors after the assignment of BNZ's right to Lambton Quay on 7 June 2019. AWIL's position is essentially that Lambton Quay acquired BNZ's rights by assignment and not by novation. AWIL's position is that when a creditor assigns rights it remains a creditor under the CCCFA. This is because the assignee's rights are fundamentally derivative from the assignor's rights.

[1271] AWIL concludes by submitting that a broad interpretation of the regulation, so as to include contracts like the 2018 refinancing documents, would best align with the purpose of the CCCFA and the intention of the regulation.

[1272] AWIL's fallback position attempts to differentiate between a prohibition on charging interest and a prohibition on enforcement.

[1273] AWIL accepts that the CCCFA, as it was during the relevant period prior to January 2020, prohibited charging the costs of borrowing at all when the relevant creditor was unregistered. Section 99B(1)(b) makes this clear.

[1274] However, AWIL submits that if a creditor became registered and simply had not given the requisite notice under subs (3)(a) then the costs of borrowing would still accrue. Only enforcement of them was prohibited. Accordingly, when the CCCFA was amended in January 2020, AWIL says that the prohibition on enforcement was removed, and it became entitled to enforce the costs of borrowing that had accrued since Lambton Quay became registered on 20 July 2019.

[1275] AWIL submits that this does not rely on the legislation having retrospective effect.

Analysis

[1276] In short, I am reluctant to accept Clearwater's or Lambton Quay's arguments, although I set out some preliminary conclusions as follows. I do not need to make a final decision, given that I conclude that AWIL's argument must succeed.

[1277] First, in response to Clearwater's argument, I consider the passing of reg 18A is significant. In my view, the need for reg 18A rests on the premise that s 99B, as it was, applied to all credit contracts. It also appears to rest on the assumption that s 99B acted to prevent all creditors (and not just those under contracts specified in the definition of costs of borrowing) from recovering interest.

[1278] If I were to accept Clearwater's argument, then s 99B would not apply to credit contracts (other than those to which Part 3A applies). If that was the case, passing reg 18A would seem to be almost entirely pointless. That alone makes me hesitant to accept either argument.

[1279] Second, in relation to Lambton Quay's suggestion that I correct an obvious mistake, I have a real reservation. I accept there is force in the suggestion that the legislature erred in s 99B by referring to credit contracts instead of consumer credit contracts. In fact, I think it is probably more likely than not that the legislature erred.

However, I would be very reluctant to rewrite the section at this stage—with the benefit of the legislative history not available at the time. Rewriting the statute is better left for Parliament as indeed it has done in this case. In reaching this view, I bear in mind Tipping J's comments about the proper role of courts. In my view, the degree of correction involved here is too significant to allow for judicial remediation. After all, the error I am being invited to correct is not a mere slip arising from a mistake in grammar or sentence construction (such as in *Brambles*). Here, the correction goes to a conceptual and policy matter.

[1280] Given my hesitation to accept the Clearwater and Lambton Quay arguments, I turn to AWIL's proposition that the relevant "credit contract" here had two or more creditors. I first note that each of the three creditors that AWIL submits are creditors under the credit contract provided "credit" in a different document. The BNZ provided credit under the 2015 BNZ facility agreement. Lambton Quay provided credit under the 2018 facility agreement. And GMHL, whom I accept provided credit in agreeing to subordinate its own debt in favour of the BNZ and Lambton Quay, did so in the 2018 quadripartite deed.

[1281] On its face, these are three separate credit contracts. The question then becomes whether they ought to be read together as one credit contract.

[1282] As will be recalled, AWIL relied on *Harmoney* in support of its proposition that the credit contract can consist of several documents. *Harmoney* was a case stated by the Commerce Commission concerning the proper definition of Harmoney's loan arrangements under the CCCFA. I note that, in *Harmoney*, the lender was attempting to argue (for its own advantage) that separate contracts should not be read as one. Here, AWIL wants to persuade the Court that separate contracts should be read as one.

[1283] Harmoney's model involved using a web-based platform to match consumers wishing to borrow money with investors wishing to lend money (commonly known as peer-to-peer lending). The resultant loan contracts name Harmoney Investor Trustee Ltd (HITL) as creditor and trustee for the investors.

[1284] The question asked of the Commission relevant to the assessment that I have to undertake in this case is what documents comprised the credit contract. It was common ground that the "Loan Contract" was part of the credit contract. However, the Commission contended that the "Loan Disclosure" and the "Borrower Agreement" were each also part of the credit contract.

[1285] The Borrower Agreement set out the terms on which the borrower may access and use the Harmoney website. It required the payment of a platform fee. The parties were the borrower, Harmoney, and HITL.

[1286] The Loan Disclosure provided disclosure of certain information about the loan prior to the Loan Contract coming into existence as was required by the CCCFA.

[1287] The Loan Contract came into force automatically after the Loan Disclosure was sent to the borrower. The parties were the borrower and HITL.

[1288] The Court of Appeal found that all three documents comprised the credit contract. As to the Loan Disclosure, the Court noted that several key details of the loan including the amount, the term, and the rate of interest were not provided in the Loan Contract but were contained in the Loan Disclosure. The Loan Contract then made explicit reference to the Loan Disclosure containing these details. As but one example, the Loan Contract said:

> Interest will accrue on the outstanding amount of the Loan at the interest rate specified in that Loan Disclosure, on the basis of a 365-day year …

[1289] The Court therefore accepted that the Loan Disclosure formed a part of the credit contract noting that it was expressly referred to in the Loan Contract and suggesting that a reasonable person in the position of the parties would have understood the terms to operate together.

[1290] As to the Borrower Agreement, the Court noted that it contained multiple definitions important for understanding the other documents. Furthermore, the Platform Fee contained in the Borrower Agreement formed an essential part of the loan and was referred to in the Loan Disclosure and indirectly in the Loan Contract.

Certain other procedures set out in the Borrower Agreement were indirectly referenced in the Loan Contract. Overall, the Court concluded:[152]

> Harmoney's objective in crafting a Loan Contract which avoided express reference to the Platform Fee is readily apparent. However, in our view the utilisation of discrete documents is ineffective in the particular circumstances where the definitions of relevant credit terms are contained in the Borrower Agreement and the specific details of individual loans are to be found only in the Loan Disclosure to which the Loan Contract expressly cross-refers. The degree of inter-relationship among the three documents is of such a nature that, on an objective analysis, they would be read by a reasonable observer as operating together. The interpretation of what is in effect a mosaic of documents governing the loan arrangement does not involve a "brushing aside" of the documents in the sense described in *Buckley & Young Ltd v Commissioner of Inland Revenue.*

[1291] Therefore, there is certainly precedent for construing multiple documents together as one credit contract. This includes where, by express reference in one document to the contents of another document, the terms of the contract comprise those of both documents. It will also include where the relationship among the three documents is of such a nature that, on an objective analysis, they would be read by a reasonable observer as operating together.

[1292] Having considered each of the agreements in this case, as well as other related documents, I am satisfied that the various agreements should be read together as one credit contract. I rely in particular on the 2018 quadripartite deed. That agreement references both the senior and junior loan facilities throughout and essentially governs how the various agreements would operate together. Therefore, I consider on an objective analysis they would be read by a reasonable observer as operating together. In my view, that is the whole point of the 2018 quadripartite deed, the purpose of which was to play an integrating role.

[1293] As examples:

(a) The 2018 quadripartite deed defines Event of Default, Junior Finance Documents, Junior Loan Amount, Lender, Senior Loan Amount, and Transaction Documents through reference to the specific facility agreements.

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152 At [55] (footnote omitted).

(b) Parties agreed not to amend the rate of interest payable under the respective facility agreements.

(c) Each funder agreed not to take steps to enforce their mortgages other than in specified circumstances.

(d) The Borrower and the Agent (BNZ) and Junior Creditor (Lambton Quay) agreed that the deed is a transaction document for the respective Facility Agreements.

[1294] I also note the deed of priority under which Lambton Quay agreed to subordinate its debt in favour of the BNZ. This deed further goes to show how interrelated the two facility agreements were after the 2018 refinancing.

[1295] It was impossible to understand the extent of the arrangements between the parties without reference to the 2018 quadripartite deed and therefore the individual facility agreements. Consequently, I consider that all the financing documents should be read together as one credit contract. That means that there were two or more creditors under the contract. Initially that comprised BNZ, Lambton Quay, and GMHL. After the assignment or novation of the BNZ's rights to Lambton Quay (the parties disagree as to the correct characterisation of this transaction but it matters not) there were still at least two creditors under the credit contract—being Lambton Quay and GMHL, regardless of whether the BNZ remained a creditor.

[1296] I accept that this reasoning means that GMHL is both a creditor and a debtor at the same time in the same set of related documents. But in the circumstances of this case, there is no logical inconsistency nor any policy problem I can see in that approach.

[1297] As a result, Lambton Quay is not prohibited from charging interest according to s 99B of the CCCFA and the whole amount of the interest calculated as having accrued on the loan is payable. I am willing to grant the relief sought in that respect to that extent.

Declaratory relief

[1298] As noted above, AWIL also seeks declaratory relief. Mr Chisholm says this relief will clear the way for efficient enforcement of any judgment debt obtained. The declaration sought is said to reflect cl 3 of the relevant mortgage instruments which states:

> Notwithstanding any other provision of this mortgage, GMHL's liability under this mortgage may only be discharged from any proceeds or other amounts arising out of the land, the road land, the land proceeds, the village 1 proceeds and/or the Assigned Property and the mortgagee agrees that it has no rights in relation to any other property of the mortgagor.

[1299] Making the declaration would therefore appear to have a protective advantage to GMHL as it prevents recourse to assets outside of those specified in cl 3. Presumably for that reason, this relief (if the Court got to this stage) was not opposed by Mr Dickey. Accordingly, I am willing to make, and do make, the declaration.

Result of counterclaim

[1300] AWIL's counterclaim succeeds. I award judgment against GMHL in the sum of $20,133,278. I award interest in full from 7 July 2020 up to the date of payment on the sum of $20,133,278 at the rate of 21 per cent per annum, compounding monthly in accordance with the Lambton Quay Term Loan Agreement dated 20 July 2018.

[1301] I also declare that the plaintiff's liability may only be discharged from the assets of GMHL specified in clause 3 of the Lambton Quay mortgages, now being any proceeds or other amounts arising out of the Village 2 land, the balance land, and the "Assigned Property".

SUMMARY OF OVERALL RESULT

The causes of action

[1302] The first, second, third, and fourth causes of action do not succeed and are dismissed.

[1303] AWIL's counterclaim succeeds.

Costs

[1304] Costs are reserved.

[1305] The parties should provide succinct memoranda (no more than ten pages) as to costs. The defendants should file within 15 working days from the date of final delivery of this judgment. The plaintiff has 15 working days from receipt of all the defendants' memoranda in which to respond. If necessary, the defendants have a further 5 working days to respond the plaintiff's memorandum.

[1306] Upon receipt of all memoranda, I will decide costs on the papers.

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Becroft J

APPENDIX 1

CHRONOLOGY OF RELEVANT EVENTS

In this chronology the most important events appear in bold.

DATE	EVENT
BACKGROUND HISTORY	
1956	Green & McCahill Holdings Ltd (GMHL) incorporated. It is a holding company for the Weiti land.
1991	The Liu family acquired GMHL, and Weiti land, for approximately $4 million. It was brought to its attention by Mr Paul Wigglesworth, a New Zealander known to Mr Liu.
2004	Various parties approached Mr Liu and his family to purchase the Weiti land. Several offers were made—one of these was a cash offer of approximately $80 million. The Liu family saw significant long-term value in Weiti land and did not want to sell it, at least as bare land, at that stage.
DEALINGS WITH MR WILLIAMS	
Mid-2005	Mr Liu met Mr Williams, introduced by Mr Wigglesworth. Mr Williams told the Liu family about his previous property developments such as in the Bay of Islands and Fiji. He said he had represented the New Zealand Government in negotiations regarding oil rights. He is said to have held himself out as someone who could be trusted and reliable.
September 2005	Williams Capital Ltd, now called William Land Ltd (WLL), offers to pay GMHL $300 million for the Weiti land, conditional upon planning consent for not less than 2,000 residential units and up to a maximum of 3,000. WLL provides a "Development Report" about development prospects of the Weiti land, with a high-end residential subdivision envisaged.
"OPTION" AND "PUT" AGREEMENTS	
7 December 2005	**First "Option" and "Put" agreements signed, giving WLL an option to purchase all the Weiti land at a base price of $295 million.** **The agreement had a two-year time span.** **WLL paid $5 million to GMHL for the option to purchase.** **The purchase price in the agreement was "pegged", according to a complicated formula, to the number of residential consents that were obtained for the land. The price was to be no more than $295 million and no less than $155 million.**

7 December 2007	Delays had occurred in obtaining subdivision consent. First extension of "Option" and "Put" Agreement (to 7 May 2008).
17 December 2007	Rodney District Council (as it then was) granted consent for a 150-lot subdivision. The decision was appealed by objectors.
31 January 2008	WLL suggests a vendor finance proposal to Mr Liu. GMHL to receive $80 million as first part of payment, on account of purchase price, with mortgage securities. Offer rejected.
8 May 2008	**Second "Option" and "Put" Agreements. WLL paid $1 million as consideration. Agreement to expire 6 November 2009 with a slightly adjusted price formula.**
16 June 2008	WLL advised Mr Liu that the appeal had been resolved and that final consent had been granted for the 150 lot Stage 1 development of the Weiti land.
30 October 2009	**Extension of second "Option" and "Put" Agreements until 30 June 2010**. As consideration, WLL agreed to transfer two lots of land in Fiji to GMHL. But transfer was expressly conditional on South Canterbury Finance releasing mortgage securities over those lots. That release was never granted and the transfer of those two properties was never completed.
FORMATION OF WEITI DEVELOPMENT LIMITED PARTNERSHIP (WDLP)	
26 May 2010	**Consent order issued by the Environment Court increasing development capacity of Weiti land to 550 lots—well above the 150-lot cap then in place.** Precinct A—Weiti Bay: 150 lots Precinct B—Villages 1 and 2: 400 lots and up to 100,000m^2 gross floor area for commercial buildings. Precinct C—Balance land: greenbelt and conservation policy areas. Development potential for the Weiti land had significantly increased.
28 May 2010	**"Option" and "Put" agreements at an end. No legal obligations arose between the parties. Until now, no significant development of Weiti land had occurred.**
31 May 2010	The Williams Group of companies transferred a half share of the intellectual property it had developed to GMHL.
21 September 2010	**Master Sales Agreement executed. GMHL would sell land in stages as titles for each stage were released. WLL would not receive a return on capital until GMHL had received $180 million.**
28 February 2011	**Development Agreement between GMHL and Williams Capital No. 1 Ltd (WCNL) for land areas then defined as Village 1A, Village 1B, Village 1C, Weiti Bay, and Village 2.**

	Adjustments made as to how GMHL to be paid. Village 1A and 1B: $25 million (Stage 1). Village 1C: $35 million. Karepiro Bay (Weiti Bay): $80 million: first 80 lots (Stage 2). Village 2: $80 million (Stage 3). Total purchase price $220 million. Adjusted dates for payment set out. The purchase price was reduced due to no "balance land" being included. WCNL to pay $190 million (as an early payment discount) for the described land but only if payment made by 28 April 2011. WCNL did not meet terms of Development Agreement. Options expired but Development Agreement continued.
26 June 2012	First subdivision development feasibility summary (land only) provided to GMHL. Revenue and costs for Weiti, Village 1 and Village 2 set out.
26 June 2012	**Weiti Development Limited Partnership (WDLP) formed.** **General partner was Weiti Development General Partner Ltd (WDGPL), of which Mr Williams was the sole director.** **Two limited partners:** **(i) Mr Liu: 60 per cent interest. Mr Liu's interest was in the form of Weiti Trustee Ltd (WTL) (now Weiti Invest Co Ltd), which he controlled.** **(ii) Mr Williams and his family interests: 40 per cent interest. The Williams' family interests were in the form of Weiti General Partner Limited (WGPL), as general partner of the Weiti Limited Partnership (Weiti LP).**
27 June 2012	Amended Development Agreement. Stage 1 now to be the 80 Weiti Bay lots. As to later stages (called Village 1 and Village 2)—planning applications to be made to protect future development. WDLP took over WCNL's interest in the Development Agreement. Payments to GMHL conditional on issuance of titles. Weiti Bay still at the $80 million purchase price.
LEAD UP TO THE TWO TRIPARTITE AGREEMENTS AND LOANS	
8 December 2012	GMHL entered into a loan agreement with the general partner of WDLP for $1.569 million, loaned in five tranches. This money was required for initial pre-development work.
12 December 2012	WDLP notifies GMHL it will apply for increase in development capacity to 1,200 lots.
3 May 2013	GMHL and WDLP vary Master Sales Agreement, allowing for increase in purchase price if Auckland Council consent to increase in number of lots from 550 to a maximum of up to 1,600.

Up to 6 May 2013	Discussions with NZMS (a financier part owned by the Manson family) about subdivision development finance—being a single loan for both pre-development and construction. Mr Liu eventually clear that GMHL does not want to provide mortgage security over any of the Weiti land.
17 July 2013	Mr Williams as CEO of WLL advises Mr Liu that $6.25 million required for pre-construction costs including obtaining approval for increase in lots from 1,200 to 1,600.
17 July 2013	Four new titles issued for the Weiti land: 1. Village 1 2. Weiti Bay encompassing the planned premiere 150 luxury size residential lots 3. Village 2 4. Balance land
8 August 2013	**First Tripartite Deed between GMHL, WDLP and Spinnaker Capital. Loan agreement for $6.25 million. Mortgage security only over the Weiti Bay land to Spinnaker Capital. Money to be used by GMHL for pre-development costs and consents.**
30 September 2013	Auckland Council Draft Unitary Plan released approving increase in subdivision from 550 to 1,200 lots as well as extensive commercial floor area.
27 August 2014	**New Loan Facility Agreement signed between WDLP and Killarney Capital. $10,420 million for six months. Designed to repay Spinnaker and bridge gap until construction. Loan was for further "pre-construction" finance, as Spinnaker loan was insufficient to complete all the pre-construction work.**
1 September 2014	**Second Tripartite Deed executed between Killarney (a finance company), WDLP and GMHL.**
4 October 2014	Presentation in Taipei by Mr Williams in person to Mr Liu, and his father and sister. $65 million loan plus interest and costs approved for subdivision construction.
28 February 2015	WDLP defaulted on Killarney Facility Agreement repayment.
LEAD-UP TO AND SIGNING OF THE THREE QUADRIPARTITE AGREEMENTS AND LOAN FACILITIES	
By 15 April 2015	Purchase price had been reduced to $180 million in three tranches for Weiti Bay, Village 1 and Village 2.
23 April 2015	Mr Liu visits New Zealand and meets with Mr Williams and with WDLP personnel including Mr Simon Matthews and Mr Dempsey. Updated forecasts/estimates/accounting bills were presented. Mr Liu very upset with the increases. This meeting became known as the "angry meeting".

24–29 May 2015	Mr Liu again visits New Zealand. Mr Liu engages Mr Anderson of Lowndes & Co for meetings.
5 June 2015	Killarney issued Property Law Act 2007 (PLA) default notices to WDLP and GMHL for $11,906,150.80.
June–July 2015	Mr Liu separately negotiated to pay back Killarney with a loan from Westpac. No acceptance by GMHL of BNZ loan offer and mortgage security. Much uncertainty.
26 August 2015	**GMHL and WDLP signed a Senior Facility Agreement with the BNZ providing for up to $68,300,000 in lending; and a Junior Facility Agreement with Capital Group for $9.785 million in lending.** **Mr Williams executed deed of personal guarantee to BNZ (capped at $1.5 million).**
7 September 2015	**First Quadripartite Deed signed between GMHL/WDLP/BNZ/Capital Group.** **Senior lender: BNZ. Initial loan of $67.31 million ($65 million principal, plus costs).** **Junior "mezzanine" lender: Capital Group loan of $9.785 million (apparently to repay the Westpac loan)** **All GMHL's intellectual property interests assigned to the lenders.**
Early November 2015	Construction of access and subdivision roads began.
17 February 2016	81 lots in Weiti Bay had been sold (off the plans) for $77.3 million.
4 October 2016	Capital Group inform they do not wish to proceed with Stage 2 financing.
1 February 2017	**Second Quadripartite Deed signed. Capital Group was replaced by Nomura Finance through its wholly owned New Zealand subsidiary, Pacific Dawn. Pacific Dawn loan for 18 months to expire 2 August 2018.** **For the first time, Village 1 land also mortgaged to secure loans.**
13–14 May 2017	A major slip occurred in the western corner of the Weiti Bay development. It occurred within an area of engineered fill affecting and isolating five lots.
23 December 2017	WDLP signed Settlement Agreement in respect of judicial proceedings against Auckland Council in respect of application for 1,200 lots. Council agreed not to oppose application.
17 January 2018	Weiti Bay Stage 1 settlements: 68 out of 80 lots settled within first four hours.
May–July 2018	Mr Williams says it is clear to him that relationship breaking down with Mr Liu about this time.

24 June 2018	Email from Mr Liu to Mr Williams expressing concern about Mr Williams' conduct in relation to the development. Mr Liu questions whether, after all Weiti Bay lots are sold, and all the financiers (WDLP and Williams) are paid off, GMHL will receive anything at this stage?
2 July 2018	Lambton Quay Properties Nominees (Lambton Quay) agreed to become the junior lender in order to "take out" Nomura/Pacific Dawn loan.
20 July 2018	**Third and final Quadripartite Deed finalised between WDLP/GMHL/BNZ and Lambton Quay. Lambton Quay "takes out" Pacific Dawn loan. GMHL again, as for the two previous quadripartite deeds grants encumbrances over Village 2 and balance land. GMHL also covenanted to pay BNZ and Lambton Quay amounts due and payable by WDLP to BNZ and Lambton Quay.**
27 July 2018	**Deed of Amendment executed by WDLP, WDGPL and BNZ which amended the 2015 BNZ facility.** **$28 million advanced to WDLP by Lambton Quay.**
AFTER LAMBTON QUAY BECAME INVOLVED	
12 November 2018	Email from GMHL advisers to Mr Williams querying plan to repay BNZ and seeking confirmation that, after all Weiti Bay lots sold, there would be a shortfall of $5 million.
14 November 2018	Email from Mr Williams on behalf of Williams Group/WDLP to GMHL's legal and accountancy advisers and Mr Liu, advising that BNZ will not extend past 31 January 2019, and confirming shortfall.
Late 2018	Approximately 80 per cent of Weiti Bay lots had been sold. Generally, sales had significantly slowed.
7 December 2018	Savills valuation issued: (a) Remaining lots at Weiti Bay: $42.5 million. (b) Village 1: ($60 million).
Early 2019	Successful completion of construction stage of Weiti Bay subdivision, constituting 150 lots at a cost of more than $100 million.
BNZ LOAN EXPIRED 2019 AND LEAD UP TO MORTGAGEE SALE	
30 January–5 February 2019	Mr Liu and his two sons visit New Zealand. It was a private visit, with hospitality from Mr Williams.
31 January 2019	The BNZ loan facility expired with arrears of about $12 million.

4 February 2019	Separate face to face meeting between Mr Liu and Mr Williams. Mr Liu says Mr Williams first informed him that BNZ loan was in default. Mr Liu says that "left me in shock". Mr Williams presented an indicative offer from Singaporean investor in range of $50 to $60 million with net payment to GMHL of $37.2 to $47.2 million. Mr Liu walked out of meeting.
Early–Mid February 2019	Mr Liu very concerned at the deteriorating position. Effectively, the relationship between Mr Williams and Mr Liu ends. Mr Liu no longer trusts Mr Williams. Mr Williams apparently committed to resurrecting business relationship.
19 February 2019	BNZ is owed about $12.8 million. BNZ agreed not to enforce penalty interest. BNZ agreed to wait until April 2019. Lambton Quay is owed about $30 million.
25 February 2019	Mr Thompson (GMHL's lawyer) advises Mr Paterson (WDLP's lawyer) that GMHL "no longer prepared to pass title to its land without some payment on account of the $180 million" —(being the total purchase price for Weiti Bay and Villages 1 and 2 land). GMHL require a "re-negotiation" of existing Quadripartite deal.
1 March 2019	Lambton Quay gave notice of its wish to exercise its option to purchase BNZ loan debt.
7 March 2019	Mr Thompson confirms no agreement to further funding until GMHL's conditions are met.
10 April 2019	Offer to buy out the Liu family/GMHL's interest for $30 million from a Williams Group "new company" was rejected.
7 June 2019	BNZ novated all its mortgage and loan rights, title, and interest to Lambton Quay. Lambton Quay now holds the first ranking mortgage over Weiti Bay and Village 1, in addition to its second mortgages.
21 June 2019	$50 million offer to GMHL from Clearwater Capital Partners (sixth defendant) to purchase all land with three years to complete plan changes and a payment to Lambton Quay. No final response.
DEFAULT NOTICES ISSUED AND MORTGAGEE SALE	
9 July 2019	The offer to GMHL by Clearwater still on table, but it is effectively revoked by this time.
10 July 2019	Lambton Quay served notices of demand (dated 9 July 2019) on WDLP, WDGPL and GMHL under the BNZ facility—$12,866,070.13.
20 July 2019	Lambton Quay registered on the Financial Service Providers Register pursuant to the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP).

22 July 2019	**Lambton Quay served PLA default notices on WDLP, WDGPL and GMHL under the BNZ facility.**
1 August 2019	Lambton Quay served notices of demand on GMHL and WDLP under the 2018 Lambton Quay term loan for $33,679,824.00.
12 August 2019	**Lambton Quay served PLA default notices on GMHL and WDLP under the Lambton Quay term loan.**
28 September 2019	**Advertisement of mortgagee sale by Bayleys Real Estate. A sales campaign began. 6 November 2019 was the mortgagee sale deadline.**
14 October 2019	Stuff media interview undertaken by Mr Williams attempting to play down damage to the development of any mortgagee sale.
6 November 2019	**Mortgagee sale deadline expired without a sale.**
MORTGAGEE SALE PROCESS CONTINUES	
12 November 2019	Valuations by Savills provided to WDLP. Adopted Market Value Gross Realisation of: (a) $29.02 million for Village 1. (b) $39.1 million for unsold Weiti Bay sections. Various forced sales valuations also provided.
20 November 2019	Lambton Quay's lawyer advised GMHL's lawyer that it did not consider there was any issue with the process and that the mortgagee sale process had not yet been concluded. Negotiations with Lambton Quay and an overseas buyer for Village 1 commence.
17 December 2019	Lambton Quay advised it had signed a conditional offer at $21 million for Village 1.
10 February 2020	The existing conditional agreement for purchase of Village 1 was cancelled by potential overseas buyer.
15 April 2020	Lambton Quay signed Term Sheet for Williams Companies/Clearwater purchase of unsold Weiti Bay lots and Village 1.
8 May 2020	Ara Weiti Development Ltd (AWDL) and Ara Weiti Investments Ltd (AWIL) are incorporated.
14 May 2020	Ara Weiti Bay Development Ltd (AWBDL) is incorporated.

18 May 2020	Intended settlement date under deed for Lambton Quay, Clearwater and Williams' companies expired. Mr William's companies could not settle. Mr Williams' asked Sir Mark for more time.
22 May 2020	Further agreement with Lambton Quay was reached. Amended agreement concluded.
12 June 2020	**Mortgagee sale settled.** **All financing agreements with Clearwater are settled.** **$35 million specified purchase price.** **A very complicated legal/financial structure was adopted involving companies effectively controlled by Mr Williams, Lambton Quay and various Clearwater entities.** **$54,846,881.77 in total was due and owing by WDLP and GMHL to Lambton Quay (under original BNZ loan and Lambton Quay loan). Increase in total debt due to daily interest rates of 10 per cent and 21 per cent respectively).** **WDLP executes an Acknowledgement of Debt for that amount. Transaction documents executed. Money held in escrow.**
12 June 2020	**Lambton Quay assigned $19,846,881.71 residual debt to AWIL (the debt was owed by GMHL to Lambton Quay as a result of the shortfall in the agreed mortgagee sale).**
24 June 2020	GMHL was notified of the terms of the mortgagee sale and the assignment of its residual debt to Lambton Quay to AWIL.
7 July 2020	AWIL served statutory demand on GMHL and WDLP for $20,133,278, for total residual debt. Demand notice against GMHL was later withdrawn, after GMHL applied to set it aside. AWIL's claim for the outstanding balance thereafter was incorporated as its counterclaim in this consolidated proceeding.
21 August 2020	GMHL filed an application that its caveats not lapse. GMHL also commenced the present substantive proceedings against Mr Williams and Williams Companies (being the second to fourth defendants and Williams Management Trust) which included claims for breach of fiduciary duties by Mr Williams personally, and related knowing receipt, knowing assistance and constructive trust claims against Williams companies. All these claims were later abandoned.
7 July 2022	Plaintiff filed amended and consolidated statement of claim. Claim against Williams Management Trust was abandoned. Lambton Quay and Clearwater were joined as fifth and sixth defendants.
8 December 2023	GMHL filed and served second amended and consolidated statement of claim, abandoning those claims it had relied upon in respect of its earlier caveats.