IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-001672
[2017] NZHC 39

BETWEEN	WILLIAM GEORGE GRAHAM CAMERON CLEARY Plaintiff
AND	EWART & EWART Defendants

Hearing: 27, 28 and 29 June 2016; and 15 September 2016

Counsel: L Herzog for the Plaintiff
P M Fee and L H Fraser for the Defendants

Judgment: 27 January 2017

JUDGMENT OF EDWARDS J

This judgment was delivered by Justice Edwards
on 27 January 2017 at 4.30 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: L Herzog, Auckland

Solicitors: Jones Fee, Auckland

Introduction

[1] Mr Cleary sues Ewart & Ewart (Mr Ewart)[1] for failing to prepare and present a written agreement surrendering rights under an Option Deed, and for providing "unsolicited advice" to the solicitor acting for the counterparty to the agreement. He says that Mr Ewart's actions resulted in the proposed counterparty refusing to go ahead with the deal and he has lost US$275,000 as a result.

[2] Mr Ewart denies any breach. Mr Ewart says the Option Deed did not afford Mr Cleary any rights to be surrendered, and that posed commercial and strategic issues in preparing and presenting a written agreement. He also says his discussions with the other solicitor were specifically authorised by Mr Cleary and part of a strategy to address the problems posed by the Option Deed. Finally, he says that his actions did not cause the counterparty to refuse to go ahead with the deal; that would have occurred anyway.

Facts

[3] In 2012, Mr Cleary decided to purchase a beachfront lot in a development being undertaken by Vunabaka Bays Fiji Ltd (VBFL). The development involved construction of a luxury hotel, 24 bures, 73 privately owned residences, shops, restaurants, a fitness centre, tennis courts, a spa and two marinas on an island in Fiji.

[4] Mr Cleary paid a deposit of US$5,000 on 18 September 2012 and signed an Option Deed with VBFL on 7 June 2013. He received legal advice on the purchase from a Fijian solicitor recommended by VBFL.

[5] The terms of the Option Deed are at the centre of the claim against Mr Ewart. Key clauses include the following:

> 2.1 **Grant of Option**
>
> In consideration of $USD165,000.00 payable upon the execution of this Option Deed by the Purchaser to the Vendor or the Vendor's nominee unless otherwise directed by the Vendor (the *Option Price*), and the amount of

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[1] Mr Ewart was the principal of Ewart & Ewart acting on behalf of Mr Cleary. I refer to the Defendant as "Mr Ewart" throughout this judgment.

> $10.00 paid by the Vendor to the Purchaser (receipt of such $10.00 is acknowledged) the Purchaser grants to the Vendor an option to enter into the Agreement. Should the Vendor exercise the Option the Option Price shall be utilised by the Vendor as the Deposit (as such term is defined in the Agreement).
>
> …
>
> 3.1 **Exercise of the Option**
>
> The Vendor may exercise the Option by notice to the Purchaser at any time after iTLTB Approval has been obtained but before the expiration of the Option Period by delivering to the Purchaser or their solicitors the Notice together with the Agreement executed by the Vendors. The Purchaser or his solicitors shall, upon receipt of the Notice and executed Agreement and within 14 days of such receipt, deliver to the Vendor or its solicitors a properly executed Agreement.
>
> …
>
> 4.1 **iTLTB Approval**
>
> The parties shall during the Option Period do all things necessary and reasonable and execute all documents as may be necessary or desirable to obtain the iTLTB Approval. If for any reason (other than a default on the part of the Purchaser), the iTLTB Approval is not obtained within thirty six months of the date hereof, the Purchaser may by notice terminate this Deed and this Deed shall be deemed to have terminated ab initio and the parties shall have no rights in law or equity against the other and the Option Price shall be repaid to the Purchaser together with any interest paid thereon (if any).
>
> …
>
> 6. **NATURE OF DEED**
>
> For the sake of certainty and the avoidance of doubt the parties acknowledge that this Deed is not an agreement to purchase land and is an agreement granting an option to the Vendors to enter into an agreement, on or after the iTLTB Approval has been obtained, to purchase the Lot on the terms and conditions of the Agreement.

[6] The reference to "iTLTB Approval" in these clauses refers to approval by the iTaukei Land Trust Board (iTLTB) in Fiji. The "Agreement" was a sale and purchase agreement for Lot 38 for the total purchase price of US$550,000 which was attached to the Option Deed.

[7] Mr Cleary paid the Option Price of US$165,000 to VBFL in separate stages with the final payment made in 2014.

[8] Towards the beginning of 2014, Mr Cleary became interested in transferring Lot 38, and purchasing a unit in the hotel. He mentioned this to Mr Lucas, one of the VBFL directors he had been dealing with about the purchase. He also spoke to a real estate agent about the sale of Lot 38. Mr Cleary's evidence was that two of the VBFL directors were not happy with him doing this, as they did not want on-sales through agents.

[9] In early April 2014, Mr Lucas met with Mr Cleary and offered to purchase Lot 38 from him. Mr Cleary's evidence was that beachfront sections were selling for over US$1,000,000 at this time. Mr Lucas offered to pay US$440,000 comprising the return of the US$165,000 deposit already paid, plus a further payment of US$275,000 when title to the property issued, which was expected to be in October 2014.

[10] Mr Cleary engaged Mr Ewart to prepare a written agreement documenting the deal reached on 9 April 2014. Mr Ewart and Mr Cleary met on 10 April 2014 to discuss the agreement. During that meeting they placed a call to Mr Lucas. Mr Ewart's file note of the telephone conversation records that "Richard Beca acts for Lucas: he will brief him & confirm", and "will need to get tax advice up there". Mr Ewart knew Mr Beca who he had dealt with on previous occasions. He regarded him as an experienced and highly competent solicitor.

[11] On 16 April 2014, Mr Ewart sent a letter of engagement to Mr Cleary. The services to be provided included: perusing the Option Deed, discussing the form of the transaction with VBFL's solicitor, and documenting the surrender of rights in return for payment.

[12] There was an initial telephone discussion between Mr Ewart and Mr Beca on 28 April 2014. At this time, neither Mr Ewart nor Mr Beca had read the Option Deed. Both assumed that it gave rights to Mr Cleary as purchaser, as is commonly the case. The discussion between the two solicitors was a brief one, with Mr Beca indicating that he did not have any instructions at that time.

[13] Mr Ewart subsequently read the Option Deed and quickly realised that the option was not a purchaser's option as he had assumed. He emailed Mr Cleary on 29 April 2014 in the following terms:

> The Option is a curious beast. It is not (as I thought in our meeting) an option for you to purchase the land once created. It is an option for the vendor to require you to purchase the land. It seems to me that they can avoid selling to you by simply not exercising the option. So, if the land is created and the vendor could sell it for more than the price in your agreement, the vendor can simply not exercise the option and this is the end of it.
>
> You pay $165k for the priviledge [sic] of not much at all, so far as I can see. As I read the agreement, it does not come back to you if the option is not exercised.
>
> My plan was for the vendor to pay you for you giving up your rights. It is a bit more difficult as you have no rights to give up.
>
> I am struggling to understand why the vendor would pay you any sum of money to get out of a contract it can get out of by simply not exercising the option. I do not think this will be lost on Vunabaka's NZ solicitor.
>
> Or have I misunderstood something?

[14] On 30 April 2014, Mr Cleary responded to Mr Ewart's concerns as follows:

> Hi John
>
> Please keep your musings to you and I. I do not think helpful to share with [Fijian solicitor] who we don't know or his morals.
>
> The bit you miss if any is an agreement between hopefully honourable people. Lucas is one. They realise they could cancel to anyone like me, but that would be a short term gain and contrary to what they are doing. And contrary to what Mike and I have agreed. Given its unusual may I suggest you make a time with Mikes lawyer for the 4 of us to get together and discuss what the agreement will say and cover. It could them [sic] be documented. Open to better ideas. I am back on 13th if this helps.
>
> G

[15] In reply, Mr Ewart acknowledged Mr Cleary's instructions not to talk to the Fijian solicitor, indicated that he did not think a meeting would help, and suggested that he "draft something and see what happens".

[16] Over the ensuing period there were further exchanges of emails between Mr Cleary and Mr Ewart. The details of those emails are referred to later in this

judgment. In essence, Mr Ewart repeated his concerns regarding the Option Deed and advised Mr Cleary to seek tax advice on the terms of the agreement. Mr Cleary responded by asking Mr Ewart to "run it past" Mr McCurrach, who was Mr Cleary's accountant in New Zealand. In terms of the commercial issues, Mr Cleary continued to assert that VBFL knew what their rights were under the Option Deed, that they would honour the deal anyway, and that a face to face meeting was the best way to deal with any issues.

[17] Mr Cleary sent a number of emails on 9 May 2014 enquiring on progress with the draft agreement. Mr Ewart prepared a draft agreement (a Deed of Release) and forwarded it to Mr Cleary the same day. Mr Cleary asked Mr Ewart to set up a meeting at Mr McCurrach's offices in order to finalise the agreement. He asked Mr Ewart not to telephone Mr Beca at this time.

[18] Following Mr Cleary's return to New Zealand, Mr Ewart, Mr Cleary, Mr McCurrach and Ms Tyrell (an employee at Mr McCurrach's firm) met to discuss the draft agreement on 13 May 2014. There is disagreement between the parties as to what was agreed at this meeting. Mr Ewart says there was agreement that Mr Ewart would telephone Mr Beca, outline the problems posed by the Option Deed, and suggest VBFL exercise the option as a way around these issues. Mr Cleary does not recollect agreeing to this approach.

[19] On 14 May 2014, Mr Ewart phoned Mr Beca. Mr Ewart says he told Mr Beca that the Option Deed conferred a right on VBFL to sell Lot 38 to Mr Cleary but did not give Mr Cleary a right to compel VBFL to sell the property to him. Mr Cleary alleges that Mr Ewart went further and told Mr Beca that VBFL did not have an obligation to refund the Option Price. Mr Ewart denies telling Mr Beca this and Mr Beca corroborates that evidence.

[20] Mr Beca came back to Mr Ewart by email on 19 May 2014 stating that his client had no obligation to sell the section to Mr Cleary, nor did it appear to have any obligation to refund the Option Price. Mr Ewart forwarded that email to Mr Cleary, who responded suggesting that the best way forward was to politely turn down the

offer to buy and continue with settling the purchase as originally intended. That was confirmed in a subsequent email from Mr Cleary to Mr Ewart as follows:

> John
>
> Thanks for the explanation on the Option.
>
> I have spoken to Mike Lucas this morning who too did not know this was structured as drafted.
>
> I call [sic] the other buyers I know of and nor do they. Interesting situation for us all perhaps.
>
> Given the status of the Option I agree that we advise Beca & Co that we thank Mike for his offer but will proceed with settlement of our own on title.
>
> Graham

[21] However, on 20 May 2014, Mr Beca telephoned Mr Ewart indicating that "as there was some bad blood" between VBFL and Mr Cleary, they had decided not to exercise the option. Although there was no obligation to do so, they were prepared to refund the US$165,000 immediately.

[22] Mr Ewart advised Mr Cleary of the conversation. He said he could look at some litigation options on behalf of Mr Cleary, but "[he] did not like [the] chances: they are just exercising rights the document gives them". Mr Cleary responded by email saying "yes, regretfully wrong approach but at least capital intact". An email the following day asked when he would receive the returned deposit.

[23] Mr Beca prepared a draft deed which was forwarded to Mr Ewart for comment. On 5 June 2014, Mr Cleary executed that deed and the US$165,000 was subsequently returned.

The parties' competing positions

[24] Mr Cleary's claim is set out in a fifth amended statement of claim. There are two causes of action pleaded.

[25] The first cause of action alleges negligence. Mr Cleary claims that Mr Ewart owed a duty of care to act with reasonable care, skill, prudence and diligence in protecting his interests and in carrying out his reasonable instructions.

[26] The second alternative cause of action alleges breach of fiduciary duty. Mr Cleary pleads that Mr Ewart owed him duties to act at all times in his best interest, to act with due care, skill, prudence and diligence, and to follow his reasonable instructions.

[27] In respect of both causes of action, Mr Cleary pleads that Mr Ewart breached his duties by:

(a) failing to draft and present to VBFL an agreement that complied with Mr Cleary's instructions; and

(b) giving Mr Beca "unsolicited advice" during the telephone call on 14 May 2016.

[28] Mr Cleary claims that had Mr Ewart not breached his duties, VBFL would have executed and settled the agreement for US$440,000. Accordingly, he claims damages in the sum of US$275,000, being the difference between the Option Price that VBFL ultimately refunded and the original amount offered, together with interest and costs.

[29] Mr Cleary originally brought a further cause of action in negligence alleging that Mr Ewart did not provide Mr Cleary with proper advice of his rights under the Option Deed by advising him that the Option Deed conferred no rights on him. Associate Judge Christiansen struck out this cause of action on the basis that the Option Deed did not provide a right to Mr Cleary to compel VBFL to enter into an agreement to sell the property.[2]

[30] Mr Ewart accepts that he owed Mr Cleary a duty of care and fiduciary duties. However, he denies breaching these duties. He claims he acted within Mr Cleary's

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2 *Cleary v Ewart & Ewart* [2015] NZHC 3259.

instructions at all times. He says that even if he had not contacted Mr Beca on 14 May 2014 to discuss the effect of the Option Deed, Mr Beca would have seen its effect for himself, and advised VBFL accordingly. This would have resulted in VBFL refusing to pay the US$440,000. Consequently, Mr Ewart pleads that the conversation with Mr Beca was not causative of VBFL's decision not to pay the agreed sum.

[31] Mr Peter Nolan and Mr Ian Haynes gave expert evidence on the practice of a reasonably competent solicitor in the circumstances. Both are highly experienced and qualified practitioners. Both experts agreed that the Option Deed was unusual in that it gave the vendor an option to compel the purchase of the lot. However, they disagreed on the scope of the duty of care owed by Mr Ewart, and on whether that duty had been breached.

[32] As explained further below, the key differences between the experts stem from the different assumptions upon which their opinions were based. Ultimately, this case turns on findings of fact.

Negligence: breach of the duty of care

[33] The claim that Mr Ewart breached his duty of care has two aspects to it. First, it is alleged that Mr Ewart was acting contrary to Mr Cleary's instructions when he failed to draft and present an agreement, and when he gave Mr Beca the "unsolicited advice". Second, it is alleged that the approach which Mr Ewart followed in contacting Mr Beca was flawed and was not in Mr Cleary's best interests. Each of those aspects is considered below.

Failure to follow instructions

[34] Both experts agreed that the contract of retainer required Mr Ewart to carry out the legal work necessary to implement an oral accord reached by the parties which would have resulted in VBFL paying Mr Cleary US$440,000. However, they disagreed on the scope of the legal work required to meet that objective. Mr Nolan

considered Mr Ewart's instructions were limited to preparing and presenting an agreement. Mr Haynes took a broader view.

[35] I consider Mr Ewart's instructions went beyond mere documentation. At the very first meeting between Mr Ewart and Mr Cleary, it was contemplated that there would be discussions with VBFL's solicitor as to the form of the transaction, and the need to obtain tax advice. The contract of retainer also included services beyond just documenting the oral agreement reached: the perusing of the Option Deed and discussions with the vendor's solicitor were specifically included.

[36] In any respect, Mr Ewart's duties would have extended beyond mere documentation even if they were not expressly mentioned in the contract of retainer.[3] As Mr Nolan accepted, at the very least, the duty of care involved reading the Option Deed, advising on any issues arising, and ensuring the agreement was effective in surrendering rights.

[37] In this case, as all parties agreed, the Option Deed was unusual. Rather than granting Mr Cleary an option to purchase in return for payment of the Option Price, the Option Deed secured an option for VBFL. The Option Deed did not contain an express term by which Mr Cleary could compel VBFL to exercise that option, nor did it contain a term requiring the repayment of his US$165,000 deposit, should VBFL elect not to exercise the option. Those features of the Option Deed raised a number of issues in the course of preparing and presenting a written agreement.

[38] Mr Ewart's duties extended to advising Mr Cleary on any issues he saw arising. That is what he did. In several emails, Mr Ewart explained to Mr Cleary that the Option Deed did not give him any rights; that this could raise tax issues because VBFL would be paying him to surrender rights which he did not have; and that it could lead to VBFL not deciding to proceed with the deal or indeed refund the US$165,000. That advice was given in the course of carrying out Mr Cleary's instructions to prepare a written agreement. It cannot be said that Mr Ewart was acting contrary to Mr Cleary's instructions up until that point.

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[3] See *Gilbert v Shanahan Partners* [1998] 3 NZLR 528 (CA) where the Court held that a lawyer's duties extended beyond merely attending to the execution of documents even though there were no clear instructions to go further than this.

[39] Further, having received this advice from Mr Ewart, Mr Cleary agreed to seek tax advice on the agreement from Mr McCurrach. In an email on 7 May 2014, Mr Cleary specifically instructed Mr Ewart to "run it past Grant [Mr McCurrach]", who was Mr Cleary's tax adviser. Similarly, following receipt of the draft agreement prepared by Mr Ewart, Mr Cleary instructed Mr Ewart to arrange a meeting at Mr McCurrach's offices to finalise the draft. The decision to seek tax advice on the agreement before presenting it to VBFL was therefore in accordance with Mr Cleary's instructions.

[40] I also consider the decision to contact VBFL's lawyer was made with Mr Cleary's agreement, and was not contrary to his instructions. This was a key assumption underpinning Mr Nolan's expert opinion that Mr Ewart had acted in breach of his duty of care by contacting Mr Beca. That opinion appeared to be based on the following email from Mr Cleary to Mr Ewart sent on 9 May 2014:

> Perfect J
>
> Draft it up & we will go see them. Please don't call Beca first. We need Mike Lucas involved. Any day after Tuesday suits me, when suits you & I will confirm with Lucss [sic]?
>
> G

[41] The instruction not to call Mr Beca in that email needs to be seen in context. The instruction was in response to an email from Mr Ewart the same day in which he had floated the possibility of calling Mr Beca:

> I can draft a deed saying they will pay you $x money in event of Y. The problem is, they are getting nothing in return. So the agreement that is being entered into is for them to pay you money for nothing. By deed, someone can promise to pay someone else for nothing, but this may create a tax issue. This is why I thought we should involve Grant.
>
> If we recognise that, at any moment they could change their mind, I will call Beca, explain the problem and openly tell him I will draft a deed committing them to pay us for nothing. Really, we can't hide anything because the problem is so obvious.

[42] In context, therefore, the instruction was not to refrain from calling Mr Beca at all, but to call him once the deed had been finalised with Mr Cleary's advisors,

and when Mr Lucas was available to meet. That is made clear in the email sent to Mr Ewart on 10 May 2014 in which Mr Cleary states:

> Hi John
>
> Looks good
>
> 1)Possibly a very silly question, given I was buying & now selling lot 38, would a simple nz real estate agreement work or be better (if to [sic] stupid , don't reply to that bit)
>
> 2)On Fiji, question is if we have bought/sold anything in Fiji, given option not yet stamped. That would be a Hari Ram Law question I assume ? If not, is it a simple "have not proceeded with purchase" & leave at that
>
> 3)NZ is a capital gain on what was going to be a beach house
>
> 4)do we want to meet Tuesday to finalise @ your office, Grant, say 1pm
>
> *5)john make a time to meet Beca anytime after that please & I will update Lucas on progress & tell him of meeting*
>
> (emphasis added)

[43] In any respect, the instruction not to contact Mr Beca first was overtaken by the discussion about the way to proceed which took place on 13 May 2014 between Mr Ewart, Mr Cleary, Mr McCurrach and Ms Tyrell.

[44] Mr Ewart's evidence regarding that meeting was as follows:

> This proposed meeting with me, Mr Cleary and Mr Cleary's accountants went ahead as requested on 13 May 2014 at the offices of the accountants, then called WHK. Grant McCurrach was there in person and Amy Tyrell from WHK attended by video link from Tauranga. The meeting ran for some time during which we discussed the tax implications of the agreement Mr Cleary had reached with Mr Lucas. Grant did not form a concluded view on the tax position. We also spent a considerable amount of time putting our heads together and trying to determine the best way forward. Recognising that no outcome resulting in payment to Mr Cleary could be achieved without VBFL's agreement, we came to the conclusion that it would be best for me to talk to Mr Beca and propose that VBFL exercise the option. This would give Mr Cleary something to give up in return for the payment from VBFL. As Mr Cleary had previously represented that VBFL was aware of the effect of the Option Deed and would proceed with the deal anyway, we did not foresee VBFL having difficulty in proceeding in this manner.

[45] Mr Cleary did not have any clear recollections of the discussions at this meeting. To the extent that there is a conflict in the evidence between Mr Cleary and Mr Ewart, I prefer the evidence of Mr Ewart for the following reasons.

[46] First, Mr Ewart's evidence is supported by his file note of the meeting, the key part of which provides:

> Long discussion about how to best proceed. Preferred option is to have them exercise the option and then surrender agreement. JZE to talk to Beca.

[47] Second, as made clear from the preceding emails, the entire purpose of the meeting was to discuss the issues posed by the Option Deed, and the approach to VBFL to be taken as a consequence. The concern was to overcome any apparent tax issues, and to address the commercial risks identified by Mr Ewart. Given that was the purpose of the meeting, it is probable that there was agreement to a strategy designed to address those very issues.

[48] Third, the approach to Mr Beca is consistent with the strategy discussed in the earlier emails in which a meeting with Mr Beca and Mr Lucas to discuss the issues posed by the Option Deed was floated. Mr Cleary was in favour of that approach because he believed that VBFL understood the difficulties posed by the Option Deed, and they would nevertheless go ahead with the deal because they were "honourable people".

[49] Mr Cleary's belief was reflected in his email of 30 April 2014 (quoted at [14] above), and in his email of 9 May 2014 to Mr Ewart in which he says:

> John They [sic] know that. If they wished to have screwed me they would have before now. And have had the opportunity to cancel the option.
>
> They are not stupid. They know what their option is. They have behaved with integrity in all dealings to date.
>
> …

[50] Fourth and finally, Mr Cleary's conduct after being told of the telephone discussion between Mr Ewart and Mr Beca is consistent with him having agreed to that call being made. Mr Cleary did not chastise Mr Ewart for telephoning Mr Beca, or even express surprise that he should have taken this step contrary to his express instructions. The absence of such a reaction suggests that Mr Cleary was well aware, and had agreed, that Mr Ewart would contact Mr Beca and outline the problems and suggested solution to him.

[51] I therefore find that Mr Ewart was acting consistently with Mr Cleary's instructions when he contacted Mr Beca on 14 May 2014. That approach had been specifically agreed at the meeting on 13 May 2014 as a way to overcome some of the issues posed by the Option Deed.

[52] Mr Cleary's case also turns on what Mr Ewart told Mr Beca during the phone call on 14 May 2014. Mr Ewart's evidence on this issue was as follows:

> I am very clear on what was discussed with Mr Beca. I told him that in my view the Option Deed conferred a right on the Vendor to sell to Mr Cleary, not a right by Mr Cleary to compel VBFL to offer him the property. Against this background I explained the issues with preparing a document that recorded the verbal agreement reached by Mr Cleary and Mr Lucas.

[53] Mr Beca's evidence about what Mr Ewart said during the telephone conversation was as follows:

> Later I received another phone call from Mr Ewart. He and I briefly discussed the arrangement that Mr Cleary and Mr Lucas discussed. Mr Ewart said that he was in the middle of drafting the deed of surrender, but he was having difficulty due to the fact that the Option Deed did not give any right to purchase to Mr Cleary. This created difficulty as there would be no consideration for any payment by VBFL.

[54] The pleaded claim included an allegation that Mr Ewart had also told Mr Beca that VBFL had no obligation to refund the Option Price. That belief appears to have stemmed from the email sent by Mr Beca to Mr Ewart on 19 May 2014 in which Mr Beca said:

> So, as you say, my client has no obligation to sell the section to your client, nor for that matter, if it does not exercise the option, does it appear to have any obligation to refund the Option Price.
>
> I will advise my client and seek instructions.
>
> Regards

[55] Mr Ewart denied telling Mr Beca that there was no obligation to refund the Option Price. Mr Beca confirmed that evidence. He said that he reached that view himself on reading the Option Deed. Mr Ewart and Mr Beca were not challenged on this issue and I accept their evidence. Not only did Mr Cleary authorise the

telephone call to Mr Beca, but the discussion Mr Ewart had with Mr Beca was consistent with that authority.

[56] In summary, Mr Ewart's instructions were broader than simply documenting the oral accord reached. Mr Cleary specifically instructed Mr Ewart to confer with Mr McCurrach on any tax issues arising. He also agreed at the meeting on 13 May 2014 to Mr Ewart contacting Mr Beca, explaining the issues with the Option Deed, and inviting VBFL to exercise the option.

Flawed strategy

[57] The second aspect to the negligence claim concerns a criticism of the strategy adopted in this case. In Mr Nolan's expert opinion, Mr Ewart should have presented a simple deed bringing the Option Deed to an end, rather than contacting Mr Beca and outlining the problems that it posed.

[58] This aspect of the negligence claim does not involve allegations of erroneous legal advice, or a failure to follow instructions. Rather, it involves an allegation that the approach adopted by Mr Ewart was not in Mr Cleary's best interests and Mr Ewart was negligent in following it. In other words, it alleges an error of judgment.

[59] In *Saif Ali v Sydney Mitchell and Co*, the House of Lords held:[4]

> No matter what profession it may be, the common law does not impose on those who practice it any liability for damage resulting from what in the result turns out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made.

[60] The terms of the Option Deed presented issues in both documenting the deal reached between Mr Lucas and Mr Cleary, and in determining the approach to be taken with VBFL. There were several approaches available to deal with those issues. Preparation and presentation of a simple deed of surrender was one approach. In Mr Ewart's view that option had possible tax consequences, and also ran the risk that

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4 *Saif Ali v Sydney Mitchell (a Firm)* [1980] AC 198 (HL) at 220.

VBFL might consider Mr Cleary was being "sharp" once it subsequently realised that the Option Deed did not afford any rights to Mr Cleary to be surrendered. Mr Ewart was concerned that VBFL might decide not to refund the Option Price in that event.

[61] Another approach was to disclose the fact that the option belonged to VBFL rather than Mr Cleary, and suggest that VBFL exercise the option so that Mr Cleary had rights to surrender. That approach would address any tax issues that may have existed, and also avoid the issue of Mr Cleary appearing "sharp". But there were disadvantages with this approach. In particular, it would alert VBFL to the fact that Mr Cleary did not have rights under the Option Deed, and it could therefore achieve its objective by simply electing not to exercise the option. From his previous dealings with Mr Beca, Mr Ewart considered it highly likely that Mr Beca would read the Option Deed for himself and advise VBFL that this was the case anyway. Mr Cleary was also of the firm view that VBFL knew the legal position under the Option Deed, and would nevertheless honour the deal. In light of those various factors, the parties opted for the second approach.

[62] I accept that it is highly unusual for a solicitor for one party to reveal the weaknesses in their own client's position to the solicitor acting for the counterparty. On its face, that approach will rarely be in the client's best interests. But in the peculiar circumstances of this case, I am not persuaded that the decision to follow that approach was one that no reasonably well informed and competent member of the legal profession could have made. Mr Ewart's conduct cannot be considered negligent in those circumstances.

[63] A number of other aspects of the flawed strategy allegation were canvassed in closing submissions. Mr Herzog was critical of Mr Ewart's concern about potential tax issues. Specifically, Mr Herzog submitted that a reasonably competent solicitor would have realised that there was no gift duty tax issue created by the proposed written agreement.

[64] I do not consider Mr Ewart's concerns about tax were specifically about gift duty. Mr Ewart was concerned to ensure that there were no adverse tax

consequences arising out of the written agreement. He was particularly concerned given his view that Mr Cleary did not have any rights to surrender in return for the US$440,000 he was receiving. It was in that context that he recommended advice be sought from Mr McCurrach. Although Mr McCurrach could not form a concluded view on the tax issues, he nevertheless considered that the exercise of the option by VBFL, so that it could then be surrendered by Mr Cleary, would cure any tax issues which might otherwise exist. Mr Ewart cannot be criticised for recommending that advice be sought from a tax expert, and then recommending a strategy which took into account that advice.

[65] Mr Herzog submitted that the strategy whereby VBFL would exercise the option could never be put into effect because the option was only exercisable once iTLTB approval had been granted. That allegation is a red herring in my view. The focus of Mr Cleary's negligence case is on the failure to present a draft agreement, and on the provision of "unsolicited advice". Whether a proposed strategy, which was never adopted, could or could not be put into effect does not impact on the resolution of those issues.

[66] Mr Herzog was also critical of Mr Ewart's failure to appreciate the commercial benefit to VBFL in doing the deal. He emphasised that at the time Mr Lucas made the offer to Mr Cleary, beachfront lots similar to Lot 38 were selling for US$1,000,000. I agree with Mrs Fee's submission that if there was a commercial benefit in VBFL doing the deal then VBFL would have proceeded with it irrespective of what Mr Ewart said during the telephone call on 14 May 2014. The fact that VBFL did not proceed suggests that the commercial benefit of the deal was premised on a belief (erroneous, as it turns out) that it was committed to selling Lot 38 to Mr Cleary at the agreed price. When advised of the correct legal position under the Option Deed, VBFL decided not to proceed with the deal at all. Clearly the commercial benefit to VBFL was in achieving the same result without having to pay Mr Cleary the additional US$275,000 agreed.

[67] Another aspect of Mr Cleary's complaint is that Mr Ewart took too long to prepare and present the draft agreement. Emails from Mr Lucas following up on progress with the agreement indicate that VBFL was anxious to settle. Mr Nolan's

expert opinion was that Mr Ewart needed to strike whilst the iron was hot and prepare and present the agreement promptly.

[68] The time taken to prepare the written agreement must be considered in context. It was approximately one month from receipt of initial instructions to the preparation of a draft agreement. Mr Ewart was on leave for some of this time over the intervening Easter break. A draft agreement could not be finalised until advice on tax issues had been sought and received. Mr Cleary was also in favour of a face to face meeting with VBFL to settle the terms of the draft agreement. However, he was overseas for a substantial period of time, meaning a meeting could not be scheduled until his return. Any delay in the preparation of the draft agreement was therefore partly dependent on the actions of others, including Mr Cleary. I do not consider Mr Ewart was dilatory in the circumstances.

Conclusions on breach

[69] I find that Mr Ewart did not breach his duty of care by failing to follow instructions. Mr Ewart acted in accordance with Mr Cleary's instructions when he telephoned Mr Beca. The approach to Mr Beca did not involve an error of judgment that no reasonably well informed and competent member of the profession could have made in the circumstances. The negligence cause of action must be dismissed.

Negligence: causation

[70] My finding that Mr Ewart did not breach his duty of care disposes of the claim. However, in the event I am found to be wrong on that issue, I have gone on to consider whether the loss which Mr Cleary claims would have been recoverable in any event.

[71] In *Benton v Miller & Poulgrain (a firm)*, the Court of Appeal set out the general principles to apply in addressing "uncertainty" in the causation assessment.[5]

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5 *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66.

Those principles were based on the following passage from *Allied Maples Group Ltd v Simmons & Simmons* which was quoted in the judgment:[6]

> In these circumstances, where the plaintiffs' loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.
>
> (1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists in some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. The court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on the balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury. …
>
> (2) If the defendant's negligence consists of an omission, for example to provide proper equipment, or to give proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances. …
>
> Although the question is a hypothetical one, it is well established that the plaintiff must prove on the balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. …
>
> (3) In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case does the plaintiff have to prove on the balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
>
> Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct.

[72] In this case, the negligence alleged consists of both the positive act (the provision of unsolicited advice) and an omission to act (the failure to present a

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6 *Allied Maples Group Ltd v Simmons and Simmons* [1995] 4 All ER 907.

written agreement). In the former case, Mr Cleary must prove, on the balance of probabilities, that Mr Ewart's unsolicited advice caused his loss. Causation in the latter case depends on the answer to a hypothetical question which is what VBFL would have done had the written agreement been presented to it. Mr Cleary must prove that he had a substantial chance of VBFL executing the written agreement and paying him the additional US$275,000.

[73] As to the first question, I am not persuaded on the balance of probabilities that Mr Ewart's unsolicited advice caused the loss suffered by Mr Cleary. The unsolicited advice was simply a summary of the legal effect of the Option Deed. There is no evidence to suggest that passing on that summary caused VBFL to decide not to proceed with the original deal. Rather, it appears that the decision not to proceed with the deal was because there was some "bad blood" between VBFL and Mr Cleary. That bad blood concerned Mr Cleary's attempts to list lot 38 with a real estate agent. Mr Cleary's evidence that VBFL directors were not happy with him taking that course of action supports that conclusion. Even if the provision of "unsolicited advice" was in breach of the duty of care, I do not consider Mr Cleary is able to show on the balance of probabilities that the provision of such advice caused him loss.

[74] As set out above, the second enquiry involves a hypothetical assessment of what VBFL would have done if presented with a written agreement. That involves a number of subsidiary questions: whether VBFL would have signed a written agreement without first seeking legal advice from Mr Beca; if not, what legal advice would Mr Beca have given to VBFL; and finally what VBFL would have done on receipt of that legal advice.

[75] In *Benton*, the Court of Appeal set out the approach to be taken to those questions:[7]

> In making a loss of chance assessment, broad judgments are called for. At one end of the spectrum, very low probabilities are unlikely to be reflected in an award of damages. So if the chance of avoiding an adverse event is as low as say one in ten, a Court will probably reject the claim rather than fix damages at ten percent of the cost to the plaintiff associated with those

[7] Above n 5 at [50].

> adverse events. At the other end of the spectrum that approach is sometimes, but not always, adopted. So a 90 percent chance of avoiding an adverse event may result either in complete recovery of all losses associated with that adverse event (on the theory that the chance of not avoiding those losses was sufficiently speculative to be able to be ignored) or alternatively a discount of ten percent for contingencies.

[76] Mr Cleary put emphasis on Mr Lucas' email dated 11 April 2014 in which he stated: "VBFL will enter the contract". Despite that unequivocal statement, I do not consider there to be a real chance that VBFL would have executed the written agreement without first seeking legal advice from Mr Beca. Mr Ewart's note of the telephone discussion between Mr Ewart, Mr Cleary, and Mr Lucas on 10 April 2014 (the day after Mr Cleary and Mr Lucas met), states:

> Richard Beca acts for Lucas: he will brief him and confirm

[77] Mr Beca's involvement was therefore anticipated from the outset. Mr Ewart's terms of engagement letter also specifically referred to discussions with the vendor's solicitor about the form of transaction, and Mr Ewart had an initial conversation with Mr Beca about the structure of the agreement on 28 April 2014. Mr Beca's evidence was that he was contacted by Mr Lucas in May 2014 who briefed him on the situation.

[78] Further, having been engaged, I consider it highly likely that Mr Beca would have read the Option Deed and advised VBFL on its effect. Mr Beca's evidence on this issue was as follows:

> It is always my practice, when advising on a transaction that involves a party surrendering rights given under a document, to peruse the document by which those rights are given. This is the case whether I am acting for the grantee or the grantor. I regard this as an essential and basic step in giving advice to my clients.
>
> …
>
> Under no circumstances would I have advised my client to enter into a deed of surrender without first reviewing the Option Deed. Likewise I am confident that I would not have overlooked the clear effect of the Option Deed when I reviewed it.

[79] There is no reason to suggest that Mr Beca would not have followed that practice in this case. Indeed, both experts agreed that reading the Option Deed

would have been the bare minimum expected of a reasonably competent solicitor acting in the circumstances.

[80] On reading the Option Deed, Mr Beca is highly likely to have reached the view that the Option Deed gave VBFL an option, and that VBFL was not obliged to exercise that option in Mr Cleary's favour. No other interpretation of the Option Deed was suggested as being reasonably tenable. Mr Beca's evidence was that even if Mr Ewart had not volunteered the effect of the Option Deed, he is confident he would have seen it straightaway. It was therefore highly likely that Mr Beca would have given VBFL the same advice that he in fact gave following Mr Ewart's phone call.

[81] The final question is how VBFL would have responded on receiving that advice. There is no reason to suggest that it would have acted any differently to the way it in fact acted in this case. That is, on receipt of advice from Mr Beca, VBFL would have decided not to proceed with the deal reached between Mr Cleary and Mr Lucas, nor would it have continued with the Option Deed, but it would have resolved to refund the Option Price.

[82] Drawing those threads together, I do not consider there to be a real possibility that VBFL would have signed the agreement without first receiving legal advice from Mr Beca. I consider it highly likely that the legal advice given by Mr Beca would have been the same as that which he gave to VBFL following the phone call from Mr Ewart. On receipt of that advice, VBFL would have acted in exactly the same way as it did in fact act, by declining to enter into the agreement. In other words, the probability that VBFL would execute any written agreement if Mr Ewart had prepared and presented such an agreement was negligible. Mr Cleary cannot show there was a substantial possibility of VBFL executing the written agreement and paying him the additional US$275,000.

[83] If I am wrong on the question of breach, I would have nevertheless declined to find for Mr Cleary on the negligence cause of action on the grounds that any loss suffered was not caused by the breach.

Fiduciary duty

[84] The second alternative cause of action pleads breach of fiduciary duty. Although couched in different terms, the foundation of the fiduciary claim mounted against Mr Ewart is essentially the same as the negligence claim. My findings that Mr Ewart did not act contrary to Mr Ewart's instructions, and did not act contrary to Mr Cleary's best interests, dispose of the second cause of action also. That cause of action is accordingly dismissed.

Result

[85] Mr Cleary's claim is dismissed.

[86] Mr Ewart is entitled to costs. If agreement cannot be reached, then Mr Ewart may file a memorandum of counsel in support of costs within 20 working days of receipt of this judgment. A memorandum in response may be filed within 10 working days thereafter.

Edwards J