Supreme Court
New South Wales

Medium Neutral Citation:	**Schacht v Bruce Lockhart Thompson and Dennis Michael Staunton (trading as Staunton and Thompson Lawyers) (No. 3) [2013] NSWSC 316**
Hearing Dates:	27 February 2012, 28 February 2012, 29 February 2012, 1 March 2012, 2 March 2012
Decision Date:	10/04/2013
Jurisdiction:	Common Law
Before:	Johnson J
Decision:	Verdict and judgment for the Plaintiff. The Plaintiff to bring in short minutes to give effect to the judgment of the Court
Catchwords:	PROFESSIONS AND TRADES - claim against solicitors - professional negligence - Plaintiff retains Defendants following marriage in 2002 - Defendants draft Financial Agreement - Plaintiff and wife execute Financial Agreement in April 2002 - Financial Agreement did not comply with s.90G(1)(b) Family Law Act 1975 (Cth) - Plaintiff retains Defendants again in 2003 - Defendants draft Deed - Plaintiff and wife execute Deed in 2003 purporting to vary 2002 Financial Agreement - Plaintiff and wife separate in 2006 and divorce in 2007 - Federal Magistrates Court declares 2002 Financial Agreement to be non-binding in April 2008 - Plaintiff settles family law proceedings in 2008 on terms considerably less favourable to him than 2002 Financial Agreement - admission by Defendants of breach of duty of care concerning 2002 retainer - contention by Defendants that Plaintiff does not plead loss or damage arising from 2002 breach - denial by Defendants of breach of 2003 retainer - reliance by Defendants on s.5O Civil Liability Act 2002 concerning alleged 2003 breach - Plaintiff entitled to assert loss or damage caused by 2002 breach - Plaintiff establishes breach of 2003 retainer - reliance by Defendants on s.5O fails - Plaintiff establishes entitlement to damages - assessment of damages - verdict for Plaintiff
Legislation Cited:	Family Law Act 1975 (Cth) Civil Liability Act 2002 Limitation Act 1969 Family Law Amendment Act 2000 (Cth) Family Law Amendment Act 2003 (Cth) Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009 (Cth) Civil Procedure Act 2005
Cases Cited:	Schacht v Thompson & Staunton t/as Staunton & Thompson Lawyers (No. 1) [2012] NSWSC 168 Schacht v Thompson & Staunton t/as Staunton & Thompson Lawyers (No. 2) [2012] NSWSC 169 Goodrich Aerospace Pty Limited v Arsic [2006] NSWCA 187; 66 NSWLR 186 Bale v Mills [2011] NSWCA 226; 81 NSWLR 498 Heydon v NRMA Limited [2000] NSWCA 374; 51 NSWLR 1 Yates Property Corporation v Boland [1998] 85 FCR 84 at 105 Dobler v Halverson [2007] NSWCA 335; 70 NSWLR 151 DJZ Constructions Pty Limited v Paul Pritchard trading as Pritchard Law Group and Ors [2010] NSWSC 1024 Hadley v Baxendale (1854) 9 Ex 341 Johnson v Perez (1988) HCA 64; 166 CLR 351 Shepherd Constructions Ltd v Pinsent Masons LLP [2012] EWHC 43 (TCC) Kekatos v Sanson [2009] NSWCA 171 Dominic v Riz [2009] NSWCA 216 Fahd v Kenneally [2011] NSWCA 419 Charles v Hugh James Jones and Jenkins (a Firm) [2000] 1 All ER 299 Heenan v Di Sisto [2008] NSWCA Middle East Trading Consultants Pty Limited v Nemes [2000] NSWSC 1213 Westcoast Clothing Co Pty Limited v Freehill Hollingdale and Page [1999] VSC 266 Black and Black [2008] FamCAFC 7; 38 Fam LR 503
Texts Cited:	---
Category:	Principal judgment
Parties:	Daniel Schacht (Plaintiff) Bruce Lockhart Thompson and Dennis Michael Staunton trading as Staunton and Thompson Lawyers (Defendants)

Representation:	Riley Gray-Spencer Lawyers (Plaintiff) HWL Ebsworth Lawyers (Defendants) Mr PS Braham SC; Mr DA Lloyd (Plaintiff) Mr A Cheshire; Mr D Steirn (Defendants)
File Number(s):	2009/297435
Publication Restriction:	---

JUDGMENT

1 **JOHNSON J**: The Plaintiff, Daniel Schacht, brings proceedings for damages alleging professional negligence against the Defendants, Bruce Lockhart Thompson and Dennis Michael Staunton, trading as Staunton & Thompson Lawyers.

Introducing the Parties and the Subject Matter of the Proceedings

2 In January 2002, the Plaintiff married Claudia Dieziger. Later in 2002, the Plaintiff consulted Andrew Corish, a solicitor with accredited specialisation in family law practising with the Defendants' firm.

3 Mr Corish prepared a Financial Agreement pursuant to s.90C *Family Law Act 1975 (Cth)* which both the Plaintiff and Ms Dieziger executed on 15 April 2002 ("the 2002 Financial Agreement").

4 In early 2003, the Plaintiff and Ms Dieziger purchased a property at Balgowlah in the Plaintiff's name. The Plaintiff again consulted Mr Corish in 2003 in the context of the purchase of the Balgowlah property. On 31 March 2003, the Plaintiff and Ms Dieziger executed a Deed which recited the 2002 Financial Agreement and referred to the acquisition of the Balgowlah property.

5 In March 2004, the Plaintiff again consulted Mr Corish with respect to his matrimonial arrangements.

6 In 2006, the marriage of the Plaintiff and Ms Dieziger broke down and they separated. They were divorced on 29 July 2007. They had two children, born in October 2001 and December 2005.

7 Proceedings were commenced in the Federal Magistrates Court between the Plaintiff and Ms Dieziger under the *Family Law Act 1975 (Cth)*. In those proceedings, Ms Dieziger moved to set aside the 2002 Financial Agreement, upon the basis of non-compliance with s.90G *Family Law Act 1975 (Cth)*.

8 On 14 April 2008, a declaration was made by Federal Magistrate Kemp that the 2002 Financial Agreement was not binding since the document did not comply with the requirements of s.90G *Family Law Act 1975 (Cth)*. In reaching this conclusion, Federal Magistrate Kemp applied the decision of the Full Court of the Family Court of Australia in *Black and Black* [2008] FamCAFC 7; 38 Fam LR 503.

9 Following that decision, the Plaintiff and Ms Dieziger attended mediation and, in due course, entered into a settlement by way of a binding Financial Agreement dated 15 December 2008. The terms of that settlement were considerably less favourable to the Plaintiff than the terms of the 2002 Financial Agreement.

10 These professional negligence proceedings were commenced in this Court on 10 February 2009. The Plaintiff claims that the Defendants breached the duty of care owed to him arising from the 2002 and 2003 retainers, and that loss and damage was caused to him arising from those breaches, for which damages should be awarded in his favour.

The Hearing

11 The hearing of the Plaintiff's claim proceeded before me between 27 February 2012 and 2 March 2012. Mr PS Braham SC and Mr DA Lloyd appeared for the Plaintiff. Mr A Cheshire appeared with Mr D Steirn for the Defendants.

12 Prior to the hearing, and given certain developments in the litigation, the proceedings had come before Hislop J (as Professional Negligence List Judge) on 3 February 2012. His Honour gave directions, including directions for the filing and service by 10 February 2012 of an Amended Statement of Claim, and a Defence to the Amended Statement of Claim by 17 February 2012.

13 An Amended Statement of Claim was filed in accordance with the Court's order on 10 February 2012.

14 The Defendants did not comply with the order of the Court, but filed on 22 February 2012 a Defence to the Amended

Statement of Claim.

15 The content of the Defence to the Amended Statement of Claim gave rise to a number of applications before me. I declined to permit the Defendants to rely upon certain parts of the Defence to the Amended Statement of Claim filed 22 February 2012: *Schacht v Thompson & Staunton t/as Staunton & Thompson Lawyers (No. 1)* [2012] NSWSC 168; *Schacht v Thompson & Staunton t/as Staunton & Thompson Lawyers (No. 2)* [2012] NSWSC 169.

16 An affidavit of the Plaintiff affirmed 9 April 2010 was read in the Plaintiff's case and the Plaintiff was cross-examined with respect to it (T85-158). In addition, a number of documents were tendered in the Plaintiff's case (parts of Exhibit A, Exhibits B-G).

17 An affidavit of Mr Corish sworn 26 July 2010 was read in the Defendants' case and Mr Corish was cross-examined (T167-202). In addition, the Defendants relied upon a number of documents tendered in evidence (parts of Exhibit A, Exhibits 1 and 2).

18 The parties relied upon reports of expert witnesses. As the hearing proceeded, counsel agreed that it was not necessary for the expert witnesses to be called to give oral evidence at the hearing, with the reports and joint reports of the witnesses speaking for themselves (T147-148, T205-206).

19 With respect to liability, the Plaintiff relied upon the evidence of Duncan Holmes, solicitor, and the Defendants relied upon the evidence of Ian Kennedy, solicitor. The reports of these witnesses are as follows:

(a) Report of Ian Kennedy dated 14 December 2011 (Exhibit A, page 251);

(b) Report of Duncan Holmes dated 24 February 2012 (Exhibit A, page 229A);

(c) Joint Report of Ian Kennedy and Duncan Holmes dated 28 February 2012 (Exhibit E).

20 On quantum issues, the Plaintiff relies upon the reports of the Hon JV Kay and the Defendants rely upon the reports of the Hon PI Rose QC, both former Judges of the Family Court of Australia. The reports of the Hon Mr Kay and the Hon Mr Rose QC are as follows:

(a) Report of the Hon JV Kay dated 6 October 2010 (Exhibit A, page 206);

(b) Supplementary Report of the Hon JV Kay dated 4 July 2011 (Exhibit A, page 227);

(c) Further Supplementary Report of the Hon JV Kay dated 25 February 2012 (Exhibit B);

(d) Report of the Hon PI Rose QC dated 20 December 2011 (Exhibit A, page 230);

(e) Report of the Hon PI Rose QC dated 1 February 2012 (Exhibit A, page 240);

(f) Joint Report of the Hon JV Kay and the Hon PI Rose QC dated 21 February 2012 (Exhibit C);

(g) Second Joint Report of the Hon JV Kay and the Hon PI Rose QC dated 27 February 2012 (Exhibit D).

21 The Reports of Mr Kay and Mr Rose QC were not relied upon by the parties on liability issues (T63, T162-165). However, as Mr Holmes, in his report of 24 February 2012 (page 3), had agreed with Mr Kay's opinion concerning breach of the 2003 retainer, it was agreed that the relevant part of Mr Kay's report of 6 October 2010 (paragraphs 18-30) would be incorporated by reference into Mr Holmes' report (T205).

22 Reference will be made to aspects of these reports later in this judgment.

The Issues to be Determined

23 The principal issues to be determined in these proceedings are as follows:

(a) the consequences which flow from the admission by the Defendants during the hearing (on 28 February 2012 - T83) of breach of duty to the Plaintiff with respect to the 2002 retainer, whereby Mr Corish prepared the 2002 Financial Agreement, which was ultimately set aside in the Federal Magistrates Court - although the Defendants admit this breach, they contend that the Plaintiff has not pleaded that this breach has caused any loss or damage to him so that the breach, on its own, cannot give rise to an award of damages in the Plaintiff's favour - there is controversy concerning this aspect, to which I will return;

(b) whether Mr Corish breached his duty of care in relation to the 2003 retainer, and for failing to draft a new and compliant Financial Agreement at that time, which will encompass consideration of the scope of the 2003 retainer;

(c) if Mr Corish has breached his duty of care under the 2003 retainer, whether he acted in a manner which was widely

accepted in Australia by peer professional opinion as competent professional practice: s.5O *Civil Liability Act 2002*;

(d) in the event that the Plaintiff establishes that any relevant breach of Mr Corish's duty of care has caused loss or damage to the Plaintiff, the quantification of the Plaintiff's loss in all the circumstances of the case.

24 Although the Defence to the Amended Statement of Claim filed 22 February 2012 raised a defence under the *Limitation Act 1969* (paragraph 33), and a defence that the Plaintiff had failed to mitigate his loss (paragraph 34), those aspects were abandoned by counsel for the Defendants during the hearing (T260).

Section 90G *Family Law Act 1975 (Cth)*

25 As at February 2002, the relevant provisions of the *Family Law Act 1975 (Cth)* were contained in Part VIIIA of the Act (ss.90A-L).

26 Part VIIIA was introduced into the Act by the *Family Law Amendment Act 2000 (Cth)*, which commenced on 27 December 2000.

27 As was explained in *Black and Black* at 511 [40]-[42], the 2000 amendments allowed the parties to make an agreement concerning their financial affairs in the event of separation, with that statutory regime removing the jurisdiction of the Court to determine the division of those matters covered by the agreement, as the Court would otherwise be called upon to do in the event of a disagreement. The introduction of a regime whereby parties could agree to the ouster of the Court's power to make property adjustment orders, reversed a long-held principle that such agreements were contrary to public policy.

28 In *Black and Black*, Faulks DCJ, Kay and Perry JJ said at 511 [42]:

> *"The underlying philosophy that had guided the courts in enunciating that principle was seen to place too many restrictions on the right of parties to arrange their affairs as they saw fit. The compromise reached by the legislature was to permit the parties to oust the court's jurisdiction to make adjustive orders but only if certain stringent requirements were met."*

29 Of particular relevance to these proceedings are the conditions contained in s.90G(1)(b), which then provided:

> *"(1) A financial agreement is binding on the parties to the agreement if, and only if:*
>
> *...*
>
> *(b) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:*
>
> *(i) the effect of the agreement on the rights of that party;*
>
> *(ii) whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement;*
>
> *(iii) whether or not, at that time, it was prudent for that party to make the agreement;*
>
> *(iv) whether or not, at that time and in the light or such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable. ..."*

30 Section 90G was amended by the *Family Law Amendment Act 2003 (Cth)* which commenced on 14 January 2004. The 2004 amendments reduced the matters in s.90G(1)(b) from four to two items. The 2004 amendments do not bear upon the determination of the present proceedings.

31 As it happens, the Plaintiff's 2002 Financial Agreement bore the same fatal defect as the Financial Agreement in *Black and Black*, described by the Full Court at 511 [43]-[45] in the following way:

> *"[43] Subsection 90G(1)(b) (as it was prior to the 2004 amendments) expressly required that the agreement must contain a statement from each party that, before they executed the agreement, they received independent legal advice from a legal practitioner in relation to the matters referred to in (i)-(iv). The section went on to provide that the agreement must also annexe a certificate executed by that legal practitioner stating that the advice in relation to the matters referred in (i)-(iv) was provided to that party.*
>
> *[44] The agreement entered into by the parties in this case did not refer to the specific requirements detailed in s 90G, although the certificate did.*
>
> *[45] Recital R and cl 29 of the agreement, set out at paras 23 and 24 above, dealt predominantly with advice in relation to the legal implications of the agreement and each party's rights and obligations. These statements did not meet all the requirements set out in s90G(1)(b), particularly there was no reference to advice in relation to whether the agreement was fair or prudent. In our view, such an omission meant that the agreement did not comply with the provisions of s 90G and was not binding upon the parties."*

32 The Full Court decision in *Black and Black* was handed down between the hearing and decision in the Federal

Magistrates Court concerning the Plaintiff's 2002 Financial Agreement. Federal Magistrate Kemp invited submissions from counsel in light of the Full Court decision in *Black and Black*. In his judgment published on 14 April 2008 (*Schacht and Schacht* [2007] FMCAfam 341), his Honour said at [26]-[29]:

> *"26. The Full Court handed down its decision on 24 January 2008 and as a result I had my Associate contact Counsel concerned to invite further submissions. Both Counsel made the following joint submission on 28 February 2008:*
>
> *a) On the facts of the present case, the Court in these proceedings is bound to conclude this case by following the Full Court's decision in Black and Black [2008] FamCAFC 7.*
>
> *b) The above submission was made after the relevant appeal period to the High Court of Australia had lapsed, without leave to appeal being sought.*
>
> *27. This Court accepts it is bound by the decision of the Full Court of the Family Court of Australia in Black and Black [2008] FamCAFC 7, which is to the following effect:*
>
> *a) The Full Court preferred the approach of Justice Collier referred to above to that taken by Justice Benjamin.*
>
> *b) Strict compliance with the statutory requirements is necessary to oust the Court's jurisdiction to made* [sic] *adjustive orders under s.79 of the Act.*
>
> *28. The said Financial Agreement did not contain within its terms a statement directly acknowledging that the parties had received legal advice in relation to all the matters set out in s.90G(1)(b) and a reference to such matters as are referred to in the annexures in Exhibit A is not sufficient.*
>
> *29. Accordingly, the said Financial Agreement is flawed and does not meet the statutory requirements and the wife is entitled to the declaratory relief sought to the effect that the said agreement be declared to be not binding between the parties pursuant to s.90G of the Act."*

33 Further amendments were made to s.90G by the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009 (Cth)* with effect from 4 January 2010. The extrinsic material indicated that those amendments were intended, in part, to overcome retrospectively the effect of the Full Court decision in *Black and Black*. However, it is common ground that those amendments do not assist the resolution of these proceedings. The 2002 Financial Agreement had been declared to be non-binding by the Federal Magistrates Court on 14 April 2008.

Findings of Fact

34 Several basic and non-contentious facts were set out at [2]-[9] above. It will be necessary to recite relevant events and, in particular, what occurred in 2002 and 2003 when the Plaintiff consulted and took advice from Mr Corish, who drafted the 2002 Financial Agreement, and then a Deed in 2003.

35 There are limited, but significant, areas of conflict between the evidence of the Plaintiff and Mr Corish. In resolving any conflicts in evidence which are necessary to determine these proceedings, I have had regard to the totality of the evidence adduced at the hearing. I have kept in mind that the events in question occurred some nine to 10 years prior to the hearing. Both the Plaintiff and Mr Corish were giving evidence concerning distant events, and were doing so in the context of contested litigation in which the Plaintiff was suing Mr Corish for professional negligence arising from these distant events.

36 Impressions concerning demeanour should be weighed carefully as against the probabilities, and the disputed evidence examined to see if it is consistent with any incontrovertible fact or facts that are not in dispute, together with other relevant evidence in the case: *Goodrich Aerospace Pty Limited v Arsic* [2006] NSWCA 187; 66 NSWLR 186 at 189-192 [16]-[31]. Of importance in a case such as this is the content of contemporaneous documents, including emails, file notes and correspondence. This is particularly so given that the claim of professional negligence is brought against a solicitor, where a documentary trail is ordinarily to be expected concerning the provision of legal services and advice.

Events in 2002

37 The Plaintiff was born in Germany in 1972 and came to Australia when he was 27 years of age. The Plaintiff met Ms Dieziger in April 2000 and they commenced to live together in June 2000. The Plaintiff has no legal training and, at the time of the hearing in 2012, was employed as a freelance translator. He was fluent in English in 2002 and 2003.

38 In 2002, the Plaintiff was a German citizen and Ms Dieziger was a Swiss citizen. Although neither was a permanent resident of Australia, they intended to live their lives together in this country.

39 In 2002, the Plaintiff was a company director engaged in business in the information technology sector.

40 As mentioned above, the Plaintiff and Ms Dieziger married in January 2002.

41 The Plaintiff and Ms Dieziger had agreed that there should be a *"marriage contract"*, a concept with which they were familiar under German law.

42 The Plaintiff located the Defendants by way of an Internet search in February 2002, whereby he discovered that the firm was close to his then residence and had expertise in family law. He rang the Defendants' office and was put through to Mr Corish, and an appointment was made for them to meet.

43 In February 2002, Mr Corish was an associate of the Defendants' firm. Mr Corish had been practising as a solicitor on a full-time basis since 1982. He became an accredited specialist in family law through the Law Society of NSW in 1994 and thereafter practised full time in family law. At all relevant times in 2002 and 2003, Mr Corish was the solicitor in the Defendants' firm who had conduct of the Plaintiff's matters.

44 On 8 February 2002, the Plaintiff met with Mr Corish, who explained the nature of a binding Financial Agreement under Australian law. I accept that the Plaintiff told Mr Corish that he and Ms Dieziger were planning to purchase a property, and that this plan formed part of the context in which a Financial Agreement should operate.

45 On 27 February 2002, Mr Corish emailed a draft Financial Agreement to the Plaintiff. On 28 February 2002, the Plaintiff responded by email, noting a number of factual errors in the draft and raising some further topics for inclusion. The content of this email confirms that the acquisition of real estate was a live issue in the context of the proposed Financial Agreement.

46 On 26 March 2002, Mr Corish emailed to the Plaintiff a further draft Financial Agreement.

47 In late March 2002, Ms Dieziger consulted an independent legal advisor at Bull Son & Schmidt, solicitors, concerning the draft.

48 On 8 April 2002, the Plaintiff signed the Financial Agreement in the presence of Mr Corish at the latter's office. I accept that the Plaintiff told Mr Corish that day that he would contact him again at a later time, after he and Ms Dieziger had purchased a property.

49 Following the meeting, Mr Corish emailed the Plaintiff in the following terms (Exhibit A, page 77):

> *"Dear Daniel*
>
> *I refer to your attendance today. I note you signed the original agreement before me. Changes were made to clause 21 only, as well as that her name and the name of her solicitor were amended.*
>
> *I note you are to give the original to her and ask that she takes it back to her solicitor to re-sign. Can she then return the original to you and you deliver it to me. I note I will lodge the original in safe custody, and serve a copy on both of you. If you wish to amend the deed you need to go through the same degree of formality, having a new deed drawn and both seeing separate solicitors to sign certificates. However, this is not difficult.*
>
> *Please confirm the arrangements."*

50 It is the fact that the 2002 Financial Agreement drafted by Mr Corish did not comply with s.90G(1)(b) in that it did not contain the statement required by that provision. Mr Corish stated in evidence that he believed that it was sufficient if the relevant words were contained in the attached certificate only (T169-170).

51 To assist an understanding of the Plaintiff's claim and certain events which unfolded in 2003, it is appropriate to set out parts of the 2002 Financial Agreement (Exhibit A, pages 78-87). Clauses 5 and 6 of the Financial Agreement were in the following terms (Exhibit A, page 81):

> *"5. Both Daniel and Claudia agree that if assets are acquired in the sole name of either party during the marriage, then those assets will remain the assets of the party in whose name they are held.*
>
> *6. If assets are acquired in joint names, the parties shall retain their title or interest in such assets in the same proportion as the title or ownership documents show at the time of the purchase (except to the extent that the parties execute a separate deed at the date of acquisition acknowledging that they hold their interests in such asset between each other in proportions different to those stated on the title or ownership documents.) Such assets shall be sold on separation and the proceeds divided in accordance with this clause."*

52 Clause 21 related to maintenance and child support and provided (Exhibit A, page 83):

> *"In the event of the separation of the parties, Daniel will pay the reasonable costs of enabling Claudia to re-establish herself and obtain alternative rental accommodation, in the sum of AUS$30,000 for Claudia and the existing child of the marriage* [name deleted]*, plus an additional amount of $10,000 for each additional child of the marriage ("the sum"), such sum to be increased annually from the date of this Deed, in accordance with increases in the Consumer Price Index for the Sydney region, and make such payments of child support for all the children of the marriage, as if he was earning the maximum amount of child support income as defined in section 42 of the Child Support (Assessment) Act 1989, irrespective of his actual income, which child support would currently be the sum of approximately AUS$335.41 per week for the one child of the marriage, as well as pay all reasonable kindergarten and pre-school costs, school fees, university fees, health care insurance and health care costs for the children and contribute to the support of Claudia by paying spousal maintenance for a period until she is able to*

return to the workforce, taking into account the need to care for any children, and her ability to support herself as a result of property acquired by her, in order that Claudia can maintain a standard of living similar to the pre-separation standard of living, such payments of spousal maintenance to continue for a period of at least 3 years from the date of separation."

53 Shortly after April 2002, the Plaintiff and Ms Dieziger moved to Zurich to start a part-time business. They remained in Zurich until November 2002, when they returned to Sydney. There were no significant problems in the marriage at that time.

The Defendants' Admission of Breach of Duty Concerning the 2002 Retainer

54 I will interrupt the factual narrative to make some observations concerning the admission by the Defendants, on the second day of the hearing, that the Defendants had breached their duty of care to the Plaintiff concerning the 2002 retainer.

55 The express and implied terms of the 2002 retainer are the subject of admissions on the pleadings. The express terms of the 2002 retainer were that:

(a) Mr Corish would draft a financial agreement between the Plaintiff and Ms Dieziger;

(b) the financial agreement drafted by Mr Corish would reflect the wishes of the Plaintiff and Ms Dieziger;

(c) the financial agreement drafted by Mr Corish would be binding on the parties.

56 The implied terms of the 2002 retainer were that:

(a) the financial agreement drafted by Mr Corish would be a financial agreement within the meaning of s.90C *Family Law Act 1975 (Cth)*;

(b) the Defendants would advise the Plaintiff about the requirements imposed by s.90G(1)(b) *Family Law Act 1975 (Cth)*;

(c) the financial agreement drafted by Mr Corish would comply with s.90G(1)(b) of that Act.

57 This admission by the Defendants reduces the need to make findings concerning events in 2002. Given associated areas of controversy, however, it is appropriate to set out what was alleged and admitted by way of breach of the 2002 retainer.

58 Paragraph 35 of the Amended Statement of Claim asserted that the Defendants were in breach of the 2002 retainer, and of the duties owed to the Plaintiff, in the following particularised ways:

(a) failure to draft the April 2002 Financial Agreement so that it complied with s.90G(1)(b);

(b) failure to draft the April 2002 Financial Agreement so that it was binding on the parties under the *Family Law Act 1975 (Cth)*;

(c) failure to recommend that an opinion as to any construction of s.90G(1)(b) that was reasonably open, be obtained from counsel;

(d) failure to attend seminars delivered by leading practitioners on the construction of s.90G(1)(b);

(e) failure to have regard to seminar papers delivered by leading practitioners when drafting the April 2002 Financial Agreement;

(f) failure to draft the April 2002 Financial Agreement so that the agreement set out in Clause 17 complied with s.90K(1)(b) *Family Law Act 1975 (Cth)*, and

(g) failure to draft the April 2002 Financial Agreement so that Clause 21 was not void for uncertainty.

59 Paragraph 19 of the Further Amended Defence to the Amended Statement of Claim, filed by the Defendants on 29 February 2012, admitted paragraph 35 of the Amended Statement of Claim.

60 I should observe that the admission of breach of duty concerning the 2002 retainer is understandable. The Plaintiff had served expert evidence in support of this breach. The Defendants did not serve expert evidence concerning this breach. Rather, the report of Mr Kennedy addressed the question whether there was breach of the 2003 retainer.

61 The Plaintiff relied upon a number of publications issued before or in 2002 which emphasised, in one way or another, the need for a Financial Agreement to comply strictly with s.90G(1)(b) (Exhibit A, pages 437-523). These included:

(a) a paper by Mr Paul Brereton SC (as his Honour then was) entitled *"The New Regime of Financial Agreements"*;

(b) a paper by Mr Bill Karras, solicitor, entitled *"Family Law: An Overview of the Law in Relation to Binding Financial Agreements"* (March 2001);

(c) an article by Patrick Parkinson entitled *"Setting Aside Financial Agreements"* (2001) 15 Australian Journal of Family Law 26;

(d) an article by Mr Garry Watts, solicitor (as his Honour then was) entitled *"Family Law: Binding Financial Agreements Possibilities and Pitfalls"*, NSW Law Society Journal, February 2001; and

(e) a paper by Ms Belinda Fehlberg and Mr Bruce Smyth entitled *"Binding Pre-Nuptial Agreements in Australia: The First Year"* (2002) 16 International Journal of Law, Policy and the Family 127.

62 I accept that the effect of the admission of breach is that the Defendants concede that when Mr Corish drafted the 2002 Financial Agreement, he was negligent and in breach of his duty of care to the Plaintiff by failing to include within the body of the agreement, a statement that was required by s.90G(1)(b), with the result that the agreement was not binding on either party.

Events in 2003

63 On 10 February 2003, a property at Balgowlah was purchased in the Plaintiff's name. The 2002 Financial Agreement provided that property acquired during the marriage was, upon separation, to remain with the party in whose name it was held (see [51] above).

64 On 10 February 2003, Mr Corish sent an email to the Plaintiff enquiring as to the non-payment of certain fees owing for 2002 services (Exhibit A, page 90). I accept that the Plaintiff had not received the earlier correspondence relating to fees. This contact led to further email communications between the Plaintiff and Mr Corish in February 2003, giving rise to the 2003 retainer and the claim by the Plaintiff that it was breached.

65 I accept the Plaintiff's evidence that he always intended to consult Mr Corish again once a property was purchased. It was coincidental that the Plaintiff contacted Mr Corish for this purpose after receipt of the email concerning fees.

66 In an email to Mr Corish on 14 February 2003, the Plaintiff said (Exhibit A, page 90):

> *"I have since purchased a property here in Sydney and would like to make a formal deed with my wife giving her 15% ownership interest on the whole property. Can you draft such a deed?"*

67 Mr Corish's reply by email, also on 14 February 2003, was as follows (Exhibit A, page 90):

> *"If you have purchased the property in your name, you can change the title details to put it in joint names as tenants in common or as joint tenants on the basis that you hold the property 85%; 15%. There is no stamp duty is* [sic] *payable on the transfer of a* [sic] *interest in a solely owned property from one spouse to another. However, you may not want that if the property is negatively geared and you want to claim the full loss on your tax return. I can do a new amended Financial Agreement (which is a "deed"), varying the existing Finncial* [sic] *Agreement by noting the purchase of the new property by you and you acknowledging the 15% interest. Pursuant to the terms of the existing Financial Agreement, it can only be varied by a new agreement with the same degree of formality; that is, that she sees an independent solicitor. That is a bit inconvenient and expensive and you may decide that a new Financial Agreement signed by both of you before witnesses is sufficient. However I note the Act provides that such Financial Agreements are only binding if signed before solicitors. Please give me a call as to what you want."*

68 Soon after, following a perusal of the 2002 Financial Agreement, Mr Corish sent a further email to the Plaintiff (Exhibit A, page 91):

> *"I just saw that you did provide specifically for this in clause 6 of the agreement, noting that you could enter into a deed at the date of acquisition. Accordingly a deed is presumably sufficient for your purposes. I will prepare a draft for your consideration."*

69 On 6 March 2003, the Plaintiff enquired of Mr Corish whether the drafted deed was available and, on 19 March 2003, Mr Corish furnished a draft deed as an attachment to the following email (Exhibit A, page 94) (emphasis in original):

> *"I attach draft Deed. I note that under clause 6 of the Financial Agreement, you can enter into a separate deed <u>at the date of acquisition</u> of some new asset, acquired in <u>joint names</u>, acknowledging that you hold title to the said property differently than as stated in the title or ownership documents. I note that you apparently did not do this at acquisition and presumably it is not in joint names. If so, the attached deed is arguably not binding on you. Clause 16 of the Financial Agreement also says that the Financial Agreement can only be varied by a new Deed with a <u>similar dgree</u>* [sic] *<u>of formality at</u>* [sic] *<u>the present deed</u>; in other words, seeing separate solicitors and having the solicitors sign Certificates. You may not wish to do that and incur that expense and the risk would appear to be Claudia's. Again it could be argued that such a deed is not enforceable, although you would have difficulty asserting this. I suggest you ring me to discuss what happened about the purchase of the land and give details of your current address and the address of the land and date of purchase and whether if you both sign this agreement, that will suffice for the time being."*

70 On 27 March 2003, a telephone conversation took place between the Plaintiff and Mr Corish concerning the draft deed (Exhibit A, page 196). That same day, Mr Corish wrote to the Plaintiff in the following terms (Exhibit A, page 95):

"I refer to our telephone attendance on 27 March 2003.

I note that you are to amend the deed and forward it to me for approval. I note that it is not going to be signed before separate solicitors. I note that you will both sign it before a witness and forward the original to me, keeping a copy yourself. I will then lodge the original in safe custody with the Financial Agreement dated 15 April 2002. This is part of a free service of storing original documents on behalf of clients which are available for collection at any time.

I enclose a note of our costs and thank you for your instructions."

71 On 31 March 2003, the Plaintiff and Ms Dieziger executed a Deed which recited the 2002 Financial Agreement, and stated that the Plaintiff granted to Ms Dieziger a 15% interest in the net value of the Balgowlah property, and that the parties agreed that the Financial Agreement be varied by the Deed (Exhibit A, page 96).

72 It was submitted for the Plaintiff that the evidence of Mr Corish ought be rejected entirely in one important area.

73 The Plaintiff submitted that the evidence of Mr Corish ought be rejected in areas where he asserted that he actually gave advice to the Plaintiff in 2003 that a new Financial Agreement should be made. It was emphasised, in support of this submission, that the contemporaneous documentary evidence did not support this position and that Mr Corish had not asserted it in his affidavit prepared for these proceedings, nor had it been put to the Plaintiff in cross-examination. Mr Braham SC submitted that parts of Mr Corish's evidence were *"entirely invented in the witness box"* (T249.32) and that parts of his evidence did not reflect *"an honest witness attempting to tell the truth"* (T249-250).

74 Mr Cheshire acknowledged that some aspects of Mr Corish's evidence were unsatisfactory. He submitted that some of his evidence was *"muddled"* (T219.5) and that there were *"some problems"* with Mr Corish's evidence (T261.20), although he was at all times seeking to give truthful evidence.

75 In approaching this aspect, I have kept in mind the need for care in making strong adverse findings with respect to evidence given long after the events under consideration. I have had regard to the totality of the evidence and, in particular, the contemporaneous documentary evidence (see [35]-[36] above). I have also kept in mind the need for clarity and fairness where strong submissions are made concerning the credibility of evidence given by a professional person: *Bale v Mills* [2011] NSWCA 226; 81 NSWLR 498.

76 For the purpose of giving judgment in the matter, I have reviewed the totality of the evidence, including the transcript of evidence. Demeanour plays a limited part in the determination of these proceedings. A person in Mr Corish's position might reasonably be expected to be guarded and defensive when giving evidence in the context of a claim for professional negligence. The foundation for the findings which I make concerning contested matters may be found in an examination and understanding of what appears in the contemporaneous 2002 and 2003 documents, the affidavits affirmed or sworn by the Plaintiff and Mr Corish in 2010 for the purpose of these proceedings, and the transcript of evidence given before me in 2012.

77 After careful consideration, I accept the submission of the Plaintiff that this evidence of Mr Corish should not be accepted. In reaching this conclusion, I have taken into account (in particular) the following matters:

(a) Mr Corish had drafted a deed which he sent to the Plaintiff with the email of 19 March 2003, not a new Financial Agreement;

(b) none of Mr Corish's written communications to the Plaintiff in 2003 contained the advice which Mr Corish now asserts he had provided;

(c) none of Mr Corish's file notes record such advice as having been given;

(d) nowhere in Mr Corish's affidavit is such advice recorded as having been given;

(e) this version was not put to the Plaintiff by counsel for the Defendants, notwithstanding that Mr Corish was in Court throughout the cross-examination of the Plaintiff.

78 Of particular significance are the documents created on or about 27 March 2003, including a file note (Exhibit A, page 196) and a letter sent by Mr Corish (Exhibit A, page 95 - set out at [70] above). I accept the submission for the Plaintiff that it is simply inconceivable that a solicitor would permit a client to take a step against his express advice, without recording that fact in some contemporaneous document, or even mentioning it to his own lawyers in the professional negligence proceedings years later, until he himself was under cross-examination (T195-200).

79 I accept the Plaintiff's submission that contained in a similar category is the evidence in Mr Corish's affidavit, unsupported by contemporaneous communications, that he had told the Plaintiff that the deed would be non-binding.

80 In contrast, the evidence of the Plaintiff was that Mr Corish told him that *"It might be argued that the deed is not enforceable, but I don't think that this argument will succeed"* (Plaintiff's affidavit, 9 April 2010, paragraph 53). In my

view, the Plaintiff's evidence to this effect ought be accepted. It closely aligns with the contents of emails sent by Mr Corish in 2003.

81 I do not accept the challenged account of Mr Corish. It is not necessary to make findings beyond that for the purpose of determining the proceedings.

Events After 2003

82 In March 2004, the Plaintiff emailed Mr Corish, indicating a desire to alter the Deed of 31 March 2003 to give Ms Dieziger an additional interest in the Balgowlah property. Mr Corish responded by email explaining the available options, but it does not appear that the Plaintiff retained the Defendants to take further steps on his behalf.

83 The Plaintiff and Ms Dieziger had a second child in 2005. In that year, the relationship between them began to deteriorate.

84 On 10 March 2006, the Plaintiff purported to increase Ms Dieziger's share of the Balgowlah property to 20% by letter directed to her (Exhibit A, page 100). This step was taken at a time when the marriage was in a deteriorating state. The Defendants and Mr Corish played no part in this aspect of the matter.

The Marriage Breaks Down

85 On 21 April 2006, the Plaintiff moved out of the matrimonial home. The Plaintiff commenced renting premises at Manly in June 2006 (Exhibit A, pages 101, 110). The Plaintiff rented different premises in Manly, Mosman and Frenchs Forest between 2006 and 2009.

86 On 26 February 2007, the Plaintiff filed matrimonial proceedings in the Federal Magistrates Court seeking various parenting orders and, on 5 April 2007, Ms Dieziger filed proceedings in that Court seeking a declaration that the 2002 Financial Agreement was not binding.

87 The divorce of the Plaintiff and Ms Dieziger became final on 29 July 2007.

88 On 23 August 2007, the Plaintiff and Ms Dieziger agreed to the s.90G question being determined as a preliminary issue. As mentioned earlier, on 14 April 2008, the Federal Magistrates Court declared the 2002 Financial Agreement to be non-binding. A mediation of the family law dispute proceeded before Mr Stephen Walsh QC on 14 November 2008, leading to settlement as recommended by Grahame Richardson SC, for the Plaintiff (Exhibit A, page 121-124), and as reflected in a binding Financial Agreement between the Plaintiff and Ms Dieziger dated 15 December 2008 (Exhibit A, pages 108-120).

89 The Plaintiff commenced the present proceedings for damages against the Defendants by Statement of Claim filed 9 February 2009.

Some Relevant Legal Principles

Principles Concerning Liability

90 In relation to both the 2002 and 2003 retainers, the Plaintiff submits that the Defendants owed him contractual duties (including a duty to take reasonable care in the performance of the retainer) and a corresponding duty of care in tort.

91 The relevant principles are not in controversy in these proceedings.

92 In *Heydon v NRMA Limited* [2000] NSWCA 374; 51 NSWLR 1, Malcolm AJA, at 53 [146], described the duty of care owed by solicitors to their clients in the following way:

> *"In my opinion the approach adopted in Rogers v Whitaker is applicable to the duty of care of legal practitioners and the standard of care. Both barristers and solicitors owe a duty of care to those whom they advise or for whom they act. In the present context, their duty is to exercise reasonable care and skill in the provision of professional advice. The standard of care and skill is that which may be reasonably expected of practitioners. In the case of practitioners professing to have a special skill in a particular area of the law, the standard of care required is that of the ordinary skilled person exercising and professing to have that special skill."*

93 As to the standard owed by a solicitor professing expertise in a particular field, Drummond, Sundberg and Finkelstein JJ said in *Yates Property Corporation v Boland* [1998] 85 FCR 84 at 105:

> *"When a client retains a firm that is or professes to be specially experienced in a discrete branch of the law that client is entitled to expect that the standard of care with which his retainer will be performed is consistent with the expertise that the firm has or professes to have."*

94 The Defendants' duty of care was to exercise reasonable care and not to ensure any particular result: *Kekatos v Sanson* [2009] NSWCA 171. The Defendants' duty will be defined by the retainer: *Dominic v Riz* [2009] NSWCA 216;

Fahd v Kenneally [2011] NSWCA 419.

95 Section 5O *Civil Liability Act 2002* has application to these proceedings:

> *"5O Standard of care for professionals*
>
> *(1) A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.*
>
> *(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.*
>
> *(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.*
>
> *(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted."*

96 Where s.5O is invoked, the relevant question is whether the solicitor can establish that he acted in a manner that, at the time the service was provided, was widely accepted in Australia by peer professional opinion as competent professional practice: *Dobler v Halverson* [2007] NSWCA 335; 70 NSWLR 151 at 166-168 [54]-[64]. Section 5O provides a defence and does not define the content of the duty of care of a professional: *DJZ Constructions Pty Limited v Paul Pritchard trading as Pritchard Law Group and Ors* [2010] NSWSC 1024 at [227]-[228].

97 The Defendants do not rely upon s.5O with respect to the 2002 retainer, but seek to do so by reference to the 2003 retainer. The parties invite the Court to consider the expert reports of Mr Holmes and Mr Kennedy, for the purpose of determining this aspect of the litigation.

Principles Concerning Damages

98 The Plaintiff contends, and the Defendants do not dispute, that damages for breach of contract in the context of a professional negligence action extend to damages which fall within the two limbs of *Hadley v Baxendale* (1854) 9 Ex 341, namely:

(a) damages that a reasonable person would have realised would occur as a usual consequence of the breach; and

(b) damages in the contemplation of the parties at the time of the agreement.

99 It is clear from the evidence of Mr Corish that matters such as cost and delay were within his specific contemplation at the relevant dates, and were seen by members of the community as being connected with the advantages of a successful binding Financial Agreement (T168-169). I accept that damages of this type fall within both limbs of *Hadley v Baxendale*.

100 In tort, the available damages are those of a type which were reasonably foreseeable at the date of breach, including for the delay in receiving (for example) the fruits of a lost cause of action: *Johnson v Perez* (1988) HCA 64; 166 CLR 351 at 373. I accept the Plaintiff's submission that damages in the categories of cost and delay of resolution of financial affairs are types of damages that were reasonably foreseeable, as a result of negligent preparation of a Financial Agreement intended to be binding.

101 The question of what the Plaintiff would have done, as a matter of fact, had he been given different advice is to be approached on the balance of probabilities, but where causation depends upon the act of a third party, a proportionate approach is to be adopted based upon the magnitude of the lost chance, as illustrated in *Heenan v Di Sisto* [2008] NSWCA 25 at [28]-[50].

Expert Evidence Concerning Liability

102 It is useful to set out, at this point, relevant parts of the joint report of Mr Kennedy and Mr Holmes dated 28 February 2012 (Exhibit E). The controversy lies in the question whether there was a breach of duty concerning the 2003 retainer and, if so, whether s.5O *Civil Liability Act 2002* applies. The joint report said (paragraphs 4-10):

> *"4. Mr Kennedy and Mr Holmes were requested to provide opinions on somewhat different questions and aspects of the matter. However where the issues on which they have been requested to express an opinion coincide (which for present purposes encompasses the issues on which Mr Kennedy's opinion was sought) they have conferred by telephone on 28 February 2012, discussed their respective views on the questions in issue and identified the issues on which they agree and disagree.*
>
> *5. Mr Kennedy and Mr Holmes agree that:-*
>
> *5.1 A binding agreement entered into in the period 2002 - 2003 in terms similar to the April 2002 Deed would have been vulnerable to attack by the wife under:-*
>
> *5.1.1 Section 90K(1)(d) of the Family Law Act 1975 (material change in circumstances concerning the care, welfare or development of a child of the marriage giving rise to hardship to a party]; and/or*
>
> *5.1.2 Section 90F of the Act (over-riding the exclusion of the Courts maintenance power where a party is Incapable*

of self-support without an income-tested benefit).

5.2 Failure to advise the plaintiff of the decision in ASIC v Rich did not constitute a failure to exercise due care and skill or to exercise competent professional practice.

6. Mr Kennedy and Mr Holmes differ in their opinions on the following questions set out on page 5 of Mr Kennedy's opinion regarding the dealings between the parties in February and March 2003 as pleaded in paragraph 36 of the Statement of Claim:-

6.1 Did Mr Corish fail to exercise reasonable care and skill in the period 10 February to 31 March 2003 and in particular by reference to each of the particulars alleged in paragraph 38 of the Statement of Claim?

6.2 In the period 10 February to 31 March 2003 did Mr Corish act in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice at that time?

7. Mr Kennedy answers the first question m the negative and the second question in the affirmative.

8. Mr Holmes answers the first question in the affirmative and the second question in the negative.

9. The primary reasons for the differences in opinion between Mr Kennedy and Mr Holmes are that:-

9.1 Both experts are asked to respond to different questions (those submitted to Mr Kennedy being narrower and more time-limited than those submitted to Mr Holmes);

9.2 Mr Holmes takes the view that the solicitor should have reviewed (and did review) the original agreement ('the April 2002 Deed') upon receiving further instructions from the client in 2003 and, having done so, should have identified the problems with the April 2002 Deed.

9.3 Mr Kennedy takes the view that both the terms of the April 2002 Deed itself (although not binding for other reasons) and the chain of communication between the solicitor and the client m 2003 made the requirements for varying the original agreement in a binding manner sufficiently clear - and placed the client sufficiently on notice as to the requirements to ensure that any variation of the original arrangements between the parties would be binding - and that the client elected not to follow the appropriate course.

10. Mr Kennedy and Mr Holmes agree the issue of whether (given the ad hoc nature of the communication between solicitor and client and the non-specific and imprecise instructions provided to the solicitor, resulting in the client being given a number of options which either he did not appreciate or elected not to take the appropriate pathway) constituted negligence - and whether and to what extent the actions of the client contributed to and/or compounded the situation - are matters for determination by the Court."

The Defendants' Pleading Point Concerning the Admitted Breach of Duty for the 2002 Retainer

103 The Defendants have admitted breach of duty with respect to the 2002 retainer. The submission is made for the Defendants that the Amended Statement of Claim asserts (at paragraph 38) that the Plaintiff sustained loss or damage as a result of the breaches pleaded in paragraph 36 (the 2003 retainer) without reference to paragraph 35 (the 2002 retainer). In this way, the Defendants argue that the admission of breach of duty with respect to the 2002 retainer, in truth, goes nowhere in the determination of these proceedings.

104 Mr Cheshire submitted that the Plaintiff should be held to his pleadings and that causation is not pleaded with respect to the 2002 breach. He developed this submission orally (T209-210, T270-272).

105 Mr Braham SC submitted that there is a clear overlap between the 2002 and 2003 retainers, and an interrelationship between them, so that the Defendants' submission is both unduly technical and wrong. He submits that the Plaintiff has pleaded all material facts, and that the Defendants ought not have been in any doubt that the Plaintiff alleged that loss or damage flowed from the breach of the 2002 retainer, as well as the 2003 retainer (T237-238, T284-285).

106 I reject the Defendants' submission that the Plaintiff does not allege that the 2002 breach caused loss or damage to him. The entire tenor of the Plaintiff's claim involves this assertion. At its highest, the Defendants' point is that the Plaintiff does not assert expressly what flows inexorably from the pleaded claim. Nor can it be said, reasonably, that the Defendants have been, in some way, prejudiced (T271-272). The Defendants were aware of the alleged 2002 breach, which was admitted. Fairly read, the Plaintiff's claim pleaded material facts which demonstrated that the Plaintiff asserted that the 2002 breach caused loss or damage.

Whether Breach of Duty Has Been Established Concerning the 2003 Retainer

107 Once it is accepted (as I have) that the admitted breach caused loss or damage, it is not strictly necessary to determine the claim for breach of the 2003 retainer. However, the matter has been fully argued and I propose to adjudicate on that part of the Plaintiff's claim as well.

108 I am satisfied that the scope of the Defendants' 2003 retainer is to be discerned from the email correspondence between the Plaintiff and Mr Corish in February-March 2003, and the context of those communications.

109 There is an inextricable link between the 2002 retainer and the 2003 retainer.

110 In my view, it would be erroneous to approach the issues in this litigation as if the 2002 and 2003 retainers were contained in two entirely separate compartments. That is not the way that the matter was approached by the Plaintiff

and Mr Corish in 2003. Nor is it a correct characterisation of events in light of the evidence adduced at this hearing.

111 I do not accept the Defendants' submission based upon the decision of Akenhead J in *Shepherd Constructions Ltd v Pinsent Masons LLP* [2012] EWHC 43 (TCC) (*"Shepherd Constructions"*). That decision is of no real assistance to them in these proceedings. The factual circumstances of *Shepherd Constructions* were markedly different to the circumstances in this case. In *Shepherd Constructions*, the issue was whether there was a duty to review advice previously given in the context of multiple contracts over an extended period of time (see [8], [26]-[35] of the judgment of Akenhead J). In the present case, the Plaintiff retained Mr Corish in 2002 and 2003 for related and overlapping purposes, where reference back to the 2002 Financial Agreement formed an integral part of the 2003 retainer. These circumstances are far removed from those in *Shepherd Constructions*.

112 I accept the submissions of the Plaintiff that the context included the following elements.

113 Firstly, in 2002, Mr Corish had been asked to draft into the Financial Agreement an arrangement which would permit property held at the date of dissolution to be dealt with otherwise than in accordance with the legal title to that property. Mr Corish purported to comply with those instructions (Exhibit A, page 72) although he did not succeed in doing so.

114 Secondly, Mr Corish's email of 22 March 2002 (Exhibit A, page 72) advised the Plaintiff that, in the event that it was sought to adjust interest in property for the purpose of the Financial Agreement, that could occur *"by a simple deed between you"*. This advice, which was incorrect, reflected the Plaintiff's understanding when he purchased the Balgowlah property on 9 February 2003.

115 Thirdly, on 14 February 2003, the Plaintiff had just purchased the Balgowlah property in his own name. This was a contingency which had been the subject of specific consideration and instruction between him and Mr Corish in 2002 (Exhibit A, page 69; T176).

116 Fourthly, it was in that context that the Plaintiff sent the email of 14 February 2003 asking Mr Corish to *"draft such a deed"*.

117 Fifthly, leaving aside his first response (which was made without looking at the 2002 Financial Agreement), Mr Corish's email at 9.12 am on 14 February 2003 (Exhibit A, page 91 - set out at [68] above) reflected an appreciation that his retainer would require him to make a deed within the mechanism provided for by the 2002 Financial Agreement. It was, in that sense, a continuation or extension of his original retainer. He was being asked to activate the mechanism which he had specifically put in place in Clause 6 of the Financial Agreement, as part of the 2002 retainer. This is confirmed by Mr Corish's own understanding of that retainer, as evidenced by the 27 March 2003 invoice (Exhibit A, page 204), the account he sent for the 2003 retainer which was sent pursuant to the cost disclosure given for the 2002 retainer.

118 Sixthly, as was clear to Mr Corish at the time, it was necessary for him to review the 2002 Financial Agreement to give effect to the 2003 retainer.

119 I accept the further submission of the Plaintiff that, leaving aside this specific request that had been made of him, it was obvious to Mr Corish, in his evidence, that his duty in 2003 extended to telling the Plaintiff about a mistake in the agreement which he had made in 2002 (T191).

120 I accept the Plaintiff's submission that a solicitor with Mr Corish's retainer, acting with reasonable care in 2003, would have:

(a) reviewed the 2002 Financial Agreement, as Mr Corish did (T184);

(b) identified that the 2002 Financial Agreement was defective, this being a corollary of the admission of breach of duty concerning the 2002 retainer; and

(c) advised the Plaintiff, for this reason alone, that he should make a new Financial Agreement - Mr Corish accepted that, had he been aware in 2003 of the correct construction of s.90G(1)(b), he would have given this advice (T191).

121 It was submitted for the Plaintiff that, even if a solicitor in Mr Corish's position had not realised that the 2002 Financial Agreement contained the relevant defect, there were still a series of steps which ought to have been taken which, in the context of these proceedings, would lead to the Plaintiff succeeding in his claim. Mr Braham SC submitted, and I accept, that a prudent solicitor in the position of Mr Corish would have:

(a) reviewed Clauses 5, 6 and 16 of the 2002 Financial Agreement, which Mr Corish did (T184);

(b) identified that the Clause 6 mechanism would not operate to achieve the Plaintiff's objectives, as Mr Corish did (Exhibit A, page 94); and

(c) advise the Plaintiff that what he ought to do was to *"start again and make a new binding financial agreement"*, which Mr Corish acknowledged as a *"strong preference"* or *"clearly a preference"* (T189-190).

122 I accept the submission for the Plaintiff that Mr Corish at no time communicated the matters at [121](c) above to the Plaintiff.

123 In addition and separate to these matters, it was submitted for the Plaintiff (in my view, correctly) that what Mr Corish did was to make a statement that was, in all of the circumstances, plainly wrong and misleading. In the email of 19 March 2003 (Exhibit A, page 94 - set out at [69] above), Mr Corish stated that *"The risk is all Claudia's"*. In cross-examination, he accepted that that was a statement that assumed that there was an underlying binding Financial Agreement (T191) and that a solicitor with a proper understanding of s.90G(1)(b) would not have made that statement (T191). I accept the submission for the Plaintiff that, even if Mr Corish did not have to go back to look at the 2002 Financial Agreement, he could not say to the Plaintiff *"The risk is all Claudia's"*.

124 The effect of Mr Corish's advice can be seen from the emails, taken together with the Plaintiff's account of events. This is particularly so as the Plaintiff's account, in my view, accords generally with the contemporaneous documentation. The Plaintiff had approached the Defendants for legal advice in an area in which Mr Corish had particular expertise. Although the Plaintiff was an educated man, with some general knowledge of the subject matter, he was to all intents and purposes, reliant upon Mr Corish for advice as to the appropriate course of action to take to protect the Plaintiff's interests. This, after all, was why he had approached Mr Corish for advice in the first place.

125 I do not accept the Defendants' submission (T226-227) that the Plaintiff was not concerned about *"formalities"* in 2003. The Plaintiff was concerned to take further steps, consequent on the 2002 Financial Agreement, in light of the purchase of the Balgowlah property in early 2003. He took advice from Mr Corish. The steps taken by the Plaintiff were influenced by Mr Corish's advice, which included advice that the risk lay entirely with Ms Dieziger. This advice was clearly wrong, given the negligence surrounding the 2002 Financial Agreement.

126 I accept the Plaintiff's submission that the email of 19 March 2003 (Exhibit A, page 94 - set out at [69] above) was wrong and misleading for reasons explained earlier. I accept the submission of the Plaintiff that the making of a separate Deed, without the formalities of s.90G, was accompanied by the following defects:

(a) there was no clear recommendation or advice to make a new binding Financial Agreement;

(b) the email of 19 March 2003 annexed a draft Deed prepared by Mr Corish, for which the Plaintiff was presumably to be charged a fee;

(c) the email suggested that the Deed was *"arguably"* not binding, but no stronger statement of advice was given;

(d) the email identified the risk of the Deed not being binding as being that of Ms Dieziger, and not the Plaintiff's risk;

(e) there is a suggestion in the last sentence of the email that the Deed might *"suffice for the time being"*;

(f) it avoided Mr Corish having to confront and admit to the drafting error in 2002, a matter which he was unwilling to concede even at the hearing (T173-175, T177-180, T185-186).

127 As mentioned earlier, it is necessary to fairly read the email communications in 2003 to understand the scope of the 2003 retainer. In my view, it is clear enough what the Plaintiff understood to be the tasks to be performed by Mr Corish, and it is likewise clear enough that Mr Corish understood these tasks in the communications which took place.

128 If Mr Corish had performed his retainer in 2002, the Plaintiff would have had in place a binding Financial Agreement at all times from that date. In that event, the effectiveness or otherwise of the subsequent arrangements would have become irrelevant.

129 I am satisfied to the requisite standard that Mr Corish breached his duty of care with respect to the 2003 retainer.

130 Accordingly, I am satisfied that the Plaintiff has established breach of duty of care with respect to both the 2002 and 2003 retainers.

Conclusions Concerning Liability and the Expert Evidence Relating to Liability

131 In finding that the Plaintiff has established that the Defendants breached their duty of care to him under the 2003 retainer, I have taken into account the reports of Mr Holmes and Mr Kennedy. I find the reasoning of Mr Holmes in his report of 24 February 2012 (pages 3-5) persuasive. That reasoning, of course, adopts part of Mr Kay's report (see [21] above). I prefer the reasoning of Mr Holmes to that of Mr Kennedy.

132 Mr Holmes explained why the Deed proposed and utilised by Mr Corish in 2003 was entirely unsatisfactory, against the

background of the 2002 Financial Agreement. Mr Holmes said (pages 3-4):

> *"I think this second document* [the 2003 Deed] *just compounded the problems from the first document. In some sense, I have difficulty in working out what it is. There is specific reference to the fact that it varies the April 2002 Deed which was the Financial Agreement.*
>
> *I have not ever seen a simple Deed of that nature which agrees to 'vary' the original Agreement. The specific concept of 'varying' an Agreement in that way has, in my experience, never been adopted.*
>
> *Bearing in mind the contentious nature of Financial Agreements and whether or not they are binding and the risks that flow there, one way or the other, I would have expected a prudent solicitor specialising in Family Law, when asked to 'vary' or change an Agreement then to do two things:*
>
> *(i) Check the original document; and*
>
> *(ii) Advise on the need to terminate it and create a new Financial Agreement in the same way.*
>
> *The solicitor was clearly alive to the issue of the need for that 'degree of formality' and attempted to probably summarise the whole thing by saying 'however I note that the Act provides that such Financial Agreements are only binding if signed before solicitors' which is a simplified version of what it takes to become 'binding' (see paragraph 17 of the opinion of Mr Kay).*
>
> *The solicitor also did the other thing, namely checking the original document. He said 'I just saw that you did provide specifically for this in clause 6 of the Agreement'.*
>
> *So, the solicitor looked at the April 2002 Deed and it appears to me again did not identify the error in that document. So, in that way, the problem was compounded.*
>
> *I would not have suggested that 'a Deed is presumably sufficient for your purposes'. That is a matter which I would have considered very carefully and then probably sought advice because the legislation tells us only a limited number of things namely:*
>
> *(a) How to create a Financial Agreement;*
>
> *(b) How to terminate one;*
>
> *(c) How to create a new one.*
>
> *I have never seen this before and so I would have been very concerned about drafting 'a Deed' and I would have taken advice from Counsel if that was the pathway that I was intending to follow - simply because that pathway is not laid down by the legislation.*
>
> *Again, I could speculate that the expectations of the client as to 'quick, simple and cheap' were inconsistent with the work that was required of the specialist Family Law Solicitor.*
>
> *Absent any clear advice from Counsel that I could create a varying Deed in the way of the March 2003 Deed, I would have expected a prudent Family Law Solicitor to go back to the legislation, take the cautionary approach, and terminate the original Agreement and create a new Agreement, putting in the extra bonus that was being offered to his partner."*

133 I accept this evidence.

134 As the liability experts said at paragraph 10 of their joint report (see [102] above), the determination of breach and the application of s.5O *Civil Liability Act 2002* are matters for determination by the Court.

135 Both Mr Kennedy and Mr Holmes considered the question whether, in the period February to March 2003, Mr Corish acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice at that time (the s.5O issue).

136 Mr Kennedy answered *"Yes"* and Mr Holmes answered *"No*".

137 In addressing this question in his report of 14 December 2011 (page 11), Mr Kennedy considers that Mr Corish left the Plaintiff three options in 2003. Mr Kennedy considered that Mr Corish identified the pros and cons to the Plaintiff, albeit in an ad hoc manner by email, and that the elements and choices were made sufficiently clear, with the Plaintiff accepting the Deed option. Mr Kennedy considers that Mr Corish acted in a manner consistent with what was widely accepted in Australia by peer professional opinion as competent professional practice at that time.

138 Mr Holmes expresses a contrary view, emphasising that the problem is that Mr Corish was starting in 2003 from a position of a flawed document.

139 The Defendants admit professional negligence in the preparation and use of the 2002 Financial Agreement. I accept Mr Holmes' opinion that the problem with the 2002 Financial Agreement is a significant starting point. It was not adequate for Mr Corish to expose three options for the Plaintiff's choice in 2003. The 2003 retainer required Mr Corish to review the 2002 Financial Agreement, a further opportunity for Mr Corish to detect and overcome the negligently prepared

2002 Financial Agreement, in the interests of his client, the Plaintiff.

140 The Defendants have not established that Mr Corish acted in 2003 in a manner that was widely accepted in Australia by peer professional opinion as competent practice at that time.

Some Causation Issues

141 To the extent that the submission for the Defendants asserts that the Plaintiff willingly took the risk of making a non-binding agreement in 2003, I do not accept the submission. The Plaintiff made clear under cross-examination that the reason he signed the Deed, in a way that might not have been enforceable, was because Mr Corish had advised him that it was not the Plaintiff's risk - that is, if the Deed did not stand up, then the result would be that Ms Dieziger would not get her 15% share (T124).

142 I accept the submission of the Plaintiff that, in the circumstances which existed upon separation, the Plaintiff had an agreement that was vulnerable to attack on formal grounds. That attack occurred in the family law litigation, causing cost and delay, which was exactly the circumstance which the making of a binding Financial Agreement was intended to make less likely.

143 The family law litigation commenced on 26 February 2007. In April 2007, Ms Dieziger filed a response which raised the point concerning the 2002 Financial Agreement. Thereafter, on 23 August 2007, the parties agreed to have the formal point determined separately. The judgment declaring the 2002 Financial Agreement void was handed down on 14 April 2008.

144 On 15 December 2008, following a mediation, the Plaintiff and Ms Dieziger settled the proceedings with another effective binding Financial Agreement (Exhibit A, page 121).

145 I am satisfied that the Plaintiff has established that loss or damage was caused to him, arising from the breaches of the 2002 retainer and the 2003 retainer.

Damages

146 I turn to an assessment of damages.

147 It is appropriate at this point to refer to the expert quantum evidence. A series of reports were prepared by the experts, but the Second Joint Report of Mr Kay and Mr Rose QC dated 27 February 2012 (Exhibit D) distilled the areas of agreement which are presently relevant (paragraph 3):

> *"3. As may be observed there was little common ground in the opinions sought from each of us. We are however agreed that:*
>
> *1. The quantum of spousal maintenance payable by the plaintiff to his wife and the duration of such maintenance pursuant to the 2002 Agreement (if its validity was not in question) assuming that she received 20% of the net proceeds of sale of the Balgowlah property would be estimated at $500.00 per week.*
>
> *2. Spousal maintenance was payable for 'at least 3 years' following separation. That liability may have subsequently continued for an indefinite period, subject to the relevant matters set out in sections 72 and 75(2) of the Act. We do not have sufficient information to be more precise.*
>
> *3. The eventual receipt by the wife of an assumed 20% of the net proceeds of sale of the Balgowlah property (less any legal expenses) would not have resulted in cessation of payment of maintenance or variation of the quantum.*
>
> *4. There was no reasonable prospect that an order for spousal maintenance would have been made in favour of the wife having regard to section 90F of the Family Law Act at any time prior to the 2002 agreement being terminated.*
>
> *5. After the parties separated the Plaintiff's wife had an arguable case of substance for an order setting aside the '2002 agreement' pursuant to section 90K(1)(d) of the Family Law Act. Success was not certain. That application would have relied upon the birth of the second child and the imbalance of the parties' financial resources as demonstrating 'hardship' sufficient to justify the setting aside of the earlier agreement. A further relevant factor may have been changes in the wife's health due to thyroid cancer and radiation treatment. There is however an absence of instructions regarding the impact of that health issue on the wife's capacity to earn income in the foreseeable future and a medical prognosis. Although the provisions of clause 21 are imprecise, the open ended nature of the spousal maintenance provision may have militated against a finding that she would suffer hardship.*
>
> *6. There is no dispute between us on the opinions that each of us provided in respect of the questions which were not common to each request."*

148 The experts observed as well (paragraph 8):

> *"As indicated above we do not have enough information to predict the duration or quantum of any ongoing spousal maintenance as it is dependent on too many variables including inability to self support and capacity to pay which may frequently alter."*

149 Mr Braham SC furnished a schedule of damages identifying items under different headings (MFI5). I will address the claim for damages by reference to the categories contained in this document, to which Mr Cheshire responded directly

in submissions.

Difference Between the Amount Payable to Ms Dieziger Under a Hypothetical Agreement and the Amount Payable Under the December 2008 Financial Agreement

150 The agreed value of the Balgowlah property at the relevant time is $1.85 million (T158-159). Under the 2002 Financial Agreement (as adjusted to provide for a 20% entitlement to the property), the Plaintiff would have been liable to pay to Ms Dieziger the sum of $370,000.00, plus an amount of $40,000.00 for relocation expenses.

151 The position in which the Plaintiff found himself, in December 2008, was that he had to pay Ms Dieziger the sum of $906,250.00 by way of property settlement. The difference between the two figures is $496,000.00, and it is submitted for the Plaintiff that he is entitled to that sum under this heading.

152 Relying upon the principles referred to at [101] above, Mr Cheshire submitted here that the question whether a new and valid Financial Agreement would have been executed in 2003, was dependent upon Ms Dieziger agreeing to execute a fresh agreement which complied with s.90G and overcame any uncertainty surrounding Clause 21. Mr Cheshire submitted that a 50% discount should be applied for this purpose (T231).

153 It was submitted for the Defendants that, if the Plaintiff succeeded in establishing an entitlement to damages, the sum to be allowed under this heading should be $219,200.00. A process of calculations was set out in the final written submissions for the Defendants, culminating in that figure which was said to be the difference between the binding Financial Agreement executed in 2008 and the Financial Agreement that would have been executed in 2002.

154 The Plaintiff submits that there should be no discount for a lost chance. It is submitted that the Court's task, where it is established that the Plaintiff has lost something of value, it to assess damages for the loss flowing to the Plaintiff by reason of the negligence: *Johnson v Perez* at 366. The Plaintiff submits that there must be some facts in evidence to support any direction for a lost chance being made: *Charles v Hugh James Jones and Jenkins (a Firm)* [2000] 1 All ER 299 at 305-306.

155 The Plaintiff submits that the Defendants have put forward no matter which would justify any discount for the lost chance, and that it is not appropriate to apply one in this case. It is submitted that the matters which were raised by Ms Dieziger in the family law litigation are not issues in the present case.

156 I accept the Plaintiff's submission that an inference should be drawn from the evidence that, if Mr Corish had told the Plaintiff in March 2003 that he did not have a binding Financial Agreement in place, or that it was Mr Corish's *"clear preference"* that he make a new binding Financial Agreement, then the Plaintiff would have instructed Mr Corish to prepare such an agreement, and that both the Plaintiff and Ms Dieziger would have signed a varied agreement (as they signed the Deed in 2003). The Plaintiff wished there to be an agreement, which he intended to be for the benefit of Ms Dieziger in relation to the Balgowlah property.

157 In my view, the appropriate approach is to look at what happened in 2002 and 2003 for the purpose of resolving this issue. Ms Dieziger executed the 2002 Financial Agreement (after taking her own legal advice) and executed the Deed in 2003. The appropriate conclusion is that she would have executed a fresh Financial Agreement in 2003 which complied with s.90G. There is no basis for applying a discount for the totally theoretical possibility that she may not have done so. It ought be inferred to the requisite standard that she would have done so. A similar conclusion is reached concerning the Clause 21 issue. An inference should be drawn that Ms Dieziger, in 2003, would have executed a fresh Financial Agreement which contained a clearly expressed and valid Clause 21. I do not consider that any discount should be applied in this respect either.

158 I am satisfied that the Plaintiff is entitled to the sum of $496,000.00 claimed by him under this head of damage.

Loss Due to Proceeds of Sale of House Claim

159 This claim by the Plaintiff rests on the proposition that there was some delay to the Plaintiff caused by the s.90G problems with the 2002 Financial Agreement, which resulted in a delay in him resolving his differences with Ms Dieziger, which in turn resulted in a delay in him being able to sell the Balgowlah house.

160 It was submitted for the Plaintiff that there can be no doubt that the delay caused solely by the s.90G problem covered the period (at least) between 23 August 2007, when the Plaintiff and Ms Dieziger agreed to have the s.90G determined as a separate question, and 14 April 2008 when the decision on the separate question was handed down. This is a period of about eight months, which is solely referable to the s.90G problem.

161 The Plaintiff submits that an additional delay of four months occurred in the Plaintiff resolving his difficulties caused by the s.90G problem alone, which was not brought about by any other factor. The Plaintiff submits that this period should be allowed, given the need to consider the decision of 14 April 2008, and the additional work that would have been

required in relation to that point from the moment it was first raised by Ms Dieziger in her response in April 2007.

162 It was submitted for the Plaintiff that he lost the use of the proceeds of sale of his house for one year, and the net proceeds to him would have been $1,440,000.00. Interest at an average rate for the period 1 July 2007 to 30 June 2008 (10.5%) for one year on that sum is $151,200.00.

163 Accordingly, the Plaintiff claims the sum of $151,200.00 under this head of damage.

164 Mr Cheshire submitted that the Court rate of interest is applicable to interest on damages and has no application here. He submitted that the Plaintiff sustained no capital loss. He submitted that the Plaintiff has led no evidence as to what he would have done with the proceeds of sale and, particularly given the uncertainly involved in financial investments, there is no justification to award any sum, let alone the 10.5% claimed by the Plaintiff. He submitted that speculative damages should not be awarded, in particular where no evidence had been led concerning the use to which the monies would have been put, let alone the return they might have achieved: *Middle East Trading Consultants Pty Limited v Nemes* [2000] NSWSC 1213 at [128]; *Westcoast Clothing Co Pty Limited v Freehill Hollingdale and Page* [1999] VSC 266 at [202]-[203].

165 Mr Cheshire submits that the only way to establish loss of this type is to assert that the delay caused the loss and that, if the Plaintiff had the money, he would have dealt with it in a particular way, such as placing it on investment, with a calculation resulting as to what that investment would have realised.

166 The Defendants submit that the Plaintiff does not assert a loss of the use of proceeds and that the Court rate is simply not applicable. It is submitted that s.100 *Civil Procedure Act 2005* has no application to this aspect of the Plaintiff's claim.

167 There is force in the Defendants' submission. In my view, an evidentiary foundation has not been laid for an award of this type, which is speculative in nature.

168 I decline to allow this part of the Plaintiff's claim.

Delay in Payment to Ms Dieziger

169 The Plaintiff gives credit for a one-year period, where there was delay in having to pay the benefits to Ms Dieziger caused by the inability to have a binding Financial Agreement. This is a benefit which the Plaintiff obtained from the delay in paying Ms Dieziger's entitlements under a hypothetical valid Financial Agreement.

170 The Plaintiff calculates this sum in the form of interest at 10.5% on $410,000.00 for one year, leading to a sum of $43,000.00. I accept that the Court interest rate may be used for this purpose.

171 I am satisfied that this is a reasonable adjustment to make, in the circumstances of the case. I will take it into account in assessing damages.

Costs

172 The Plaintiff claims a sum for the legal costs and disbursements in relation to the Federal Magistrates Court proceedings. A sum of $70,000.00 is agreed between the parties in this respect (T207).

173 The Defendants submit that no allowance should be made by way of costs and disbursements, as these sums would have been incurred in any event given the family law proceedings which were on foot and required resolution.

174 I am satisfied that the Plaintiff has demonstrated an entitlement to the sum of $70,000.00 being included in the award of damages to be made in his favour. This is a reasonable allowance for costs incurred in litigating issues arising from the 2002 Financial Agreement.

Interest

175 It is submitted that the Plaintiff is entitled to interest on the sum of $496,000.00, being the difference between his position under a hypothetical valid Financial Agreement and his actual position, from January 2009 to the date of judgment in his favour, calculated at an average rate (for the period January 2009 to 1 March 2012) of 8.16%, the Court rate of interest.

176 This sum is quantified as $127,900.00 as at 1 March 2012, a figure which will require revision to take into account the date of judgment.

177 The Plaintiff also claims interest on his legal costs for approximately four years, at an average rate of 8.16%, leading to a figure of $22,800.00.

178 The Defendants submit that the Plaintiff is not entitled to interest calculated in these ways or at all.

179 I am satisfied that the Plaintiff is entitled to interest to be calculated in accordance with the formula submitted on his behalf. The Court rate is appropriate for use in this way.

Maintenance

180 The Plaintiff relies upon the evidence of the quantum expert witnesses, Mr Kay and Mr Rose QC, that the amount of maintenance that would have been payable under a valid 2002 Financial Agreement would be no more than $500.00 per week for at least three years (Exhibit B). Mr Braham SC submits that this gives rise to a sum of $78,000.00, which is very close to the amount actually paid for maintenance in the 2008 Financial Agreement.

181 However, it is submitted for the Plaintiff that, if the 2002 Financial Agreement had applied, then the payment of maintenance would have ceased in April 2009, meaning that, as at November 2008, there would have been only six months of payments left ($13,000.00) instead of $76,200.00.

182 Accordingly, it is submitted that the Plaintiff is entitled to a credit of $63,200.00.

183 The Plaintiff claims interest on this sum for a period of two years and six months, at the Court rate of 8.16%, leading to a sum of $12,900.00.

184 The Defendants object to this head of damage being introduced at this time and contend that it is too late to raise it as part of the Plaintiff's claim. Further, the Defendants contend that the Plaintiff's calculations are incorrect and that, if anything, the appropriate calculations should see an allowance of $1,800.00 in favour of the Defendants.

185 I accept that this claim lies within the Plaintiff's foreshadowed claim in these proceedings. I have considered the submissions made on this topic. I prefer the Plaintiff's submission which persuades me that the appropriate sum to allow is that proposed by the Plaintiff.

186 The claim for interest is reasonable and I allow it as well.

Conclusion and Orders

187 I am satisfied that the Plaintiff has demonstrated breach of duty with respect to the 2002 retainer (which is admitted) and the 2003 retainer.

188 I am satisfied that the Plaintiff has demonstrated that he has suffered loss and damage as a result of the breach of both the 2002 and the 2003 retainers.

189 The Defendants have not made good the defence under s.5O *Civil Liability Act 2002*.

190 There ought be a verdict and judgment in favour of the Plaintiff against the Defendants.

191 I am satisfied that the Plaintiff is entitled to an award of damages, in accordance with the calculations advanced on his behalf (MFI5) which I have accepted and described in this judgment. The Plaintiff has made good all aspects of his claim with the exception of the claim for loss of use of the proceeds of sale of the Balgowlah house.

192 It will be necessary for Short Minutes to be brought in to reflect relevant calculations as at the date of judgment, in accordance with findings and conclusions expressed in this judgment.

193 The Plaintiff has succeeded fully on liability and very substantially on the quantum of damages. It seems appropriate, in these circumstances, that costs should follow the event.

194 The Plaintiff is directed to bring in Short Minutes to give effect to this judgment, including an order as to costs.

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