

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

CIV 2014-409-549

Between **GREGORY ROBERT SMITH**, of Christchurch, Investor and
COLIN PETER STOKES, of Christchurch, Architectural Designer
Plaintiffs

And **NOBLE INVESTMENTS LIMITED**, a duly incorporated company
having its registered office at 60 Tinakori Road, Thorndon,
Wellington
First Defendant

And **APPLE FIELDS LIMITED**, a duly incorporated company having its
registered office at Level 3, 38 Clearwater Avenue, Christchurch
8051
Second Defendant

.../continued

29 July 2016

Next event date

Judicial Officer Gendall J

Duncan Cotterill

Solicitor acting: Jonathan Forsey / Stephen Caradus
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- And** **JUSTIN WILLIAM PRAIN**, of Christchurch, Company Director
Third Defendant
- And** **CARDNO (NZ) LIMITED**, a duly incorporated company having its
registered office c/- Pocock Hudson Limited, Level 7, 44 Victoria
Street, Wellington
Fourth Defendant
- And** **SHAYNE PHILPOTT**, of 475c Yaldhurst Road, Christchurch,
Director, New Zealand Trustee Services Limited, as duly
incorporated company having its registered office at Unit 1, 142
Ferry Road, Christchurch, **FAY EUNICE RICHARDSON** of 475c
Yaldhurst Road, Christchurch, Teacher, and Burnside Trustees
Limited a duly incorporated company having its registered office at
5/35 Sir William Pickering Drive, Christchurch,
Second Counterclaim Defendant
- And** **STUART ELLESMERE LINDSAY**, company director of 47a
Yaldhurst Road, Christchurch and **JULIE IVONEE LINDSAY**,
married woman, of 47a Yaldhurst Road, Christchurch
Third Counterclaim Defendants
- And** **GOLD BAND FINANCE LIMITED**, a duly incorporated company
having its registered office at 485 Papanui Road, Christchurch
Fifth Defendant
- And** **DELTA UTILITY SERVICES LIMITED**, a duly incorporated
company and subsidiary of Dunedin City Holdings Limited and
Dunedin City Council having its registered office at 10 Halsey
Street, Dunedin
Sixth Defendant

The plaintiffs say:

Parties

- 1 The plaintiffs are two thirds owners of Lot 9, formerly two thirds owners of Lot 19 and two third owners of a 1/10th share of Lot 22 DP323203 (**Property**) in the Yaldhurst Road Subdivision (**Further Subdivision**).
- 2 The plaintiffs have the authority of the other one third owner for this proceeding.
- 3 The first defendant, Noble Investments Limited (**NIL**) was the original registered proprietor of the land upon which the Further Subdivision is located.
- 4 NIL is currently the registered proprietor of Lots 11 to 19 (**NIL Land**) which comprises the majority of the Further Subdivision.
- 5 The second defendant, Apple Fields Limited (**AFL**) has a management contract with NIL under which AFL manages the development of the Further Subdivision and takes a 95% share of all profits or losses.
- 6 At all material times the third defendant (**Mr Prain**) has been director of AFL.
- 7 Mr Prain manages day to day operations of NIL.
- 8 The fourth defendant, Cardno (NZ) Limited (**Cardno**) provided consultancy services to NIL, AFL, Mr Prain, Gold Band Finance Limited, Delta Utility Services Limited and the plaintiffs.
- 9 The fifth defendant, Gold Band Finance Limited (**Gold Band**) carries on business as a financier.

- 10 The sixth defendant, Delta Utility Services Limited (**Delta**) carries on business as a civil construction company.

Purchase of Property from NIL

- 11 On 17 May 2002 the plaintiffs entered an Agreement for Sale and Purchase (**ASAP**) as purchaser with NIL as vendor.
- 12 Under the ASAP the plaintiffs purchased Lot 9, 19 and 1/10th share of Lot 22 following an initial subdivision (**Initial Subdivision**).
- 13 Lot 22 is a strip of land that serves as a right of way for the Initial Subdivision and, under the ASAP, was, in the event of a further subdivision being approved, to be widened and vested in the Council as a fully serviced legal road to L1A zoning (District Plan) standard at NIL's cost.
- 14 The plaintiffs rely on the terms of the ASAP as if pleaded in full, along with the Deed of Option and the Memorandum of Encumbrance which formed part of the ASAP including the further terms of sale clauses 14 and 15 (FT14 and FT15) which provide:

"14. Following completion of the initial subdivision the vendor will use it's [sic] best endeavours at it's costs to obtain L1A zoning for Lot 9 and further undertakes not to do anything or negotiate with the Council to use Lot 9 to effect a more advantageous zoning than it might have achieved on the balance of it's land, i.e, it shall not agree to a lesser zoning for Lot 9 than for any other lot where it is seeking L1A zoning or it's equivalent (unless previously agreed in writing with the Purchaser)."

"15. In the event a further subdivision is approved and work undertaken for residential subdivision by the Vendor on the adjoining development then the Vendor undertakes to provide full width roading to L1A zoning standard at it's cost, together with sewer, power, telephone, water and stormwater connection for this zone's standard to Lot 9. This work is to be completed

within TWO YEARS of residential zoning being granted or when development of the Vendors adjoining land is undertaken, whichever comes first.”

- 15 The ASAP settled on 12 August 2003 following the Initial Subdivision.

Deed of Option

- 16 The plaintiffs granted NIL an option to purchase Lot 19 pursuant to clause 24 of the ASAP but subject to FT 14 and FT 15.
- 17 The plaintiffs and NIL entered into the Deed of Option dated 23 November 2003, pursuant to which NIL was entitled to purchase Lot 19 for \$10.00 (and the interests in FT 14 and FT 15) (Option).
- 18 The terms of the Option are pleaded in full but included the following terms:
- 18.1 The plaintiffs granted NIL an option to purchase the Final Balance Property (Lot 19) on terms set out in the Option (clause 2.1);
- 18.2 It was a condition precedent to NIL exercising the Option that it obtained the 'Option Consent' (clause 2.2);
- 18.3 The Option Consent meant the full and final resource consent to allow the property to be subdivided in accordance with the Preliminary Plan (clause 1.1);
- 18.4 The Option Consent included all easements, covenants, restrictions, rights or obligations required to effect the subdivision and provide for access and services to the lots (clauses 1.1);
- 18.5 The Option lapsed after 20 years less one day, after which time NIL had no interest or claim upon the Property (clause 3.2).

- 19 The Preliminary Plan referred to in clause 1.1 of the Option Consent was never provided.
- 20 Under the terms of the ASAP and Option the plaintiffs were not required to transfer Lot 19 to NIL until the full width roading and services had been provided for Lot 9 for its further subdivision.

Gold Band Loan Agreement

21 On or about 4 April 2008, Gold Band and NIL entered into a Commercial Loan Facility Agreement (**Loan Agreement**) and a General Security Agreement. The terms of the Loan Agreement and General Security Agreement are pleaded as if set out in full.

22 Security for the Loan Agreement included:

22.1 An assignment of NIL's options to purchase the land described and comprised in part certificates of title 93049, 93050, 93051, 93052, 93053, 93054, 93055, 261109 and 93057; and

22.2 An agreement to mortgage the land described above, after titles had issued and the land transferred to NIL.

Breach of FT 15

23 NIL and AFL obtained the grant of residential zoning on 21 August 2006.

24 NIL made application for the consent for the Further Subdivision on 29 June 2007.

25 NIL advised the plaintiffs that it entered into a contract with AFL for AFL to manage the development of the Further Subdivision in exchange for a 95% share of NIL's profits.

- 26 The time frame for performance of FT 15 was 21 August 2008, being two years from the granting of residential zoning.
- 27 NIL failed to comply with the requirements of FT 15 by 21 August 2008.

Particulars of failure

- 27.1 The full width roading to L1A zoning (District Plan) standard had not been connected to Lot 9;
- 27.2 The sewer, power, telephone, water and stormwater connections (to L1A zoning standard) had not been provided.

Breach of Further Term 14

- 28 NIL sought more advantageous zoning density for the NIL Land as compared with Lot 9.

Particulars of failure

- 28.1 NIL applied for lot sizes of 175m² for the NIL Land but only applied for lot sizes of 800m² for Lot 9;
- 28.2 The above failure was acknowledged by Mr Kain in an email to Mr Stokes dated 3 June 2008 at 11:06am.

Representations about Imminent Resource Consent

- 29 NIL, AFL and Cardno represented (expressly and impliedly) that the Further Subdivision was imminent and in accordance with what had been agreed between the parties:

Particulars of representations

- 29.1 Email dated 27 June 2007 from Alan Thomas and Richard Graham of Cardno to the plaintiffs and other Lot 22 owners containing a plan showing parts of the Further Subdivision including the widened Lot 22 road servicing Lot 9 and other Lot 22 subdivisions;
- 29.2 Email dated 7 April 2008 from Richard Graham of Cardno to the plaintiffs containing a plan showing part of the Further Subdivision including the widened Lot 22 road leading to Lot 9;

- 29.3 Email dated 2 July 2008 from Richard Graham of Cardno to the plaintiffs containing a revised plan showing part of the Further Subdivision including the widened Lot 22 road leading to Lot 9 and additional rights of way to Lot 9 over Lot 19 to the south;
- 29.4 Email dated 24 July 2008 from Richard Graham of Cardno to the plaintiffs containing a plan showing 450m² density for Lot 9 that had been submitted to the Council and the widened Lot 22 road;
- 29.5 Email dated 24 July 2008 from Richard Graham or Cardno containing a plan showing the additional right of way over Lot 19;
- 29.6 Conversations on various dates between Richard Graham of Cardno to Colin Stokes and Greg Smith in which Mr Graham repeated the representations contained in the emails pleaded above;
- 29.7 Verbal representations from Mr Kain and Mr Prain to Greg Smith and Colin Stokes on various dates leading up to the Further Agreement that the Further Subdivision consent was imminent and that NIL and/or AFL would provide full width roading and services along Lot 22 including stormwater provision to and for Lot 9's further subdivision at NIL and/or AFL's cost.
- 30 The plans that were shown to the plaintiffs provided full width roading to L1A zoning (District Plan) standard along Lot 22 and connecting to Lot 9 to enable its further subdivision.
- 31 Cardno also prepared a stormwater catchment plan for the Council subdivision resource consent which was not shown to the plaintiffs (**Stormwater Plan**).
- 32 The Stormwater Plan made provision for stormwater drainage and basins for the NIL Land but made no provision for Lot 9 and the Lot 22 roading.
- 33 The works pleaded at paragraph 28 cannot be completed without stormwater drainage for Lot 9 and the Lot 22 roading.

34 The defendants did not advise the plaintiffs that:

34.1 The Stormwater Plan existed; or

34.2 The subdivision plans shown to the plaintiffs could not be taken at face value; or

34.3 The subdivision plans shown to the plaintiffs could not be implemented.

The 2008 Further Agreement

35 In reliance on the representations pleaded above, the plaintiffs entered a series of discussions with NIL whereby it was agreed, without prejudice to the ASAP:

35.1 The plaintiffs would reserve their rights under the ASAP including FT 14 regarding zoning density disparity and that NIL would use best endeavours to obtain resource consent for 450m² density zoning for Lot 9 as contained in the Cardno plan dated 24 July 2008.

35.2 Lot 9 would have additional roading access to the South via a sealed and serviced right of way over Lot 19 and roading over Lots 18 and 19 and the proposed spine road.

35.3 The plaintiffs would grant a limited access easement over Lot 22 to enable new titles to issue for Lots 11 – 19, which could then be transferred to NIL to assist NIL in raising funds to effect the Further Subdivision including Lot 9's part of it which was due in the first stage under FT 15.

35.4 The plaintiffs would provide an executed transfer of Lot 19 to NIL in advance of NIL providing the interests outlined at paragraph 35.2.

36 The further agreement between NIL, AFL and the plaintiffs pleaded above were recorded, in part, on a letter dated 8 August 2008 (**Further Agreement**).

37 The plaintiffs rely on the terms of the Further Agreement as if pleaded in full, which includes the following:

“2.5. Apple Fields Ltd will use all reasonable endeavours to ensure sufficient funds are committed from the proceeds of the pre-sales towards construction of the further subdivision, and will otherwise use all reasonable endeavours to implement roading for the spine road and the roading and sealed and serviced right of way required for and to Lot 9 at its expense and to use all reasonable endeavours to complete such as soon as possible”.

38 The plaintiffs transferred Lot 19 to NIL on 22 August 2008.

39 At the same time that Lot 19 was transferred to NIL, the fifth defendant, Gold Band, registered a mortgage over all Lot 11 – 19 new titles.

Particulars

39.1 Instrument 7915583.35;

39.2 Priority amount of \$1,750,000;

40 Mortgage memorandum number 2007/4238. Lot 19 comprises 3.2ha of residentially zoned land which has a developed value of around \$8 million. Lots 11 – 19 combined comprise over 25ha with 6ha zoned commercial.

Council Approval

41 The application for Further Subdivision that Cardno submitted to the Council included:

41.1 The plans shown to the plaintiffs; and

41.2 The Stormwater Plan which was not shown to the plaintiffs.

42 NIL, AFL and Cardno obtained the consent for the Further Subdivision application from the Council on 25 May 2009 (**Consent**).

43 Richard Graham of Cardno sent a copy of the Consent (absent the Stormwater Plan) to the plaintiffs on 26 May 2009 advising their further subdivision development could be progressed.

44 The Consent, at face value, provided for the widened Lot 22 roading and services for Lot 9 to enable the plaintiffs to further subdivide Lot 9, however the roading and further subdivision could not be implemented.

Particulars

44.1 No provision was made for stormwater drainage for Lot 9 which is a prerequisite to subdividing Lot 9;

44.2 No provision was made for the stormwater drainage for roading along Lot 22 which is a prerequisite for forming a legal road;

44.3 The widened Lot 22 legal road is a requisite to subdividing Lot 9 as consented.

45 Accordingly while the Consent appeared to permit and enable the further subdivision of Lot 9, that was not the case.

46 The plaintiffs learned that provision had not been made for stormwater drainage for Lot 9 and Lot 22 during High Court proceedings in 2012 when NIL sought to lapse the plaintiffs' caveats.

47 On or about October 2013 the plaintiffs requested plans from the Council that might have been missing from the stamped Consent.

48 On 22 October 2013 the Council emailed the Stormwater Plan to the plaintiffs.

49 The Stormwater Plan revealed that the defendants had never sought the stormwater provision necessary to enable the Lot 9 further subdivision.

50 AFL and NIL have not provided the roading and services required pursuant to the subsequent events ASAP or the Further Agreement.

Delta

51 NIL contracted with Delta to provide services to the subdivision.

52 On or around 2009 NIL, Gold Band and Delta agreed to secure Delta's works by a registered mortgage over Lot 14.

53 On 22 December 2009 Delta's lawyers wrote to NIL's lawyers and asked them to advise the plaintiffs that "having DELTA carry out the works will result in Noble being able to provide the required roading and services."

54 NIL's lawyers forwarded Delta's email to the plaintiffs later on the same day.

55 By email dated 23 December 2009 the plaintiffs advises that they would consent to Delta registering its mortgage "so as to enable the roading and services to continue."

56 Delta registered a second mortgage (instrument 8325807.1) over Lot 14.

57 On or about the same time, NIL, Gold Band and Delta entered a Deed of Priority pursuant to which Delta was granted priority over Gold Band's mortgage in relation to Lot 14.

- 58 On or about 14 April 2010 NIL, Gold Band and Delta purported to enter into a “Security Sharing Agreement”, which is pleaded as if set out in full, but included provisions to the effect that:
- 58.1 Gold Band would hold its first registered security “in trust” for Delta;
 - 58.2 Gold Band would confer the rights and benefits of its first mortgage in respect of Lot 14 to Delta.
 - 58.3 Gold Band agreed to act on Delta’s instructions; and
 - 58.4 Gold Band would not discharge its first mortgage without Delta’s consent, or until Delta had a first registered mortgage over Lot 14 or was paid in full.
- 59 From about 2009 to 2013 Delta constructed physical works for the Further Subdivision and represented to the plaintiffs that the work being undertaken included the provisions and capacity required for their Lot 22 roading and Lot 9 subdivision.

Particulars

- 59.1 Representation made on site by staff and management.
 - 59.2 Email correspondence and representations by telephone.
- 60 On or about March 2011 Gold Band, NIL and Delta agreed to grant Delta a first registered mortgage over Lots 18 and 19.
- 61 The plaintiffs, whose caveats prevented the registration of Delta’s mortgage, did not consent to Delta’s mortgage over Lots 18 and 19.
- 62 Representatives for Gold Band, NIL and Delta exchange numerous emails regarding how Delta could register a mortgage over Lot 19, and defeat the plaintiff’s interests, if necessary.

Particulars

- 62.1 By email dated 11 February 2011 David Smillie, lawyer for Delta, proposed a four stage process:
 - 62.1.1 NIL granting a registered mortgage to Delta over Lot 19;
 - 62.1.2 The plaintiffs consenting to registration (but their caveat remaining ahead of Delta's mortgage);
 - 62.1.3 Gold Band agreeing to Delta having first priority;
 - 62.1.4 Gold Band holding its first mortgage on trust for Delta "to allow sale/enforcement by Delta if necessary so as to avoid caveat issues."
- 62.2 By email dated 8 March 2011, David Smillie, lawyer for Delta, noted that the plaintiffs had an existing caveat over Lot 19 which protected their interests including an agreement to create a right of way easement" and proposed a mechanism "so as to be able to overcome the caveat if it became necessary to enforce Delta's security".
- 62.3 By email dated 4 May 2011 David Smillie wrote an email which said that if the existing caveats were not withdrawn then NIL, Gold Band and Delta would need to enter a further security sharing agreement (or words to that effect).
- 63 On or about 21 December 2011 NIL, Gold Band, and Delta entered a further Deed of Priority and Security Sharing Agreement pursuant to which:
 - 63.1 Gold Band granted Delta priority over Lot 19;
 - 63.2 Gold Band agreed to confer the rights and benefits of its first mortgage in respect of Lot 19 to Delta.
 - 63.3 Gold Band agreed to act on Delta's instructions; and

63.4 Gold Band would not discharge its first mortgage without Delta's consent, or until Delta had a first registered mortgage over Lot 19 or was paid in full.

64 On or about 2011 Delta, NIL and the plaintiffs negotiated a Memorandum of Understanding (**MOU**) whereby the plaintiffs would remove caveats ahead of roading and services and interests due to them on the basis NIL would give irrevocable instructions to Delta to complete the plaintiffs roading and services required for their subdivision and that Delta would then undertake to complete the works secured by additional mortgage security over NIL's land.

65 NIL and/or Delta did not follow through with the MOU.

66 In about 2013 the plaintiffs discovered that the infrastructure Delta had installed did not cater for their subdivision or roading.

Particulars

66.1 The stormwater basins did not cater for nor had the capacity for Lot 9 subdivision or Lot 22 roading.

66.2 The stormwater pipes under the sealed roads did not cater for the stormwater requirements for the Lot 9 subdivision and Lot 22 road.

66.3 Services of sufficient capacity were not installed to enable connection for the further subdivision of Lot 9 and 22.

First cause of action: Breach of Contract – First Defendant (NIL) - ASAP

The plaintiffs repeat paragraph 1 to 57 and say:

67 The first defendant is in breach of its obligations pursuant to the ASAP as:

67.1 NIL achieved a less advantageous zoning for Lot 9 than it did for its lots in the Further Subdivision.

Particulars

67.1.1 NIL effected zoning density as small as 85m² for its lots;

67.1.2 NIL effected zoning density of 450m² for Lot 9.

67.2 NIL failed to provide full width roading and services to Lot 9 required for its further subdivision pursuant to the ASAP.

Particulars

67.2.1 NIL was required to provide the roading and services within two years of the rezoning which occurred on 21 August 2006;

67.2.2 NIL are yet to provide the roading and services necessary for the Further Subdivision of Lot 9.

68 As a result of the breach's the plaintiffs have suffered a loss.

69 NIL, alone, has the necessary ownership, control and rights over all of the Further Subdivision to complete the roading and services works required pursuant to the ASAP and Further Agreement.

Wherefore the plaintiffs seek:

- A. Specific performance of the ASAP and damages arising from NIL's delays and zone density disparity;
- B. (Alternatively) Orders vesting Lot 19 in the plaintiffs pursuant to the Contractual Remedies Act 1979;
- C. (Alternatively) Damages to be quantified prior to trial;
- D. Interest;
- E. Costs.

Second Cause of Action: Breach of Contract - First and Second Defendants (NIL and AFL) – Further Agreement

70 The plaintiffs repeat paragraph 1 to 57 and say:

71 Pursuant to the Further Agreement dated 8 August 2008 the first and second defendants agreed:

71.1 AFL would use all reasonable endeavours to ensure sufficient funds were committed towards construction of the further subdivision (including specifically Lot 9's part of it which was required in the first stage);

71.2 AFL would use all reasonable endeavours to implement the roading and the sealed and serviced right of way required for and to Lot 9 at its expense;

71.3 AFL would complete the above as soon as possible;

71.4 NIL consented to these obligations.

72 The first and second defendants breached the Further Agreement.

Particulars

72.1 AFL did not use all reasonable endeavours to ensure sufficient funds were committed towards construction of the further subdivision for Lot 9;

72.2 AFL did not use all reasonable endeavours to implement roading, rights of way, and services for and to Lot 9, as per the Cardno plan, at its expense;

72.3 NIL/AFL did not make stormwater provision in its applications to enable the Lot 22 roading and Lot 9 further subdivision;

72.4 AFL failed to complete the above as soon as possible.

73 The plaintiffs have suffered a loss as a result of the first and second defendants' breach of contract.

Wherefore the plaintiffs seek:

- A. Specific performance of the Further Agreement and damages arising from AFL/NIL's delays;
- B. (Alternatively) Orders vesting Lot 19 in the plaintiffs pursuant to the Contractual Remedies Act 1979;
- C. (Alternatively) Damages to be quantified prior to trial;
- D. Interest;
- E. Costs.

Third Cause of Action: Misrepresentation – First and Second Defendants (NIL and AFL) – Further Agreement

74 The plaintiffs repeat paragraph 1 to 57 and say:

75 During negotiations which led to the Further Agreement dated 8 August 2008 the first and second defendants expressly represented to the plaintiffs:

75.1 AFL would use all reasonable endeavours to ensure sufficient funds are committed towards construction of the further subdivision;

75.2 AFL will use all reasonable endeavours to implement roading, sealed and serviced right of way, and services for and to Lot 9 in accordance with the Cardno plan for Lot 9 at its expense;

75.3 AFL would complete the above as soon as possible;

75.4 NIL would agree to the above obligations.

76 By letter dated 10 April 2008 from NIL's solicitors (Cavell Leitch) to the plaintiffs solicitor (White, Fox & Jones) it was expressly represented that NIL would provide plans which showed details of the works to be carried out.

77 It was an implied representation that:

- 77.1 Material details would not be withheld from the plaintiffs;
- 77.2 The plans, which showed sealed and serviced right of way, and services for and to Lot 9 in accordance with the Cardno plan could be taken at face value;
- 77.3 NIL and AFL would not submit to the Council further plans and applications which meant the works pleaded above could not be effected.
- 78 The plaintiffs entered the Further Agreement in reliance on the above representations.
- 79 The representations pleaded at paragraphs 58 to 60 were false.

Particulars

- 79.1 AFL did not use all reasonable endeavours to ensure sufficient funds were committed towards construction of the further subdivision for Lot 9 at the first stage, or at all;
- 79.2 AFL did not use all reasonable endeavours to implement roading and right of way and services for and to Lot 9 at its expense;
- 79.3 AFL did not make stormwater provision for Lot 9 and 22 in its applications to the Council;
- 79.4 AFL and NIL did not provide the plaintiffs with a copy of the Stormwater Plan;
- 79.5 The Stormwater Plan, which was submitted to the Council, meant that the plans shown to the plaintiffs and that were consented could not be effected;
- 79.6 AFL failed to complete the above as soon as possible.
- 80 The plaintiffs have suffered a loss as a result of the above.

Wherefore the plaintiffs seek:

- A. Damages to be quantified prior to trial;

- B. (Alternatively) orders vesting Lot 19 in the plaintiffs pursuant to the Contractual Remedies Act 1979;
- C. Interest;
- D. Costs.

Fourth Cause of Action: Deceit – Third Defendant (Justin Prain)

81 The plaintiffs repeat paragraph 1 to 57 and say:

82 From about 2006 onwards Mr Prain has acted for and spoke on behalf of NIL and AFL.

Particulars

82.1 Mr Prain is a director and shareholder of AFL, which has an agreement to take 95% of the profits and losses of the Further Subdivision;

82.2 Mr Gordon Ralph Stewart, director of NIL, did not take an active role in NIL's day to day affairs;

82.3 Mr Prain acted for NIL in place of Mr Stewart;

82.4 Mr Prain advised on LinkedIn website he is "Development Director, Yaldhurst Village Christchurch, being part of the Further Subdivision;

82.5 Mr Prain's name appears on various applications to the Council to change the Further Consent for the Further Subdivision including RMA92009135;

82.6 Mr Prain was involved as NIL's agent and Development Director of the Further Subdivision on a daily basis.

83 In the course of the misrepresentations and breaches of contract pleaded above, NIL and AFL obtained consents which made the Lot 22 roading and further subdivision of Lot 9 impossible.

Particulars

- 83.1 No provision was made for stormwater drainage for Lot 9 which is a prerequisite to subdividing Lot 9;
- 83.2 No provision was made for the stormwater drainage for roading along Lot 22 which is a prerequisite for forming a legal road;
- 83.3 The Lot 22 legal road is a requisite to subdividing Lot 9 as consented.
- 84 Mr Prain was aware that NIL and AFL had included the Stormwater Plan in its Consent application and that it did not provide for Lot 9 and Lot 22's part of the Further Subdivision.
- 85 From on or around 2007 until 2013 Mr Prain represented to the plaintiffs that the infrastructure Delta was installing included for the capacity for their Lot 9 subdivision and Lot 22 roading and that NIL and AFL would construct full width roading along Lot 22 to L1A zoning (District Plan) standard and related services necessary for the plaintiffs to further subdivide Lot 9 including:
- 85.1 To Mr Stokes on site advising that Lot 22 construction plans had been given to NIL's roading and infrastructure construction company Delta;
- 85.2 Engaging in discussions regarding raising funds in order for NIL, AFL and Delta to construct the roading and services.
- 86 Mr Prain knew his representations were false or were reckless as to whether they were true.
- 87 As a result of Mr Prain's deceit the plaintiffs did not take steps to enforce their rights under the ASAP or Further Agreement until after October 2013.
- 88 The plaintiffs have suffered a loss as a result of Mr Prain's deceit.

Wherefore the plaintiffs seek:

- A. Damages to be quantified prior to trial; and
- B. Interest;
- C. Costs.

Fifth Cause of Action - Deceit - Fourth Defendant (Cardno)

89 The plaintiffs repeat paragraph 1 to 57 and say:

90 Cardno was engaged to assist NIL in the planning and consents and effecting of the Further Subdivision.

91 Cardno was instructed by NIL to assist the plaintiffs in relation to their part of the Further Subdivision including roading and services requirements and applications to the Council on behalf of those owners, as recorded in:

91.1 An email from Alan Thomas of Cardno to Colin Stokes dated 27 June 2007; and

91.2 An email from Richard Graham of Cardno to Colin Stokes dated 2 July 2008.

92 It was a pre-requisite to NIL exercising its Option that it complied with the Plaintiffs conditions in agreeing to it and the ASAP.

93 Cardno expressly implied and represented to the plaintiffs that the Further Subdivision consent was imminent and would be able to be implemented with full width vested roading and services along Lot 22 including stormwater provision.

94 Cardno knew its representations were false or was reckless as to whether they were true.

95 Cardno submitted an application to the Council that it knew would make the implementation and effecting of Lot 9's part of the Further Subdivision including its roading impossible and materially:

95.1 Did not make provision for stormwater drainage for Lot 9; and

95.2 Did not make provision for stormwater drainage to enable the legal roading and services to and for Lot 9's subdivision.

96 Cardno continued to represent to the plaintiffs that the application allowed for Lot 9's further subdivision.

97 In reliance on Cardno's deceit the plaintiffs entered into the Further Agreement with AFL/NIL and transferred Lot 19 to NIL and which enabled Gold Band to register a mortgage over it.

98 Cardno continued to represent to the plaintiffs that the engineering design for physical works it was doing included for the capacity and connection for their Lot 9 subdivision and Lot 22 roading.

Particulars

98.1 Richard Graham for Cardno sent a letter to the plaintiffs dated 28 October 2009 "*clarifying the obligations of the Company [NIL] and the adjoining landowners in respect of the upgrading of the Lot 22 access to legal road status*" and that "*it is anticipated that the Lot 22 works will be completed by January 2011.*"

99 In reliance of this representation Mr Graham for Cardno requested that the owners of Lot 22 including the plaintiffs transferred the front 140m of Lot 22 (approximately 1200m²) to NIL for commercial use ahead of the obligations clarified.

- 100 The obligations pleaded above could not be implemented because Cardno, NIL, AFL, and/or Mr Prain had not made stormwater provision to enable it.
- 101 On or about 22 October 2013 following requests pursuant to the Local Government Official Information and Meetings Act 1987 the plaintiffs obtained the Cardno Stormwater Plan from the Council.
- 102 The Stormwater Plan showed that Cardno had not made stormwater provisions to enable the Lot 22 and Lot 9 part of the Further Subdivision.
- 103 The plaintiffs have suffered loss as a result of Cardno's deceit including:
- 103.1 Transferring Lot 19 to NIL when they otherwise would have retained ownership;
- 103.2 Refraining from taking any steps to enforce the ASAP and Further Agreement until after 22 October 2013.

Wherefore the plaintiffs seek:

- A. Damages to be quantified prior to trial; and
- B. Interest;
- C. Costs

Sixth (Alternate) Cause of Action – Negligence – Fourth Defendant (Cardno)

- 104 The plaintiffs repeat paragraph 1 to 57 and say:
- 105 Cardno owed the plaintiffs a duty of care that it would act for the benefit of the plaintiffs by ensuring that Lot 9's Further

Subdivision, services and roading were provided for in its subdivision design and application to the council, and in its engineering design.

106 Cardno was aware at all material times of NIL's obligations to the plaintiffs under the ASAP and Further Agreement to include and ensure their roading and services for their Further Subdivision at NIL's cost.

107 Cardno negligently failed to:

107.1 Provide accurate advice and information to the plaintiffs about the nature of the consent to be submitted to the Council; and

107.2 Ensure that the Further Subdivision application to the Council met the obligations pleaded as above.

108 As a result of Cardno's negligence the plaintiffs suffered loss.

Particulars

108.1 Transferring Lot 19 to NIL when they otherwise would have retained ownership.

108.2 Failing to obtain a Further Subdivision consent that enables the effecting of Lot 9's part of it including the required Lot 22 widened roading.

Wherefore the plaintiffs seek:

A. Damages to be quantified prior to trial; and

B. Interest;

C. Costs.

Seventh Cause of Action – Deceit – Sixth Defendant (Delta)

- 109 The plaintiffs repeat paragraph 1 to 57 and say:
- 110 The plaintiffs consented to a mortgage over Lot 14 on proviso that the mortgage security would include their interests.
- 111 Delta used the plaintiffs' consent to register a mortgage but then did not provide for their interests.
- 112 Delta's works made the implementation and effecting of Lot 9's part of the Further Subdivision including its roading impossible and materially:
- 112.1 Did not make provision for stormwater drainage for Lot 9; and
- 112.2 Did not make provision for stormwater drainage to enable the legal roading and services to and for Lot 9's subdivision.
- 113 Delta continued to represent to the plaintiffs that the physical works would allow for Lot 9's further subdivision.
- 114 The plaintiffs have suffered loss as a result of Delta's deceit including:
- 114.1 Refraining from taking any steps to enforce the ASAP and Further Agreement until after 22 October 2013.

Wherefore the plaintiffs seek:

- a. Damages to be quantified prior to trial; and
- b. Interest;
- c. Costs.

Eighth Cause of Action – Declaration – Sixth Defendant (Delta)

- 115 The plaintiffs repeat paragraph 1 to 57 and say:

- 116 The plaintiffs consented to a mortgage over Lot 14 on proviso that the mortgage security would include their interests.
- 117 Delta used the plaintiffs' consent to register a mortgage but then did not provide for their interests.
- 118 Delta's works made the implementation and effecting of Lot 9's part of the Further Subdivision including its roading impossible and materially:
- 118.1 Did not make provision for stormwater drainage for Lot 9; and
- 118.2 Did not make provision for stormwater drainage to enable the legal roading and services to and for Lot 9's subdivision.
- 119 Delta continued to represent to the plaintiffs that the physical works would allow for Lot 9's further subdivision.

Wherefore the plaintiffs seek:

- A. A declaration that Delta's mortgage was registered against the plaintiff's consent;
- B. A declaration that Delta's mortgage is invalid;
- C. Interest;
- D. Costs.

Ninth Cause of Action – Land Transfer Fraud – First, Fifth and Sixth Defendants (NIL, Gold Band and Delta)

- 120 On or about 2009 Delta, Noble and Gold Band agreed to secure Delta's debt for future infrastructure works over Lot 14.
- 121 At all material times the consortium was aware of the plaintiffs' 2002 interests in Lots 11- 19 as protected by two caveats lodged against those titles.

- 122 In around December 2009 Delta and NIL through their lawyers requested the plaintiffs' remove their caveats to allow Delta to register a mortgage over land owned by NIL.
- 123 By email dated 22 December 2009 the plaintiffs declined to withdraw their caveat but said they would consent to Delta registering a mortgage behind their caveats on condition that Delta completed the works and services required to further subdivide Lot 9.
- 124 Delta registering a second mortgage on Lot 14 on 23 December 2009.
- 125 On 14 April 2010 Delta, NIL and Gold Band entered a Security Sharing Agreement which was kept hidden from the plaintiffs.
- 126 The Security Sharing Agreement was entered with the express intention of circumventing the plaintiff's caveats and elevate Deltas subordinate mortgage ahead of them.
- 127 Delta, NIL and Gold Band entered a similar arrangement in relation to Lot 19 pursuant to a Security Sharing Deed dated 21 December 2011.
- 128 On 22 August 2013 Gold Band, Delta and Avanti Finance Limited (Avanti) purported to enter a Partial Assignment of Debt and Security Sharing Deed pursuant to which:
- 128.1 Gold Band sold 67.5% of its loan to Delta and Avanti;
- 128.2 Gold Band agreed to assign a proportionate share in its first mortgage to Delta and Avanti.
- 129 Pursuant to s84 of the Property Law Act 2007 the interests of a mortgage must assign all rights, powers and remedies.

130 In breach of s84 of the Property Law Act 2007 the Partial Assignment of Debt and Security Sharing Deed purported to share Gold Band's first mortgage between three parties.

Wherefore the plaintiffs seek:

- A. A declaration that the Security Sharing Agreements and Partial Assignment and Security Sharing Agreements are illegal contracts;
- B. Damages to be quantified prior to trial; and
- C. Interest;
- D. Costs.

Tenth Cause of Action – Damages –Fifth Defendant

The plaintiffs repeat paragraphs 1 – 57 above.

131 The plaintiffs have an interest in the NIL land.

132 By email dated 16 December 2014 at 8:13am Greg Smith emailed Martin Brennan of Gold Band Finance and outlined a proposal to purchase Gold Band's mortgage for its face value plus interest and penalties.

133 By email dated 22 December 2014 at 3:29pm Mr Brennan replied to Greg Smith's email. He said that an indicative figure for the purchase would be \$5.9m inclusive of accrued interest and charges. This was against an indicative land value of approximately \$20m (valued on the basis that the caveats were not in place).

134 On 24 December 2014 at 4:07pm Greg Smith emailed Mr Brennan and sought clarification as to whether Delta had consented to the mortgage being assigned

- 135 By email dated 5 January 2015 at 9:00am Mr Brennan responded to the email by noting that discussions were ongoing.
- 136 On 12 February 2015 at 1:33pm Mr Brennan sent a follow up email in which he said that Delta would only consider the sale of their share of the first mortgage if the sale included their second mortgage. He also said he understood Avanti had disposed of its share of the first mortgage to Delta and that Gold Band would be guided by the actions of Delta acknowledging support during the period of Delta's subordinate advances.
- 137 On 4 July 2016 the plaintiffs wrote to Gold Band and sought to redeem Gold Band's mortgage pursuant to s102 of the Property Law Act 2007.
- 138 On 17 July 2016 the plaintiffs made a further request to redeem Gold Band's mortgage.
- 139 In breach of s102 of the Property Law Act 2007 Gold Band has refused to allow its mortgage to be redeemed without the plaintiffs also purchasing Delta's mortgage.
- 140 The plaintiffs have suffered a loss as a result of Gold Band's refusal to allow its mortgage to be redeemed.

Wherefore the plaintiffs seek:

- A. A declaration that the plaintiffs are entitled to redeem Gold Band's mortgage;
- B. A declaration that the plaintiffs are not required to purchase Delta's mortgage as part of that redemption;
- C. Damages to be quantified prior to trial; and
- D. Interest;

E. Costs.

This document is filed by Ayleath Veronica Foote of Duncan Cotterill, solicitor for the plaintiffs.

The address for service of the plaintiffs is:

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Documents for service on the plaintiffs may be:

- Left at the address for service.
- Posted to the solicitor at PO Box 5, Christchurch 8140
- Transmitted to the solicitor by fax on +64 3 379 7097
- Emailed to the solicitor at ChristchurchLitigation@duncancotterill.com.

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