IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP31/SD-00 CIV2000-404-001512

	BETWEEN	EILEEN MULLEN Plaintiff
	AND	RODNEY DISTRICT COUNCIL First Defendant
	AND	JAMES D THOMPSON Second Defendant

Hearing: 21-25 July 2003

Appearances: S W N Piggin for plaintiff
S A Bambury for first defendant
J R Mulligan with H J Brandts-Giesen for second defendant

Judgment: 29 August 2003

RESERVED JUDGMENT OF WILLIAMS J

Solicitors:

Piggin O'Brien Batterton, Auckland, for plaintiff
Heaney & Co, Auckland, or first defendant
Kensington Swan, Auckland, for second defendant

Preliminary: Issues and Pleadings

1. The plaintiff in this case, Ms Mullen, and her family have suffered a number of severe reverses from at least mid-1997. Nobody who heard the evidence in this case would deny that.

2. The defendants, Rodney District Council which was the territorial local authority within which Ms Mullen's then property was situated, and Mr Thompson, a solicitor who acted for her from November 1997-May 1998, do not deny it. But they say her claims against them for breach of statutory duty and negligence are unfounded in law or that, even if they were to be found to have breached duties to her, she suffered no loss as a result of their actions.

3. The claim centres round the property at 165 Duck Creek Road, Stillwater, which at all material times was owned by Ms Mullen and her then husband, Mr Eagle. Stillwater and Duck Creek lead to the southern shore of the Weiti

River which forms part of the south-western shore of the Whangaparaoa Peninsula, north of Auckland.

4. The claim involves at least four courses of action by different persons or bodies, all of which affect one another to greater or lesser degree and all of which converge in April-May 1998. The first of those concerns Ms Mullen, her then husband, their children and their company, Cedar Centre Limited. The second involves Mr Thompson and counsel acting for Ms Mullen in relation to the break-up in her marriage, the couple's debts and the possible subdivision of 165 Duck Creek Road or its purchase by Rodney District. The third relates to Rodney District's actions in relation to a proposed road and bridge from East Coast Bays Road through Stillwater to the Whangaparaoa Peninsula to improve access and the effect of that proposal on 165 Duck Creek Road. The fourth involves the National Bank of New Zealand Limited, the mortgagee of 165 Duck Creek Road, and its actions to recover the amount owed under its security, culminating in the Bank selling the property by mortgagee sale on 27 May 1998.

5. Ms Mullen's claim was commenced on 4 February 2000. It is unnecessary to recount details of its unfortunate and lengthy history save to note that Ms Mullen has been represented by a number of different counsel and at times acted for herself, the defendants have shown more interest in bringing the case to hearing than is often the position and the case has been allocated a number of fixtures prior to the one with which this judgment is concerned, none of which proceeded.

6. The statement of claim on which the hearing proceeded was filed on 18 February 2003. After detailing the background discussed later, Ms Mullen said she received a letter from Rodney District on 10 November 1997 advising of Council's decision in principle to construct the road and bridge and informing her the road was likely to affect her property once formally

designated – expected to take 2-3 years – and constructed. She spoke to a Mr Dearham, Rodney District's special projects manager, and pleads he failed to inform her of her rights, advised her that the injurious affection of her property was of no concern to Council and failed to comply with Rodney District's statutory obligations to advise and inform her in relation to the works. She claims those rights arise principally from the Resource Management Act 1991 ss23, 35 and 93[1] together with the right of compulsory purchase by the Council of her property or the right to compensation found in the Public Works Act 1981 ss17, 60 and 63.

7. She claims Rodney District finalised its formal notice of requirement affecting 165 Duck Creek Road on 14 April 1998 and on 27 April she asked Rodney District to purchase the property in discussions with Mr Dearham and two other Council officers, Messrs White and Barker. She asserts Mr Dearham wrongly advised her that plans had not been finalised for the road requirement, wrongly because of the 14 April decision which she received about 10 May 1998.

8. Ms Mullen's claims against Rodney District are in negligence and breach of statutory duty. In the former, she avers Mr Dearham was under a duty not to make misleading, negligent or inaccurate statements to her, that duty being said to arise under the statutory provisions mentioned and at common law. In that latter aspect, the claim asserts the relationship between the parties was sufficiently proximate for a common law duty to exist or was a special relationship relating to the advice on which Rodney District knew Ms Mullen would rely and that :

> The first defendant breached its duty of care to the plaintiff by making the statements and giving the advice which was incorrect, misleading and failed to properly inform the plaintiff of her rights and remedies.

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[1] All section references in this judgment are to the Resource Management Act 1991 unless otherwise stated.

> As a result of the aforesaid negligent advice and omitted statements by the first defendant the plaintiff has suffered loss and damage in the sum of $260,000, being the market value of the Property of $800,000 less the mortgagee sale proceeds of $540,000.

9. The cause of action founded in breach of statutory duty asserts Rodney District breached a duty to advise Ms Mullen of her rights as the party affected by the proposed designation, invoking the same statutory provisions. She also claims a further breach in "failing to offer to compensate or enter into an agreement to purchase the plaintiff's property" and asserts she suffered financial loss in the same sum as mentioned "from the time of notification of the proposed public works".

10. Mr Thompson is sued in negligence and breach of contract of retainer. Ms Mullen claims that in November 1997 when she instructed him to act on her behalf in relation to her debts, she told him what had occurred to that date as regards the road and asked if there was "anything that could be done to obtain compensation from the first defendant or to force the first defendant to purchase the property". She pleads he said she should accept Mr Dearham's advice that she could do nothing in respect of the Council's proposal and she should accept any offer she received or walk off the land. A variant on that pleading is that she sought advice from Mr Thompson as to what could be done to remedy the detrimental effects on the property of the 10 November 1997 letter and he failed to advise her of remedies potentially available, including rights to compensation and to require Rodney District to buy the property and failed to initiate a potential claim in that respect. She said he failed to bring the statutory provisions to her attention thus causing her loss. Another variant appears in the breach of contact claim which avers Mr Thompson failed to advise of her potential compensation rights to have her property purchased by Rodney District, failed to give her "advice on the process the first defendant must adhere to to acquire her land" and failed to explore opportunities to reduce her loss, again seeking the same damages.

11. In pleading terms, Ms Mullen's claim included an unconventional addition, namely a list of further particulars filed on 23 May 2003. It was only in those particulars that she first relied on s185 which became central to the hearing. She also attached schedules of alternative re-workings of what were said to be her damages totalling $267,355, $277,730, $319,605 and added consequential claims for lost income of $172,000 and general damages for distress and inconvenience of $50,000. The first of those figures was said to be a calculation of the compensation Rodney District might have had to pay Ms Mullen as at May 1998. The second and third were calculations of damages depending on what Ms Mullen might have done with 165 Duck Creek Road. The claim for consequential losses was, by agreement since it was raised so late, not pursued at this hearing. Beyond those particulars, there was no amendment setting out how the various amounts claimed could be justified, which of the alternatives was pursued nor how the claim for general damages was said to arise. That aspect of the matter was exacerbated by the filing of a further set of particulars on 15 July 2003 which, without notice, re-calculated the compensation claim, re-calculated the two existing causes of action and added two other variants as to what Ms Mullen might have done with the proceeds. All of that was a plainly unsatisfactory approach to pleading Ms Mullen's losses.

12. Rodney District's defence essentially put Ms Mullen to proof but also pleaded Mr Dearham telling her it would be inappropriate for him to give her legal advice and she should consult her solicitor, and Mr White telling her that it was highly unlikely the Council would negotiate the purchase of her property. The positive defence to the breach of contract claim was that Ms Mullen assumed the risk of her losses by failing to take legal advice and failing to take appropriate steps plus a claim she contributed to the losses.

13. Mr Thompson's defence was, broadly, a general denial.

14. Both defendants issued cross-claims, each seeking indemnity or contribution from the other in the event of being found liable, principally under the Law Reform Act 1936 s17(1)(c) in relation to the tort claims.

Statutory provisions

15. To set the background against which the facts are to be considered, it is helpful to note the statutory provisions on which Ms Mullen relies or their effect.

16. Section 35(3)(a) (b) reads :

> (3) Every local authority shall keep reasonably available at its principal office, information which is relevant to the administration of policy statements and plans, the monitoring of resource consents, and current issues relating to the environment of the area, to enable the public –
>
> (a) To be better informed of their duties and of the functions, powers, and duties of the local authority; and
>
> (b) To participate effectively under this Act.

17. Section 93(2)(a) provides that notice of applications for resource consent served on persons likely to be directly affected must "contain sufficient information to enable the recipient, without reference to other information, to understand the general nature of the application and whether it will affect him or her".

18. And s185 reads :

> **185. Environment Court may order taking of land –**
>
> (1) An owner of an estate or interest in land (including a leasehold estate or interest) that is subject to a designation or requirement under this Part may apply at any time to the Environment Court for an order obliging the requiring authority responsible for the designation or requirement to acquire or lease all or part of the owner's estate or interest in the land under the Public Works Act 1981.

(2) … An application under subsection (1) shall be in the prescribed form and a copy of the application shall be served upon the requiring authority and the relevant territorial authority by the applicant.

(3) The Environment Court may make an order applied for under subsection (1) if it is satisfied that –

(a) The owner has tried but been unable to enter into an agreement for the sale of the estate or interest in the land subject to the designation or requirement at a price not less than the market value that the land would have had if it had not been subject to the designation or requirement; and

(b) Either –

(i) The designation or requirement prevents reasonable use of the owner's estate or interest in the land; or

(ii) The applicant was the owner, or the spouse of the owner, of the estate or interest in the land when the designation or requirement was created.

(4) Before making an order under subsection (1) the Court may direct the owner to take further action to try to sell the estate or interest in the land.

(5) If the Environment Court makes an order to take an estate or interest in land under the Public Works Act 1981, the owner of that estate or interest shall be deemed to have entered into an agreement with the requiring authority responsible for the designation or requirement for the purposes of section 17 of the Public Works Act 1981.

…

(7) The amount of compensation payable for an estate or interest in land ordered to be taken under this section shall be assessed as if the designation or requirement had not been created.

19. Section 185 refers disjunctively to a "designation or requirement". "Designation" is defined by s166 to mean a provision in a district plan to give effect to a "requirement" made under ss168 and 168A. Those sections set out the process to be followed. Ministers, local authorities or requiring authorities may give notices for public and other works to territorial authorities of a requirement for a designation. The procedure then followed by the territorial authority is similar to that for approval of resource consents, including public notice, submissions and hearing. At the conclusion of that process the territorial authority recommends to the requiring authority that the latter confirm, modify or withdraw the requirement. The requiring

authority advises the territorial authority whether the former accepts or rejects the recommendation. The territorial authority notifies the decision of the requiring authority to landowners and others directly affected by the decision. The decision is appealable. Once that process, including appeal, is completed, the territorial authority then includes the designation in its District Plan and, subject to compliance with s176A as to an outline plan for the works, the requiring authority is then entitled to take action in accordance with the designation but no others may do anything, including subdivision, in relation to that land which would hinder the public work without the requiring authority's consent. Section 178 provides that where notice of requirement for a designation has been given, persons may not undertake work which would hinder the public work without the requiring authority's consent between the date on which notice of the requirement is given or publicly notified and the date on which the requirement is withdrawn, cancelled by the Environment Court or the designation is included in the District Plan.

20. Although s185 has now been in force for well over a decade the texts on the subject show it has produced little in the way of precedent. That may be because local authorities take a responsible attitude and try to settle claims for purchase of affected properties, but equally it may arise because the scheme of s185 shows applicants for purchase orders have a number of substantial prerequisites to overcome before the Environment Court can make such an order. Owners must prove inability to effect sale and the market value of the land had it not been subject to the designation or requirement plus compliance with either of the alternatives in subs (3)(b). The Environment Court has the express power under subs (4) to direct further sales efforts be undertaken. (Salmon *Resource Management Act* Part VIII pp17-18, Brookers *Resource Management*, paras A185.04, 10 ppA8-61-3). The lack of cases on the section suggest s185 applications are difficult to prove and the Environment Court does not grant them automatically. There is a strong implication that such claims take time so

the results are neither swift nor automatic. Further, such authorities as there are show the s185 power only arises if there is an extant requirement to designate not under appeal (*Queenstown Airport Corp Ltd v Skipworth* 2 April 2001, CA77/00, paras [42]-[44] pp13-14) and the level of any compensation is to be assessed not under the Act but under the Public Works Act 1981 and, if necessary, by the Land Valuation Tribunal (*Queenstown Airport Corp Ltd v Skipworth* 8 November 1999, HC Dunedin, AP19/99 Chisholm J, pp26-28). At the Environment Court level (*Skipworth v Queenstown Airport Corp Ltd* [1998] NZRMA 410, 442, para 42) matters relevant to exercise of the s185 discretion included the current status of the designation, whether the applicant has submitted against the requirement, whether the application is premature and the need to co-ordinate the manner in which the property is dealt with by comparison with other properties effected by the designation request. Although that decision was reversed on appeal on other grounds, the text writers suggest those criteria may still be pertinent.

Facts: 1. To Early November 1997

21. Of the four streams of evidence, it is, naturally enough, convenient to start with Ms Mullen.

22. She and her then husband, Alan Eagle, married in 1974 and have four children the eldest of whom has Down's Syndrome and has been a resident, it would appear, for much of his life in an IHC-supported home. Mr and Mrs Eagle – as Ms Mullen then called herself – bought their first property when she was 19 and he 26. To better themselves they worked hard at their jobs, brought up their family and involved themselves in what would appear to have been shrewd investments in buying and developing properties up until about 1992.

23. But Mr Eagle had a serious problem. He was a gambling addict. Despite efforts to break the habit, Ms Mullen said he became unemployable.

24. To provide him and them with income, they incorporated Cedar Centre Limited, buying cedar from Ms Mullen's brother in Canada, shipping it to New Zealand and selling it. Initially it was profitable. They ran the business from home, storing the cedar with their machining sub-contractor with Mr Eagle working in the yard.

25. They bought 165 Duck Creek Road on 7 December 1993 for $189,000 with settlement due on 3 June 1994. It seems to have been a good price since the property was valued in May 1994 at $200,000. The land was 4.1852ha in extent or just over 10 acres. The main house had been relocated to the property. There was a detached studio. Much of the site was covered with regenerating native bush and pasture traversed by two streams The valuation noted the "easy potential to subdivide a further site without compromising the existing home". Ms Mullen said that over the period they lived there they spent about $200,000 renovating and extending the house and cottage. They converted a garage into another cottage for one of their children.

26. On 29 November 1996 the Eagles obtained resource consent to subdivide the property into two lots, roughly by dividing the land diagonally in half with the house and 2ha on lot 2 to the south-east and the studio and 2.2ha on lot 1 to the north-west. The previous month the land values of lots 1 and 2 had been estimated at $294,000 and $470,000 respectively. The resource consent was conditional, amongst a number of matters, on the formation of a carriageway on a small portion of lot 1 adjacent to the road frontage and the payment of a reserve contribution, initially assessed at $8015.00.

27. After unsuccessfully trying to sell by tender in early 1997, the Eagles lodged their subdivisional plan with Land Information New Zealand. On 17 June 1997 the plan was approved as to survey. What remained to complete the subdivision was receiving a certificate from Rodney District as to compliance with all subdivisional conditions including payment of the reserve

contribution and compliance with the legal requirements to enable new titles to issue.

28. However, the business was in a parlous financial state. From the only accounts in evidence, it appears turnover at 31 March 1996 of just over $1m had nearly halved in the succeeding year, bank debt had risen from just under $46,000 to over $300,000, drawings and salaries had risen from $124,155 to $158,871 and the business had negative equity at 31 March 1997 of $52,936.73.

29. Ms Mullen said much of that was unknown to her at the time because Mr Eagle was secretive about the company's accounts but she became alarmed during 1997 when he kept telling her money was tight and when he was keen in about May that year to accept an offer for lot 2 and the house which she thought a considerable under-value. After separation she found Mr Eagle had paid nothing whatever on the mortgage to the National Bank for more than a year.

30. For about four or five months from June 1997 she said Mr Eagle was depressed and sleepless. She later found he had been gambling at the casino every day using money taken from the business. There was an alarming episode in September involving guns and the Police. In early October she applied to the Family Court for occupation and temporary protection orders. She had difficulty in enforcing them. He sold a car, some equipment and the stock of timber without telling her and kept the proceeds of over $8,000. It was not until 8 August 2000 that they settled their matrimonial property dispute including Mr Eagle agreeing not to play any part in this case. By that stage, Mr Eagle was long gone. He accepted a position in the Falkland Islands, left about Christmas 1997 and has not seen Ms Mullen or the children or paid anything for their support since.

31. As if this were not enough, the manager of the National Bank had been expressing concerns privately since early 1997 at the worsening position of the Cedar Centre debt. The Bank refrained from action only because of the prospect of 165 Duck Creek Road being subdivided and the sale proceeds reducing its mortgage. By August 1997 the manager was recommending support for only three months to sell the property. But the position rapidly worsened with demands by Rodney District for the Bank to meet unpaid rates and notice from the Inland Revenue Department for payment of GST in August 1997. That resulted in a formal demand to Mr Eagle, Ms Mullen and the company on 10 October 1997 for the outstanding debt of $309,860.29 and, on 17 October 1997, a formal demand under the Property Law Act 1952 s92 for the mortgage debt, then $313,455 and other debts. The notices were to expire on 9 December 1997. However, it seems that demand may have related only to part of the debt because on 8 December 1997 the National Bank gave notice that Mr Eagle, Ms Mullen and the company owed a total of $447,476.24 of which $128,077.35 plus interest was a personal loan and the balance of $270,567 plus interest was owed by the company.

32. In addition to the couple's debts on credit cards, school fees, and the amount owing to the Bank, on 4 April 1997 Mr Eagle and Ms Mullen personally guaranteed Cedar Centre's debts to its timber supplier, Rosenfeld Kidson & Co Ltd. A formal demand for payment of $64,758.98 under that guarantee was issued on 26 September 1997. A charging order over 165 Duck Creek Road was obtained by the company for $65,563.98 and registered against the title on 25 November 1997.

2. November 1997

33. In light of all of that, on the recommendation of the barrister acting in relation to her marital matters, on 3 November 1997 Ms Mullen consulted Mr Thompson. She said at the initial consultation she told him about her

personal background including the protection and occupation orders, Mr Eagle's gambling, the failure of Cedar Centre and her problems concerning matrimonial property. She said she also instructed him concerning her debts –principally those to the National Bank and Rosenfeld Kidson. Ms Mullen told Mr Thompson the position as to the subdivision of 165 Duck Creek Road and said she thought the lots were worth about $540,000 and $340,000 but she said "the discussion was mostly about debts and how I was going to pay" and "about how to resolve my financial situation". She told him she intended to sell both lots at 165 Duck Creek Road to clear the Bank and Rosenfeld Kidson and hopefully leave sufficient for the children and her to re-establish themselves. She said his advice was to concentrate on selling the property to clear debt.

34. Ms Mullen said she asked Mr Thompson about possible rezoning and her debts and was told "don't pour any more money into the property because you're going to lose it anyway" and to "sell it for anything you can get for it or what people do in a situation like this is simply walk off the property". She said he did not mention the Environment Court if a notice of requirement was received but told her to ignore the demands from creditors. He would write to stall for time, something she acknowledged he did.

35. Mr Thompson does not disagree with much of what he was told concerning the debts and the property but in addition says Ms Mullen told him that she had "no money to put food on the table and to meet everyday bills" and as a result he understood his instructions to be "to assist in holding off the creditors while she tried to sell the properties".

36. There was disagreement as to when Ms Mullen came to know the detail of the new road and bridge and when and whether she discussed it with Mr Thompson.

37. She said that she told him about the new road on 3 November but, at that stage, it was "going on a ridge a few kilometres from the property" whereas he said he was told that once the bridge had been completed the zoning would change to residential and the property's value would increase. Ms Mullen signed a Legal Aid application that day to cover her barrister's fees. It is of some interest to note that the form said the "property has been earmarked as the boundary for the feeder road for the Waiiti [*sic*] bridge – it is anticipated that this may adversely affect the value of the property".

38. That notwithstanding, Mr Thompson's notes of the interview, while correctly summarising the financial position, said nothing about the road.

39. Acting in accordance with what he believed to be his instructions, Mr Thompson wrote to a number of Ms Mullen's creditors seeking time to meet the debts. The letters included one to the National Bank on 21 November 1997 which brought a reply on 28 November agreeing to take no action prior to mid-January 1998.

40. Whatever may have been Ms Mullen's understanding of the position concerning the road and bridge on 3 November, on or shortly after 10 November 1997 she received a letter from Rodney District making the position clear. The letter said her "property is likely to be affected" by the project but said more detailed engineering and other studies were required before the "documentation required for supporting any designation application can be completed" indicating that once that work was complete the "documentation to complete a formal application to designate the land identified as being required in future for roading purposes will be lodged probably as early as February or March 1998". The letter said the community would have the opportunity to make submissions, a hearing would follow before Planning Commissioners, there was then a right of appeal and the "whole process could take 2-3 years" and "physical works

cannot begin until the designation has been confirmed by the Environment Court".

41. A "map" was said to be enclosed. Even now, it is unclear which map it was. Ms Mullen said she received a package from the Council "about the size of a telephone book" but is unsure when that came. It seems probable she is referring to notice of the formal requirement for designation issued in April-May 1998. There are differences between the maps in evidence from Mr Thompson's file and that in the agreed bundle of documents but the bundle had an aerial photograph which, so far as 165 Duck Creek Road is concerned, shows minimal incursion into approximately the northern half of the western boundary and, on a similar photograph from Mr Thompson's file, the property is circled with the word "Eagles" written alongside. His file also included a contoured profile plan (fig. 2.4) which has a bracket and the word "Eagle" written alongside 165 Duck Creek Road but it seems more likely that the aerial photograph was included with the 10 November letter than the profile plan. The letter and "map" were, after all, intended to inform recipients of the position and the aerial photograph portrays the situation much more clearly than the profile plan even though it is the latter which Council officers thought may have been the one attached to the letter.

42. Ms Mullen said she took the letter and plan to Mr Thompson immediately. He disagrees saying that although there were plans on his file he does not recall when he received them and there was no copy of the 10 November 1997 letter on his file. His diary has no appointment for Ms Mullen about that time. Indeed, he said she habitually called without appointment and waited to see him. He opined that she may have given him the plan and he saw that her property was only "very marginally affected by the proposed road". He said he told her on many occasions that "until there has been a formal designation there was nothing" she could do.

43. However, Mr Thompson accepted in cross-examination that, whenever he gave Ms Mullen the advice about "designation", he was using it in the technical sense under s185, but went on to acknowledge :

Q. Would you accept that that advice was incorrect if the rights of a land-owner under s185 are triggered, not merely from the designation, but can be triggered at an earlier point when there is a Notice of Requirement?

A. Again, my advice, without being technical to Mrs Eagle, was that it required a designation however the Notice of Requirement would have triggered it, yes. I'm aware of that now. At the time I gave that initial advice I wasn't fully aware of s185. But I still believed that until we received formal notice of a requirement, without differentiation between them, that was received by the owner, that any interest couldn't be determined.

…

Q. Your advice at the time was to the effect that she couldn't do anything until the designation?

B. Correct.

Q. And have I got it right, that that is as far as it went with you advising her about designation? That she couldn't do anything until the designation came along?

A. Correct.

Q. You didn't tell her about how she could get herself – how shall I put it – tee'd up, ready to go, before that arrived?

A. No.

…

Q. Prior to 27/5/98 had you ever had cause to read s185 of the Resource Management Act 1991?

A. No.

Q. Prior to 27/5/98 did you know of the relief available to land-owners under s185 of the Resource Management Act?

A. I knew there was relief available. I couldn't have quoted you the section.

Q. Did you know that a land-owner could apply for an order that the Council purchase their land if they were having difficulties selling that land as a result of a Notice of Requirement?

A. No.

But in response to questions from the Court, Mr Thompson said (pp98-99) :

> Q. What was the basis of your advice to that effect?
>
> A. My advice was that until the Council had made a formal decision as to where the road would go and what was going to be affected by the road in its associated works, that there was no way that she was in a position to request compensation or anything from the Council. Because I'd received an indication from the Council that they hadn't actually decided whether they were going to do the road at all, let alone where it would go. It was only a proposal, so far as I was aware.

44. The 10 November letter invited concerned addressees to contact Council. Ms Mullen did. On 17 November 1997 she discussed her position with Mr Dearham.

45. 165 Duck Creek Road had been back on the market for some time. She told Mr Dearham of her plight and said she needed to sell the property because her financial position meant she could not comply with the time-line in the letter. She said she told Mr Dearham she was "marketing now, today, and can't sell for the market value with the road on it". She said Mr Dearham was understanding but after making a call told her there was nothing she could do about it and the fact that she needed to sell the property was not Council's concern. They had no responsibility. He recommended she see her lawyer.

46. Mr Dearham's recollection is that :

> I explained to the plaintiff that at that point in time the Council was not intending to purchase properties that may be affected by the Weiti Crossing. The reason for this was because the proposal was at a very early stage and it was not entirely clear what properties would be physically required for any future works.

and advised her to see a solicitor who could advise her both in relation to Council's proposals and her personal matters. He expanded on that in cross-examination saying that he told Ms Mullen that if she approached the Council in writing directly

or through her solicitor "she could possibly get them to consider purchasing her property".

47. Mr Dearham said he showed Plan A1.2, a profile plan, to Ms Mullen at that meeting. That seems unlikely if for no other reason than that plan is Revision E and comes from Rodney District's files as part of the formal designation. A more likely plan would be fig. 2.4 which is Revision A of the profile plan and was on Mr Thompson's file and which Mr Dearham accepted may have been the one involved. Either would have been less helpful than the aerial photographs earlier mentioned as the lot boundaries are indistinct. Mr Dearham said he pointed out the cut-and-fill lines current at the time.

48. Ms Mullen said that as a result of the meeting with Mr Dearham she went to see Mr Thompson, probably the next day, with fig.2.4 and the aerial photographs and "how the road was now going on my property" and told him Council were unconcerned. She claims she said that "surely they had to purchase it if they want to put the road on my land" but Mr Thompson was uninterested, took the plans but not the letter, and told her if Council had not made the final decision about the road the requirement would not go through for a period and she would have to accept it. As noted, he disputes much of that.

49. The Court's view is that Ms Mullen did consult Mr Thompson with the 10 November letter and the plan or plans and it was probably after her discussion with Mr Dearham. He may have no record of the consultation but it seems probable he gave her the advice she recounted in relation to it.

3. December 1997 - 13 April 1998

50. Ms Mullen urged all local agents to find prospective purchasers after getting the 10 November letter. She reduced the price. Little eventuated. She said some agents refused to bring prospective buyers to the property because of

the road proposal. One couple visited several times but withdrew after seeing the detail at Rodney District's offices. Mr Bruce, a real estate agent who sold 165 Duck Creek Road to Ms Mullen and Mr Eagle, visited the property during their occupancy and who specialises in sales of lifestyle blocks in the area, said that after learning of the road proposal he was not prepared to continue marketing the property because "a new road going through or adjoining a lifestyle property is a very touchy issue" and he thought that a "road on the boundary of the Eagle property would take away the qualities people look for in a lifestyle property" with the fact that the road was only proposed and not finalised adding uncertainty.

51. Ms Mullen discussed the matter with Mr Thompson on 30 January 1998. That may have been because the National Bank wrote to her on 28 January saying it intended to proceed with a mortgagee sale. Mr Thompson's file note suggests they discussed the potential value of the property both subdivided and not, and he said he told her it would be to her benefit to complete the subdivision to increase the property's worth. But she was financially unable to raise the $10,000 or thereabouts needed for that purpose. She raised the possibility of the Bank funding the costs but Mr Thompson advised it was unlikely the Bank would assist given the arrears and the pending mortgagee sale.

52. Sales efforts continued. All were unsuccessful until 20 March 1998 when an offer was received to buy the whole property for $650,000 conditional on the buyers being satisfied as to title and "any environment law issues relating to the property". The conditions were not satisfied, apparently because Rodney District would not allow the purchasers to subdivide the property into six lots. The buyers cancelled the contract on about 17 April 1998.

53. There was another offer for lot 1 alone but that, too, came to nothing.

54. The National Bank was kept advised of these developments but throughout this period were preparing for the mortgagee sale. A diary note dated 23 February 1998 suggested that "from reports from the real estate agent Mrs Eagle has not been very co-operative with the agent and hence the sale has not been pushed very hard". The Bank was becoming increasingly concerned since valuers had suggested a forced sale would yield only $450,000 and as at that date the Bank was owed $455,931.46. By 23 March 1998 Ms Mullen suggested completing the subdivision, selling one lot and retaining the other. The Bank declined that suggestion on the basis that the sale of one lot would not nearly repay the Bank's debt, there was no proposal as to how the approximately $12,000 needed to complete the subdivision would be funded given the Bank's unwillingness to make further advances and there would be delays before new titles were issued, with no proposal for servicing the debt in the meantime and no certainty Mr Eagle would co-operate. The Bank stayed its hand while the proposed sale was on foot but decided to proceed once it was advised on 20 April 1998 of the cancellation.

4. 13 April 1998 - 27 May 1998

55. Ms Mullen again approached Rodney District telling Mr White, its property manager, that the property was worth $800,000 but she was prepared to sell it for $600,000-$650,000 to avoid the mortgagee sale. She asked Mr White whether :

> "… the Rodney Council would be prepared to negotiate and purchase my property? Paul White said based on information he had at the time it was highly unlikely. He said they didn't have to purchase. He said the requirement was not in place. He said they were undecided about it."

56. Mr White said the discussion occurred on 27 April. His file note, made immediately after the conversation, largely confirmed what was discussed and included Ms Mullen's suggestion for Council to realign the road fully

within the boundaries of 165 Duck Creek Road to avoid buying three other properties.

57. Mr White also said that his advice as to the unlikelihood of Council buying the property was based on Ms Mullen's description of her property having a common boundary with the designation and his unfamiliarity with the detail as it affected her. He was also concerned about her distraught condition. Neither his recollection nor his file note suggests he was told the date of the mortgagee sale.

58. Mr White promised to arrange for a Council officer to contact Ms Mullen. He did that. Mr Dearham and a Mr Baker saw her at the property on 29 April 1998.

59. Ms Mullen's description of what occurred is that :

> 99. I asked Eddie Dearham why wouldn't they purchase my property which was for sale when they were purchasing other properties. Eddie Dearham said the Council's plans had not been finalised. That was the Council's position. Until then they were not going to purchase. He said it was unfortunate. He said he understood that I was being forced into a mortgagee sale but he couldn't do anything about it because the Council was undecided. He said nothing had been finalised. I said the road proposal was there and was stopping me from selling. I said I'm going to lose everything.
>
> 100. Both Eddie Dearham and Ross Barker [*sic*] were doing the talking. They said haven't you got some family or someone to help you out? I told him no, I had no family help. I had no contact with my sister … My husband doesn't support us. All I have is my home and my equity and you are forcing me to a mortgagee sale. I said I put my business into voluntary receivership and intended to market my property for sale to get the equity and re-establish myself. Now they are taking all that from me. They said they were sorry about my situation but there is nothing we can do.
>
> 101. I told them all about my situation, with the business, the mortgage, my husband, the children, everything.
>
> 102. I broke down. I was absolutely distraught. I had to leave the room. I couldn't bear talking to them. I couldn't even bear looking at them. I calmed myself down and went back into the room. I said there has to be something you can do. There must be something for me and my children.

103. They said no decision could be made by them. They said I should write through my solicitor to the general manager of the Council, stating my personal situation and the problems of the proposed road, my attempts to sell it and the fact that I was facing a mortgagee sale.

104. They said any decision would be made by the Council on the recommendation of the general manager Mr Sharplin.

105. Eddie Dearham said you can contact your local councillor Ken Canton. He gave me Councillor Canton's phone number. Then they left.

60. Mr Baker's file note of the 25 minute meeting relevantly reads :

Eddie advised her of the Council's position, that is, the plans have not been finalised yet, however it appears that the front portion of the property would be required for the proposed road.

A plan showing the current position of the proposed road was left with her to consider.

Eagle broke down during our discussion and had to momentarily leave the room to recompose herself.

We stated that no decisions could be made by ourselves, and that she should either write direct or via her solicitor to the General Manager of the Council, stating her personal situation, problem with proposed road, her attempts to sell, and her mortgage problems if she so wishes. We also intimated that any decision may be made by the Council at the recommendation of the General Manager.

61. Mr Dearham's evidence largely reflected the file note bar adding :

24. We said that we could not negotiate a purchase of the property with her directly. We advised that she should set out formally in writing or via her solicitor details of the concerns she had about the proposed Weiti Crossing on her ability to sell the property and that should include a formal request the Council purchase the property at that stage. We also said that it would assist if she set out details of her own personal problems.

25. We explained that once a formal request had been received the matter would be considered by the Council (Councillors) and that they would in all likelihood act upon the recommendation of the General Manager.

62. When Ms Mullen telephoned Cr Canton she was told there was a Council meeting on the afternoon of 30 April and she should have a letter to Council by then for discussion.

63. She telephoned Mr Thompson and went to see him in the early afternoon of 29 April. Her description of what occurred is :

> 107. I wanted to discuss a letter to be put to the Council asking them to purchase my property I told him about the Council meeting the next day and we would have to have a letter to the general manager. I also told him that the Council meeting was the only one between then and the mortgagee sale. It was the only opportunity I had for the Council to make a decision.
>
> 108. I wanted him to follow it up. He didn't seem very interested. He took some notes. I thought he would follow it up and do what was required. We discussed other things such as the medium density zoning. I left the meeting thinking he was going to write a letter to be presented to the Council meeting the next afternoon asking them to buy the property.

64. Mr Thompson recalls a discussion with Ms Mullen between February and 29 April by which time he knew of the Bank's valuation of $450,000 and a mortgagee sale estimation of a maximum of $560,000 on the open market. From that he concluded that her estimate of at least $800,000 was unrealistic. He knew she was without sufficient funds to complete the subdivision and that a private sale may not even yield enough to repay the Bank and Rosenfeld Kidson. He said he suggested to Ms Mullen there was little point in her going to great effort to sell the property if the proceeds would not clear her debts and accordingly it may be better for her to let the mortgagee sale proceed.

65. He agreed Ms Mullen turned up at his offices on 29 April and told him of her discussion with Mr Dearham but his recollection of their discussion, supported to an extent by his file note was :

> 24. … She said that the Council had not finally decided where the road to access the bridge at Stillwater was going to go. I understood from her that the road was going to be constructed at some time in the future but they had not decided exactly where it was going to go so they did not know which properties would be affected.
>
> 25. Mrs Eagle instructed me to write to Brian Sharplin, the general manager of Rodney Council Council asking the Council to agree at a meeting the following day to change the zoning on her property from rural to residential.

> 26. She also asked me to ask the Council how much of the property would be affected and when. I recall that she also told me she wanted to ask the Council to buy her whole property. I advised her that I considered it certain that the Council would not be prepared to buy the property because so little of it was affected by the potential designation and because the formal designation had not yet been issued and accordingly it was far from certain whether any of her property would actually be required. In those circumstances I could see no basis for asking the Council to buy it and I told her I saw no point in making that request.

66. The file note mentioned that the road "includes corner of property" and the letter was to request Council to make an early decision.

67. Mr Thompson faxed a letter to Rodney District on 30 April. After noting the existing subdivisional consent and the proximity of the mortgagee sale, the letter continued :

> Mrs Eagle has been unable to sell the property as any interested parties have lost interest once they have become aware of the fact that the proposed road between Stillwater and Silverdale has not yet been finalised. To assist Mrs Eagle in the sale of her property she requests that the Council either confirm position of the road and when it is likely to be completed. She also requests that the Council confirm how much of her property is likely to be required for the road.
>
> As an alternative or as an addition my clients requests that the Council confirm that they would look favourably on an application by her for the further subdivision of the property under the medium intensity provisions of the District Scheme. The property currently does not fit within the medium intensity zoning however is on the very edge of this zone and clearly the ability to subdivide to this degree would enhance the potential sale of the property.
>
> My client requests that this letter [be] placed before Council at their meeting today and a positive response obtained if possible.

68. The Rodney District Council meeting on 30 April actually started at 9:00am and concluded at 10:10am. Mr Thompson's faxed letter arrived at12:32pm.

69. Mr Thompson sent Ms Mullen a copy of his 30 April letter. Her evidence said she noted the lack of any request for Council to buy the land. But she made no complaint before 3 July 1998 when she uplifted her file.

70. Mr Thompson said Cr Canton telephoned him on 1 May to tell him that until there was a formal designation there was no guarantee the road would be built and Council would respond in due course in relation to the zoning request.

71. In fact Rodney District Council had convened a special meeting on 14 April 1998 at which, in its capacity as requiring authority, it resolved to issue a formal Notice of Requirement for Designation under s168A to itself as territorial authority and appointed commissioners to hear submissions. Cr Canton moved the motion. Documents put in evidence were ambiguous as to whether the discussion took place with the public excluded; at all events, no parties put in evidence any publicity concerning the decision on that or succeeding days. 165 Duck Creek Road was one of thirteen properties in that area listed as being affected by the route chosen for the road. Mitigation measures included "negotiated agreements with property owners about acquisition of land". The time period for completion of the works was said to be 10 years from commencement of construction.

72. Amongst the several lengthy appendices was the profile plan covering 165 Duck Creek Road and adjacent properties (fig. A1.2) which Mr Dearham said he thought was one he gave Ms Mullen on 29 April. If so, it may not have been easy for Ms Mullen to follow. A much clearer plan was Q21/3 which plainly showed 165 Duck Creek Road and the proposed designation taking a slice uniformly off the western boundary. However, Mr Dearham did not think he gave Ms Mullen a copy of that plan on 29 April and he accepted that although he knew the formal notice of requirement was being processed for despatch to affected property-owners on that day, he told Ms Mullen nothing of it.

73. Ms Mullen, curiously, omitted all reference to the Notice of Requirement for Designation from her brief of evidence but accepted in cross-examination

that she received the "telephone book" of documents about 10 May 1998. About 15 May 1998 she again consulted another solicitor, Mr McKay of Messrs Wilson McKay & Co, who had acted for her in early 1997.

74. Rodney District replied on 13 May 1998 to Mr Thompson's letter of 30 April informing him that the road position was as shown in the formal notice of requirement sent during the week beginning 4 May. The letter said that a larger scale plan was enclosed showing about .3ha of 165 Duck Creek Road being required or about 7.5% of the property though the "area is indicative".

75. At this hearing, it was uncertain which plan accompanied the letter though it seems likely it would have been one of those put in evidence derived from Mr Thompson's file which means it would either have been the profile plan fig.2.4 or the aerial photograph with the word "Eagle" and a circle round the plaintiff's property. They appear to show different portions of 165 Duck Creek Road being required. That may be because the letter pointed out that the "area required for the road is less than that designated as the latter is required to facilitate the works that need to be undertaken" and that once the works were completed the road boundary would be defined by survey and the designation uplifted from land beyond it. The letter suggested the works would not affect the property for "another 3 years or so". Mr Thompson said he faxed the letter to Ms Mullen. She does not remember receiving a copy. He never heard from her again after the 29 April meeting.

76. As mentioned, Mr McKay was reinstructed on about 15 May 1998. The mortgagee sale was fixed for 27 May 1998. Ms Mullen gave Mr McKay a copy of Mr Thompson's 30 April letter. She said they discussed s185 and he advised her it was too late for the Environment Court to act on any claim and a s185 claim would take months to complete. On 20 May he recommended sending a "much stronger letter advising Council of the likely consequences and losses you will no doubt experience if the property sells at mortgagee sale". On 25 May Mr

McKay wrote to the National Bank's solicitors advising them of a contract for Ms Mullen to sell Lot 1. Completion of the subdivision was said to "present no difficulty". The attached contract was for the sale of 2.2ha for $255,000. The remaining land was to be sold as soon as possible. Withdrawal of the mortgagee sale was sought. On the same day the Bank's solicitors declined to withdraw the property from sale making the point the mortgagee was owed $473,118.55, the account was not being serviced, there were doubts as to where the subdivisional costs would come from and whether the chargeholder would consent.

77. Ms Mullen's final attempt to forestall the mortgagee sale was to see Mr Sharplin, Rodney District's then Chief Executive. She did this on 26 May 1998 on the advice of Mr McKay and the Stillwater Ratepayers Association, a representative of which accompanied her. Ms Mullen said she explained her personal situation to Mr Sharplin telling him the property was valued at $778,000. Mr Sharplin told them it was impossible to stop a mortgagee sale the day before it occurred. By then she knew about the Environment Court's jurisdiction under s185. She asked Mr Sharplin about that. She claimed he repeated his earlier statement. She said she asked why Council officers had not told her earlier of her right to apply to the Environment Court. She said his response was insulting.

78. Mr Sharplin strongly denied Ms Mullen's description of his behaviour. The support person did not give evidence. Mr Sharplin said that having regard to his background knowledge he was very aware of the need to deal with ratepayers' matters with sensitivity. His recollection is that he telephoned either the National Bank or its solicitor during or immediately after the meeting to see what might be done but was left in no doubt the mortgagee sale would proceed. He said Mrs Mullen described her background in a wide-ranging discussion, becoming distraught on several occasions. He told her the matters she was discussing with him should be discussed with her solicitor, although he was unaware of her change of representation at the time. Mr Sharplin said that, in his experience, it is dangerous for Council officers to advise those having differences with local

authorities as to their legal remedies, particularly when they are distressed, and for this reason it was his practice to advise such persons to take independent legal advice. He acknowledged, however, that his understanding was such that he knew it was unlikely Ms Mullen could obtain an order under s185 in 24 hours and probably told her so.

79. He adhered to his position in cross-examination saying that although local authorities do their best to advise people concerning their problems with the authority's actions, his view was that they were under no obligation to give them legal advice and would be unwise so to do, particularly relating to the Resource Management Act 1991. He, Rodney District, and, he understood, most local authorities adopted the policy of advising persons dissatisfied with local body decisions to seek legal advice as to their rights. He gave her that advice and mentioned s185 on 26 May. He accepted the same information could have been given earlier by Council officers but made the point that prior to 14 April 1998, Council's plans were far from detailed and lengthy engineering environmental and financial processes including hearings before Commissioners were required.

5. Events on or after 27 May 1998

80. 165 Duck Creek Road sold at the mortgagee's auction on 27 May 1998 for $540,000. The National Bank was fully repaid ($445,948.46 plus an earlier payment of $36,746.58). After payment of all fees the sum of $36,883.62 was left. That was paid to Rosenfeld Kidson in part satisfaction of its debt. The balance apparently remains owing.

81. Rodney District did not attend the mortgagee sale. Mr White said there was no formal authorisation by Council to enable any officer to bid and it would have been highly unusual given the public consultation process concerning the road had not then begun.

82. Ms Mullen attended the auction. She found the experience humiliating and distressing. In the days leading up to settlement she was frantically trying to obtain accommodation for herself and the family. She was on a benefit. Auckland City found her emergency housing. WINZ lent her the moving cost. The house had vermin. It leaked. She stayed three years on short term tenancies. She had to bring her Downs syndrome son out of support and house him in a caravan. She was evicted in May 2000. She was able to find other premises in Herne Bay where her son could have his own room. After a time he went to live with a Trust but loss of his disability allowance increased Ms Mullen's hardship in meeting the rent. She was evicted on 22 November 2001, despite her daughter sitting exams at the time. They moved to a friend's house and slept in the lounge for about a month. Her friend was evicted. In December 2001 Ms Mullen and the children staged a "sit in" at the Rodney District offices but were removed by the Police and spent the night on the verge outside. They then house-sat for two weeks, stayed with friends on three occasions and finally moved into a Housing New Zealand property in Glenfield on 6 April 2002 where they apparently remain.

83. She sold her daughter's car in December 1997. She sold her own car in December 1998. She sold her chattels and her antiques and some of her jewellery from August 2000. The total received for all those items was $29,134.35.

84. Unsurprisingly, Ms Mullen has suffered insomnia and stress. She has needed medical and counselling treatment. She remains on a benefit caring for two school age children and is without assets. She has found a house in Grey Lynn she wants to buy. She had hoped to start another business, perhaps again in cedar.

85. In the meantime, Mr McKay gave notice of claim on 11 June 1998 which, after reciting some of the background spoke of:

> … the dreadful predicament our clients have now found themselves in as a result of your council's plan to possibly construct a new link road which would pass our client's property with earthworks to be inside the boundary …

and then, after saying it was Ms Mullen's belief that the price should have been at least $765,000 said:

> The financial disaster which has occurred must be largely attributed to your council's uncertainty and public statements regarding the link road which, as already stated, would have a direct impact on the property. …
>
> Your council must do the "honourable thing" and compensate our clients for their devastating loss. Your council is fairly and squarely accountable for this financial disaster and it is only fair and just that our clients must receive the difference in value of the market price and the mortgagee sale price.

86. Mr Sharplin replied on 23 June refuting many of Mr McKay's assertions, denying Council liability, saying that Mr Thompson's 30 April letter "did not raise the issue of the possibility of any form of monetary compensation from the Council", suggesting that "Ms Eagle's predicament has been caused by a combination of factors other than the Council's action to determine the line of a possible new future road" and saying the appropriate action for her to have taken after 14 April 1998 was to have applied under s185 and no application was made.

87. It remains to add that 165 Duck Creek Road was transferred as one lot into four names following the mortgagee sale. The buyers paid the reserve contribution of $8,437.50 on 14 August 1998. All other conditions of subdivision were completed and two new titles issued on 17 November 1998 for Lot 1 (2.1862ha) being the more northerly triangle of the land which was transferred to two of the buyers, and Lot 2 (2ha) being the land to the south which was transferred to the other pair of buyers.

88. After the Commissioners confirmed the requirement for the designation with a number of conditions on 18 September 1998, Rodney District embarked on a 2-3 year process of public consultation to finalise the designation and progressively considered what property negotiations and acquisitions it needed to undertake for

the project. The designation was ultimately confirmed by the Environment Court on 27 February 2002.

89. Commencing in September 2000 negotiations took place with the owners of the two new lots at 165 Duck Creek Road. The owners of Lot 1 twice asked Rodney District to buy the whole of the land because of concerns over traffic noise and pollution. Council offered to buy the designated part consisting of 8844m^2. Each of the parties obtained valuations. In August 2001 Rodney District served a compulsory notice to acquire that part of the property subject to the designation. Further negotiations ensued and finally Rodney District agreed to buy the whole of Lot 1 for $360,819 (including substantial improvements since the mortgagee sale) with settlement on 5 October 2001.

90. Negotiations also began in September 2000 with the owners of Lot 2. Although they, too, sought purchase of the whole of the property, the designation had much less impact on that lot. Rodney District was accordingly disinclined to buy it all. In August 2001 it served a compulsory notice to acquire part of the property. On 30 July 2002 an agreement was signed under which Rodney District bought a trapezoidal area of 1582 m^2 on the south-western corner of Lot 2 for $140,000 with settlement effected on 3 September 2002.

91. The Court was told at the hearing that the bridge has not yet been built nor the road constructed.

Valuation Evidence

92. Mr Kerr, an experienced valuer, gave evidence for Ms Mullen. He knows the area and 165 Duck Creek Road well. He acted for the owners in their compensation negotiations with Rodney District.

93. Mr Kerr valued 165 Duck Creek Road as at May 1998 at $710,000 assuming separate titles had been issued for the two lots. Lot 1 was valued at $280,000

and Lot 2 $430,000. But if the subdivision was incomplete at that date the market value would need to be discounted by $100,000 to allow for expenses of completing the subdivision, holding costs, profit and risk.

94. As to the first, Mr Kerr said that in 1998 inclusive of the reserve contribution it would have cost $14,740.25 to obtain separate titles plus $11,550 to complete outstanding building requirements plus a tank ($1,400), Telecom cable ($1,000) and that valuation disregarded any effect of the road, the forced sale and the charging order. Real estate fees would need to be allowed on Lot 1 as his assessment was based on what he regarded as the most likely scenario, namely one person buying both lots and then selling Lot 1 following completion of the subdivision. Holding costs, profit and risk accounted for the rest of the $100,000.

95. His thesis was that had Rodney District Council been ordered under s185 to buy the whole of Lot 1 and part Lot 2 on the same basis as the 2001 negotiations, it would be reasonable for a valuer to value the property at May 1998 on the basis of highest and best use either with two separate titles or with two titles less the cost of providing them. Applying a 25% reduction in value for injurious affection to Lot 2 ($110,000) and on the basis Rodney District would be required to buy Lot 1 outright ($280,000), Mr Kerr's assessment of the total compensation was $390,000.

96. His estimate was about $560,000 for the sale of the whole of the land in May 1998 by the owner – not a forced sale – but with the notice of requirement being issued and subdivisional approval. He accepted the value of the requirement was about $50,000 being the difference between $610,000 ($710,000 less discount) and $560,000.

97. Mr Gamby for Rodney District said the plaintiff's claim was originally that the land was worth $800,000, the mortgagee sale was $540,000 and her loss was

$260,000. But the amendment was on the basis that in 1998 the Environment Court would have ordered Council to pay Ms Mullen $390,000 and she would have been left with one lot valued at $320,000.

98. His assessment was that the property following a s185 order would have been worth $603,000, not materially dissimilar from Mr Kerr's $610,000. The sale proceeds in May 1998 should be deducted from the $603,000 in Mr Gamby's assessment but the deduction should be $563,000 not $540,000.

99. Following hypothetical subdivision, Mr Gamby's assessment was that in May 1998 Lot 1 was worth $290,000 and Lot 2 $470,000, again a total of $760,000 and again not too far distant from Mr Kerr's value of $710,000. Then, valuing the land in one lot, as subdivisible but not subdivided, Mr Gamby, after deducting selling costs, profit and risk following the cost of completing the subdivision and reserve costs reached his figure of $603,000 against Mr Kerr's $610,000.

100. Mr Gamby's assessment of the impact of public notification of the requirements of designation was that it would have reduced the value of each lot by about 10% ($63,000 in total) and, after making the same deductions, gave an indicated market value of $540,000.

101. He concluded that if the Environment Court had ordered Rodney District to purchase 165 Duck Creek Road in May 1998 under s185 the purchase price would have been $585,000-$600,000 giving a maximum loss to Ms Mullen of $45,000-$60,000.

102. Both he and Mr Kerr commented on the various other scenarios in Ms Mullen's May and July 2003 particulars. In particular, Mr Gamby rejected Mr Kerr's approach that compensation as at 1998 would have been assessed on the same basis as it was actually assessed in 2001. Differences included the impact of the consultation process, changes in the market and a lack of equivalence in the

stance of buyers in May 1998 as opposed to those negotiating for compensation in 2001.

Expert Legal Evidence

103. Mr Eades, a highly respected and experienced conveyancer gave evidence for Ms Mullen as to what a solicitor should have done in response to Ms Mullen's inquiries and instructions in mid-November and on 29 April. He said he would expect a practitioner to have a working though not detailed knowledge of the relevant statutory provisions or research the same.

104. Mr Eades accepted that Ms Mullen had no statutory or other rights at the time of her consultation with Mr Thompson following her receipt of the 10 November letter and that what he told her was essentially correct though he should have gone further and advised her of the compensation or other rights which would accrue when a formal designation was notified including reference to s185. Mr Eades' view was, however, that Ms Mullen should not have been advised not to complete the subdivision as this would have improved her financial position though he accepted in cross-examination that it would be unhelpful to a client to suggest a course of action not practically available.

105. Mr Eades' view was that on 29 April Mr Thompson should have ascertained the position concerning the designation, refreshed his memory of the client's rights, ensured Rodney District was approached quickly and the 30 April letter should have specifically sought purchase and emphasised the urgency of Ms Mullen's position. He was critical of the terms of the letter as not seeking advice as to the process before designation, omitting the date of the mortgagee sale and, of course, making no reference to possible Council purchase. Mr Eades said mortgagees often seek to avoid mortgagee sales on humanitarian grounds though, to be fair to him, Ms Mahoney had not then given evidence for the National Bank. She made it clear the Bank had run out of patience well before 29 April.

106. Finally, Mr Eades was critical of Mr Thompson failing to follow up his letter of 30 April given the urgency of Ms Mullen's situation. Against that must be set the fact that she did not consult him when she received the formal requirement for designation.

107. Mr Laxon, also a highly respected and experienced conveyancer, gave evidence for Mr Thompson. His overall view was that Mr Thompson's actions were sensible and appropriate in the circumstances having regard to the instructions received and in particular having regard to Ms Mullen's straitened financial position. He pointed to Mr Thompson's successful staving-off creditors' actions, the uncertain position concerning the designation in November 1997 and drew attention to the National Bank's actions in enforcing its security from November 1997 on.

108. He said that there was nothing Mr Thompson could have done in November 1997 to force Rodney District to negotiate over purchase of 165 Duck Creek Road.

109. While accepting Mr Thompson may have omitted the purchase request from his 30 April letter, he pointed out that neither he nor Ms Mullen knew of the designation at that stage and Mr Thompson was not later instructed in relation to it. Even had Mr Thompson acted under s185 on 29 April – assuming he became aware of the requirement for designation – Mr Laxon's view was that nothing effective could have been achieved before the mortgagee sale and there was little likelihood of an injunction being granted to stop the sale.

Submissions

110. Mr Piggin for Ms Mullen submitted local authorities can be liable in negligence relying on Australian authority such as *Kyriacou v Kogarah Municipal Council* (1995) 88 LGERA 110 in the Supreme Court of New South Wales where Council wrongly advised the plaintiff as to existing use rights of a property she proposed

to purchase. The case (at 120-122) contains a review of Australian authority on the topic. Liability appears to have been determined in those cases on the circumstances of the inquiry, the seriousness of the matter in hand, the trust placed in the official coupled with the inquirer's intention to rely on the information provided and the fact of reliance to the inquirer's detriment. The plaintiff's solicitor was also held liable for failure to protect her by insertion of an appropriate clause in the contract.

111. Mr Piggin relied on those authorities in relation to the 17 November 1997 meeting - though accepting that s185 rights had not then materialised – and the inquiries on 27 April from Mr White and 29 April from Messrs Dearham and Baker. He submitted Mr Dearham did not advise Ms Mullen of her s185 rights and knew of information critical to her situation but failed to advise her as to the course she should follow. In particular, he relied on the 14 April 1998 resolution and his furnishing her with a plan which did not show the extent of the designation. He also relied on Mr Sharplin's advice on 26 May but it was then too late for Ms Mullen to take effective action to stop the mortgagee sale.

112. He also submitted that the advice to Ms Mullen to consult her solicitor was factually wrong in relation to the 29 April meeting and suggested the advice given did not amount to a disclaimer, relying on *Court v Dunedin City Council* [1999] NZRMA 312. In short, Mr Piggin submitted that on 29 April Mr Dearham should have advised Ms Mullen to issue a s185 proceeding not merely to instruct her solicitor to write a letter with advice as to its contents. That, he submitted, was fortified by Rodney District's invitation in its 10 November letter for addressees to make inquiries.

113. Turning to the breach of statutory duty claim - which he conceded was the weaker plank of Ms Mullen's proceeding – he submitted, in principal reliance on s35, that the duty was to provide information publicly to enable persons to be better informed of their rights and powers under the Act. He relied on *Attorney-*

General v Carter [2003] 2 NZLR 160 and suggested Rodney District's obligation was much broader than in that case. With respect, the circumstances in *Carter* are so far divorced from the present that the case is of no assistance. He submitted that s35(2)'s reference to "current issues relating to the environment of the area" indicates an obligation to those affected giving rise to a private cause of action for breach.

114. In negligence, he submitted Ms Mullen sought Mr Thompson's advice in November as to what could be done in relation to Rodney District's letter and submitted he failed to advise Ms Mullen of all the remedies potentially available to her and failed to initiate a claim though, again, accepting nothing effective could have been done at that stage. But he went on to submit that Mr Thompson's advice that Ms Mullen could do nothing before formal designation was wrong since s185 allows applications to be made at the earlier notice of requirement stage.

115. Again with respect to counsel, as the analysis elsewhere in this judgment shows, information to persons potentially affected by forthcoming requirements for designations is one thing, formal requirements for designations are another. Only the latter triggers s185 rights.

116. Relying on expert evidence that practitioners were obliged to have at least general knowledge of a relative statute or carry out research before giving advice, Mr Piggin submitted Mr Thompson had and did neither. Accordingly his advice was negligent. He should have familiarised himself with the statute and told Ms Mullen what her rights would be if any formal requirement eventuated and affected her property. He submitted Mr Thompson should have advised Ms Mullen to obtain a valuation and complete the subdivision so as to be in a better position either to embark on s185 action or negotiate compensation or to improve the chances of sale at maximum prices but could point to no evidence of substance realistically supporting Ms Mullen's financial ability to pursue such a

course between November 1997-May 1998 apart from drawing attention to her sale of assets.

117. As to compensation, Mr Piggin submitted that Mr Kerr's evidence based on what occurred in relation to the purchasers was correct and made detailed submissions as to compensation in reliance on that approach. He also submitted that general damages of $50,000 arising out of the negligence claims were supportable in this case because of the stress and worry endured by Ms Mullen throughout the period reviewed in this judgment and her distress and inconvenience in relation to her accommodation after the mortgagee sale including the indignity of being evicted and the distress of selling possessions.

118. For Rodney District, Ms Bambury first submitted that s35 and the other sections on which Ms Mullen relied impose no statutory obligation on Council to make sufficient information available for persons to determine their legal rights, pointing to statutory provisions which do set out detailed procedures for Councils to follow in circumstances other than those impleaded by Ms Mullen, eg the Local Government Act 1974 16th Schedule (*Ardern v Rodney District Council* 2 October 1997 HC Auckland M735/96 Barker J).

119. Ms Bambury also submitted there was no common law duty of care owed in this situation. She submitted the facts did not indicate that liability should be imposed, nor was it just and reasonable that a duty of care be found to exist (*South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282). In reliance on that case she submitted that pointers against proximity and in favour of policy considerations negativing a duty of care were the fact that economic loss alone was sought, the relationship was not one where a defendant had assumed responsibility, the statutory framework did not indicate a duty and a "floodgates" argument. She pointed to the fact that Ms Mullen relied on the advice of Mr Thompson and, later, Mr McKay rather than advice from Council officers and also submitted it was not

foreseeable by Rodney District that Ms Mullen would seek legal advice from its officers as to her rights and remedies. *Court*, she submitted, was a case which was distinguishable in that specific planning advice was sought and incorrect advice given. She contrasted *Court* with *Francis Mining Co Ltd v The West Coast Regional Council* (20 December 2001 HC Christchurch CP114/99 J Hansen J p25) where the plaintiff sought the cost of cleaning up contamination of a creek near its workings following a land slip. Following later determination that the slip probably occurred through natural causes, the plaintiff sued the Council alleging that an officer had advised Francis Mining that it had caused the slip and was required to remedy the damage. The learned Judge held (paras [99]-[103]) :

> [**99**] It was put to Mr Rennie that what was being alleged effectively required regional councils to take remedial action in relation to all slips or land subsidences from land contiguous to rivers, streams, lakes or coastlines throughout New Zealand. It was also put to him that he was alleging a duty on regional councils to give legal advice to such persons.
>
> [**100**] He specifically disavowed that the duty alleged was intended to extend so far. However, it is difficult to see how it could be limited in any satisfactory manner. Rhetorically one may ask is [it] to be limited to those who carry out potentially hazardous operations in land adjoining creeks, streams, rivers or coastline? If that is the case, what is defined as potentially hazardous activity? For example, one could argue that farming fell into this category. Furthermore, if the duty could not be limited in some satisfactory way, the burden on ratepayers throughout New Zealand, given the terrain of much of the country, to rectify slips or landslides and to take reasonable remedial action in relation to them, could well be on an unimaginable scale.
>
> [**101**] Likewise, where does one draw the line as to whom one owes a duty to give legal advice to?
>
> …
>
> [**103**] The "floodgate" arguments are significant. In my view, even if the plaintiff had made out its case on a factual basis, there would be powerful policy reasons against imposing a duty on regional councils in these circumstances. Essentially, Mr Rennie was forced to accept that the duty contended for was limited to persons in a similar position to the plaintiff. Even that has the potential to lead to a large number of significant claims. Furthermore, it could act as a disincentive to miners and others involved in potentially hazardous activity for taking responsibility for clearing up where contamination of waterways occurred. Finally, it is hard to see why this duty should be owed to miners, as an example, but not to others who undertake activities near waterways and coastlines.

120. Ms Bambury submitted it was not foreseeable by Council officers that Ms Mullen expected them to give her legal advice particularly given their suggestion she consult her solicitor, nor was there any responsibility by Council officers so to advise her. Such was not required by statute. Even if such were not the case Ms Bambury submitted there were telling policy arguments against imposing a duty of care in Ms Mullen's circumstances.

121. She also submitted that no causal nexus had been established between Council's actions and Ms Mullen's losses, again drawing attention to her consultation with her solicitors, her decision not to seek compensation or issue s185 proceedings and the fact that all Council was doing was pursuing its statutory rights.

122. Ms Bambury made submissions as to quantum, submitting that Ms Mullen's only loss was one of lost opportunity to apply under s185. That was to be determined in a pragmatic way (*McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39, 41). She pointed out that Mr Kerr's market value of 165 Duck Creek Road at May 1998 at $610,000 and Mr Gamby's estimate of $585,000-$600,000 were not far apart and she drew attention to Mr Kerr's acceptance that sale of the land at a mortgagee sale with the notice of requirement was worth $560,000 so the maximum damage on his assessment was $50,000. From that figure she submitted a number of deductions would necessarily be made including the costs of obtaining an injunction against the Bank (secured by legal aid charge over the title), interest accruing before any s185 order might be made, and risk of failure in the Environment Court. The result, Ms Bambury submitted, was that damages, if justified at all, would be nominal.

123. She challenged whether Ms Mullen was entitled to general damages. Even if she were, she submitted a table of the modest awards of general damages awarded in New Zealand in comparable situations.

124. Finally, she submitted that, even if judgment were entered against Rodney District, it should be entitled in the circumstances to full indemnity from Mr Thompson.

125. For Mr Thompson, Mrs Mulligan first relied on what she submitted was the limited nature of his contract of retainer: to demonstrate reasonable competence according to the normal standards of the profession in doing what he was instructed to do and matters incidental thereto (*Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] 1 Ch 384; *Tuiara v Frost & Sutcliffe (a firm)* [2003] 2 NZLR 833, 849 para [42]; *Gilbert v Shanahan* [1998] 3 NZLR 528, 537) and to beware of imposing upon a solicitor duties beyond the contract of retainer, even if an especially meticulous solicitor may have undertaken additional work or inquiries on the client's behalf (*Midland Bank* at 402-403).

126. Mrs Mulligan submitted Mr Thompson's initial instructions were to stave off creditors while she attempted to sell the property, advise her concerning Council's plans as they might affect her property including writing the 30 April letter seeking purchase and incidental legal work relating to the agreements for sale and purchase.

127. She drew attention to Ms Mullen's acceptance that she did not seek Mr Thompson's advice on whether she should complete the subdivision because her view was that she could sell at market value without it.

128. Mrs Mulligan also relied on Ms Mullen's acceptance that in November 1997 she did not seek Mr Thompson's advice as to her remedies on the formal requirement for designation being issued because the "decision wasn't going to come through in my time-frame" and to Mr Thompson's evidence that in response to her query about quantum of compensation he replied that could not be assessed until the degree of affection was known. There was expert evidence that in those circumstances it was reasonable for Mr Thompson not to advise her on that topic

because the client could not act in accordance with it. Accordingly, she submitted, Mr Thompson owed Ms Mullen no duty of care to advise her on the remedies available if and when a formal requirement for designation was issued affecting 165 Duck Creek Road.

129. Concerning the assertion in negligence that Mr Thompson failed to initiate a s185 claim, Mrs Mulligan submitted that Mr Thompson was not acting for the plaintiff when the notice of requirement for designation was issued. With respect, that seems to be incorrect – though it is common ground that she sought Mr McKay's advice, not Mr Thompson's, when she actually received the formal requirement. There is, however, force in Mrs Mulligan's submission that Mr Thompson could not be negligent in failing to initiate a s185 claim when he was never instructed so to do.

130. As to the claim in breach of contract for failure to explore opportunities to reduce her losses, as earlier noted, Ms Mullen accepts she never sought advice on that topic. Her earlier property dealings and the application to subdivide the property gave her sufficient knowledge in that regard. In any event, instructing Mr Thompson to stave off her creditors necessarily led to her disclosing her financial position and it was not unreasonable for him to assume she was financially unable to meet the cost involved at that stage.

131. As to her instructions that the letter of 30 April seek Council's purchase, Mr Thompson said there was no legal basis to ask Council to buy the property at that stage given the process required to be completed for the designation to be confirmed and the fact that, if ultimately confirmed, the extent to which it might affect her property was imponderable. The evidence diverges on whether he gave her that advice.

132. Given that Mr Dearham had advised Ms Mullen just before she saw Mr Thompson that she should ask her solicitor to write to Council and request it

purchase her land, the Court's view is that it is likely, given her circumstances, that she instructed Mr Thompson in that respect - though it seems equally clear that in the discussion on 29 April they also spoke of a number of other matters including the degree to which the property might be affected and further subdivision.

133. Mrs Mulligan made detailed submissions on causation and loss to the effect that even if Mr Thompson breached his duty to Ms Mullen by not advising of her s185 rights so she could have taken more prompt and effective action immediately on issue of the requirement for the designation affecting her property, that breach would only give rise to damages if she suffered loss as a result. Critical to this question was the time available to her following receipt of the formal notice and the fact she did not instruct Mr Thompson to take action. Further, given Ms Mahoney's evidence and the circumstances the Bank was most unlikely to agree. It was unlikely she would have obtained an injunction to halt the sale when there was no proposal for payments on account of interest, still less for the payment into Court of all arrears of interest and principal (*Development Consultants Ltd v Lion Breweries Ltd* [1981] 2 NZLR 258, 261-270 citing *Harvey v McWatters* (1948) 49 SR (NSW) 173; *Parry v Grace* [1981] 2 NZLR 273, 275-276). Mrs Mulligan submitted not just that there was no time for the s185 procedure to be completed but also that Ms Mullen could not satisfy the requirements of s185(3) (4) before the mortgagee sale, particularly given that the property had been on the market for six months at that point without an unconditional contract being achieved.

134. She, too, submitted that, even if Ms Mullen were successful in this claim, the loss suffered on the valuation evidence could not exceed $60,000. She submitted Mr Kerr's approach that the Environment Court would order Rodney District to buy the property at a price based on the subdivided value less costs of subdivision rather than its overall value was unlikely to be correct and that Mr Gamby's approach was preferable.

135. Mrs Mulligan also pointed out that even if the sale price had been greater by the $60,000 to which Mr Gamby referred, $28,680.36 of that sum would have been payable to Rosenveld Kidson. The difference, $31,320.64, would have been further eroded by interest accruing during the delays until purchase could be ordered plus by legal costs refundable under the legal aid charge. She speculated it may have been for that reason that Mr McKay advised Ms Mullen that s185 proceedings would be futile.

136. Mrs Mulligan submitted that even had Mr Thompson included the request for purchase in his 30 April letter, it could only have sparked action based on Ms Mullen's personal circumstances whereas Mr White made it clear that Rodney District was not buying properties in Stillwater at the time because of uncertainties concerning the road and its placement and that no Council mandate to buy properties affected by the Weiti Crossing was given until 31 May 2000. She also pointed out that Mr Thompson's letter was not received until after the Council meeting on 30 April had finished.

137. Relying on evidence showing that in 1998 it would have cost at least $28,690.25 to complete the subdivision, Mrs Mulligan submitted such a sum was well beyond Ms Mullen's means and accordingly any lack of advice to continue with the subdivision could not sound in damages.

138. As to a claim based on loss of a chance, Mrs Mulligan submitted the prospective benefit must have been substantial and only arrived at after assessing the contingencies (*Astra Pharmaceuticals (NZ) Ltd v Pharmaceutical Management Agency Ltd* [2001] 1 NZLR 415, 434 paras [73]-[74]).

139. Finally, Mrs Mulligan submitted that were Mr Thompson to be found liable he should be fully or partially indemnified by Rodney District.

Discussion

(1) General

140. Before considering the precise allegations made by Ms Mullen against the defendants, it is helpful to see the situation in context.

141. In the first place, it is clear the 10 November 1997 letter was neither a "requirement" nor a "designation" as those terms are used in ss166, 168A and 185. It was no more than information concerning Council's decision in principle as to the course to be followed and advice that the formal application to designate would be lodged in early 1998 and, when granted, would be followed by a hearing, the opportunity to make submissions and, possibly, appeals. It did not trigger the rights of affected owners to apply under s185 so no application could have been made to the Environment Court at that stage. For Ms Mullen, Mr Piggin accepted that.

142. But unfortunately for Ms Mullen, property buyers can be flighty. Here, despite the best efforts of her husband and herself over a number of months before 10 November 1997, no buyers had been found at a price they found acceptable. And once Council's decision was made public on 10 November 1997, even though no formal requirement for designation was in force it is unsurprising that buyers tended to shy away from properties that might be affected when the formal requirement for designation was confirmed. As Mr Bruce said, after 10 November 1997, the proposals "would make selling the property extremely difficult if not virtually impossible". That prophecy was borne out by lack of offers for all or part of the property over the six months leading up to the mortgagee sale, despite Ms Mullen's efforts. Proposals such as that reflected in the 10 November letter, even if no more than proposals, have a chilling effect on sales of properties potentially affected. When prospective purchasers have a range of properties available, they not unnaturally shy away from those with potential problems such as the possibility of a requirement for designation affecting the title or discount offers heavily to compensate for that factor.

143. No doubt Ms Mullen or Mr Thompson on her behalf could have sought to start negotiations with Rodney District in advance of the formal requirement for a designation and emphasising her personal circumstances. But it could not be said that Rodney District was under any duty to respond positively. Indeed, since Council could not know the precise extent of any requirement for designation at that stage and whether, if and when confirmed, it would affect 165 Duck Creek Road and Council officers had no authority to conduct negotiations with affected owners, it is unlikely that negotiations would have been undertaken at that stage or, if they were, proceeded very far. And the "map" which accompanied the 10 November letter showed only minimal incursion into the western boundary of 165 Duck Creek Road for about half its length so there would have been little impetus for Council to negotiate given the uncertain state of the project and its scope.

144. Further, it is not as if Ms Mullen was unaware of the broad thrust of the proposal prior to receiving the 10 November letter. She knew of the proposed road even though her understanding was that it would not directly affect her property. After receiving the 10 November letter she had a realistic enough appreciation of her position to tell Mr Dearham that she "can't sell for the market value with the road on it".

145. This is not to suggest that Ms Mullen was not in a desperate situation, both personally and financially, nor that she wished to sell 165 Duck Creek Road as soon as possible and for the maximum price, either with or without the subdivision being completed. But, realistically, completion of the subdivision was beyond her. She had no money. She was on a benefit. She and her husband had substantial debts, one of which she had guaranteed. She was being pressed for payment and could not meet them. Completion of the subdivision would have cost at least the reserve contribution plus fees and although estimates varied at the hearing as to the cost of completion, it is clear that even the $8,000 plus estimate for the reserve fund contribution was

well beyond her personal resources. Mr Thompson's assessment was right that the National Bank would not help. Ms Mahoney of the Bank said as much. Ms Mullen said in evidence that if she had not been discouraged by Mr Thompson from completing the subdivision she "could have raised the $10,000 or so to pay the reserve contribution and concrete the driveway by selling some furniture or my or Teresa's car". That is doubtful. She sold Teresa's car in December 1997 but received only $4,000 net for it and it may be unlikely she would have disposed of her own car (sold in December 1998 for $8,500) given the need for a vehicle for her family and herself in the somewhat isolated environment of 165 Duck Creek Road.

146. So the conclusion must be that, despite the thoroughly unfortunate predicament that Ms Mullen found herself in on 10 November 1997, she had no accrued rights under s185 at that stage. Her rights were no more than inchoate. They would accrue only if in due course the proposal became a formal requirement for a designation which affected 165 Duck Creek Road. The difficulty of her position was exacerbated, first, because her property had become "extremely difficult if not virtually impossible" to sell and, secondly, that she was being pressed for payment of her debts, particularly by the mortgagee which had been paid nothing all year.

(2) Claims against Rodney District

147. The first aspect of Ms Mullen's claim against Rodney District for breach of statutory duty as part of her negligence cause of action is that on 17 November Mr Dearham failed to inform her of her rights, told her Rodney District was unconcerned by her plight, and failed to comply with the statutory obligation to inform her in relation to the works.

148. It is important to bear in mind that Ms Mullen's alternative claim against Rodney District for breach of statutory duty as such refers only to her discussions

with Mr Dearham on 17 November 1997 and with Mr Sharplin on 26 May 1998. No complaint under that head is raised in relation to other events of the April/ May 1998 period.

149. It must first be observed that, to the extent findings on credibility are required, the measured views expressed by Council officers usually supported by file notes or other documents are to be preferred to those of the plaintiff. Ms Mullen was in error factually on some issues – an example was confusing what she received on 10 November 1997 with what she received about 10 May 1998 – and the view cannot be avoided that the dire financial and emotional privations she has experienced over the past six years or so seems understandably to have coloured her evidence.

150. The first allegation is that Mr Dearham failed to inform Ms Mullen of her rights and remedies in relation to the proposed works. That aspect of the claim must fail if for no other reason than that Ms Mullen had no accrued rights at that stage and any remedy in the sense of compelling Rodney District to engage in negotiations or buy the property was only a future possibility, if the designation was confirmed and affected her property. In addition, local body officers have no obligation to advise persons of their rights, other than to the extent imposed by statute. And, as to the suggested lack of concern on Rodney District's part, as earlier noted Mr Dearham's evidence as to what occurred on 17 November is to be preferred. The Court's view is that no claim has been made out in those respects.

151. Then Ms Mullen invokes the provisions of the Act earlier listed. They do not assist her. Section 23 is a general provision that other requirements outside the Act are not affected. Section 35 requires local authorities to have reasonably available information relevant to its work so as to enable the public to be better informed and participate effectively under the Act. There was little evidence on this topic save Ms Mullen's own acknowledgement that prospective purchasers

in early 1998 were able to satisfy themselves from information publicly available at Council's offices concerning the possible impact of the requirement on 165 Duck Creek Road. In any event, s35 is a general provision and there is no evidence of breach by Rodney District as far as the matters at issue in this case are concerned. Section 93 sets out the requirements for notifying applications but only for resource consents. Even if that were applicable, subs (2)(a) requires notices to contain sufficient information to enable recipients to understand the general nature of what is proposed. Here, Ms Mullen accepts the information she received about 10 May was as thick as a telephone book. Its bulk may have meant she had difficulties in appreciating all the information it contained, but she could scarcely complain that it did not contain sufficient data to enable her to understand the proposal. The other sections Ms Mullen invokes deal with calculations of compensation.

152. In what is phrased as a second cause of action based in breach of statutory duty, Ms Mullen asserts Mr Sharplin breached Rodney District's duties owed to her by failing to advise her at the meeting on 26 May of her rights in respect of compensation or purchase of her property, again invoking the statutory provisions mentioned.

153. Again, the respective versions of the conversation between Mr Sharplin and Ms Mullen have been set out. Again, the Court prefers Mr Sharplin's view, backed as it is by file notes. Further, as Chief Executive Officer responsible for a local authority, he was well aware of the need to treat ratepayers with views opposed to the Council with sensitivity and caution. There is no basis to conclude he did anything else. Indeed, he went as far as making inquiries as to the possibility of delaying the mortgagee sale. He, too, advised Ms Mullen to take legal advice from Mr Thompson who had already written to him. The Court's view is that Mr Sharplin was correct in telling Ms Mullen of the unlikelihood of obtaining an injunction to stop a mortgagee sale the day before it was due. Factually, there is

no foundation for Ms Mullen's claim in relation to her interview with Mr Sharplin.

154. It follows that all the advice Ms Mullen received from Messrs Dearham and Sharplin in relation to this cause of action was accurate as far as it went and there was no legal obligation to go further.

155. It must therefore follow that Ms Mullen's claim against Rodney District for breach of statutory duty, both separately and as part of her claim in negligence, cannot succeed.

156. The balance of the negligence claim against Rodney District asserts breach of a common law duty of care. In that regard at some stage a complaint about the "meeting between Eddie Dearham and the plaintiff" was pluralized by someone handwriting an "s" on the pleading thus possibly including the discussion on 29 April 1998.

157. Ms Bambury's submissions against the Court holding that a common law duty of care arose in the circumstances of this case have considerable weight. Even if the relationship were regarded as sufficiently proximate, there are strong policy reasons against finding a common law duty of care in this matter. The "floodgates" argument is compelling. The circumstances of this case are closer to *Francis Mining* then to *Court*.

158. However, no extensive consideration of that question is required because the Court's view is that, even assuming – without deciding – that a common law duty of care may arise in circumstances such as these, Ms Mullen's claim in negligence against Rodney District fails on the facts.

159. Ms Mullen's allegations of breach are that Rodney District's officers failed to properly inform her of her rights in making the statements to her and giving her the advice described earlier.

160. Assuming all the statements made to her were intended to be comprehended in the pleading and bearing in mind the Court's earlier findings on credibility, the statements made by Messrs Dearham at the 17 November meeting were not negligent. He advised her appropriately as to the then position. He suggested she take legal advice. She immediately did. He might have advised her of the effect of s185, but he was advising her to seek legal advice, not giving it, and in any event such advice would have been of little, if any, assistance to her given that she had no accrued rights under the section at that stage.

161. The respective versions of Ms Mullen's conversation with Mr White on 27 April were earlier discussed. Mr White's description and his file note are accepted. Given his unfamiliarity with the details of the designation as far as 165 Duck Creek Road was concerned and the fact that she did not then have the designation package, his caution is understandable. In any event, what Mr White said was not incorrect on the information known to him.

162. Ms Mullen asserts that at the 29 April meeting Mr Dearham wrongly told her that no plans were finalised for the road requirement despite the formal resolution some 13 days earlier.

163. Again the contrasting versions of the meeting have been set out. Mr Dearham's recollection, backed as it is by Mr Baker's file note, is to be preferred. Ms Mullen's recollection of both meetings may have been affected by her emotional state.

164. It follows that it is accepted that Messrs Dearham and Baker explained her position to Ms Mullen including by reference to a plan. They advised her of their lack of authority to negotiate over purchase. They suggested she consult her solicitor and advised what his letter should say. In effect, they informed her of the preliminaries to a claim under s185. They did not advise her of s185 itself but, given their lack of legal training and the fact that the Council would be in

opposition to any claim by Ms Mullen before the Environment Court, this Court accepts they did all that could reasonably be required in that regard and they could confidently expect her solicitor would advise her on legal issues such as s185.

165. Further, although the Court's view is that Messrs Dearham and Baker went as far as they were required to go in advising Ms Mullen of her position on 29 April, sensibly suggesting she take legal advice and telling her what her solicitor should say, nothing effective could have been done in the one month remaining to her to get an order from the Environment Court requiring Rodney District to buy all or part of 165 Duck Creek Road and assess compensation so, even if their actions had been deficient in law, no breach on their part caused her loss.

166. Conclusions have already been expressed about Ms Mullen's meeting with Mr Sharplin on 26 May.

167. In the light of all of that, Ms Mullen's claim against Rodney District in negligence also fails.

(3) Claims against Mr Thompson

168. The failure of Ms Mullen's claims against Rodney District necessarily leads to her claims against Mr Thompson also failing since all her allegations against him centre round the advice he should have given her concerning Rodney District. There are no allegations about other matters such as advice he should have given her concerning completion of the subdivision, unless that was intended to be comprehended in an allegation made in the breach of contract claim that he failed to explore opportunities to reduce her loss from Rodney District's actions.

169. Mr Thompson's evidence was not buttressed by the same level of documentary detail and he acknowledged never reading s185 at any time whilst acting for Ms Mullen. Expert evidence suggested he could have been rather more detailed in

his advice. As far as credibility is concerned, Mr Thompson was therefore relying more on his recollection than Rodney District's officers. Even so, the conclusion must be, in terms of credibility, that the accuracy of Ms Mullen's recollection of events has been affected, first, by the personal and financial problems with which she was wrestling at the time and has wrestled since and, secondly, by the time which has elapsed since the occurrence of the matters in issue in this claim.

170. Turning to the particulars, Ms Mullen's claim is, first, that she sought advice from Mr Thompson in November 1997 as to whether anything could be done to obtain compensation or force Rodney District to buy the property and was told she should accept any offer or walk off the property and in any event should put no more money into it. Although Mr Thompson did not advise her of her rights and remedies at that stage concerning purchase of the property and did not initiate a claim on her behalf, the short answer must be that any failure in that regard caused no loss as she had no right to compensation at that stage. Any s185 claim he might have issued would have been premature and although he might have tried to start purchase negotiations with Rodney District, it is improbable they would have proceeded, certainly not to fruition before the formal requirement and the mortgagee sale occurred.

171. Had Mr Thompson checked the terms of s185, his advice to Ms Mullen on 17 November could have been more definite. But it would scarcely have assisted in the personal circumstances in which she found herself to be told that she may have rights under s185 - but in the future and none had accrued at that stage. In Ms Mullen's situation, it was more likely to have been hurtful than helpful to advise her that she may have rights at some indeterminate stage in the future if it turned out that 165 Duck Creek Road was affected by a confirmed designation.

172. Factually, to advise Ms Mullen that at that stage she could do effectively nothing to obtain compensation from Rodney District or force it to buy the property was

accurate. It is not accepted that Mr Thompson advised Ms Mullen that she should walk off the property but advice that she should diligently pursue sale and put no more money into the property was not negligent advice at the time. She did pursue sale but was unsuccessful. Given the amount of her debts and the arrears when contrasted with a likely sale price of the property in respect of which advice of a possible designation had been given, it was not negligent for Mr Thompson to advise her not to put any further money into the property. When she had no money "to put food on the table" she must have known that paying the reserve contribution plus the cost of obtaining new titles was unattainable.

173. Further, at least up to his 30 April letter, realistically there was little more Mr Thompson could have done. He had an indigent client. She knew the property would be worth more if the subdivision was completed and new titles issued and the cost of doing so but could not afford to meet the reserve contribution and other subdivisional costs. He successfully staved off her creditors whilst she tried to sell the property. Therefore, while there were aspects of Mr Thompson's actions on Ms Mullen's behalf up to 30 April where more could have been done, as it turns out, no effective action was possible on her behalf. Nothing he did to that date was negligent or, even if it was, causative of any loss to Ms Mullen. His retainer did not oblige him to undertake those extra measures.

174. Mr Thompson failed to include a request for purchase in his 30 April letter. He is open to criticism on that score and on the fact that, even then, he did not refresh his memory as to the terms of s185. But, as it turns out, even the most diligent solicitor could have done nothing to protect Ms Mullen's position before the mortgagee sale in the sense of either compelling Rodney District to buy 165 Duck Creek Road and settling the compensation – negotiations with the buyers took more than a year - or obtaining an injunction to defer the sale. That is particularly the case when, although Mr Thompson was unaware of it, Ms

Mullen instructed Mr McKay on 15 May. In relation to the claim against Mr Thompson, it is important to note that Ms Mullen never approached him to protect her position after receiving the formal requirement for designation. She said Mr McKay recognised nothing could be done to save the position at that stage. He said it was too late for the Environment Court to act within the available time-frame. They discussed s185 but she did not instruct Mr McKay to issue proceedings under the section or require the property to be purchased prior to the mortgagee sale or seek an injunction to defer it.

175. More generally, given that Ms Mullen only received notice of the requirement for designation about 17 days before the mortgagee sale in terms of the authorities earlier reviewed no effective action could have been taken by Ms Mullen or on her behalf before the mortgagee sale eventuated. Throughout that short period the requirement for designation was far from finalised. Public submissions had not begun. The Commissioners' report was months off. Appeals were still a possibility. Ms Mullen took no step to oppose the designation (although such steps ceased to be open to her after 27 May). There was no opportunity for harmonisation in the Environment Court between what was proposed for Ms Mullen's property and others similarly effected. It is therefore highly probable that an application to the Environment Court under s185 brought between 10 and 27 May would have been regarded as premature. There is no basis to conclude that a s185 claim could have been launched and completed before the mortgagee sale.

176. Because of that, it is equally unlikely that any application for an injunction to stop the mortgagee sale would have been successful. The mortgage had not been serviced for over a year. A charging order was registered against the title. It was doubtful the sale price would meet the indebtedness on the title (and in fact it fell short). There was no agreement in existence for the sale of the whole or part of the property at a price which would come anywhere near satisfying the debts on the title. It does not seem possible to conclude that, had she sought an

injunction, Ms Mullen would have been able to satisfy the balance of convenience test, particularly when she had not been able to pay anything off the mortgage since becoming aware of her husband's default at least six months before the mortgagee sale and could make no proposals to meet arrears or service the debt (*Development Consultants*; *Parry* supra).

177. It follows that when Rodney District is not to be held liable to Ms Mullen for the reasons mentioned, Mr Thompson can similarly not be held liable for failing to take action that in the circumstances was bound to be futile in the time available. Even if he had been held negligent, his actions, too, were not causative of her loss.

178. It follows that Ms Mullen's claims against Mr Thompson both in negligence and for breach of contract of retainer must also be dismissed.

179. In those circumstances, it is unnecessary to discuss the valuation evidence save to note that the Court's view is that Mr Gamby's approach was the more correct both as to the worth of 165 Duck Creek Road as it was in May 1998 and the sums which would have been required to be deducted before arriving at a figure for damages. The additional deductions argued by Ms Bambury and Mrs Mulligan may also have been relevant. And whether the circumstances of the claim justified an award of general damages would have required anxious consideration.

180. At the beginning of this judgment it was observed that there were four courses of action, all of which converged in April/May 1998. The course which led to Ms Mullen losing 165 Duck Creek Road was the National Bank exercising its rights and selling the property by mortgagee sale. But it only took that action after Mr Eagle had repeatedly breached the mortgage by not paying the instalments for over a year, leaving Ms Mullen in the position when she discovered the defaults of being unable to recoup the position and when the

National Bank had been sufficiently sympathetic to Ms Mullen's position not to exercise its rights as mortgagee for a number of months after if first became entitled to sell the property. The third course of action was Rodney District notifying the public of the proposed requirement for designation in November 1997 with the formal requirement being made on 14 April 1998 and advised to affected owners such as Ms Mullen around 10 May. The closeness in time between those events and the pending mortgagee sale was an unfortunate near-coincidence as far as Ms Mullen was concerned because the public notification affected the likelihood of her selling 165 Duck Creek Road and by the time her s185 rights began to crystallize, her selling efforts had been unavailing and too little time was left to her and her advisers to do anything effective about her retaining the property. But that was not Rodney District's fault. It was doing only what it was entitled and required to do under the Resource Management Act 1991 and the Court has held that its officers did all they were legally obliged to do in their dealings with Ms Mullen. The Court has also held that Mr Thompson did all he was legally obliged to do for Ms Mullen according to his contract of retainer. While Ms Mullen's position is deserving of understanding, the conclusion at law must accordingly be that no claim has been made out by Ms Mullen that Rodney District and Mr Thompson were negligent as regards Ms Mullen or that Rodney District was in breach of its statutory duty in that respect or, even if such had not been the case, that their actions and statements caused her loss.

Result

181. In the light of that the Court's formal orders are that :

a) All the plaintiff's claims against the first and second defendants are dismissed.

b) Since the plaintiff is legally-aided it is assumed costs will not be an issue. If that assumption is incorrect then memoranda may be filed by the defendants within 28 days and the plaintiff within 35 days of the date of delivery of this judgment with counsel certifying, if they consider it appropriate, that the Court may determine all questions of costs without further hearing.

……..
Williams J

Signed at ……3:37**PM this ……**29th**….. day of ……**August**……..…2003**