IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-1952
[2016] NZHC 442

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

Hearing: 8-10 September 2015

Counsel: H Memelink, in Person, for the Plaintiffs
H M Twomey and M O Fee for Defendant

Judgment: 15 March 2016

JUDGMENT OF CLIFFORD J

Introduction

[1] In August 2006 the first plaintiff, the Link Trust (No 1) (the Trust), contracted to purchase 4 Suzetta Place, Pakuranga (the Property). The Property was then owned by Cecile Matthews and her husband, John Hoyte, as to a one-half share each. The agreed purchase price for the Property was $570,000. The second plaintiff, Harry Memelink, signed the agreement for sale and purchase on behalf of the Trust. Mr Memelink then instructed the defendants, the firm of Collins & May Law, to act for the Trust to settle the purchase.[1]

[2] Collins & May settled the purchase on behalf of the Trust on 21 September 2006 by the payment of $232,569.34, the amount called for by the vendors'

[1] The Trust is Mr Memelink's family trust.

settlement statement. Collins & May duly completed the purchase by arranging for title to the Property to be registered in the name of the Trust.

[3] In 2010 and 2011 Ms Matthews sued the Trust for what she said was the unpaid balance of the $570,000 purchase price. In May 2012 Andrews J found that the Trust was liable to pay Ms Matthews "her" one-half share of that balance.[2]

[4] The Trust and Mr Memelink now sue Collins & May. They say that Andrews J decided against them 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. They claim damages of $155,715.33, the amount Andrews J ordered the Trust pay Ms Matthews.

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

Facts

[6] There has been a lengthy dispute between Mr Memelink and Mr Hoyte, and Mr Memelink and Ms Matthews. The Trust purchased the Property as part of an earlier attempt to resolve that dispute. The trial before Andrews J, and the judgment which issued, was part of that dispute. Before me, evidence as to matters of fact was given by Mr Memelink, and Messrs Eugene and Lloyd Collins, the partners in Collins & May who dealt with Mr Memelink and the Trust. A reasonably clear, and

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2 *Matthews v Memelink* [2012] NZHC 2284.

largely undisputed, narrative of fact emerged. That narrative can be recorded by reference to the facts and circumstances that led to:

(i) Mr Memelink and the former first plaintiff, Link Technology 2000 Limited, registering caveats against the Property in December 2003;

(ii) the August 2006 purchase of the Property by the Trust; and

(iii) Ms Matthews' claim and Andrews J's judgment in May 2012.

Mr Memelink caveats the Property

[7] Mr Memelink and Mr Hoyte appear to have gone into business together, wholesaling tools, some time in 1998. Difficulties arose.

[8] Matters came to a head in late November 2003, focusing on Mr Hoyte's company, John Hoyte and Associates Limited (JHAL), of which both men were shareholders. JHAL had been used to operate the tool wholesaling business. Each claimed the other had not complied with the terms of their shareholders' agreement for JHAL. Mr Memelink said Mr Hoyte applied company funds for his personal benefit, including to improve his and his wife's family home, the Property. Mr Memelink said he was required to contribute funds to JHAL to meet that expenditure. Mr Memelink also said that Mr Hoyte had failed to complete the arrangements to transfer to him 50 per cent of the shares in JHAL, in exchange for Mr Memelink's financial and material (stock in trade) support of JHAL. On the morning of Saturday, 29 November 2003, following some form of confrontation at the premises of Link Technology in Lower Hutt, Mr Hoyte signed an acknowledgement. That acknowledgement, which Mr Memelink himself prepared, read in part as follows:[3]

> 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.)

[3] Mr Memelink gave evidence of having spoken to his then legal advisers (not Collins & May) before doing so.

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

[9] It was Mr Memelink's evidence that Ms Matthews had also signed such an acknowledgement around that time. I return to that question later.

[10] Mr Memelink subsequently arranged for caveats to be lodged against the title to the Property on behalf of himself and Link Technology. The estate or interest claimed in those caveats read as follows:

> 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 above named Caveator as Mortgagee.

[11] Those caveats were not challenged, either by Ms Matthews or Mr Hoyte. They remained on the title of the Property until the events of August 2006.

The Trust purchases the Property

[12] In August 2006 ASB Bank, as mortgagee of the Property, served a Property Law Act notice on Mr Hoyte and Ms Matthews, saying they were in default of the mortgage. As caveator, Mr Memelink received a copy of that notice.[4] To protect the equity in the Property, and his interests as caveator, Mr Memelink arranged for the Trust to purchase the Property. He did so (he says) on the following terms:

(a) The Trust would agree to buy the Property for $570,000.

(b) Recognising the monies owing to Mr Memelink by JHAL, and Mr Hoyte's (and Ms Matthews') guarantee of the same, the purchase would, however, be settled by the Trust paying an amount sufficient to clear the bank debt, with the balance being applied by way of set-off to the repayment of those outstanding debts.

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4 Property Law Act 2007, s 121.

[13] Mr Memelink himself prepared an agreement for sale and purchase between the Trust, Ms Matthews and Mr Hoyte by "filling in" the sale details on a seventh edition REINZ/ADLS standard form agreement for sale and purchase of real estate. As relevant, those details were:

(a) Purchase Price: $570,000;

(b) Deposit: $nil;

(c) Balance of purchase price to be paid or satisfied as follows: Paid in full on settlement date;

(d) Possession date: 31/8/06; and

(e) Finance date: 18/8/06.

[14] No other details were completed. The standard form agreement was not amended in any way, and no further terms of sale were included.

[15] Mr Memelink says that (undated) agreement was signed on or about 9 August. Mr Memelink told Mr E Collins of the transaction on or about August. Mr Memelink did not immediately provide Mr E Collins with a copy of the sale and purchase agreement. Mr E Collins did recall being told that the Trust was taking over the property in Auckland from Mr Hoyte and his wife in lieu of some debts owed by Mr Hoyte's company to Mr Memelink or his company. Mr E Collins was going on holiday on 4 September. He left a memorandum with his brother and partner, Mr L Collins in the following terms:

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 MEMH01 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

[16] In Ms Terpstra's (Kirsten's) email, she summarised monies owing as follows:

Initial stock that Harry provided Enterprise Tools	= $356,661.00
Loans from Harry (either from Link Tech or Trust etc.)	= $251,533.93
Rent owed for use of premises in Wellington	= $47,401.00
Directors Salary owed	= $58,200.00

[17] On receiving that memorandum, Mr L Collins emailed Mr Memelink. He said that as soon as he received the signed agreement for sale and purchase he could get matters under way, and that he awaited further instructions. Mr Memelink faxed him a copy of the agreement that afternoon. The same afternoon, Mr L Collins received confirmation of the loan that ASB had agreed to make to the Trust of $399,000. Some days later, Mr L Collins emailed Mr Memelink, asking Mr Memelink to urgently advise him who was acting for the vendor so that arrangements for settlement could be made as soon as possible. Mr Memelink

phoned Mr L Collins, but he was out. A note was left for Mr L Collins by his secretary who took the call, to call Mr Memelink back. Mr L Collins said he did that either that afternoon or the next morning. Mr L Collins' evidence was that:

> I have made the following note of his instructions on the bottom of the note to call him:
>
> (a) Sufficient to clear existing security $195k;
>
> (b) The balance is being satisfied by funds owed to caveats;
>
> (c) Auth (authorise) balance.
>
> 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.

[18] Ms Matthews and Mr Hoyte's solicitors were at that time Knight Coldicutt McMahon Butterworth of Auckland. On 12 September 2006 Mr L Collins wrote to that firm, confirming that the Trust was in a position to settle. The letter dealt with settlement in the following terms:

> …
>
> 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.
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> (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.

…

[19] On 15 and 19 September Mr L Collins wrote again to Knight Coldicutt McMahon Butterworth, enquiring as to when the vendors would be in a position to settle. On 20 September Ms Niamh McMahon, a partner in that firm, faxed Mr L Collins in the following terms:

> Thank you for your fax of 19 September 2006.
>
> I met with John Hoyte and Cecile Matthews yesterday. I expressed concern to my clients as to the arrangements between them and your client Harry Memelink.
>
> I understand that John and Cecile are going to consider their position and provide further instructions in due course.

[20] The next day, Mr L Collins was contacted by a principal of The Conveyancing Shop, lawyers of Epsom, Auckland. He was told that firm was now acting for Mr Hoyte and Ms Matthews, at the introduction (as I understand) of Mr Memelink. Later that morning a faxed letter provided confirmation of settlement that day, 21 September 2006, and the required settlement details. Enclosed with that letter was a settlement statement in the following terms:

> Collins & May Law Office
>
> RE: John Hoyte & Cecile Matthews to H Memelink
>
> Settlement Statement
>
> | | |
> |---|---|
> | Balance required to settlement | $231,844.34 |
> | Fees and Disbursement | $700.00 |

Special Water Reading charge		$25.00
Balance required from client	$232,569.34	
Total	$232,689.34	232,569.34

[21] Neither The Conveyancing Shop's letter of 21 September, nor that settlement statement, record the basis upon which the "Balance required to settlement" had been formulated.

[22] Collins & May arranged for The National Bank to provide a bank cheque, payable to The Conveyancing Shop's trust account, for that settlement amount. As noted, settlement duly took place, the transfer of the title was registered and at the same time the caveats lodged by Mr Memelink and Link Technology were withdrawn.

[23] As far as Collins & May were no doubt concerned, that matter was at an end.

The further dispute and Andrews J's judgment

[24] Notwithstanding the sale of the Property to the Trust, Mr Hoyte and Ms Matthews continued to live there. In his evidence before Andrews J Mr Hoyte claimed that reflected an agreement pursuant to which, amongst other things:

(i) he and Ms Matthews would have the right to lifetime occupancy of the Property at no cost; and

(ii) GSE Group Limited (GSE), established to effect the expansion of JHAL's business, would meet the bank debt secured against the Property, pay Mr Hoyte $20,000, a salary for life of $5,000 per month, and provide him with a motor vehicle.

[25] Mr Memelink denied that such an agreement was ever reached.

[26] In any event, a lease agreement was entered into between the Trust and GSE for an initial term of three years with two rights of renewal of three years each. The rental was to be $480 per week plus GST subject to "rent review from time to time".

No rent was ever paid to the Trust, whether by GSE, Mr Hoyte, Ms Matthews or anybody else.

[27] In 2008 matters again came to a head. In June of that year Mr Memelink had trespass notices served on Mr Hoyte and Ms Matthews. He took the dispute to the Tenancy Tribunal, then the District Court. That year Ms Matthews and Mr Hoyte lodged a caveat against the title to the Property, claiming, in Andrews J's words, "an interest as beneficiaries by virtue of a cestui que trust, arising out of the agreement claimed to have been reached in September 2006".[5]

[28] The Trust applied to lapse the caveat. Ms Matthews took proceedings to defend the caveat, and shortly thereafter made a substantive claim based on the terms of what she said was that 2006 agreement. She did so in both her and Mr Hoyte's names, Mr Hoyte by then being a bankrupt. Ms Matthews alleged that the balance of the purchase price of the Property from the September 2006 transaction, namely $337,430.66, remained unpaid. She sought an order for specific performance of that agreement and related orders.

[29] Collins & May were initially instructed by Mr Memelink with respect to Ms Matthews' claims. When they experienced difficulty in obtaining instructions and being provided with access to relevant documents, they declined to act further. Other solicitors acted when the matter came to Court.

[30] At the trial, Ms Matthews and Mr Hoyte gave evidence. They both denied ever having agreed to mortgage the property, or to accepting less than the stated purchase price. When confronted with a copy of Mr Hoyte's memorandum from November 2003, Mr Hoyte and Ms Matthews both denied that the signature was his. There was no documentary record, at the trial, of any agreement by Ms Matthews to mortgage the property. Andrews J found that Mr Hoyte had, indeed, signed the November 2003 acknowledgement, agreeing to guarantee a mortgage on the terms therein recorded. In doing so she compared the signature on that memorandum with Mr Hoyte's signature on the 2006 agreement for sale and purchase and on documents filed in the proceedings. In the absence of expert evidence that the signature on the

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5 Above n 2, at [36].

November 2003 memorandum was a forgery, the Judge considered it reasonable to infer that the signature was Mr Hoyte's. That conclusion was reinforced by the fact that Mr Hoyte never challenged the caveats that were lodged.

[31] The Judge then reasoned:

> [61] That conclusion raises the further question of what was the implication, if any, of the November 2003 agreement on the plaintiff's interest in the property.
>
> [62] The plaintiff and Mr Hoyte were recorded on the title to the property as owners "in equal shares". The words "in equal shares" are words of severance: that is, they indicate that Mr Hoyte and the plaintiff took distinct and separate shares in the property. They held the property, therefore, as tenants in common in equal shares, rather than as joint tenants. Accordingly, Ms Matthews held a separate half interest, which Mr Hoyte could not mortgage by entering into the November 2003 agreement. (footnote omitted)

[32] The Judge went on to consider the consequences of the 2006 agreement for sale and purchase, and of the way that transaction was settled. In argument on that issue counsel for Ms Matthews placed particular reliance on the fact that The Conveyancing Shop had not, as requested by Collins & May in their 12 September letter to Knight Coldicutt McMahon Butterworth, provided an express acknowledgment that the balance of the purchase price was to be settled by way of set off.

[33] The Judge concluded:

> *Discussion*
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> [79] I do not accept Mr Hoyte's evidence that he knew nothing about Collins & May's letter of 12 September 2006. That evidence is inconsistent with his evidence that Ms McMahon was "unhappy with the set up". It is unlikely that he could have known that Ms McMahon was "unhappy" without being aware of what the "set up" was – that is, the transactions and the basis on which the purchase price would be paid. I find that he was aware of Collins & May's letter.
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> [80] None of the solicitors gave evidence. However, in the light of the following:
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> (a) the explicit requirement for confirmation as to the basis on which settlement was to proceed, as set out in Collins & May's letter of 12 September 2006;

(b) Mr Hoyte's evidence that he collected an envelope of papers from Knight Coldicutt McMahon Butterworth and delivered it to the Conveyancing Shop, before settlement;

(c) Mr Hoyte's evidence that he instructed the Conveyancing Shop that settlement was to proceed;

(d) my finding that Mr Hoyte was aware of Collins & May's letter of 12 September 2006; and

(e) the fact that settlement proceeded on the basis outlined in Collins & May's letter,

[80] I am 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.

[81] However, I am not satisfied that the variation to the agreement for sale and purchase extended to the plaintiff's separate interest in the property. At [62], above, I concluded that the agreement to mortgage in the November 2003 agreement did not affect the plaintiff's half share. I am not satisfied that the evidence supports a finding that the plaintiff 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.

[34] As matters transpired, there was in fact such an agreement – or at least something akin to it – in existence. At the time, however, Mr Memelink did not have a copy of it: it was subsequently discovered by Collins & May in the course of these proceedings. It read as follows:

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 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 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

[35] At the start of the hearing before me, counsel for Collins & May objected to Mr Memelink's production of that document. When it was pointed out that it had been discovered as mentioned that objection was, understandably, withdrawn.

[36] Whilst the document is not in the same form as that signed by Mr Hoyte, it does show knowledge on Ms Matthews' part of relevant arrangements. I simply note those matters for the record. As will become apparent, it is in my view not material whether Collins & May knew the details of Mr Memelink's arrangements with Mr Hoyte and Ms Matthews. What matters is the basis upon which Mr Memelink instructed them that the purchase of the property was to be settled.

[37] The essence of the Trust's negligence claim against Collins & May is found in Andrews J's finding that she was not satisfied the evidence supported a finding that Ms Matthews had agreed to her separate share of the purchase price being used to meet debts for which Mr Hoyte was responsible.

Analysis

Breach of contract – negligence

[38] Collins & May deny liability on the basis that their contract of retainer with Mr Memelink was a limited one: Mr Memelink assured them that the underlying arrangements regarding the balance of the purchase price were "covered" and that Collins & May need not concern itself with them. Much of the evidence given at trial was addressed to that issue, and dealt with the way in which Mr Memelink had instructed Collins & May to act for the Trust.

[39] It is a well-established principle that the obligations of a solicitor can be limited by agreement between the parties. In *Frost & Sutcliffe v Tuira*,[6] the Court of Appeal cited the Privy Council in *Clarke Boyce v Mouat:*[7]

> [23] The Privy Council clearly recognised and accepted in *Clark Boyce v Mouat*…that in general terms solicitors are entitled to limit the scope of the retainer, and hence their potential liability, as they see fit. Lord Jauncey of

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6 *Frost and Sutcliffe v Tuiara* [2004] 1 NZLR 782.
7 *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC).

> Tullichettle, delivering the judgment of their Lordships, implicitly recognised this when he said at 648:
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> > When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.
>
> [24] It must follow that a solicitor may, at least in general terms, contract with a client on the basis that advice on the wisdom of the transaction is not within the scope of the retainer. There is, however, a clear difference between the wisdom of a transaction and its legal effects, whether actual or potential…

[40] The Court in *Tuiara* confirmed that where a retainer has been properly limited in contract, the corresponding tortious duty will usually be similarly limited.[8] The authors of *Laws of New Zealand* summarise the well-established principles in this area:[9]

> The duty of a solicitor is not open-ended. He is not and never has been held to be an insurer of any and every client he acts for. The duty of a solicitor in any particular case depends entirely on what he is employed to do, *Griffiths v Evans*. To similar effect is the observation in the case of *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* 571 in which Oliver J at 583 observed that the duties owed by a solicitor to his client are high in the sense that he holds himself out as practising a highly-skilled and exacting profession yet the court must beware of imposing on solicitors or professionals in other spheres, duties which go beyond the scope of what they are requested and undertake to do. See *Knox v Till* and *Camdoola Investments Ltd v Cavell Leitch Pringle & Boyle* (defendant consulted after contract entered into). The plaintiff was not entitled to expect solicitor's opinion as to the financial wisdom of the transaction when required only to advise on the conditions of the contract and to implementation. See also *Burbery Mortgage Finance & Savings Bank Ltd v Haira.*

[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,

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8 At [22].

9 *Laws of New Zealand* Lawyers and Conveyancers at [99], n 6, citations omitted.

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.[10]

[42] I acknowledge that the law in this area is not without complexity. Nevertheless, a leading expert writes:[11]

> A written record must contain an adequate statement of the agreed consideration, or of the agreed method by which the price is to be fixed. Any agreed details as to the time or method of payment must also be included in the record. For example, if part of the purchase price is to be paid by way of a mortgage back to the vendor, all agreed details of that mortgage such as the period of the loan and the rate of interest must be stated.

[43] Moreover, whilst s 67 of the Property Law Act 2007 precluded any claim that Ms Matthews or Mr Hoyte might make following settlement for an interest in the property because of unpaid purchase monies, settlement does not preclude such a claim against a purchaser personally.

[44] It does not matter, therefore, that Collins & May did not know the details, and were not legally responsible for the efficacy, of the underlying arrangements which gave rise to the right of set-off Mr Memelink told them would be exercised on settlement. What did matter was that Collins & May's clear instructions were to effect settlement on that basis. Whilst Mr Memelink's instructions to Collins & May may have been limited, any limitation agreed by Mr Memelink did not relieve Collins & May from that obligation.

[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

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10 Property Law Act 2007, s 24; previously in Contracts Enforcement Act 1956.
11 D W McMorland *Sale of Land* (3rd ed, Cathcart, Wellington 2011) at [4.09].

competent practitioner would do having regard to the standards normally adopted in his profession".[12]

[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:

> 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.
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> 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.
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> 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.
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> 43. In my opinion, by virtue of the vendors transferring title to the Property, Collins & May were entitled to believe that they had

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[12] Duncan Webb *Ethics Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 178, n 44.

obtained for the Trust all of the right, title and interest in the Property of the two vendors.

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.

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.

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.

[47] I have a little difficulty in following Mr Nolan's reasoning as regards the significance of the withdrawals of the caveats, given the identity of the interests of Mr Memelink, the Trust and Link Technology. The point is not whether the mode of settlement made any difference to Ms Matthews and Mr Hoyte as vendors, but whether it made a difference to the Trust. Ms Matthews and Mr Hoyte did not have any particular interest in the process whereby Link Technology and Mr Memelink released their caveats. Nor is it an answer that the "equity" in the property was transferred and that the Trust had obtained good title to the whole of the property, free of any interest in the property that might be claimed by either of the vendors. Settlement needed to be effected on a basis that recorded the discharge of the Trust's personal covenant to pay the stated purchase price in the sale and purchase agreement.

[48] Did the settlement statement do that?

[49] Commenting on the significance of settlement statements, McMorland writes:[13]

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[13] McMorland, above n 11, at [11.08].

(b) Settlement statement

> The normal procedure is that the vendor calculates the apportionments and other items involved in determining how much the purchase is to pay on settlement. These are then sent to the purchaser before settlement in the form of a settlement statement. However, though this "is a customary step in conveyancing procedure", it "is merely a matter of practice and not of law".
> …

[50] That "normal procedure" was at the time reflected in the 7th (2) REINZ/ADLS sale and purchase agreement used by Mr Memelink which, as to settlement, provided as follows:

> **Settlement**
>
> 3.5 The purchase shall prepare, at the purchase's own expense, a memorandum of transfer of the property, executed by the purchaser if necessary. The purchaser shall tender the memorandum of transfer to the vendor or the vendor's solicitor a reasonable time prior to the settlement date.
>
> 3.6 The vendor shall prepare, at the vendor's own expense, a statement of apportionments, showing all outgoings and incomings apportioned at the possession date. The vendor shall tender the statement of apportionments to the purchaser or the purchaser's solicitor a reasonable time prior to the settlement date.
>
> 3.7 On the settlement date:
>
> (1) The purchaser shall pay or satisfy the balance of the purchase price, interest and other moneys, if any, due as provided in this agreement (credit being given for any amount payable by the vendor under subclause 3.9 or 3.10); and
>
> (2) The vendor shall concurrently hand to the purchaser:
>
> (a) the memorandum of transfer of the property provided by the purchaser under subclause 3.5, in registrable form; and
>
> (b) all other instruments in registrable form required for the purpose of registering the memorandum of transfer; and
>
> (c) all instruments of title –
>
> the obligations in subclauses 3.7(1) and 3.7(2) being interdependent.

[51] As can be seen, the "statement of apportionments" called for does not explicitly refer to credits against, or other changes to, the purchase price. In terms of

cl 3.7, the purchaser's obligation remains to "pay or satisfy the balance of the purchase price … as provided in this agreement". Crucially, settlement and completion does not necessarily discharge a purchaser's personal covenant to pay the purchase price.[14]

[52] Agreements for the sale and purchase of land must – in the way explained above – be recorded in writing. In my view the settlement statement prepared by The Conveyancing Shop did not, notwithstanding Mr Nolan's opinion to the contrary, adequately document the basis upon which the settlement was – from the Trust's perspective – to occur in a way that conformed with normal professional standards. As Mr Nolan himself acknowledges:

> 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 a reduction in the debt owing under the two caveats.

In my view that "normal practice" was what – in Mr Memelink's interests – was required here. Collins & May themselves recognised that, when they wrote to Knight Coldicutt McMahon Butterworth setting out their requirements for settlement, in particular that Collins & May required written confirmation it was authorised to release the balance of the purchase price to the purchaser.

[53] Subsequent editions of the REINZ/ADLS agreement for sale and purchase have, I note, reinforced the role of settlement statements in conveyancing transactions in New Zealand. Commenting on the eighth edition of the REINZ/ADLS form of agreement for sale and purchase, McMorland writes:[15]

> Because there is no duty on the vendor under the general law to provide a settlement statement, any duty on the vendor to do so must therefore be found in the contract itself. Clause 3.6 of the REI-ADLS form provides that the vendor shall prepare, at the vendor's own expense, a settlement statement; and that the vendor shall tender the settlement statement to the purchaser or the purchaser's lawyer a reasonable time prior to the settlement date. "Settlement statement" is defined in cl 1.1(19) as a statement showing the purchase price, plus any GST payable by the purchaser, less any deposit or other payments or allowances to be credited to the purchaser, together with apportionments of all incomings and outgoings apportioned at the

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14 *Paugra Holdings Ltd v Harvestfield Holdings Ltd* [2014] NZCA 164 at [37(a)].

15 McMorland, above n 11, at [11.09], footnotes omitted.

> possession date. Clauses 6.2(4) and 6.4(2) contain undertakings by the vendor regarding the apportionments.

[54] I note, in particular, the reference now in the definition of settlement statement of "other payments or allowances to be credited to the purchaser". That confirmation of the importance of written records in my view confirms, but does not change, the requirements for clarity and written documentation of those matters as they applied at the time the Trust settled the purchase of the Property.

[55] The Conveyancing Shop's settlement statement did not clearly evidence that payment of the sum tendered on settlement was a full and final discharge of the Trust's personal covenant to pay the purchase price. The settlement statement might have, in Mr Nolan's words, given a "credit" on settlement. It did not, however, document the full significance of that "credit", and that it reflected a full and final discharge of the Trust's obligation to pay the purchase price.

[56] Collins & May's reliance on that settlement statement, and its failure to obtain a clear written acknowledgement that payment of the lesser amount on settlement discharged the Trust's obligation to the vendors in full, in my view constitutes negligence. It also constitutes a failure by Collins & May to comply with the terms of their contract of retainer, namely to settle the agreement for sale and purchase in accordance with Mr Memelink's instructions.

Causation and contribution

[57] It was argued for Collins & May that any (denied) negligence was not causative. In particular, the agreement for sale and purchase was unconditional when the firm was instructed, and on the face of things the Trust was obliged to pay the full purchase price without deduction.

[58] I do not find that argument persuasive. As matters transpired, settlement did occur on the basis of the payment of the bank debt. The argument may be that, had Ms Matthews been confronted with an explicit settlement statement, she may have balked. If that had have happened, which as matters transpired seems unlikely, particularly given Ms McMahon's account of her meeting with Mr Hoyte and

Ms Matthews on 19 September 2006, then settlement may not have occurred at all. A quite different scenario, about which I could only speculate, would then have arisen.

[59] I also do not agree with Mr Nolan's conclusions at para 45 of his evidence, set out above at [46], that (a) the only reason Andrews J was able to find that the Trust owed money to Ms Matthews was that there was a complex set of other arrangements between the parties that had been made at the same time; and (b) if Collins & May knew nothing about those arrangements, then it could not be expected to do anything about them to protect the Trust's position. In my view, the crucial element for the purposes of this claim is that part of Andrews J's reasoning that relies on her finding of fact that there was no evidence of agreement by Ms Matthews to the set-off arrangements. I do not think that finding of fact would have been possible if, in addition to Collins & May's letter of 12 September to Knight Coldicutt McMahon Butterworth, the settlement statement – or some other record in writing – had correctly recorded the original purchase price, the allowances, including by way of set-off, and, therefore, the amount to be paid on settlement in full discharge of the obligation to pay that original purchase price.

[60] I therefore conclude that Collins & May's negligence was causative of the loss the Trust suffered.

[61] The final matter I must consider is whether the Trust contributed negligently itself to that outcome. I acknowledge that Mr Memelink was – to put it mildly – a difficult client. The circumstances in which Collins & May ceased to act for him on Ms Matthews' proceedings evidenced that. Be that as it may, and to repeat myself, Mr Memelink's instructions on behalf of the Trust to Collins & May were clear, as that firm understood. There was, in my view, no contributory negligence on the part of the Trust or Mr Memelink.

Result

[62] Collins & May Law are, therefore, to pay damages to the Trust in the sum of $155,715.33. I note that the amount the Trust was required to pay Ms Matthews as a result of Andrews J's judgment was less than that. That lesser amount took account

of other amounts (as I understand it principally rent) that were owing to the Trust. For the award of this Court to properly compensate the Trust, damages in the original "notional" amount are therefore called for.

Costs

[63] As Mr Memelink himself represented the Trust, no question of costs arises. Collins & May will, however, pay the reasonable disbursements of Mr Memelink and his McKenzie Friend, Ms Terpstra.

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Clifford J

Solicitors:
Robertsons, Auckland for Defendant