IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV-2010-442-000481
[2014] NZHC 2080

BETWEEN	LEGEND OF BATHURST LIMITED First Plaintiff
	FLETCHER VAUTIER MOORE Second Plaintiff
AND	DAVID JOHN HOBBS First Defendant
	BARRY ANTHONY TAYLOR as liquidator of an unregistered managed Investment Scheme known as the Integrity Plus Unit Trust Second Defendant
	BARRY ANTHONY TAYLOR as liquidator of an unregistered managed Investment Scheme known as the Master Fund Third Defendant

Hearing:	25 August 2014
Counsel:	J C Ironside for Plaintiffs W J Heal for First Defendant M Kersey and S P Pope for Second and Third Defendants
Judgment:	29 August 2014

JUDGMENT OF COLLINS J

Introduction

[1] This judgment explains why I am dismissing Mr Hobbs' application to set aside an order dated 8 April 2013 that was obtained by consent following a judicial settlement conference on 15 March 2013.

[2] I am also granting Mr Taylor's application to take vacant possession of a property at 6/30 Echodale Place (Echodale Place) by 15 September 2014 and 34 Covent Drive (Covent Drive) by 31 October 2014. Mr Taylor is authorised to sell those properties and to use the proceeds to settle the debt owed to him by Mr Hobbs recorded in the consent order.

[3] I have concluded that none of Mr Hobbs' grounds for setting aside the consent order have been established. In particular, his claim that the consent order was agreed to:

(1) without his authority;

(2) by mistake; and

(3) in circumstances where he had entitlement to a set-off

are wrong in fact and law.

[4] To explain my judgment I shall:

(1) describe the background;

(2) describe the proceedings and the settlement conference;

(3) examine the relevant legal principles;

(4) set out the key evidence and my factual findings; and

(5) set out the reasons for the conclusions I have reached.

Background

[5] I shall only briefly explain the background. There are six volumes of evidence and pleadings, including an 837 page judgment delivered by Ward J in the

Supreme Court of New South Wales on 24 October 2012 which is relevant to the present dispute.[1]

[6] In her judgment Ward J concluded Mr Hobbs had contravened a number of provisions of Australia's Corporations Act 2001 and the Australian Securities and Investment Commissions Act 2001 relating to the operation of 14 investment schemes which received over AUD 50,000,000 in investments. Mr Hobbs has been described as the "mastermind" behind the investment schemes, including a AUD 30,000,000 "Ponzi" scheme.

[7] In a supplementary judgment dated 21 February 2013, Ward J imposed a AUD 500,000 penalty on Mr Hobbs for his various breaches of the relevant legislative provisions.[2] According to the Australian Securities and Investment Commission (ASIC) the penalty imposed on Mr Hobbs is the largest awarded in Australia in relation to ASIC proceedings. Mr Hobbs has now been permanently banned from managing companies and providing financial services in Australia.

[8] Mr Hobbs filed an appeal from the judgment of Ward J. That appeal was dismissed. In his evidence Mr Hobbs said that he was filing a further appeal and/or judicial review on 26 August 2013.

[9] The orders made by Ward J included the appointment of Mr Taylor, a Sydney accountant as liquidator of a number of the schemes promoted and managed by Mr Hobbs, including two schemes called:

(1) Integrity Plus Unit Trust; and

(2) Master Fund.

[10] The orders made by Ward J included appointing Mr Taylor receiver of the assets of Mr Hobbs and his wife, Jacqueline Hobbs.

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1 *In the matter of Idylic Solutions Pty Ltd – Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 1276.

2 *In the matter of Idylic Solutions Pty Ltd – Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106 at [10].

[11] In October 2007 Mr Hobbs gave instructions to the Nelson law firm, Fletcher Vautier Moore, to incorporate Legend of Bathurst Ltd. The sole director of that company is a partner of Fletcher Vautier Moore. The shareholders are the director and another lawyer in Nelson.

[12] Mr Taylor's investigations revealed that between 29 October 2007 and 28 November 2007 seven payments totalling $1,532,647.60 were made to Fletcher Vautier Moore's trust account and credited to Legend of Bathurst Ltd.

[13] For present purposes I need only refer to three of those seven transfers:

(1) On 29 October 2007, $443,990 was transferred to the trust account of Fletcher Vautier Moore. Mr Taylor has said those funds belonged to investors in the Integrity Plus Trust scheme.

(2) On 2 November 2007, $655,332.45 was transferred to the Fletcher Vautier Moore trust account. Mr Taylor has said those funds belonged (at least in part) to Master Fund investors.

(3) On 15 November 2007, $131,102.44 was transferred to Fletcher Vautier Moore's trust account. Mr Taylor has said those funds belonged (at least in part) to Master Fund investors.

[14] Mr Taylor has said that Mr Hobbs had no entitlement to these funds which were, together with funds from other transfers used to purchase Echodale Place and Covent Drive in the name of Legend of Bathurst Ltd. Mr Hobbs also arranged to deposit $511,415.57 from the transfers with Fletcher Vautier Moore (investment sum). The investment sum was placed on deposit in the name of Legend of Bathurst Ltd.

The proceedings and settlement conference

[15] Before the proceedings were commenced the investment sum was paid into the High Court at Nelson pursuant to an order of the High Court made on 8 October 2010.

[16] In December 2010 Fletcher Vautier Moore commenced an interpleader proceeding to determine who was entitled to Echodale Place, Covent Drive and the investment sum. Mr Taylor claimed an entitlement to the three transfers I have identified in paragraph [13]. Other people made claims on the transfers, including Mr Hobbs.

[17] Mr Hobbs' claim to the funds referred to in the three transfers was based on his suggestion that:

(1) the first transfer was a loan from an entity called "Destiny Holdings Ltd" to Legend of Bathurst. Mr Hobbs claimed this money was subsequently repaid;[3]

(2) the second transfer related to fees Mr Hobbs says he had earned and which had been paid to him through a company he owned called "First Zurich International Ltd" for assisting a Taiwanese company called "Global Funeral Services Co Ltd" when raising a USD 150,000,000 bond to purchase interests in insurance companies in China;[4] and

(3) the third transfer was money Mr Hobbs said he received from an entity called "Amazing Glory Corporation" as part of the Global Funeral Services Co Ltd transaction.

[18] Two judicial settlement conferences were convened to try and settle the interpleader proceeding. The first settlement conference was held on 28 March 2012. No settlement was reached at that time. The second settlement conference was held on 15 March 2013 and was presided over by Associate Judge Matthews. Mr Hobbs was represented at the settlement conference by Mr Bamford, a Nelson solicitor. The settlement conference commenced in the morning of 15 March 2013 and concluded later that day. It is accepted that Mr Hobbs did not participate directly

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3 Affidavit of D J Hobbs, 16 March 2011 at [7]-[12].
4 At [29].

in the settlement conference during the afternoon because of illness and that Mr Bamford represented Mr Hobbs during the entire settlement conference.

[19] Agreement was reached during the afternoon session of the settlement conference. On 18 March 2013 the Associate Judge issued a minute recording the terms of that settlement.

[20] The key terms of the settlement recorded in the Associate Judge's minute were:

(1) Mr Hobbs agreed to pay Mr Taylor $1,175,000 (settlement sum).

(2) Echodale Place was to be sold. Mr Hobbs was to provide vacant possession by 30 April 2013. The net proceeds of the sale of Echodale Place were to be paid into the High Court at Nelson.

(3) The net proceeds of sale of Echodale Place and the investment fund (previously paid into the Nelson High Court) were to be paid:

- to settle Fletcher Vautier Moore's fees; and

- to Mr Taylor and three other claimants.

(4) Mr Hobbs was to pay to Mr Taylor by 15 July 2013 the difference between the sums paid to Mr Taylor under the agreement and the settlement sum.

[21] The settlement of Mr Taylor's claims was conditional on him obtaining the approval of the Supreme Court of New South Wales.

[22] As part of the settlement Mr Hobbs agreed to withdraw his claims in relation to five of the transfers, including the first and third transfers referred to in paragraph [13] of this judgment.

[23] At the time of the settlement conference it was thought the net proceeds from the sale of Echodale Place would be approximately $400,000. Thus, the effect of the settlement was that Mr Hobbs could possibly save Covent Drive provided he could find approximately $300,000 to pay Mr Taylor after Mr Taylor had been paid the investment fund and the net proceeds from the sale of Echodale Place.

[24] The terms of the settlement conference were substantially replicated in the Court order that was sealed on 8 April 2013.

[25] After the settlement conference Mr Taylor obtained the approval of the Supreme Court of New South Wales for the settlement. Thereafter, Mr Taylor was paid the investment sum that had been paid into the High Court.

[26] Mr Hobbs did not give vacant possession of Echodale Place. As a consequence an order was made on 2 September 2013 for the sale of that property. There is now a contract to sell the property for $420,000. All agree that is a reasonable price. If that sale is to proceed vacant possession is required by 15 September 2014.

[27] Mr Hobbs has not complied with the consent order because he says:

(1) the agreement of 15 March 2013 was reached without his authority;

(2) the agreement was entered into under a mistake of fact and law;

(3) he is entitled to a set-off from other funds held by Mr Taylor which he says would substantially settle the debt owing to Mr Taylor.

Legal principles

[28] The High Court has an inherent jurisdiction to set aside orders made by consent. The key issue when considering an application to set aside a consent order is whether the interests of justice require the order to be set aside.[5]

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5 *Waitemata City Council v MacKenzie* [1988] 2 NZLR 242 (CA) at 249.

[29] Applications to set aside consent orders should not be granted except in cases which clearly require the setting aside of the order. Such circumstances may arise where there is no doubt a party's lawyer has acted contrary to the party's express instructions when negotiating the consent order.[6] Such cases are, however, rare and are not to be confused with situations where a lawyer, in the presence of his or her client advises the Court and the other party that he or she is authorised to agree to the terms of settlement.[7] The jurisdiction may be exercised on grounds akin to the principles governing the setting aside of a contract. Thus, a unilateral mistake which is not known or appreciated by the other party may provide a basis to consider setting aside a consent order.[8]

[30] The factors which might render it necessary in the interests of justice to set aside a consent order made in error include:

(1) the gravity of the error made;

(2) whether the error was appreciated at the time by the other party;

(3) the prejudice caused by the error;

(4) the delay in applying for relief;

(5) the extent to which the consent order has been relied upon;

(6) whether it is possible to restore the parties to the position they were in before the consent order was made; and

(7) the effect of setting aside the consent order on innocent third parties.

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6 *Marsden v Marsden* [1972] 2 All ER 1162.
7 *Carrell v Carrell* [1975] 2 NZLR 441 (SC).
8 *Phillips v Phillips* [1993] 3 NZLR 159 (CA) at 166 per Cooke P, at 172 per Casey J; cf *Aplin v Lagan* (1993) 10 FRNZ 562 (HC) at 569.

Key evidence and my factual findings

Key evidence

[31] Mr Hobbs says:

(1) he and his wife attended the settlement conference on 15 March 2013 but "no agreement was reached";[9]

(2) he and his wife had a meeting during an adjournment of the settlement conference at which point he and Mrs Hobbs "made it plain to Mr Bamford" that Mr Hobbs "had a legitimate and strong claim to the funds that were being sought by Mr Taylor";[10]

(3) he did not accept the terms proposed by Mr Taylor and that he can "only assume [Mr Bamford] thought he had authority to settle …";[11]

(4) Mr Bamford did not talk to Mr Hobbs about the minute of the settlement conference that was sent to the parties on 18 March 2013; and

(5) it was not until 2 July 2013 that Mr Hobbs says he became aware of the settlement agreement.[12] In his oral evidence Mr Hobbs said he received a copy of the Associate Judge's minute dated 18 March 2013 on 12 June 2013.

[32] Mrs Hobbs filed an affidavit dated 26 June 2014 in which she substantially supports the position taken by her husband which I have summarised in paragraph [31].

[33] Mr and Mrs Hobbs were cross-examined by Mr Kersey, senior counsel for Mr Taylor.

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9 Affidavit of D J Hobbs, 5 June 2014 at [5].
10 At [5].
11 At [7].
12 Affidavit of D J Hobbs, 26 June 2014 at [26].

[34] Mr Hobbs waived his privilege in relation to the communications he had with Mr Bamford. Mr Bamford has sworn an affidavit dated 14 August 2014, a draft of which was sent to Mr Hobbs' new counsel before it was filed.

[35] Mr Bamford has explained:

(1) that he had represented Mr Hobbs for some time prior to the settlement conference but had experienced difficulties in obtaining instructions and receiving payment for outstanding fees;

(2) that in his assessment Mr Hobbs "had very little evidence on which he could realistically mount a defence to the claims made by on behalf of the various investors";[13]

(3) that Mr Hobbs was not happy about the condition that he vacate Echodale Place by 30 April 2013. Mr Bamford said during the lunch adjournment on 13 March 2013 that he would "attempt to push that date out" but that Mr Hobbs might have to accept that he would have to vacate Echodale Place by 30 April 2013;[14]

(4) that the actual date of vacant possession of Echodale Place was the only issue in respect of which Mr Bamford's instructions were unclear;[15]

(5) that he recommended Mr Hobbs endeavour to reach a settlement which achieved some certainty for him and gave him the opportunity to retain "a beneficial interest… [in] at least his home in Covent Drive";[16] and

(6) that Mr and Mrs Hobbs agreed that a settlement in which they obtained some control over the properties was the best outcome;[17]

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13 Affidavit of A J D Bamford, 14 August 2014 at [9].
14 At [11].
15 At [11] and [14].
16 At [12].
17 At [13].

(7) that during the lunch adjournment Mr Hobbs asked Mr Bamford if "there was any way that [he] might have the settlement overturned in the event that he could not raise funds or find suitable purchasers";[18]

(8) that he told Mr Hobbs that by agreeing to the terms of the settlement he would be bound by those terms "and it would be nigh impossible to set it aside";[19]

(9) that Mr Hobbs repeated he was not happy with the settlement but accepted he "had little option but to accept" the terms that had been offered;[20]

(10) that he believes he had authority to agree to the terms of the settlement on behalf of Mr Hobbs;[21] and

(11) that on 18 March Mr Bamford forwarded to Mr Hobbs the minute of Associate Judge Matthews.[22]

[36] Mr Bamford was not cross-examined. I asked Mr Heal, Mr Hobbs' new counsel, why no application had been made to cross-examine Mr Bamford. Mr Heal advised that he did not believe it necessary to cross-examine Mr Bamford and that in any event Mr Bamford was engaged in a trial. I advised that had an application been made to cross-examine Mr Bamford then I would have ensured that would have occurred even if it involved sitting after normal court hours.

[37] Mr Bamford annexed to his affidavit a number of emails between himself and Mr Hobbs. Those emails were not produced by Mr Hobbs and provided fertile grounds for the cross-examination of Mr Hobbs.

[38] The email correspondence which Mr Bamford made available to the Court included:

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18 Affidavit of A J D Bamford, 14 August 2014 at [16].
19 At [16].
20 At [16].
21 At [15], [18] and [24].
22 At [19].

(1) An email from Mr Hobbs to Mr Bamford at 8.43 am on 18 March 2013 in which Mr Hobbs asked Mr Bamford what was required in the form of mental health evidence to overturn the agreement reached on 15 March 2013.

(2) A response from Mr Bamford to Mr Hobbs on 18 March 2013 at 8.51 am in which Mr Bamford said:

> If you feel the need to overturn it you'll need a comprehensive psychiatric report. Having said that the settlement is reasonable given the risks you faced taking this to trial, let alone the cost that you would have incurred.

(3) A response from Mr Hobbs to Mr Bamford at 9.00 am on 18 March 2013 in which Mr Hobbs said:

> We should only overturn the judgment as a backup plan.

(4) On 18 March 2013 at 8.50 am Mr Bamford sent by way of an attachment the minute of Associate Judge Matthews. Mr Hobbs says he never received that attachment. I will address that contention in paragraph [41] of this judgment.

(5) Later on the morning of 18 March 2013 Mr Bamford forwarded to Mr Hobbs correspondence from a partner in Fletcher Vautier Moore. That email also contained an attachment of the minute of Associate Judge Matthews. Mr Hobbs says he did not receive that attachment.

(6) In an email dated 22 March 2013 to Mr Bamford, Mr Hobbs makes specific reference to a document which states he had to provide vacant possession for Echodale Place on 30 April 2013. Mr Hobbs says this does not refer to the minute of Associate Judge Matthews but to a contract for the sale of Echodale Place which he had negotiated. Mr Hobbs failed to provide any copy of that contract.

(7) In early April 2013 Mr Hobbs emailed Mr Bamford on a number of occasions concerning a possible sale of Echodale Place. A contract appears to have been signed on 11 April 2013. That sale did not proceed.

(8) On 22 May 2013 Mr Hobbs sent an email to a partner in Fletcher Vautier Moore. That email contained criticisms of Mr Bamford.

(9) Mr Bamford became aware of Mr Hobbs' criticisms and sent him an email later on 22 May 2013 in which he set out very clearly that any criticisms of Mr Bamford were unjustified and that the settlement which had been reached was the only realistic course available to Mr Hobbs.

(10) On 22 May 2013 Mr Hobbs, via his secretary, withdrew his criticism of Mr Bamford and sent a full apology to Mr Bamford. Mr Hobbs said in evidence that he was not aware of the full extent of the apology sent by his secretary to Mr Bamford.

(11) Further correspondence was exchanged between Mr Bamford, Mr Hobbs and a partner in Fletcher Vautier Moore concerning the sale of Echodale Place. On 12 June 2013 Mr Moore from Fletcher Vautier Moore sent an email to Mr Hobbs containing the Associate Judge's minute of 18 March 2013 and explained to Mr Hobbs that he was no longer the beneficial owner of Echodale Place. Mr Hobbs claims this was the first time he received a copy of the Associate Judge's minute.

Key factual findings

[39] I am satisfied Mr Bamford had the authority to reach the settlement he agreed to on behalf of Mr Hobbs on 15 March 2013 and which was substantially replicated in the consent order sealed on 8 April 2013. I have reached this conclusion for six key reasons.

[40] First, Mr Bamford's affidavit evidence was not challenged by way of cross-examination. If Mr Hobbs genuinely disputed Mr Bamford's affidavit evidence then he should have applied to cross-examine Mr Bamford.

[41] Second, Mr Hobbs' evidence conflicted with contemporaneous documentary evidence. In particular, his claim that he did not know about the terms of the settlement until 12 June 2013 is impossible to reconcile with his emails to Mr Bamford from 18 to 22 March 2013. The contents of those emails show Mr Hobbs clearly knew of the terms of the settlement. Furthermore, Mr Bamford's emails of 18 March 2013 show he sent the Associate Judge's minute as attachments to emails at 8.50 am and 9.39 am.

[42] Third, Mr Hobbs' assertion that he did not authorise the settlement is also impossible to reconcile with his withdrawal of his criticisms of Mr Bamford on 22 May 2013.

[43] Fourth, Mr Hobbs did not corroborate his account with any documentary evidence. It was telling Mr Hobbs' claim that he had by 22 March 2013 negotiated a sale for Echodale Place with vacant possession on 30 April 2013 was not supported by any contemporaneous evidence.

[44] Fifth, Mrs Hobbs' evidence conflicted in a very material respect with the evidence of Mr Hobbs. Mrs Hobbs impressed me as being a genuine witness when she was being cross-examined. At the conclusion of her evidence I asked her if it was her "understanding that when Mr Bamford went back into the Court, that he would be endeavouring to negotiate an outcome that was the best that he could negotiate for [Mrs Hobbs] and [her] husband". Mrs Hobbs unequivocally answered "that's right".[23]

[45] Sixth, the agreement negotiated on 15 March 2013 was a very reasonable outcome for Mr Hobbs. He had recently been ordered to pay a penalty of AUD 500,000 by Ward J in the Supreme Court of New South Wales. He was facing a claim from Mr Taylor that could see him losing Echodale Place, Covent Drive and

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[23] Transcript of Evidence, 25 August 2014 at 81.

the investment sum. The agreement of 15 March 2013 provided Mr Hobbs with an opportunity to possibly keep Covent Drive provided he could find approximately $300,000 to settle the agreement with Mr Taylor. The agreement provided Mr Hobbs and his wife with an advantage that was unlikely to have been achieved if the interpleader proceeding had progressed to trial.

[46] In these circumstances I am certain Mr Hobbs appreciated the benefits of the settlement and that he authorised Mr Bamford to agree to the terms of settlement that are recorded in the Associate Judge's minute and substantially replicated in the consent order of 8 April 2013.

Reasons for the conclusions I have reached

Consent order

[47] There is neither a factual nor legal basis for me to set aside the consent order agreed to on 15 March 2013.

[48] The consent order was agreed to by Mr Bamford with the knowledge and approval of Mr Hobbs. There was no mistake in the agreement. On the contrary, the agreement was advantageous to Mr and Mrs Hobbs and achieved an outcome that was more favourable to them than the likely consequences of the interpleader proceeding being heard and determined.

[49] The agreement was negotiated in good faith by parties who were fully informed of all relevant facts. It would offend the interests of justice if the consent order was to be set aside now.

Set-off claim

[50] Mr Hobbs claims he is entitled to a set-off because he says Mr Taylor has $612,515 which belongs to Mr Hobbs following the liquidation of Master Fund, Geneva Financial Ltd, Best Fund and Pinnacle Fund. Mr Hobbs' claim is based on ss 254 and 310 of the Companies Act 1993, and s 254 of the Insolvency Act 2006. Alternatively, Mr Hobbs claims an equitable set-off.

[51] Mr Hobbs faces a number of insurmountable barriers to this aspect of his claim.

[52] First, the liquidation of the investment schemes in Australia is governed by Australian law, not the New Zealand Companies Act 1993 or the New Zealand Insolvency Act 2006. Mr Hobbs has not identified any statutory provisions in Australia which are equivalent to the New Zealand legislation he attempts to rely upon and which apply to the liquidation in Australia of an unlicensed management investment scheme.

[53] Second, the investment schemes in Australia were, obviously, separate entities from Mr Hobbs. There is no mutuality.

[54] Third, only one of the liquidated funds (Master Fund) which Mr Hobbs points to in his set-off claim is the subject of the consent order in New Zealand.

[55] Fourth, Mr Hobbs is precluded from claiming an equitable set-off because he used investment funds, to which he had no entitlement, to create the investment fund that was initially deposited with Fletcher Vautier Moore and to purchase Echodale Place and Covent Drive.[24]

Possession order

[56] On 10 April 2014 Mr Taylor applied for possession of Echodale Place and Covent Drive. Echodale Place has previously been the subject of a sale order. Mr Hobbs opposed the possession orders and sought to set aside the sale order. His reasons for doing so mirrored his grounds for applying to set aside the consent order.

[57] Consistent with my findings concerning the application to set aside the consent order, and my findings in relation to the set-off claim, I rule Mr Taylor is entitled to vacant possession of Echodale Place by 15 September 2014. Mr Taylor is also now entitled to vacant possession of Covent Drive. The parties agree that if

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[24] *Manson v Smith* [1997] 2 BCLC 161 (CA); *Walker v Wimborne* [1976] HCA 7; *Commissioner for Corporate Affairs v Peter William Harvey* [1980] VR 669, (1979) 4 ACLR 259; Roy Derham *The Law of Set-off* (4th ed, Oxford University Press, New York, 2010) at 418-421.

vacant possession of Covent Drive is ordered then vacant possession should be available from 31 October 2014.

Conclusions

[58] The application to set aside the consent order is dismissed.

[59] Mr Taylor's applications for vacant possession of Echodale Place and Covent Drive are granted.

[60] Mr Hobbs' application to set aside the sale order for Echodale Place is dismissed. Mr Taylor is authorised to sell both properties.

[61] Mr Taylor is entitled to costs on a scale 2B basis.

[62] Fletcher Vautier Moore is entitled to costs on a scale 2B basis.

D B Collins J

Solicitors:
Fletcher Vautier Moore, Richmond for Plaintiffs
Rout Milner & Fitchett, Nelson for First Defendant
Russell McVeagh, Auckland for Second and Third Defendants