IN THE COURT OF APPEAL OF NEW ZEALAND

CA159/2016
[2017] NZCA 541

BETWEEN	COLLINS & MAY LAW Appellant
AND	HARRY MEMELINK AND PATRICK JOHN RENSHAW AS TRUSTEES OF THE LINK TRUST (NO. 1) First Respondent
AND	HARRY MEMELINK Second Respondent

Hearing:	31 July 2016
Court:	Miller, Simon France and Toogood JJ
Counsel:	H M Twomey and M O Fee for Appellant Q S Haines for Respondents
Judgment:	23 November 2017 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B We set aside the orders made in the High Court.

C Judgment is entered for the appellant on the respondents' claims.

D The cross-appeal is dismissed.

E Costs in the High Court to be determined in that Court in light of this judgment.

F Costs in this Court are reserved.

REASONS OF THE COURT

(Given by Toogood J)

[1] Collins & May Law appeals against a judgment of Clifford J in which the law firm was held to have been negligent in the conduct of a conveyancing transaction and ordered to pay damages of $155,715.33.[1]

[2] The facts reveal an unusual train of events between November 2003 and the hearing before Clifford J in September 2015.

The purchase of 4 Suzetta Place, Pakuranga

[3] In late August 2006, Mr Harry Memelink instructed Mr Eugene Collins of Collins & May Law to act for his family trust, the Link Trust (No. 1) to settle the purchase of a property at 4 Suzetta Place, Pakuranga. The property was then owned by Mr John Hoyte and his wife, Ms Cecile Matthews, as tenants in common in equal shares. The transaction had its origins in an agreement entered into in November 2003, settling a dispute between Mr Memelink and Mr Hoyte over the ownership of a company, John Hoyte and Associates Ltd (JHAL), and related issues.

[4] The settlement of that dispute included an agreement that, among other things, Mr Memelink's 50 per cent shareholding in JHAL and other debts owed by the company to him would be secured by a mortgage over the property in favour of Mr Memelink and a company owned by him, Link Technology 2000 Ltd (Link Technology). The arrangements were recorded in a written acknowledgement dated 29 November 2003, prepared by Mr Memelink and signed by Mr Hoyte, in these terms:

> I John Hoyte officially recognize Harry Memelink as a 50% shareholder of John Hoyte and Associates Limited (Enterprise Tools). Balance out as according to original agreement (i.e. Stock & Cash input for balance out of shareholding still to be done.)
>
> I John Hoyte agree to grant a mortgage and guarantee over my house at 4 Suzetta Place, Pakuranga, Auckland, life insurance policies and personal guarantee to Harry Memelink, Link Technology 2000 Ltd and associated companies, as security for any debt that John Hoyte and Associates Limited

[1] *Memelink v Collins & May Law* [2016] NZHC 442.

> (Enterprise Tools) owe. This includes advanced monies, interest, stock, outstanding invoices, rent, power etc.

[5] It seems that a mortgage was never registered but Mr Memelink arranged for caveats to be lodged against the title to the property on behalf of himself and Link Technology. The caveats recorded the estate or interest claimed in the following terms:

> Pursuant to an Agreement to Mortgage dated 29 November 2003 in respect of the land contained in the above Certificate of Title and made between the registered proprietors John Charles Hoyte and Cecile Ann Matthews, as mortgagors and the abovenamed Caveator as Mortgagee.

No issue arises about the validity of the caveats. It was common ground in the High Court and before us that the caveats were related to all of the indebtedness of Mr Hoyte and JHAL to Mr Memelink and Link Technology. We return below to Mr Memelink's assertion that Ms Matthews had similarly agreed to the use of her interest in the property to secure JHAL's indebtedness.

[6] In August 2006, ASB Bank, as mortgagee of the Pakuranga property, served a Property Law Act 2007 Notice on Mr Hoyte and Ms Matthews, claiming they were in default of the mortgage. When Mr Memelink received a copy of that Notice as caveator,[2] he arranged for the Link Trust to purchase the property in order to protect his interests.

[7] Although the purchase price was agreed to be $570,000, Mr Memelink instructed Collins & May Law that the arrangements he had entered into for the transfer of the property to the Link Trust were such that the Trust would be required to pay only $232,569.34 to complete the settlement. He said the balance of the purchase price would be met by setting off amounts owed to Mr Memelink, Link Technology or the Link Trust by Mr Hoyte or JAHL. The cash sum to be paid on settlement was sufficient to satisfy the debt to ASB Bank under its mortgage. Mr Memelink arranged an advance from ASB Bank to the Link Trust to finance the purchase.

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[2] Property Law Act 2007, s 121.

[8] The internal documents created by Collins & May Law upon receiving instructions from Mr Memelink explain the solicitors' understanding of the scope of their retainer. We do not understand there to have been any dispute that they reflect what Mr Memelink said he wanted them to do. The first is a memorandum from Mr Eugene Collins to Mr Lloyd Collins, the Collins & May Law partner who handled the transaction for Mr Memelink and the Link Trust:

M E M O

TO: Lloyd

FROM: Eugene

DATE: 4 September 2006

RE: HARRY MEMELINK

1. I thought I had already opened a file for this job but I haven't yet so Harry's file code is MEMH0l and [Mr Memelink's contact details].

2. I have sent him an email to get hold of you today to forward a little bit more information because I thought I had a copy of a draft Sale and Purchase Agreement her[e] but I didn't. He is already underway with financing.

3. He is purchasing a property in Auckland from a John Hoyt[e] and his wife. Although the purchase price is $570,000.00 little or no money will be changing hands.

4. Harry apparently has a caveat over the property because of advances that Harry had made to John Hoyt[e]'s Company.

5. The house is owned by John and his wife and I raised some concerns regarding consideration passing to the Vendor if they didn't owe the money and especially Mrs Hoyt[e] and that we would have to ensure that the correct paperwork was done so there was some sort of assignment of debt. Bearing in mind we cannot act for the Hoyt[es]on the transaction and I advised him that it was something that we need to find out a little bit more information.

6. In response to that Kirsten (Harry's partner) sent me the attached email with the figures.

7. I advised that you would need to complete the transaction for me whilst I was away hence sending you this memo. I have sent another email to Harry to advise him to fax through the draft contract so that you can see the existing conditions. Apparently the Hoyt[es] have already signed. I will leave it with you to take instructions from Harry but I understand that there are ASB Bank instructions on the way.

Thanks

Eugene

[9] After a phone call with Mr Memelink, Lloyd Collins made the following short note summarising the terms of settlement on 11 September 2006:

> (a) Sufficient to clear existing security $195k;
>
> (b) The balance is being satisfied by funds owed to caveats;
>
> (c) Auth [authorise] balance.

[10] Mr Collins's evidence regarding this note was:

> It is clear to me from reviewing my note that during that conversation Mr Memelink has instructed me that the net balance of the $570,000 purchase price was being retained by Mr Memelink in satisfaction of funds he was owed secured by the caveats lodged against the Property. The note "Auth balance" is a note to myself to get authorisation from the vendors' solicitors that the balance of the purchase price would be retained by Mr Memelink.

[11] On 12 September 2006, Lloyd Collins wrote to Knight Coldicutt McMahon Butterworth, the solicitors then acting for Mr Hoyte and Ms Matthews, setting out the basis upon which he understood settlement of the transfer would be effected. The letter indicated that on settlement the Link Trust would pay no more than sufficient funds for repayment of the ASB Bank mortgage over the property. It said that the balance of the purchase price (after repayment of the ASB Bank loan) was to be released directly to the Link Trust "by way of a set-off in respect of the outstanding debts pursuant to the two caveats registered against the Certificate of Title". Since the terms of the letter dealing with settlement assume some importance in the analysis of whether Collins & May Law's conduct of the transaction was negligent, we set them out:

> 3. We understand from the purchaser that settlement will be completed on the following basis:
>
> (a) We will pay to you sufficient funds for you to attend repayment of the existing indebtedness under Mortgage D607761.2 to ASB Bank Limited. We suggest on the morning of settlement you forward to us a copy of the ASB Bank Limited repayment statement. That will constitute the settlement statement.
>
> (b) We will require your undertaking that there is no arrears of Auckland City Council, Auckland Regional Council and water rates.

(c) Prior to settlement you are to forward your firms undertaking that in consideration of our paying into your trust account by bank cheque the amount to attend repayment of ASB Bank Limited, that you will immediately forward to us in registerable form the signed Transfer and Discharge of Mortgage D607761.2.

(d) Prior to settlement please confirm that Charging Order 5817719.1 has expired.

(e) Prior to settlement you are to confirm on behalf of the vendor that our firm is authorised to release the balance of the purchase price directly to the purchaser by way of a set-off in respect of the outstanding debts due pursuant to the two caveats registered against the Certificate of Title.

4. We are holding a Withdrawal of Caveat 5836008.1 and 5827690.1 on our file and you do not need to forward them to us.

5. Further, we should point out to you that settlement will take place upon the abovementioned basis but without prejudice to any outstanding balance of debt due by the vendor to Harry Memelink and Link Technology 2000 Limited…

[12] It is clear, and it has not been suggested otherwise, that Collins & May Law were not instructed to inquire into the underlying arrangements which led to the instruction that the sum to be paid on settlement was confined in the manner set out in the internal documents and the letter.

[13] The transaction was actually conducted on behalf of Mr Hoyte and Ms Matthews by an Epsom law firm, The Conveyancing Shop. The file held by Knight Coldicutt McMahon Butterworth was taken to the new firm by Mr Hoyte. Neither Knight Coldicutt nor the new firm provided the confirmation, sought in para 3(e) of Mr Collins's letter, that the balance of the purchase price was to be paid to the purchaser after payment of the funds to the Bank and incidental costs. The Conveyancing Shop, however, provided a settlement statement which largely reflected Mr Collins's understanding of the parties' agreement about how the $570,000.00 purchase price would be met. It read:

Collins & May Law Office

RE: John Hoyte & Cecile Matthews to H Memelink

Settlement Statement

Balance required to settlement [sic]		$231,844.34
Fees and Disbursement		$700.00
Special Water Reading charge		$25.00
Balance required from client	$232,569.34	
Total	$232,569.34	232,569.34

[14] The purchase was settled on that basis. The caveats lodged by Mr Memelink and Link Technology were withdrawn and the transfer of the title to the Trust and the discharge of ASB Bank's mortgage were registered.

Continuing dispute between Mr Memelink, Mr Hoyte and Ms Matthews

[15] The completion of the purchase, however, did not end the disputes between Mr Memelink, Mr Hoyte and Ms Matthews. Mr Hoyte and Ms Matthews continued to live in the property, claiming they had a right to lifetime occupancy of it at no cost. They said a company established to expand JAHL's business, GSE Group Ltd (GSE), would meet the cost of the bank debt which the Link Trust had entered into to purchase the property and would also provide other benefits to Mr Hoyte. Although Mr Memelink denied the existence of any such agreement, a lease agreement was entered into between the Link Trust and GSE for an initial term of three years with rights of renewal and a rental of $480 per week plus GST. The rent, however, was never paid.

[16] The continuing dispute was litigated in the Tenancy Tribunal and the District Court. At some stage after the transfer of the Pakuranga property to the Link Trust, Mr Hoyte was adjudicated bankrupt. On behalf of both Mr Hoyte and herself, Ms Matthews issued a proceeding in the High Court against the trustees of the Link Trust (Mr Memelink and a trustee company) concerning the lapsing of a caveat which had been lodged against the title to the Pakuranga property by Ms Matthews. The proceeding included also a claim by Ms Matthews alleging that

the balance of the purchase price of the property from the September 2006 transaction — a sum of $337,430.66 — remained unpaid. She sought specific performance of the 2006 agreement for sale and purchase and related orders.

[17] At the trial of the High Court proceeding before Andrews J, Ms Matthews and Mr Hoyte denied that they ever agreed to mortgage the property to Mr Memelink or Link Technology. They said that Mr Hoyte's signature on the memorandum dated 29 November 2003 produced by Mr Memelink had been forged.[3] Ms Matthews and Mr Hoyte also said that they never agreed to accept less than the full purchase price of $570,000 when the property was transferred to the Link Trust in 2006. In that regard, Mr Hoyte denied that he was aware of the letter dated 12 September 2006 from Collins & May Law to Knight Coldicutt.[4] Moreover, Ms Matthews and Mr Hoyte denied that Ms Matthews had ever agreed to allow her interest in the property being used to secure JHAL's indebtedness to Mr Memelink and Link Technology. No document purporting to contain any such acknowledgement by Ms Matthews was produced at the trial.

The judgment of Andrews J

[18] In a judgment dated 5 September 2012, Andrews J found that settlement of the purchase of the Property by the Link Trust was in fact effected on the basis of Collins and May Law's letter dated 12 September 2006 and that Mr Hoyte, contrary to his evidence, had been aware of the terms of that letter.[5] Moreover, the Judge found that she was:[6]

> ... satisfied on the balance of probabilities that insofar as Mr Hoyte's separate share in the property is concerned, a variation to the agreement for sale and purchase was agreed, such that his share of the balance of the purchase price was paid or applied in accordance with the terms set out in Collins & May's letter of 12 September 2006.

[19] Andrews J said, however, that she was not satisfied that the variation to the agreement for sale and purchase, which she found was binding on Mr Hoyte, extended to Ms Matthews' separate interest in the Property. The Judge held that the

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3 Set out above at [4].
4 Quoted above at [11].
5 *Matthews v Memelink* [2012] NZHC 2284 at [79].
6 At [80].

agreement to mortgage set out in the November 2003 memorandum did not affect Ms Matthews' half share. The Judge said she was:[7]

> ... not satisfied that the evidence supports a finding that [Ms Matthews] agreed to her separate share of the purchase price being used to meet debts for which Mr Hoyte was responsible. There was no evidence of any agreement that she guaranteed payment of such debts.

[20] The result of those findings was that Ms Matthews's claim before Andrews J failed in respect of Mr Hoyte's half interest in the property. It succeeded, however, in her claim against the purchasers to the extent that they had not made full payment of the purchase price for Ms Matthews' half share (less adjustments to account for Ms Matthews' indebtedness to the purchaser). The Judge held Ms Matthews was entitled to be paid a sum of $155,715.33.[8]

The proceeding before Clifford J

[21] The judgment which is the subject of this appeal concerned a subsequent claim by the then trustees of the Link Trust and Mr Memelink in his personal capacity to recover from Collins & May Law damages equivalent to the amount Andrews J had ordered the Link Trust to pay to Ms Matthews. As Clifford J put it, the trustees of the Link Trust asserted:[9]

> ... that Andrews J decided against them [in favour of Ms Matthews] because of the negligent way Collins & May acted for the Trust on settlement, by not properly documenting that the payment of $232,569.34 on settlement fully discharged the Trust's obligation to pay the $570,000 sale price.

Clifford J recorded Collins & May Law's defence to the trustees' claim in these terms:

> [5] Collins & May deny liability on the basis of the instructions they say Mr Memelink, on behalf of the Trust, gave them. Collins & May emphasised the limited scope of those instructions: their job was simply to settle the transfer on the basis of the settlement statement. They had no

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7 At [81].

8 Andrews J found, for reasons which are not relevant to the present appeal, that Ms Matthews' claims regarding the subsequent property agreement giving her a continued interest in the property failed and that her caveat protecting that interest must lapse. The Judge also held that the trustees succeeded in their counterclaim for rent and for an order requiring Ms Matthews and Mr Hoyte to vacate the Pakuranga property: at [106], [116] and [119].

9 *Memelink v Collins & May Law*, above n 1, at [4].

> responsibility to do any more than that. In particular, they did not have a duty to the Trust or Mr Memelink to review or document the underlying arrangements pursuant to which the Trust only paid $232,567.34 on settlement, when the sale and purchase agreement called for the payment of $570,000. They say the settlement statement adequately recorded the parties' agreement to that effect.

[22] On appeal to this Court, the parties agreed that the issue for determination was whether Clifford J was right to find that Mr Memelink's instructions to Collins & May Law was to settle the transaction for the transfer of the property to the Trust on a basis which not only resulted in title to the property being transferred to the Trust but which also extinguished any claims by Ms Matthews and Mr Hoyte to the personal liability of the trustees as purchasers to pay the full purchase price of $570,000.[10]

[23] Collins & May Law also argue that any (denied) negligence on their part in the conduct of the transaction was not causative of the loss the Trust suffered by reason of Andrews J's Judgment. They submit that Ms Matthews's claim succeeded only because Andrews J held there was no documentary evidence that Ms Matthews had agreed to the use of her interest in the Pakuranga Property to secure JHAL's indebtedness to Mr Memelink and/or Link Technology. They say, in that regard, that prior to the trial before Clifford J, a signed acknowledgement by Ms Matthews, dated 27 May 2004, was discovered.

[24] As Clifford J held,[11] while the acknowledgement was not in identical terms to the memorandum of 29 November 2003 signed by Mr Hoyte, it does provide evidence of knowledge on Ms Matthews's part of the relevant arrangements between Mr Hoyte and Mr Memelink underlying the agreement that the transfer of the Pakuranga property would be effected by payment of a sum less than the full purchase price. Significantly, it supports Mr Memelink's claim in the proceeding before Andrews J that Ms Matthews agreed to the use of her share in the property to secure the indebtedness to Mr Memelink and Link Technology. The acknowledgement signed by Ms Matthews reads as follows:

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[10] Or, at least, the balance of that sum not satisfied by the payment of the amount required to clear the ASB Bank mortgage.

[11] *Memelink v Collins & May Law*, above n 1, at [36].

> "I Cecilie Ann Matthews give my permission to Harry Memelink of (Link Technology 2000 Ltd) to use my 50% share holding in a property located at (4 Suzetta Place Pakuranga), as security to raise Finance for the purposes of increasing the Capital in the business of John Hoyte & Associates Ltd.
>
> This security is given on the basis that the said Company John Hoyte & Associates Ltd undertakes to make all repayments on the finance raised until such time as the said finance is repaid, or the business of John Hoytes and associates Ltd [sic] is sold, at which time the full balance of any monies owed will be promptly repaid.
>
> I do not take responsibility for any costs incorrect [sic] in raising such finance, nor in any debts that John Hoyte and Associates Ltd may incur.
> Signed 'C A Matthews'
> Cecilie Ann Matthews
> Date: 27th.05.04"

[25] Collins & May Law argue that had Mr Memelink produced that document in the proceeding determined by Andrews J, Ms Matthews's claim would have failed for the same reasons that Mr Hoyte's claim failed; namely, that the settlement of the transaction by Collins & May Law reflected the arrangements between the parties as to how the purchase price of $570,000 was to be met.

[26] Put another way, the submission is that the trustees' loss arising from the judgment of Andrews J was caused by Mr Memelink's failure to produce the crucial document signed by Ms Matthews and not by any negligence on the part of the law firm.

Clifford J's judgment

[27] We turn to consider Clifford J's reasoning. The Judge acknowledged that Mr Memelink had assured Collins & May Law that the underlying arrangements regarding the balance of the purchase price were "covered" and that the firm need not concern itself with them.[12] The Judge accepted that it was a well-established principle that the obligations of a solicitor could be limited by agreement between the parties.[13] Clifford J accepted also that where a retainer has been properly limited in contract, the corresponding tortious duty will usually be similarly limited.[14]

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12 At [38].

13 *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC); and *Frost & Sutcliff v Tuiara* [2004] 1 NZLR 782 (CA).

14 *Frost & Sutcliff v Tuiara*, above n 13, at [22].

The Judge also held that "settlement and completion does not necessarily discharge a purchaser's personal covenant to pay the purchase price".[15] We observe that the Judge was right to qualify that proposition by saying that the availability of a personal remedy is not "necessarily" extinguished by settlement. Whether settlement has that effect in any particular case will depend on the circumstances.

[28] Clifford J made the following central findings:[16]

> [41] The fact here is, however, that from the outset Collins & May knew that the Trust was, notwithstanding the terms of the agreement for sale and purchase, not to pay the full $570,000 for the property. Rather, the Trust would only pay sufficient to discharge the bank debt. Other liabilities of Mr Hoyte and Ms Matthews would be set off against the obligation to pay the balance of the stated purchase price. Collins & May knew that, as purchaser, the Trust was to have no further liability for the payment of the purchase price. As Collins & May's letter of 12 September shows, the firm also knew that a written acknowledgement of that fact was required. There are any number of reasons for that, including that agreements for the sale and purchase of land, and variations thereto, must – in general terms – be in writing: that is, a "written record" is required.

Clifford J then said:

> [45] The single issue I must decide is, therefore, whether as Collins & May argue the settlement statement provided a sufficient written record of what was, in effect and as Andrews J recognised, a variation of the agreement for sale and purchase Mr Memelink had signed on behalf of the Trust with Mr Hoyte and Ms Matthews. In considering that issue, I note that the standard of care, both contractual and tortious, to which a legal practitioner is to be held is that of "what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession".

[29] Overall, the findings of fact as to what occurred were supported by the evidence. As the Judge said, the issue was whether the settlement statement provided to Collins & May Law by The Conveyancing Shop acknowledged sufficiently in writing a variation of the agreement for sale and purchase so that Mr Hoyte and Ms Matthews would be precluded not only from maintaining a continuing interest in the transferred property but also from making a claim against Mr Memelink and the Link Trust personally for the balance of the purchase price. In

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15 *Paugra Holdings Ltd (in liq) v Harvestfield Holdings Ltd* [2014] NZCA 164, (2014) NZTC 21-070 at [37(a)].

16 *Memelink v Collins & May Law*, above n 1.

support of its argument on that point, Collins & May Law relied on the evidence of an expert witness, Mr Peter Nolan.

[30] We set out Mr Nolan's evidence as recorded by Clifford J:

> [46] For Collins & May, expert evidence was given that the settlement statement was sufficient for that purpose. The defendant's expert witness, Mr Peter Nolan, is an experienced and senior conveyancing lawyer. Mr Nolan's evidence on that point was as follows:
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> > 39. In my experience, it would have been normal practice for the Conveyancing Shop to have recorded in their settlement statement the full purchase price of $570,000 and then to have granted an allowance to the purchaser for the amount to be satisfied by way of the reduction in the debt owing under the two caveats. However, I do not believe that it makes any difference that this process was not followed by the Conveyancing Shop on this occasion. By stipulating a lesser sum than the full purchase price as the balance to settle, they still gave a credit for the difference.
> >
> > 40. For the vendors to be able to transfer clear title to the purchaser, it was necessary for them to procure withdrawals of the two caveats. That meant making payment on settlement from the proceeds of the sale of the Property of the amounts owing to the caveators.
> >
> > 41. Accordingly, it would have made no difference to the vendors whether they received full payment of the sum of $570,000 on settlement and then paid to the caveators the difference between the purchase price and the amount they had to pay to ASB Bank Limited, or whether they gave a credit to the purchaser for the amount of that difference on account of the debt owed to the caveators, *so long as that credit was accepted on account of that debt and withdrawals of the caveats were provided in return*.
> >
> > 42. Strictly speaking, of course, the debts owing to the caveators could not be set off against the balance of the purchase price because the debts claimed under the caveats were owed to Mr Memelink and Link Technology, rather than to the purchaser, being the Trust. However, it would have been clear to Collins & May, in my opinion, that the Conveyancing Shop were not concerned about this technicality. I believe that Collins & May were entitled to make the assumption that because Collins & May acted for Mr Memelink and Link Technology as well as the Trust, that Collins & May would not withdraw the caveats unless the credit granted to the Trust was accepted by Mr Memelink and Link Technology as a reduction of the debt owed to them.
> >
> > 43. In my opinion, by virtue of the vendors transferring title to the Property, Collins & May were entitled to believe that they had

> obtained for the Trust all of the right, title and interest in the Property of the two vendors.
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> 44. As a matter of conveyancing practice, there is no need to take any steps to ensure that a vendor's equity in a property is transferred to a purchaser. That occurs automatically upon registration of the transfer of title.
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> 45. In this case the only reason, as far as I can see, that the Court was able to find that the Trust owed money to Ms Matthews, despite the transfer of title to the Property, was that there was a complex set of other arrangements between the parties that had been made at the same time. If Collins & May knew nothing about those arrangements, which I believe to be the case, then they could not be expected to do anything about them to protect the Trust's position.
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> 46. In my opinion, Collins & May took all of the normal steps that a competent property lawyer would have taken in the circumstances of this case to ensure that the Trust obtained title to the Property, free of any interest that might be claimed by either of the vendors.

(Emphasis added.)

Our analysis

[31] Clifford J did not accept Mr Nolan's reasoning.[17] Respectfully, we take a different view from the Judge about the significance of the withdrawals of the caveats. The caveats were lodged to secure all of Mr Hoyte's indebtedness to Mr Memelink or his interests. We agree with Mr Nolan that, given Mr Memelink's express instructions that Collins & May Law did not need to concern themselves with the underlying arrangements, the simple proposition in the 12 September letter that payment of a sum sufficient to discharge the ASB Bank mortgage was all that was required to settle the transaction; the settlement statement provided by the vendors' solicitors; and the withdrawal of the caveats, together sufficiently credited the purchaser for that part of the purchase price not paid for the discharge of the mortgage.

[32] Those aspects reinforce the limited nature of the retainer and, consequently, the scope of Collins & May Law's duty. Mr Memelink elected not to entrust Collins & May Law with any responsibility for advising him on the underlying arrangements, which had been agreed before the firm was engaged and which meant

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[17] At [47] and [52].

that less than the full purchase price would be paid over on settlement. His instructions to the firm were limited to effecting the conveyancing settlement; he gave them precise instructions about how they were to settle. On the basis of Mr Memelink's limited instructions, Collins & May Law did not know and were not required to find out whether both Mr Hoyte and Ms Matthews accepted that settlement on the basis set out in the 12 September letter was sufficient to satisfy any personal claim the vendors might have had to receipt of the full purchase price. Lloyd Collins's request for confirmation that the balance of the funds could be released to his client was prudent, but express confirmation was not necessary to satisfy all of the purchaser's obligations on settlement. The settlement statement was sufficient for that purpose.

[33] We disagree, therefore, with Clifford J's view that obtaining an express discharge was an implied element of the retainer because it was needed as a matter of law.[18] That is inconsistent with the Judge's prior acceptance that, where a retainer has been properly limited in contract, the corresponding tortious duty will usually be similarly limited, and with his finding that Collins & May Law were instructed to settle the conveyance only and not to address the underlying arrangements in the transaction.[19]

[34] Clifford J noted that Mr Nolan's opinion was that it would have been normal practice for the vendors' solicitors to have recorded in their settlement statement the full purchase price of $570,000 and then to have granted an allowance for the amount to be satisfied by way of a reduction in the debt owing under the two caveats.[20] We agree with Mr Nolan's proposition, however, that by stipulating a lesser sum than the full purchase price as the balance required to settle, against the background of the Collins & May Law letter of 12 September 2006, the solicitors for the vendors gave a credit for the difference between the sum actually paid and the full purchase price so as to satisfy the debt owed to the caveators. That must include an acknowledgement by the vendors' solicitors on behalf of their clients that the settlement precluded any claim to payment of the balance of the purchase price not

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18 At [49]–[56].
19 See above at [27].
20 *Memelink v Collins & May Law*, above n 1, at [52].

satisfied by the payment of the lesser amount required to discharge the ASB Bank mortgage.

[35] Contrary to Clifford J's findings, therefore, we are satisfied that the vendors' solicitors' settlement statement provided sufficient clear evidence that payment of the sum tendered on settlement was a full and final discharge of the Link Trust's obligations to pay the full purchase price.[21]

[36] In reaching this view we do not overlook that at para 3(e) of the letter of 12 September 2006,[22] Collins & May Law requested that, prior to settlement, the vendors' solicitors should confirm that Collins & May Law was authorised to release the balance of the purchase price directly to the purchaser by way of a set-off in respect of the outstanding debts due pursuant to the two caveats. That was a prudent request but, in the circumstances, we do not consider that separate, express confirmation was required as a matter of law.

[37] There is nothing in the arrangements viewed as a whole (including Ms Matthews's written acknowledgement) to indicate that the vendors considered at the time of settlement that they would have an entitlement to claim the balance of the purchase price from the Link Trust. Although the vendors' solicitors did not give the confirmation sought by Mr Collins, The Conveyancing Shop did not challenge the proposition that Collins & May Law was authorised to release the balance of the purchase price directly to the purchaser by way of a set-off. In our view, the settlement statement provided the confirmation sufficiently by implication when it stated that the balance required to settle was $231,844.34, plus fees and disbursements and a charge for reading the water meter. Against the background of the limited scope of the retainer and the exchanges between the lawyers, we do not consider that an express reference in the settlement statement to the full purchase price would have made any material difference to determining whether Collins & May Law acted as reasonably competent practitioners.

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21 At [55].

22 Quoted above at [11].

[38] It is not insignificant, in our view, that Andrews J must have interpreted the documents in the same way in concluding that Mr Hoyte was precluded from recovering the unpaid portion of the purchase price.[23] Moreover, in the trial before Clifford J, there was no evidence to rebut the evidence of Mr Lloyd Collins that Mr Memelink had instructed him that the net balance of the $570,000 purchase price was being retained by Mr Memelink in satisfaction of the funds he was owed as secured by the caveats lodged against the property. In those circumstances, there was no proper basis upon which Mr Memelink could claim, contrary to those instructions, that Collins & May Law had acted negligently.

Causation argument

[39] We agree also with the proposition for the appellant that Mr Memelink's loss in the case before Andrews J was attributable not to any negligence on the part of Collins & May Law but to Mr Memelink's failure to produce at the hearing Ms Matthews's written acknowledgement that her interest in the Pakuranga property was available to secure and satisfy the indebtedness of Mr Hoyte and/or JHAL to Mr Memelink and Link Technology.

[40] In reaching that view, we depart from Clifford J's proposition that Andrews J's finding that there was no evidence of agreement by Ms Matthews to the set-off arrangements would not have been possible if the settlement statement had recorded the original purchase price, the allowances to be made by way of set-off and the conclusion that the amount to be paid on settlement was a full discharge of the obligation to pay the original purchase price.[24] It is clear that Andrews J was satisfied that the settlement was effected in a way which precluded any personal claim by Mr Hoyte without the need for a fuller explanation of the transaction in the settlement statement. It was Mr Memelink's failure to put in evidence Ms Matthews's acknowledgement of 27 May 2004, not anything done on settlement by Collins & May Law, that led Andrews J to find him liable to Ms Matthews for her share of the purchase price.

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23 *Matthews v Memelink*, above n 5, at [80].
24 *Memelink v Collins & May Law*, above n 1, at [59].

Result

[41] The appeal is allowed. We set aside the orders made in the High Court. Judgment is entered for the appellant on the respondents' claims.

[42] Given the result on the appeal, the respondents' cross-appeal to recover interest which had been claimed but was not awarded by Clifford J becomes moot. The cross-appeal is accordingly dismissed.

[43] Costs in the High Court to be determined in that Court in light of this judgment.

[44] Although we would normally make an order for standard costs in favour of the appellant, we were enjoined by counsel to receive further submissions in due course. Costs in this Court are reserved accordingly.

[45] Any claim for costs by the appellant shall be filed and served by 7 December 2017. Submissions by the respondents in reply shall be filed and served by 14 December 2017. Costs shall then be dealt with on the papers.

Solicitors:
Robertsons, Auckland for Appellant
Q H Law, Ōtaki for Respondents