IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-001941
[2018] NZHC 366

BETWEEN	GG & GE BLACKBURN TRUSTEE LIMITED Plaintiff
AND	CROWE HORWATH (NZ) LIMITED Defendant

Hearing: 21 February 2018

Appearances: M N Edwards for Plaintiff
R Woods for Defendant

Judgment: 8 March 2018

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on summary judgment application

Introduction

[1] This proceeding primarily involves a claim by the plaintiff that the defendant, its accountant, should compensate it for a taxation liability incurred when selling a property. The plaintiff seeks summary judgment.

Background

[2] In 2015 the Parliament enacted taxation reform to create a new "bright-line test" that would require income tax to be paid on any gains from residential property disposed of within two years of acquisition, subject to some exceptions.[1]

[3] The bright-line test came into force on 1 October 2015. When the legislation was at Bill stage earlier in 2015 it was signalled that the bright-line test was intended to come into force on 1 October 2015, as occurred.

[4] The plaintiff, GG & GE Blackburn Trustee Ltd (the Trust) is the corporate trustee of the Blackburn Family Trust.

[5] Until 31 March 2016 Gabrielle Blackburn (Mrs Blackburn) had owned a Waiheke Island residential property (the Property) in her own right. On 31 March 2016 Mrs Blackburn transferred ownership of the Property to the Trust at a purchase price of $2,850,000.

[6] On 3 April 2017 the Trust sold the Property to a third party for a sale price of $5,200,000.

[7] The Inland Revenue Department applied the bright-line test to the sale of the Property with the consequence that the Trust incurred a tax liability. The Trust pleads that the liability is $774,984.21. The Trust took taxation and valuation advice in order to minimise or avoid the loss. Ultimately, the sale of the Property settled and the Trust was required to make payment of the tax liability.

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1 Taxation (Bright-line Test for Residential Land) Act 2015.

The Trust's claim

[8] The Trust sues in a single cause of action in contract.

[9] The Trust asserts:

(a) Crowe Horwath NZ Ltd (CH) has been retained since 2013 to provide the Trust with ongoing expert financial and tax advice.

(b) In March/April 2017 the Trust sought CH's expert financial and tax advice on the proposed sale of the Property.

(c) CH was contractually obliged to provide the Trust with accurate expert financial and tax advice regarding the proposed sale in 2017.

(d) On 29 March 2017 the Trust requested that CH advise it on a proposed agreement for sale and purchase of the Property recording a counter-offer.

(e) On 3 April 2017 the Trust requested that CH approve its tendering a signed agreement for sale and purchase of the Property.

(f) CH breached its contractual obligation to the Trust by failing to correctly advise the Trust that the proposed sale of the Property in 2017 would result in a tax liability.

(g) In reliance on CH's advice, the Trust sold the Property – the Trust would not have entered an agreement to sell the Property if it had known that a tax liability would thereby be incurred.

(h) The tax liability incurred was $774,984.21.

(i) The Trust attempted to mitigate its loss by taking professional advice at a cost of $10,711.88.

CH's defence

[10] Notwithstanding the summary judgment context, CH has exercised its right to file a statement in defence. Its pleading to the Trust's claims, adopting the above order, is:

(a) CH admits that it has been retained to provide the Trust with accounting services since 2013 including specific tax advice but asserts that there first had to be a request for advice.

(b) CH denies the general allegation that in March and April 2017 the Trust sought CH's expert financial and tax advice on the proposed sale of the Property.

(c) CH admits that it had the obligations and duties imposed on it by the terms of its engagement with the Trust and as imposed by law but otherwise denies the allegation that it was contractually obliged to provide the Trust with accurate expert financial and tax advice regarding the proposed sale of the Property in 2017.

(d) CH denies that it breached a contractual obligation to the Trust by failing to advise correctly that the proposed sale would result in a tax liability.

(e) In response to the Trust's allegations of reliance, CH pleads that it has insufficient knowledge and therefore denies those claims. CH affirmatively pleads that the Trust had been previously advised (by its solicitors Gaze Burt) that tax would be payable under the bright-line test if the Property was sold within two years of acquisition.

(f) CH admits that the bright-line test applied to the sale of the Property and that the Trust incurred a tax liability under the bright-line test. CH pleads insufficient knowledge as to whether the Trust is liable to make a tax payment of $774,984.21 and therefore denies that allegation.

(g) CH pleads insufficient knowledge of the Trust's allegations as to mitigation and therefore denies them.

The Trust's summary judgment application

[11] The Trust applies for summary judgment for the sum of $785,696.09 (the total sum referred to in the statement of claim).

[12] The Trust also seeks a declaration that the Trust is not liable to make payment of any sum claimed by CH from the Trust for the provision of CH's services in respect of the sale of the Property in 2017.

[13] The Trust's application sets out grounds parallel to the allegations in the statement of claim. The Trust asserts that CH has no arguable defence to the pleaded claim.

[14] CH by its notice of opposition provides particularised grounds of opposition as establishing an arguable defence. CH asserts:

(a) The Trust did not seek CH's advice in relation to the sale of the Property, including in relation to the tax implications of the sale.

(b) Other than to advise the Trust's directors to discuss the matter with the Trust's solicitors and other family members, CH did not offer advice in relation to the sale of the Property including in relation to the tax implication of the sale.

(c) The Trust did not suffer any loss by reason of the sale of the Property.

(d) Any loss which may have been suffered by the Trust is attributable wholly or in part to the Trust's own negligence on the basis that:

(i) the Trust had received legal advice previously that the sale of the Property would be subject to tax under the bright-line test; and

(ii) the Trust entered into the agreement to sell the Property without seeking legal advice despite having been advised to do so.

[15] CH also asserts that the nature of the allegations in this proceeding, being allegations of professional negligence, render the claim inappropriate for summary judgment as it gives rise to disputed questions of fact bearing on liability, requiring assessments of credibility; questions of fact bearing on contributory negligence; questions of professional standards, potentially requiring expert evidence; and questions of causation.

[16] The Trust's summary judgment application was supported by affidavits of Loretta Jacobs (a director, with her mother, of the Trust) and Daniel Smith (a solicitor and partner of the firm Gaze Burt).

[17] CH's opposition was supported by affidavits of Belinda van den Bos (an accountant and senior client manager with CH, whose clients have included the Trust since 2003), and Christine Keeling, a registered valuer who provided opinion evidence as to the value of the Property on its date of sale, 3 April 2017.

[18] Both Mrs Jacobs and Mr Smith filed reply affidavits. The reply affidavits in part refute some of CH's evidence.

[19] There was a further development in relation to evidence shortly before the hearing. On 15 February 2018 counsel for the plaintiff served CH with notice, purportedly pursuant to r 9.74 High Court Rules, requiring CH to produce Ms van den Bos for cross-examination at the hearing. I issued a Minute, recording that the applicable provision in relation to cross-examination of a deponent on an interlocutory application was r 7.28 High Court Rules. I noted that the Trust had not made an application under that rule and that Ms van den Bos was accordingly not required for cross-examination.

Plaintiff's summary judgment application – the principles

[20] The starting point for a plaintiff's summary judgment application is r 12.2(1) High Court Rules, which requires that the plaintiff satisfy the Court that the defendant

has no defence to any cause of action in the statement of claim or to a particular part of any such cause of action.

General principles

[21] I summarise the general principles which I adopt in relation to this application:

(a) Commonsense, flexibility and a sense of justice are required.[2]

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.[3]

(c) The Court will not hesitate to decide questions of law where appropriate.[4]

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.[5]

(e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.[6]

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.[7]

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2 *Haines v Carter* [2001] 2 NZLR 167 (CA) at [97].
3 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
4 *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 (CA) at 516.
5 *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21 (SC).
6 *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).
7 *Middleditch v NZ Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA).

(g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.[8]

(h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.[9]

(i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.[10]

Particular considerations arising in professional negligence claims

[22] For CH, Mr Woods submits that the judgment of McGechan J in *Economy Services Ltd v Smith & Hughes* (*Economy Services*) appropriately identifies the factors which make it difficult for a plaintiff, in a professional negligence case, to satisfy the summary judgment test.[11] McGechan J observed:[12]

> Given the usual nature of negligence cases, and a fortiori professional negligence cases, in reality the required degree of satisfaction as to absence of defence is not easily achievable. Frequently, there will be differences over matters of primary fact with decisions required upon credibility. Any motor vehicle collision case furnishes an example. Frequently, there will be disputed factual questions relevant to foreseeability, standard of care, and remoteness. Often factual questions bearing on contributory negligence will arise. In the particular professional negligence area, particularly if matters actually reach the litigation stage, there may well be a sharp conflict as to both the events which occurred and the professional standards involved. In the residue of cases which pass through these barriers, there will of course remain the question of ultimate discretion under r 136.

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8 *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [28].
9 *Bilbie Dymock Corporation Ltd v Patel & Bajaj* (1987) 1 PRNZ 84 (CA).
10 *Pemberton v Chappell*, above n 3.
11 *Economy Services Ltd v Smith & Hughes* (1989) 2 PRNZ 657.
12 At 660.

[23] The discussion in *Economy Services* was in turn considered by Master Faire in *Ball v New Zealand Debt Repay (in liq)*.[13] Master Faire recited the passage which I have quoted from McGechan J's judgment in *Economy Services* and then continued:

> [24] His Honour ... drew attention to the difficulties that professional negligence cases throw up in the area of foreseeability, standard of care and remoteness. I have added the further issue of causation. The difficulty is highlighted in this case. It was recognised by Mr Eade, the solicitor who gave evidence supporting the plaintiffs' cases. It is this. A solicitor who is advising a client on either the entry into a transaction or the confirmation of a transaction cannot stop the client from entering into a foolish transaction. At the end of the day, it is the client's right to do what he or she wishes. That position, however, needs to be contrasted with the position of a solicitor who fails to take a particular course of action when he has been instructed to do so. *Economy Services Ltd v Smith & Hughes* is, of course, an example of the latter. In that case the solicitor failed to take action to obtain an order that a caveat not lapse pursuant to s 145 of the Land Transfer Act 1952. The failure to take that action was, on its face, a clear cut breach of the contract of retainer. As a result, judgment for liability was entered.

[24] Mr Woods referred also to the judgment of Associate Judge Christiansen in *Hole v Snedden.*[14] In *Hole v Snedden,* a solicitor was found to have been negligent in relation both to the advice he gave and the advice he did not give, rather than having been negligent through failing to take action when instructed to do so. Associate Judge Christiansen recognised, citing *Economy Services*, that the Court will usually be cautious before granting summary judgment on a negligence case and especially in professional negligent cases[15] but, found on an extensive review of the affidavit evidence that the defendant had no arguable defence to judgment for liability.

[25] As I observed in *McRaeway Group Ltd v Lane Neave,*[16] these three cases establish no hard and fast rule as to the inappropriateness of summary judgment in professional negligence cases. The rules which the Court must apply are those in rr 12.2 and 12.3 High Court Rules, as the case may be. What the cases emphasise in relation to professional negligence is, as recognised in *Hole v Snedden*, that the Court will be cautious before granting summary judgment in professional negligence cases.

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13 *Ball v New Zealand Debt Repay (in liq)* HC Auckland CIV-2002-404-002006, 5 August 2003.
14 *Hole v Snedden* [2012] NZHC 1907.
15 *Hole v Snedden,* above n 14, at [73].
16 *McRaeway Group Ltd v Lane Neave* [2017] NZHC 1138 at [42].

The defences for consideration

[26] Ms Woods invited the Court to consider CH's asserted defences under three heads:

(a) Absence of breach;

(b) Absence or lack of proof of loss;

(c) Contributory negligence.

The plaintiff's case on breach

The nature of the duty defined

[27] The Trust asserts that CH accepted a contractual obligation to provide the Trust with accurate expert financial and tax advice regarding the proposed sale in 2017. The Trust further asserts that CH had been retained since 2013 to provide the Trust with ongoing expert financial and tax advice.

[28] The Trust does not assert that there was a written contract.

[29] CH admits that it was retained to provide the Trust with accounting services since 2013 including specific tax advice but asserts that there had to be a request for advice.

[30] Mr Edwards, in his submissions, suggested there may be little difference between the parties' pleaded positions as to the duty. I consider that there is a material difference. The Trust's pleading might suggest a duty to proffer advice (without request) whenever CH became aware of a transaction which affected the Trust's interests. On the other hand, CH's suggested definition of the duty would limit the duty to advise on tax liability to situations of specific request by the Trust.

[31] On the evidence it is at least arguable that CH's duty to provide taxation advice arose only when it was requested to do so. There is arguably no clear pattern of dealings which would have required Ms van den Bos to volunteer taxation advice.

Events surrounding the transfer of the Property to the Trust

[32] In early 2015, Mrs Blackburn looked at transferring a number of properties to the Trust.

[33] The documenting of contracts and transfer documents for two properties (the Waiheke property being at Tawa Street and another property situated on Tamaki Drive, Auckland) was to be attended to by Mr Smith of Gaze Burt. The new tax legislation creating a bright-line test for capital gains came into effect and the 1 October 2015 date passed without completion of the transfers. On 20 January 2016, Mr Smith sent an email to Mrs Jacobs stating:

> Due to the recent Auckland price increases, the CV of the property may be on the low side. This will, however, only create difficulty if you sell Tawa Street within 2 years of the date of its transfer to the Trust. This is because the new two-year brightline test (which you may have read about in the media) will require that you pay tax on the capital gain and a low purchase price may mean more tax to pay when the property is sold.
>
> This will not be the same problem with Tamaki Drive, as there is a main home exclusion to the 2 year brightline test and I understand that your mum uses that property as her main home.
>
> If you are considering selling Tawa Street within the next 2 years, then perhaps it should not be transferred to the trust. Alternatively if you do not think you will sell the property but, just in case you do sell, then it might be best to obtain a registered valuation in order to document a higher purchase price.

[34] Thus, on 20 January 2016 the Trust received from Gaze Burt advice that a tax liability would arise on any capital gain on the sale of the Waiheke property within two years of its acquisition. Ms van den Bos was not directly involved in that email correspondence but was copied into it later in the day when the decision was being made to obtain a registered valuation.

[35] Mrs Blackburn proceeded with the transfer to the Trust, the transfer taking place on 31 March 2016.

[36] Just over one year later – on 3 April 2017 – the Trust had sold the Property.

The Trust's case on the request for advice

[37] Mr Edwards submitted that, in the event that CH's duty was to provide taxation advice upon request, the Trust had made requests which covered it. Mr Edwards referred in particular to the requests of 29 March 2017 and 3 April 2017 as pleaded by the plaintiff and summarised above at [9](d) – (e). In his submissions, Mr Edwards focused particularly on an email from Mrs Jacobs to Ms van den Bos on 29 March 2017 sent upon receipt of an increased offer from the intending purchaser:

> Hi Belinda, Happy wet Wednesday!
>
> FYI the offer has been up'd to $5 million for the waiheke (sic) property.
>
> Will talk to the family about this but let me know your thoughts when you get a moment.
>
> Thanks,
>
> Loretta

[38] A telephone conversation followed between Mrs Jacobs and Ms van den Bos on 31 March 2017.

[39] Of that conversation, Mrs Jacobs deposes:

> On Friday 31 March 2017, I telephoned Belinda [van den Bos] by way of follow-up to my email of 29 March 2017 and discussed the revised offer to purchase the property.
>
> (1) Advising that Daniel Smith of Gaze Burt was still on leave and the Trustee was without his legal advice;
>
> (2) Repeating my written advice that the purchaser was offering to pay the agent's commission and contribute up to $5,000 for reimbursement of the Trustee's legal fees, and venturing that the purchase price would return $5 million cash-in-hand to the Trust;
>
> (3) Belinda did not in-turn advise me of any misapprehension on my part;
>
> (4) Our discussion concluded with Belinda agreeing that the Trustee should venture a counter-offer of $5.2 million as a sale price for the Property.

[40] Ms van den Bos deals with the conversation in three paragraphs:

> I spoke to Mrs Jacobs by telephone on 31 March 2017. We discussed the offer over the Property and I recall Mrs Jacobs indicating that she was particularly

> attached to the Property and was not eager to sell. I enquired as to how the rest of the family felt about the possibility of selling, and Mrs Jacobs indicated that for the right price they were willing to sell the Property. Mrs Jacobs did not indicate what price might be considered appropriate. I did not express any opinion as to whether the Property should be sold. I was acutely aware of the family's emotional ties to the Property and considered that it was a decision that ought to be made within the family.
>
> Mrs Jacobs indicated that the directors were considering making a counter-offer to the purchaser. I did not agree on any such counter-offer with Mrs Jacobs. Nor did I make any recommendations or give any advice in this regard. It was simply not my place to be involved in any such decision making, and I was very clear that the directors of the Trustee company need to make any decisions in consultation with their legal advisors.
>
> There was no discussion about the *"net"* price that would be received for the Property. Nor was there any discussion about family members being unwilling to part with the Property for less than $5 million. From my discussion with Mrs Jacobs, I understood that no decision had been made in relation to any counter-offer and that this was simply an option that was under consideration.

[41] On 3 April 2017, Mrs Jacobs by email advised Ms van den Bos that she would let her know about Waiheke when she had an update. She noted that she had extended the settlement date to 15 May 2017 (implicitly in a counter-offer document).

[42] Mrs Jacobs deposes that she subsequently followed up her email in a telephone conversation:

> 1. Again advising Belinda that Daniel Smith was away and the Trustee was without the benefit of his legal advice, and asking for her approval to submit the proposed agreement for sale and purchase of the Property noting that there was no turning back once it was submitted;
>
> 2. Belinda advised that she approved the submission of the proposed Agreement for Sale and Purchase of the Property provided that all family members were in agreement to sell and receive a sum of $5.2 million for the Property.

[43] Ms van den Bos deposes that Mrs Jacobs' accounts of the conversation are inaccurate. She deposes (among other matters):

> 1. Mrs Jacobs did not advise me that Mr Smith was still away at that time. Had she done so I would have advised her not to take any further steps until she had spoken with Mr Smith and obtained his advice. From discussions at the March meeting, I had understood that the directors would not proceed with any transaction until they had received legal advice.

2. Mrs Jacobs did not ask me whether she was *"OK sending off a signed counter offer which there was no turning back from … as long as all the family is comfortable with selling the property for $5.2 million*". Had Mrs Jacobs asked whether it was acceptable to send the counter-offer I would have asked whether Mr Smith had approved the transaction. For the avoidance of doubt, I confirm that I did not advise Mrs Jacobs as to whether it would be acceptable to put forward the counter-offer or in any way "*approve*" the counter-offer.

The Trust's case on the request for advice

[44] In Mr Edwards' submission, Mrs Jacobs' email request on 29 March 2017 for "your thoughts" is appropriately to be read as a request for advice including advice as to the taxation implications of the proposed sale.

The context of past communications

[45] Mr Edwards seeks to establish that construction of the request by drawing the Court's attention to a context of communications which had passed between the parties commencing in November 2014. In Mr Edwards' submission, requests for "your thoughts" identified in earlier communications could be used to establish the proposition that a request for "your thoughts" on 29 March 2017 went beyond the progress being made on the level of the potential purchaser's offer. He submits the request clearly required advice on aspects, including taxation aspects, of the proposed agreement for sale.

[46] Mrs Jacobs exhibits earlier correspondence in which she had requested from Ms van den Bos "your thoughts". The first example is an email of 10 November 2014 in which Mrs Jacobs asks:

> Just wondering if there was any feedback on the WG proposal? Keen to get your thoughts on this as we have to get back to them this week.

[47] Ms van den Bos's reply records that she had read through a document with a lot to absorb, including formulas. She raises a number of issues (with comment on taxation implications included) which Mrs Jacobs would have to consider.

Further context – the meeting on 22 March 2017

[48] In Mr Edwards' submission, further relevant context to the request made of Ms van den Bos for "your thoughts" is to be found in a meeting which Ms van den Bos attended with Mrs Blackburn, Mrs Jacobs and a family friend and adviser, Denis Kirkcaldie, on 22 March 2017.

[49] Detail in relation to the meeting is pleaded by the Trust in its statement of claim as particulars of the way in which the Trust sought CH's expert financial and tax advice on the sale of the Property. The relevant part of the pleading is:

> 9.2 On 22 March 2017, the defendant attended the plaintiff's "Blackburn Family Trust Meeting" ("the Meeting").
>
> 9.3 The idea of selling the Property was discussed at the Meeting.
>
> 9.4 All attendees at the Meeting, including the defendant, agreed that:
>
> 9.4.1 The offer to purchase the Property was insufficient;
>
> 9.4.2 Only an offer to purchase the Property for a sum returning an ultimate sum of no less than $5 million to the Trust would be considered;
>
> 9.4.3 The Trustee was to table a counter-offer with the would-be purchaser of the Property.

[50] In her affidavit, Mrs Jacobs gives detailed evidence consistent with the pleading.

[51] By its statement of defence, CH admits that Ms van den Bos attended the meeting and that the idea of selling the Property was discussed at the meeting. CH otherwise denies the Trust's allegations as to the meeting.

[52] Ms van den Bos exhibits the agenda that Mrs Jacobs provided ahead of the meeting. She also exhibits her four-page handwritten note of the meeting. Ms van den Bos deposes at some length as to the first part of the meeting which was taken up with discussion of the Trust structure which was under review.

[53] Ms van den Bos refutes a number of statements made by Mrs Jacobs about the meeting, and in particular:

(a) She says that both she and Mr Kirkcaldie advised Mrs Blackburn and Mrs Jacobs that they would need to consult Gaze Burt in relation to the transaction. She notes Mrs Jacobs' evidence that Mrs Jacobs advised Ms van den Bos that Mr Smith was away at the time and that the Trust was therefore unable to obtain legal advice. She deposes that she has no specific recollection of that statement but accepts that Mrs Jacobs may have stated that Mr Smith was on leave. She denies that Mrs Jacobs suggested that it would not be possible to obtain legal advice due to his absence. She deposes that had such a statement been made, she has no doubt that she would have told Mrs Jacobs to consult another solicitor at Gaze Burt or another law firm or should await Mr Smith's return. She notes that there was no urgency in relation to the offer over the Property and that there would have been no difficulty in waiting for Mr Smith to return to the office; and

(b) She denies that she (Ms van den Bos) endorsed the proposed offer (in excess of $5 million cash-in-hand). She states that she is not an investment adviser and at the time had no decision-making role within the Trust. She denies in particular that there was any discussion of an amount representing "cash-in-hand" or "net" proceeds of sale. She deposes that the only discussion as to price was a suggestion that Mrs Jacobs should go back to the real estate agent orally to see if the purchaser would increase their offer to $6 million.

[54] Whether or not those representing the Trust identified a need to obtain $5 million "cash-in-hand" is a significant matter affecting the context in which subsequent discussions occurred. With the bright-line test applying to any imminent sale, a sale price in the vicinity of $5,800,000 would have been required if the Trust was to achieve $5 million net proceeds. A later request for comment or observation on the transaction might then be found to have called for advice from the accounting adviser involved that the target "cash-in-hand" figure of $5 million would not result unless a sale price in the order of $5,800,000 was achieved.

[55] It is not possible on this application to resolve the material differences between the deponents as to the discussions at the 22 March 2017 meeting. On the particular matters on which Mr Edwards would rely for context of later discussions, there are conflicts of evidence which require the assessment of credibility.

Discussion

[56] The Trust is unable on the evidence to establish beyond reasonable argument that CH (through Ms van den Bos) was requested to provide taxation advice on the proposed sale agreement. On its own, the request made for "your thoughts" does not establish such a request beyond argument. Nor is the matter advanced beyond argument through the Trust's reliance on context whether that be the Trust's previous use of the expression "your thoughts" when requesting advice or through the discussions which took place of the 22 March 2017 meeting or both.

[57] This is not a finding that the Trust does not have a case in relation to the scope of the requested "thoughts". Rather, it is a product of the difficulty recognised in the cases to which I have referred that the required degree of satisfaction as to the absence of a defence in professional negligence cases is not easily achievable.[17] The Trust's reliance on matters of context to support the meaning of the Trust's request for "your thoughts" points strongly to the need for the exploration of evidence, both narrative and documentary, which would take place at trial and would enable the Court to fully understand and determine any relevant matters of context.

[58] As the Trust's single cause of action turns on an allegation of breach of a duty to provide accurate tax advice, the Trust is not entitled to summary judgment. This is so regardless of such conclusions as the Court might have on other elements of the Trust's cause of action.

CH's remaining grounds of opposition

[59] Having regard to my finding that CH has an arguable defence in relation to the alleged request for advice, and therefore as to breach, I will only briefly record the

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17 Above at [22] to [25].

issues raised in relation to loss and contributory negligence. I will not in detail discuss the evidence – assuming the case proceeds that will become the province of the trial Judge.

[60] CH's remaining defences can be discussed under two heads:

Absence or lack of proof of loss

[61] CH provided an affidavit of Ms Keeling, a registered valuer. Ms Keeling analysed transactions comparable to the April 2017 sale and provided her opinion that the Property had a value of $3,650,000 at the date of sale. On that basis, Ms Woods submitted that the Trust, rather than incurring a loss through selling the Property at the time it did, was better off than it would have been if it had retained a property worth Ms Keeling's ascribed value.

[62] Ms Woods' submissions did not address the fact that, had the Trust retained the Property, the Trust would not have sold the Property immediately around the April 2017 period but might have done so in April 2018 at the earliest (when the Trust would have owned the Property for two years). In the meantime, the Trust would have had its tax liability to meet. Neither counsel was able to point to any case law dealing with a similar situation.

[63] A further issue as to loss – this in relation to the quantum of loss – arises on the pleadings. CH pleaded that it has insufficient knowledge as to whether the Trust is liable to make a tax payment of $774,984.21 and therefore denied that allegation.

[64] Mrs Jacobs deposed that "the Trust is obligated to payment of $774,984.21 to the Inland Revenue". The evidence is unsupported by any calculation or analysis of the legislation and Mrs Jacobs has not exhibited any demand from the Inland Revenue Department. Equally, she does not qualify herself as an expert to give evidence on the question of liability.

Contributory negligence

[65] The Trust pleads contributory negligence based primarily on the fact that Gaze Burt had given the Trust accurate advice in the period before the Property was transferred into the Trust as set out at [33] above. The advice was that tax on any capital gain would be payable in the event of a sale by the Trust within two years of the date of the transfer of the Property into the Trust (that is, on or before 31 March 2018).

[66] Ms Woods for CH submits that in this case the contractual liability of CH at common law involves the duty of care as described in *Jackson & Powell on Professional Liability*, where the authors record:[18]

> Historically, the law of contract based on common law principles is the principal means by which the courts have exercised control over the standard of performance of professional persons. In most instances there is a contract between the professional person and his client, whereby the former agrees to render certain services in return for a fee. In such a contract there is generally implied by law a term that the professional person will exercise reasonable skill and care.
>
> (footnotes omitted).

[67] Ms Woods invoked the analysis of the Court of Appeal in *Vining Realty Group Ltd v Moorhouse,*[19] in which the Court undertakes a three category analysis when considering the availability of contributory negligence to a defendant sued in contract.[20]

[68] Ms Woods submits that the claimed liability in this case – a failure to correctly advise the plaintiff – falls within the category recognised by the Court of Appeal in

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18 John L Powell and Roger Stewart *Jackson and Powell on Professional Liability* (8th ed, Sweet and Maxwell, London, 2016) at 2-013.

19 *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104.

20 The three category analysis was originally that of Hobhouse J in *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488 at 508, affirmed in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, the categories being:

1. Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.
2. Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
3. Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

Vining as permitting a defence of contributory negligence, namely where the defendant's liability of the contract is the same as their liability in the tort of negligence independently of the existence of any contract.

[69] Ms Woods submitted that the contributory negligence of the Trust in this case involved a significant lack of care and would warrant a substantial reduction of any damages award.

[70] For the Trust, Mr Edwards made an over-arching, less than detailed, submission placing primary reliance on observations in the Law Commission's *Review of Joint and Several Liability* – Issues Paper.[21] Mr Edwards submitted that the case law cited by Ms Woods does not provide an exception to what Mr Edwards submits is the unavailability of a contributory negligence defence under the Contributory Negligence Act 1947 in cases pursued solely in contract (as in this case). He did not cite any recent authority.

Outcome

[71] The Trust has not established that CH has no arguable defence. The summary judgment application will be dismissed.

Costs

[72] In accordance with my usual practice, I invited counsel when reserving this judgment to immediately provide their submissions as to costs. CH in its notice of opposition had requested, in the event the application was dismissed, that the Trust be ordered to pay CH's costs (notwithstanding the usual practice identified by the Court of Appeal in *NZI Bank Ltd v Philpott*).[22]

[73] Counsel made competing submissions as to the appropriate costs decision in the event the summary judgment application failed. Mr Edwards submitted that I should adopt the usual practice and order that costs and disbursements be reserved. Ms Woods submitted that it would be appropriate to adopt a "half-way house"

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21 Law Commission *Review of Joint and Several Liability* (NZLC IP32, 2012).
22 *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).

approach reserving costs up to the point that CH's opposition (including its valuation evidence) was filed but ordering the Trust to pay the costs and disbursements of the application thereafter. Ms Woods submitted that it should have been clear to the Trust at the point the opposition was filed that its case for summary judgment was hopeless.

[74] I am satisfied that this it is appropriate to depart from the usual approach in *NZI Bank Ltd v Philpott* in relation to costs of preparation of written submissions and the hearing. The factual disputes in relation to matters of context on which the Trust relied were plain once the opposition evidence was filed. At that point, there was not a realistic prospect of the application succeeding. The appropriate course would have been for the Trust to then withdraw the application.

[75] Costs on a 2B basis for submissions (Item 24, Schedule 3) and appearance at the hearing (Item 26, three quarter days) amount to $5,017.50 (1.5 days on Item 24 and .75 days on Item 26).

Case management

[76] I will issue a separate Minute dealing with the case management of this proceeding.

[77] As CH has already filed its statement of defence, r 12.13 High Court Rules does not apply. I extend the time for the filing of the plaintiff's reply to the affirmative defence to 10 working days from today.

Orders

[78] I dismiss the plaintiff's summary judgment application.

[79] I reserve the costs and disbursements of the application incurred up to and including the filing of opposition.

[80] I order the plaintiff to pay to the defendant, for the costs of the remaining steps on application, the sum of $5,017.50.

Associate Judge Osborne

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Counsel: R Woods