IN THE COURT OF APPEAL OF NEW ZEALAND

CA251/2016
[2017] NZCA 401

BETWEEN	GARY OWEN BURGESS Appellant
AND	MALLEY & CO Respondent

Hearing: 25 July 2017 (further submissions received 10 August 2017)

Court: French, Simon France and Toogood JJ

Counsel: Appellant in person
M E Parker for Respondent

Judgment: 13 September 2017 at 3.00 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis with a 25 per cent uplift and usual disbursements.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] Malley & Co is a law firm. It issued proceedings against its former client Mr Burgess for recovery of legal fees. He denied liability and counterclaimed alleging seven causes of action including negligence and breach of fiduciary duty.

[2] The proceeding was heard by Gendall J in the High Court. The Judge held the fees were owing and dismissed the counterclaim.[1] He entered judgment for Malley & Co in the sum of $54,594.81 together with interest at the rate of 11 per cent per annum, being the contracted rate of interest payable on unpaid fees under the written retainer between the firm and Mr Burgess.

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1 *Malley & Co v Burgess* [2016] NZHC 907 [HC judgment].

[3] Mr Burgess now appeals the decision. He contends the Judge failed to evaluate the evidence properly and misdirected himself in law.

Background

[4] In February 2008 Mr Burgess instructed Mr Tait of Malley & Co to act for him in relationship property proceedings between him and his estranged wife, Ms Beaven. Up until that point, Mr Burgess had largely been representing himself. There had been a Family Court decision issued by Judge Strettell[2] which Mr Burgess had appealed to the High Court. The appeal was unsuccessful apart from two issues which in late 2007 the High Court Judge (John Hansen J) referred back to Judge Strettell for reconsideration.[3]

[5] Mr Tait represented Mr Burgess at the second hearing before Judge Strettell. In his subsequent decision, Judge Strettell assessed the parties' respective contributions to the relationship property as 62:38 in favour of Ms Beaven.[4] This represented a slight improvement for Mr Burgess because in Judge Strettell's first decision the assessment had been 65:35. In money terms, it meant the relationship property was divided as to $142,162.11 to Mr Burgess and $231,948.68 to Ms Beaven.

[6] One of the key items of relationship property was a rural property at Medbury registered in joint names. Judge Strettell ordered that the Medbury property was to be sold forthwith unless, within seven days of the judgment, Mr Burgess advised the Court of his intention to retain the property in which case Judge Strettell said he had 28 days to make payment to Ms Beaven.[5] The amount of the payment required was $36,250.

[7] Mr Burgess elected to acquire the Medbury property from Ms Beaven. He also filed an appeal in the High Court against Judge Strettell's second decision and obtained a stay pending the determination of his appeal.

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2 *Burgess v Beaven* FC Christchurch FAM-2005-009-3126, 16 May 2007 [First FC judgment].
3 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 27 November 2007.
4 *Burgess v Beaven* FC Christchurch FAM-2005-009-3126, 30 June 2008 [Second FC judgment] at [37].
5 Second FC judgment, above n 4, at [47].

[8] There was then a further development. Before Mr Burgess' High Court appeal could be heard, the Southland Building Society which held a mortgage over Medbury had served a default notice threatening a mortgagee sale. Mr Burgess proposed refinancing and obtained a loan offer from TSB Bank. However, in order to take up the new loan and repay the Southland Building Society, he needed the Medbury property to be in his sole name.

[9] From Ms Beaven's perspective, it was in both their interests to avoid a mortgagee sale. On the other hand, she was unwilling to transfer her share in the Medbury property without being paid for it and also without receiving payment for court costs of $9,000 that had been awarded to her by John Hansen J. She was also apprehensive about security for any future costs, having regard to the already protracted nature of the litigation. For his part, Mr Burgess was (according to Malley & Co) not prepared to make any payments to Ms Beaven until his High Court appeal was heard.

[10] Negotiations to resolve the impasse took place between Mr Tait and Ms Corry, the lawyer acting for Ms Beaven. Time was of the essence because on 3 September 2008 the Southland Building Society imposed a deadline of 11 September 2008 for payment, otherwise it would proceed with its mortgagee sale.

[11] The negotiations culminated in the signing of a consent memorandum dated 9 September 2008. The memorandum was addressed to the Family Court and was signed by the two lawyers on behalf of their respective clients.

[12] The memorandum is at the centre of this appeal and it is therefore necessary to explain its content in some detail.

[13] Judge Strettell had reserved the right of either Mr Burgess or Ms Beaven to apply for such further orders as were necessary to finalise division of property. The memorandum commenced with a reference to that right and then summarised the difficulties Mr Burgess was facing regarding the bank loan.

[14] Under the heading "Conditional Agreement on Transfer" the memorandum stated:

> The parties have agreed that Ms Beaven will transfer her ownership of the property to Mr Burgess in order that he may proceed with the refinancing but this transfer is not to be taken, at this stage, as a complete transfer of Ms Beaven's beneficial ownership of the property. Mr Burgess will be holding the property on trust for himself and Ms Beaven pending finalisation of all monies due by one party to the other in terms of the Family Court Judgment and or the outcome of the Appeal in the High Court on 28 October 2008.

[15] The memorandum then continued under the heading "Proposed Orders" to say that the parties were seeking the following by consent orders:

(a) Ms Beaven will transfer her share in the Medbury property to Mr Burgess for the purpose of enabling him to refinance the Southland Building Society loan.

(b) In consideration for the transfer of title to Mr Burgess, his solicitors shall hold in their trust account the sum of $36,250, which is to be placed on interest bearing deposit pending the outcome of the appeal in the High Court.

(c) At the conclusion of that appeal, the sum of $36,250 and interest shall be paid forthwith to Ms Beaven unless the outcome of the High Court appeal is that a lesser sum should be paid, in which case the lesser sum will be paid.

(d) Mr Burgess and his solicitors are to protect Ms Beaven's entitlement to the High Court costs already made in her favour by utilising the TSB mortgage facility. Mr Burgess' solicitors will arrange for the sum of $9,000 (or any lesser sum should this be appropriate at the conclusion of the appeal) to be drawn down and paid to Ms Beaven at the conclusion of the appeal.

(e) The solicitors are to obtain an irrevocable authority from Mr Burgess in order to fulfil the undertakings and requirements imposed upon them and him as a result of these orders.

(f) Pending the determination of the current appeal and full satisfaction of her entitlements regarding the property and litigation about it, Ms Beaven is entitled to file a notice of claim or caveat against the title to the Medbury property subject to the prior registration of the TSB loan.

(g) In the event that any further Court ordered costs are payable by Mr Burgess to Ms Beaven, the Medbury property shall be regarded as security for those costs.

(h) When all Ms Beaven's interest in the property has been satisfied by payment of the amount due under the judgment and under appeal, and by payment of all awards of costs, she shall withdraw the notice of claim/caveat.

[16] The reference to a notice of claim was a reference to a notice of claim of interest under s 42 of the Property (Relationships) Act 1976. As explained by Gendall J,[6] a notice of interest is similar to a caveat and effectively prevents any dealing with the land until its removal.

[17] It was anticipated that Ms Beaven's costs award of $9,000 would be paid from the undrawn portion of the TSB mortgage. In order to provide an alternative source of funds to cover the costs award, Mr Tait also proposed that Mr Burgess would mortgage the Medbury property to Malley & Co and create a power of attorney and caveat in Malley & Co's favour. In evidence, Mr Tait described this as taking "a belts and braces approach".

[18] In accordance with the terms of the consent memorandum, on 12 September 2008, title to the Medbury property was duly transferred into the sole

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6 HC judgment, above n 1, at [59].

name of Mr Burgess, the TSB loan was drawn down, the monies were used to repay the Southland Building Society and a notice of claim in favour of Ms Beaven was registered. A caveat was also registered in the name of Malley & Co, Mr Burgess having signed an agreement to mortgage in favour of Malley & Co. Malley & Co retained the $36,250 owing to Ms Beaven under Judge Strettell's second decision in its trust account.

[19] In late 2008, Mr Tait represented Mr Burgess at the hearing of the appeal in the High Court against Judge Strettell's second decision. The appeal was dismissed by Fogarty J.[7] An application in the High Court for leave to appeal Fogarty J's decision to this Court was also declined.[8] On 3 March 2009, Malley & Co disbursed the $36,250 to Ms Beaven together with a payment on account of interest. The costs of $9,000 were never paid for reasons which are disputed.

[20] On 3 June 2009, Mr Tait obtained special leave from this Court to appeal out of time against the decision of John Hansen J.[9] He also filed an application in the Family Court to remove the notice of claim over the Medbury property, so that Mr Burgess could fund the prosecution of his appeal in the Court of Appeal and in particular pay the setting down fee and security for costs.

[21] In its leave decision, this Court stated that the relationship property proceedings had gone on for far too long and were wasteful of the courts' resources as well as those of Mr Burgess and Ms Beaven. It said that taking what was the best possible outcome from Mr Burgess' perspective, the amount at issue was approximately $40,000. This Court urged the parties to attempt to settle their dispute without the need for a further hearing.[10]

[22] According to Mr Tait's evidence, he encouraged Mr Burgess to come to a mutually acceptable solution with Ms Beaven, but Mr Burgess was unwilling to accept that the most he could hope to gain from the litigation was around $45,000. Mr Tait's evidence on this point was not contested.

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7 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 15 December 2008.
8 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 11 February 2009.
9 *Burgess v Beaven* [2009] NZCA 229. This Court simultaneously declined leave to appeal against the decision of Fogarty J, as it became unnecessary.
10 At [27].

[23] On 23 October 2009, Mr Tait wrote to Mr Burgess repeating concerns about continued non-payment of outstanding fees and disbursements owing to Malley & Co. The letter advised that the firm needed an arrangement for payment to be put in place, otherwise it would be unable to proceed with either the case in the Court of Appeal or the Family Court.

[24] Mr Burgess replied on 14 November 2009 terminating the retainer.

[25] Mr Burgess then acted for himself at the hearing of the application to remove the notice of claim. The application was dismissed by Judge Somerville principally on the grounds it would be unjust if Mr Burgess were not held to the bargain he made with Ms Beaven when she agreed to transfer the property to him.[11] The $9,000 had not been paid and there was still the prospect of a future costs award for which she had security under the memorandum.

[26] On 12 January 2010, Mr Burgess lodged a multiplicity of complaints against Mr Tait with the Lawyers Complaints Service. The complaints are broadly similar to those comprising the counterclaim in this proceeding. None of the complaints was upheld except for two which we address later.

[27] Meantime Mr Burgess was facing another threatened mortgagee sale of the Medbury property. He had defaulted on his payments under the mortgage to TSB and, in July 2010, the bank exercised its power of sale. The sale resulted in a loss. It also resulted in Ms Beaven's notice of claim being discharged.

[28] The appeal in this Court against the 2007 decision of John Hansen J was heard on 5 October 2010, Mr Burgess again representing himself. Contrary to the findings in the Family Court and High Court, this Court held there was no basis for an unequal distribution.[12] It ordered that Mr Burgess was entitled to receive $22,000 from Ms Beaven. That amount was further increased by the Supreme Court on

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[11] *Burgess v Beaven* FC Christchurch FAM-2005-009-3126, 23 April 2010; aff'd *Burgess v Beaven* HC Christchurch CIV-2010-409-876, 4 October 2010.

[12] *Burgess v Beaven* [2010] NZCA 625, [2011] NZFLR 609.

appeal to $30,046.25.[13] The calculation did not take into account a number of unpaid costs awards in favour of Ms Beaven.

[29] In the course of its judgment, the Supreme Court rejected a submission made by Mr Burgess that Ms Beaven should be held responsible for his losses associated with the TSB mortgagee sale. It stated that such an exercise:[14]

> … would, retrospectively, make her a hostage to Mr Burgess' entrepreneurial activity in relation to Medbury despite Mr Burgess having elected to take title to Medbury at a time when the second judgment of Judge Strettell was in place and he was thus well-positioned to assess the financial implications, and thus the risks, of doing so. Despite his success in the Court of Appeal — and his greater success in this Court notwithstanding — he has been overly litigious and not always focused on what is truly relevant and he has undoubtedly contributed to the imbroglio. … [H]er insistence on enforcing the judgments in her favour does not give rise to a claim against her for the consequences.

The defence and counterclaim

[30] Mr Burgess is highly critical of the quality of the work done for him by Mr Tait. He has several complaints. These are advanced both as a defence to the claim for unpaid fees and in support of the counterclaim. In particular, Mr Burgess holds Malley & Co responsible for the loss of the Medbury property and associated costs as well as general and exemplary damages. The amount of his counterclaim far exceeds the amount of the fees.

[31] The various causes of action pleaded in the counterclaim can be summarised as negligence (failing to give advice or adequate advice relating to the division of relationship property and the consent memorandum); breach of fiduciary duty (regarding the memorandum and its implementation and the operation of the firm's trust account) breach of contract; malicious prosecution and fraud.

[32] There is considerable overlap between the various claims. The central allegation is that as a result of Mr Tait's negligence and breach of fiduciary duty, the Medbury property did not vest in Mr Burgess as his separate property. He wanted clear title and had instructed Mr Tait to achieve that. But instead the

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13 *Burgess v Beaven* [2012] NZSC 71, [2013] NZLR 129.
14 At [50].

property was transferred to him as trustee and subject to Ms Beaven's notice of interest. The notice of interest limited his ability to deal with the property and led directly to the mortgagee sale.

[33] In evidence, Mr Burgess claimed that at no stage was he ever advised that Mr Tait was negotiating an agreement with Ms Beaven's solicitor. He did not consent to it and only found out about the memorandum later. He said he understood he was to receive legal and beneficial ownership of the Medbury property as required by Judge Strettell's second decision. He "had no idea" the memorandum would delay vesting of Medbury as his separate property.

[34] On the eve of the hearing before us, Mr Burgess sought to adduce additional evidence relating to what he says are continuing losses he has incurred since Gendall J's decision. We declined leave because in our view the evidence was not relevant to the issues before us. The issue before us regarding the alleged losses is one of causation, not quantum.

The High Court decision

[35] The hearing before Gendall J lasted four days and was followed by written submissions. The Judge made the following key findings:

(a) Mr Tait was a credible and reliable witness.[15]

(b) He carried out the work he was required to undertake under his retainer with Mr Burgess in a competent and professional manner.[16]

(c) Mr Burgess received considerable benefit from that work including obtaining leave from the Court of Appeal which was a turning point in the case.[17]

(d) The fees were reasonable.[18]

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15 HC judgment, above n 1, at [34].
16 At [45].
17 At [19], [28] and [92].
18 At [28].

(e) As regards the memorandum, that was very much in Mr Burgess' interest. It averted the SBS mortgagee sale and gave him the opportunity to retain the Medbury property.[19]

(f) Mr Burgess' claims that the agreement in the memorandum was made without his knowledge or understanding were not supported by the evidence.[20]

(g) The subsequent loss of Medbury was due to Mr Burgess' own actions in being unable almost from the outset to service the new mortgage he had arranged.[21]

Grounds of appeal

Failure to give reasons

[36] Mr Burgess makes a general complaint that Gendall J failed to give reasons for his findings. We do not accept that assessment. The Judge's key findings are all supported with reasons. It is not incumbent on a judge to summarise all the evidence he or she has heard. Further, in this case, because of the overlap between the various causes of action, it was unnecessary for the Judge to repeat the detail of his reasons in respect of each cause of action when the same reasons applied as had already been articulated.

[37] A related complaint is that Gendall J wrongly adopted the findings of the various disciplinary bodies that considered Mr Burgess' complaints to the Law Society without considering the evidence that was before him and forming his own opinion.

[38] This contention is also untenable. At the hearing in the High Court, both parties appear to have drawn the Judge's attention to the various disciplinary decisions and the judgment certainly refers to them. But the Judge also expressly states that he made his findings on the evidence before him.

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19 At [41].
20 At [34].
21 At [43].

[39] We note too that although the reasoning of the Judge is obviously important, we are in any event required to review the evidence ourselves and reach our own conclusions.[22]

Predetermination

[40] Mr Burgess contends Gendall J did not bring a fresh mind to the proceeding and predetermined it. The only ground advanced for this contention is that Gendall J issued a decision in other proceedings between Mr Burgess and TSB and cited that decision in this case without considering the evidence.[23]

[41] The decision was cited as a footnote in that part of the judgment dealing with the seventh cause of action. The seventh cause of action was an allegation that Malley & Co fraudulently or unlawfully obtained High Court orders to sustain a caveat, because they falsely represented to the High Court that the caveat was required by order of the Family Court.

[42] Justice Gendall found the allegation of fraud had no evidential basis and dismissed the claim. The only reference made by the Judge to his earlier TSB decision was in the context of saying that Mr Burgess had already been warned about making groundless allegations of fraud against others. The warning had been issued by an Associate Judge in the TSB litigation and noted by Gendall J.

[43] This ground of appeal is also without merit.

Failing to disqualify counsel

[44] Mr Burgess contends there was procedural impropriety because Gendall J permitted Parker Cowan to represent Malley & Co. According to Mr Burgess, Gendall J should have disqualified Parker Cowan from acting because its actions were part of the counterclaim and a witness summons had been issued.

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22 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]–[5].

23 *TSB Bank Ltd v Burgess* [2013] NZHC 3291; cited in HC judgment, above n 1, at [79].

[45] However, no formal application was ever made by Mr Burgess. The judgment records he only raised the concern at the beginning of the hearing and then withdrew his request that Mr Parker should cease to act. He said he "simply wanted the Court to be aware of the issue" and agreed the hearing could properly continue.[24] The Judge also noted that neither Mr Parker nor his firm were parties to the proceeding nor was anyone connected with Parker Cowan to give evidence.[25]

[46] The Judge went on to say that having regard to the position adopted by Mr Burgess and the material before the Court there were no grounds to disqualify Mr Parker or his firm.[26] We agree.

Errors regarding the amount of the unpaid fees

[47] Between 23 May 2008 and 19 November 2009, Malley & Co rendered various invoices to Mr Burgess for its fees. It is common ground that Mr Burgess made some payments.

[48] In evidence, Mr Tait stated that the total amount still outstanding was $54,595.81. He identified the unpaid invoices as follows:

- 27 August 2008 — original invoice $4,253.91, balance outstanding $1,065.51;
- 9 December 2008 — $10,578.00;
- 22 May 2009 — $13,589.15;
- 19 November 2009 — $23,723.15; and
- 31 May 2010 — $5,640 (security for costs and filing fees in the Court of Appeal).

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24 At [14].
25 At [13].
26 At [75].

[49] The Judge accepted this evidence and as mentioned entered judgment for the sum of $54,594.81.[27]

[50] On appeal, Mr Burgess submits the Judge made "fundamental errors" regarding the invoices. The errors in question primarily relate to a table of invoices that Gendall J set out in the judgment and which the Judge described as the invoices "originally involved".[28]

[51] The first error according to Mr Burgess is that the Judge's table does not mention an invoice dated September 2008 which Mr Burgess paid in full. However, that omission is of no consequence as regards quantum because it was not taken into account in the calculation of the $54,594.81.[29] The second alleged error is that the Judge's table shows money owing in relation to an invoice dated 23 May 2008, yet that invoice too was paid in full. Again in our view, the point is misconceived. Mr Tait did not include that invoice in his evidence and as already mentioned the judgment sum is based on that evidence, not the Judge's table.

[52] The only invoice in Mr Tait's list of unpaid invoices that Mr Burgess challenged at the hearing as regards quantum is the invoice of 27 August 2008. Mr Tait's evidence was that this invoice originally for $4,253.91 was only partly paid, and that there was still an outstanding balance of $1,065.51. Mr Burgess contends this invoice was paid in full.

[53] After the hearing before us, we sought and received further submissions from the parties on the 27 August 2008 invoice. We are satisfied based on the firm's accounting records that there is a debit balance owing comprised of disbursements that Mr Burgess never paid and which had been drawn to his attention. The unpaid disbursements actually exceed $1,065.51. The existence of a discrepancy was noted by Mr Tait in evidence. He said the firm was not pursuing the difference.

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[27] The fact the Judge entered judgment for a sum $1 less than the amount in Mr Tait's written evidence seems to be a result of differences between the written material and Mr Tait's oral evidence.

[28] At [5].

[29] The relevance of the invoice as regards the claim of unauthorised deduction of fees is dealt with elsewhere.

[54] In his further submissions, Mr Burgess provided this Court with a copy of letter to him from Malley & Co dated 4 August 2009 enclosing "accounts rendered that are due". Mr Burgess says only two accounts were enclosed, the invoices dated 22 May 2009 and 9 December 2008. He says further the letter was not discovered.

[55] However that cannot be correct because the letter is included in the case on appeal which Mr Burgess himself prepared.[30] Mr Burgess' reliance on the letter to support a new submission that only the two enclosed invoices are unpaid is also misplaced. The letter was followed by other correspondence from Malley & Co including further invoicing and a note of the final fee on which Mr Tait's evidence was based.

[56] We are satisfied that the figure of $54,594.81 is supported by the evidence. We are also satisfied that the amount charged was reasonable having regard to the amount of time expended by Mr Tait and the volume of work done. We address the nature and quality of that work in the sections that follow.

Reliance on expert witness

[57] In finding that Mr Tait carried out the work in a competent and professional manner, the Judge placed weight on opinion evidence given by a specialist family law practitioner, Ms Manuel.

[58] On appeal, Mr Burgess contended the Judge was wrong to rely on this evidence. Indeed Mr Burgess went further and submitted the evidence was not admissible. The basis for that submission was that Ms Manuel had no knowledge of the oral advice given by Mr Tait to Mr Burgess. She had failed to detail the advice on which her opinion was based and accordingly had failed to comply with the requirements of an expert witness under the code of conduct for expert witnesses.[31]

[59] According to Mr Burgess, Mr Tait's evidence also suffered from the same deficiency. He did not know what advice he had given.

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30 The letter in the case on appeal has a different date, but the text is identical.

31 High Court Rules, sch 4.

[60] We do not accept these criticisms. It is correct that Mr Tait was unable to recall all details of the advice he gave. However, that is only understandable given the passage of time and the loss of his files as a result of the Christchurch earthquake in February 2011. The incontrovertible evidence was that he and Mr Burgess met on a regular basis, had numerous phone calls and wrote to each other at critical points, not only about the memorandum but also during the course of the proceedings. In our view, quite apart from Mr Tait's evidence, there was ample written material including time sheets, correspondence and court documents to support Ms Manuel's opinion and the Judge's finding.

The memorandum

[61] The memorandum and its implementation feature large in the majority of the causes of action and thus the grounds of appeal. It is therefore convenient to address all of the arguments about the memorandum in one section of our judgment.

Mr Burgess' knowledge and understanding of the memorandum

[62] Mr Burgess submits the Judge was wrong to find he instructed Mr Tait to negotiate an agreement in the face of Mr Burgess' evidence that no such instruction was given. Mr Burgess says Mr Tait's evidence should not have been accepted over his evidence.

[63] In our view, the Judge was entitled to prefer Mr Tait's testimony to that given by Mr Burgess. The claims made by Mr Burgess regarding his knowledge and understanding of the memorandum were demonstrably untrue. The documentary evidence shows he was provided with copies of the negotiations correspondence between the lawyers and was also provided with a copy of the consent memorandum for comment before it was signed by Mr Tait.

[64] The letter from Mr Tait to Mr Burgess enclosing a copy of the memorandum asked Mr Burgess to "please contact me on Monday as to whether it is in order for me to sign this". The letter was dated 5 September 2008.

[65] The evidence establishes that Mr Burgess responded by fax to Mr Tait on 8 September 2008. The fax contained some suggested corrections to the memorandum and significantly includes the statement:

> I am uneasy about point 7. This seems overkill, as her interest is only in The sum to be held in the Trust Account In Terms of STRETTELS decision she does not appear to have a beneficial interest in The property itself, only a debt from me to her. If you think this is a reasonable clause, go ahead & sign, otherwise contact me.

[66] Point 7 stated:

> The Parties have agreed that Ms Beaven will transfer her ownership of the property to Mr Burgess in order that he may proceed with the refinancing but this Transfer is not to be taken, at this stage, as a complete transfer of Ms Beaven's beneficial ownership of the property. Mr Burgess will be holding the property on trust for himself and Ms Beaven pending finalisation of all monies due by one party to the other in terms of the Family Court Judgment and or the outcome of the Appeal in the High Court on 28 October 2008.

[67] In our view it is clear from the fax that Mr Burgess fully understood the memorandum and its effects. In particular, he understood the memorandum meant he would be holding the Medbury Property as a trustee and committing to the notice of claim remaining on the property until such time as the judgment sum and all costs including future costs had been paid. He was by this time a seasoned litigant and, as his use of the term "beneficial interest" demonstrates, he was well versed in the matters at issue. This is further supported by the content and tone of other correspondence between him and Mr Tait.

[68] It is also clear from the fax that he authorised Mr Tait to sign the memorandum on his behalf without needing to take further instructions, provided Mr Tait thought it was reasonable.

[69] Mr Tait testified that he considered the memorandum was reasonable because Ms Beaven was entitled to demand security for the judgment sum of $36,250 and this was the only method by which this could be secured, allow the Medbury property to be transferred into Mr Burgess' sole name and thence be re-financed, and the mortgagee sale averted. Mr Tait therefore signed the memorandum on 9 September 2008.

Failure to advise on or implement alternatives

(a) Application for a vesting order

[70] Mr Burgess submitted that Mr Tait failed to advise him of other alternatives to the memorandum agreement and this was not addressed or not addressed properly by Gendall J. When we asked what other alternatives there might have been, Mr Burgess suggested Mr Tait could have explored the possibility of applying to the Court for an urgent vesting order. However as Ms Manuel confirmed in evidence that was not a realistic option because of the time pressures and also because the Family Court would not have made such an order without Mr Burgess paying the money to Ms Beaven.

(b) Making an immediate payment to Ms Beaven

[71] In evidence Mr Burgess claimed he would have been prepared to pay Ms Beaven the $36,250 ordered by Judge Strettell and the $9,000 but was dissuaded from that course of action by Mr Tait. Mr Tait had a different version of events. He said Mr Burgess was adamant throughout that he would not pay his former wife anything because he believed Judge Strettell's decision was wrong. We prefer the evidence of Mr Tait which is consistent with the correspondence, the tone of Mr Burgess' written communications and Mr Burgess' conduct in seeking a stay of Judge Strettell's decision pending the appeal. At all material times Mr Burgess knew the judgment sum was being held in Malley & Co's trust account. He received a statement showing this on the refinancing with TSB. He also received a copy of the certificate of title showing registration of the notice of claim in favour of Ms Beaven, all without raising any objection.

[72] There is no credible evidence of any instruction to Mr Tait at any time to pay Ms Beaven the $36,250 before the High Court appeal was determined.

(c) Selling the property

[73] Similarly there is no credible evidence that Mr Burgess ever indicated to Mr Tait while the memorandum was being negotiated or any time thereafter that he

would be willing to consider the option of selling the Medbury property. He claims however that Mr Tait breached the contract of retainer by failing to advise on the merits of the election Judge Strettell gave him in the second decision, that is whether to retain or sell. Justice Gendall rejected this claim on the basis Mr Tait was not under a duty to proffer unsought financial advice.[32]

[74] On appeal, Mr Burgess challenges that reasoning as contrary to authority that:[33]

> While in general clients seeking simply to complete loan documentation are not entitled to expect advice as to the wisdom of underlying business transactions, that cannot apply in absolute terms when, because of prior advice by the solicitor… those clients are labouring under a serious misunderstanding as to the risks involved. In that situation a solicitor, exercising reasonable skill and care, will ensure the prior erroneous advice is corrected.

[75] The sequence of events in this case however shows how far removed it is from that authority.

[76] After Mr Burgess and Ms Beaven separated in 2003, Mr Burgess remained in possession of Medbury. At the first hearing before Judge Strettell in March 2007, Mr Burgess, who was representing himself, elected to retain Medbury and acquire Ms Beaven's interest. She consented to that. The net value of Medbury including stock and plant was fixed at $196,534.[34]

[77] Then, following the case being referred back to the Family Court by John Hansen J, Mr Burgess told Judge Strettell at a pre-trial conference on 1 February 2008 that he now wished to sell Medbury. As he confirmed to Mr Tait in a letter dated 27 February 2008, he had made that decision because of his inability to continue to make the mortgage payments. The letter stated he had taken steps to have the property marketed. And then went on to say he did not really want Medbury sold, but it was "grossly unfair" he should have to pay his wife out on the basis of a valuation of $196,534 when that was too high.

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32 HC judgment, above n 1, at [40].
33 *Yukich v MacKenzie* CA100/99, 20 June 2000 at [59].
34 First FC judgment, above n 2, at [106].

[78] At the subsequent hearing before Judge Strettell, Mr Burgess asked for the Medbury property to be re-valued but the Judge declined to allow this. The Judge calculated the couple's respective entitlements on the basis of the valuation of $196,534. Notwithstanding Mr Burgess' advice that he now wanted to sell, the Judge as already mentioned gave him the opportunity to revert back to his original choice.[35]

[79] Mr Burgess subsequently instructed Malley & Co that he wanted to keep Medbury after all and the firm (it seems in the absence of Mr Tait) wrote accordingly to the Family Court on 10 July 2008. The letter advised the Court that Mr Burgess wanted to retain the property subject to him being able to raise finance. It said he was making that election "under protest and in order to protect his position because of the potentiality of a mortgagee sale".

[80] A month later (that is, August 2008) the firm obtained a valuation of the Medbury property which valued it at $395,000. Obviously that made retention of the property an attractive proposition when Mr Burgess would be paying Ms Beaven a half share calculated on the basis of a valuation of $196,435.

[81] On the face of it, the new valuation meant it was very much in Mr Burgess' interest to retain the property, subject to him being able to meet the payments. We accept Mr Tait's evidence that once the new valuation report came through, Mr Burgess' view was that whatever other risks were attached he was gaining a property of such substantially greater value it was for him "a no brainer".

[82] We agree with Gendall J that the commercial risks of keeping Medbury were outside the scope of Mr Tait's retainer. In any event, the reality was that Mr Burgess was in a far better position than Mr Tait to assess those risks. Mr Burgess knew what the outgoings on Medbury were and he knew better than Mr Tait his ability to meet those outgoings. He had had occasion to consider the pros and cons of keeping the property, or selling it, for some considerable period.

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[35] Second FC judgment, above n 4, at [43] and [47].

[83] In all those circumstances, there can be no doubt that Mr Burgess made a fully informed decision to retain the property in preference to selling it.

Failing to advise that the fixed term table mortgage was on demand

[84] Justice Gendall rejected this claim on the basis it too was a purely financial matter outside the scope of the retainer. Mr Tait did not attend on Mr Burgess when he signed the mortgage documents and had no knowledge of what advice had been given by the legal executive who did. Regardless of arguments about the scope of the retainer, in our view this claim must fail in any event. Mr Tait gave uncontested evidence that there was nothing unusual about the mortgage. All of its terms were standard. Bank mortgages were nothing new to Mr Burgess. There is no evidence he was unaware of the terms or did not understand them.

Payment of the $9,000 costs

[85] As regards payment of the $9,000 costs owing to Ms Beaven, the memorandum agreement did not require Malley & Co to hold this in trust. What the memorandum said was that funds were to be drawn down at the conclusion of the appeal. This was never done. Mr Burgess blames Mr Tait for this.

[86] In evidence Mr Tait said the intention was that in the event of the then pending appeal to the High Court being unsuccessful, they would access any undrawn balance of the TSB facility. The second port of call if need be was to go to some other lender.

[87] There is no evidence Mr Burgess ever instructed Malley & Co to hold funds after the refinancing in September 2008 for the purpose of paying the $9,000 or to seek funding elsewhere. On the contrary, Mr Burgess required payment of some $6,000 from the September 2008 draw-down to pay a debt he had incurred to a third party for cropping. There were in fact no funds available to Malley & Co to make the costs payment to Ms Beaven.

[88] The firm did deduct fees owing to it by Mr Burgess from the TSB monies. Mr Burgess complained about that deduction which was unauthorised and there was

then an exchange of cheques in November 2008 whereby the money was refunded to Mr Burgess and he in turn paid the firm. In those circumstances there can be no complaint by Mr Burgess against the firm that it used the TSB money to pay its fees rather than pay Ms Beaven the $9,000.

Acting upon non-existent court orders/implementing a void relationship agreement

[89] As the memorandum makes clear, the intention was to file the memorandum in the Family Court and obtain consent orders. As it transpired, unbeknown to Mr Burgess (or Mr Tait while he was still acting for Mr Burgess) sealed orders were never issued. Ms Beaven's solicitor Ms Corry filed the memorandum in the Family Court. It appears to have come to the attention of Judge Strettell because the Court copy has a notation on it "draft order to be provided". This was conveyed to Ms Corry who duly filed draft orders on 17 September 2008. In a covering email, she asked for the Registrar to advise her if the draft was not satisfactory. She did not ever hear back. Ms Corry's subsequent interpretation of the Court records is that the Registrar appears to have thought (rightly or wrongly) that the Judge had approved the orders. The matter then got overlooked by both the registry and the lawyers.

[90] Mr Burgess contends Mr Tait was negligent and also breached his fiduciary duty in acting upon the application for Family Court orders where no such orders were made and in implementing an agreement which was void. It was void, according to Mr Burgess, because s 21F of the Property (Relationships) Act requires an agreement purporting to deal with relationship property to be signed by the parties personally and certified by lawyers. The agreement contained in the memorandum did not comply with either of those two requirements.

[91] Both in the High Court and again in this Court, Mr Burgess attempted to make much of the fact that sealed orders were never obtained. However, we agree with Gendall J that nothing turns on the point.

[92] The failure to obtain sealed consent orders was simply an oversight. Had it been drawn to Judge Strettell's attention again, we are confident formal orders would have been issued. Equally, although the agreement may not have complied with the procedural requirements of s 21F, it would have been saved by s 21H of the

Property (Relationships) Act. We agree with the expert evidence provided by Ms Manuel on this point. Both parties had received legal advice about the agreement, it had been relied upon and part-performed, and both parties had derived benefit from it. We have no doubt the agreement was binding and enforceable.

[93] It follows that like Gendall J we also reject the contention that Mr Tait was negligent or in breach of his fiduciary duty in holding the money for Ms Beaven in the trust account and then disbursing it once the appeal was determined. The payments were required to be made by the terms of the memorandum which Mr Burgess had authorised and which were binding on both him and Malley & Co.

[94] It follows too that Mr Tait acted lawfully in registering the caveat. Mr Burgess' contention to the contrary, relying on the absence of sealed orders and non-compliance with the formal requirements of s 21F of the Property (Relationships) Act, is misconceived.

[95] A related argument raised by Mr Burgess was that the agreement was contrary to Judge Strettell's decision because Judge Strettell had ordered that the Medbury property be Mr Burgess' separate property. However, this overlooks that Judge Strettell had also ordered him to make payment to Ms Beaven within 28 days if he wanted to retain Medbury.

Execution of the notice of claim on behalf of Ms Beaven

[96] The Land Transfer Act 1952 provides that instruments affecting any interest in land must be endorsed with a certificate that the instrument is correct for the purposes of the Act and signed by the party claiming under the instrument or a legal practitioner employed by that party.[36] In this case, Mr Tait signed the notice of interest on behalf of Ms Beaven who was not his client. The counterclaim alleges that Mr Tait thereby created a conflict of interest and breached his fiduciary duty to Mr Burgess. Justice Gendall rejected this claim. Mr Burgess says wrongly.

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[36] Land Transfer Act 1952, s 164.

[97] In evidence, Mr Tait explained that Ms Beaven's lawyer, Ms Corry, had asked him to sign the notice. She had drafted the notice, but was a barrister sole and considered herself unable to sign it. His recollection was that there was also some issue about the availability of Ms Corry's instructing solicitor who was in a small husband/wife firm.[37] Delay was not in the interests of Mr Burgess because of the pending mortgagee sale and Mr Tait accordingly signed. He did so as a matter of business efficacy with express written authority from Ms Corry to sign. We accept this evidence and the further point that there was no prejudice to Mr Burgess nor was there any conflict of interest.

[98] The same conclusion was reached by those considering Mr Burgess' complaint about the matter to the Law Society. Both the Standards Committee and the Legal Complaints Review Officer held there was no professional failing or wrongdoing on the part of Mr Tait.

Conclusion on memorandum

[99] We agree with Gendall J that the evidence clearly established that Mr Burgess was fully informed as to the content and implications of the memorandum and that he accepted it without real question at the time. We also agree that Mr Tait acted in a proper and skilled fashion in negotiating a viable way to protect the relationship property at issue. None of the complaints associated with the memorandum has any substance.

Other matters on which advice not given

[100] In addition to matters relating to the memorandum, the counterclaim alleges Mr Tait was negligent or breached his contract by failing to advise practical steps upon being notified of Mr Burgess' financial stress — in particular his becoming in arrears under the TSB mortgage and secondly crop failures.

[101] There is no evidence of Mr Burgess seeking advice from Mr Tait on these matters. We agree with Gendall J that this was outside the scope of the retainer.

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[37] The instructing solicitor gave evidence that he was available around that time but could not be more specific than that.

[102] Another claim made by Mr Burgess is that Mr Tait failed to advise him on the availability of legal aid. This was not addressed by Gendall J. The issue was not one of the grounds of appeal and only raised by Mr Burgess in submissions. Mr Parker did not object.

[103] We have therefore considered the point. In evidence, Mr Tait said he could not recall whether legal aid was discussed but went on to point out that Mr Burgess had agreed he was to proceed on the basis of a paid retainer. There was evidence that at the time he retained Mr Tait, Mr Burgess already had a Legal Services statutory land charge on his property relating to legal aid. He was therefore well aware of the existence of legal aid. Further, there is no evidence of what loss he suffered as a result of not being given advice about something he already knew.

[104] We note too that according to a letter that was put in evidence, Malley & Co had offered to act for Mr Burgess on legal aid in relation to the application for removal of the notice of claim.

Failure to address the fifth cause of action — malicious prosecution

[105] The fifth cause of action was malicious prosecution. It purported to be a claim against both Malley & Co and their solicitors Parker Cowan. Justice Gendall held that because Parker Cowan had never been joined to the proceeding, the cause of action should be dismissed.

[106] On appeal, Mr Burgess accepts that is correct so far as Parker Cowan is concerned. However, he submits Gendall J overlooked that the fifth cause of action was not limited to Parker Cowan but also included a claim against Malley & Co. It is unclear to us whether the Judge did overlook this. Apart from the joinder point, the Judge also said there was "nothing before the Court which in any way supports the allegations Mr Burgess endeavours to make in this particular cause of action".[38] That comment is capable of encompassing the claim against Malley & Co.

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[38] HC judgment, above n 1, at [75].

[107] The claim against Malley & Co concerned two matters. The first related to its conduct of these proceedings and the second an application it made to sustain the caveat.

[108] The firm initially issued proceedings in the District Court against Mr Burgess for recovery of its fees. It is acknowledged that it did so in breach of s 161 of the Lawyers and Conveyancers Act 2006. Under s 161, a practitioner who receives a complaint about a fee must refrain from issuing proceedings for recovery of that fee until the complaint is disposed of. A complaint is not disposed of until after a Standards Committee has made a determination and the time for filing a review to the Legal Complaints Review Officer has expired.[39]

[109] Malley & Co issued its proceedings on 24 September 2010 after a Standards Committee had dismissed Mr Burgess' complaint about the fees on 2 September 2010. As at 25 September 2010, the appeal period for lodging a review had not expired. Mr Burgess applied to review the Committee's decision on or around 13 October 2010. In issuing the proceedings in September, the firm thus acted prematurely. Mr Burgess says not only did the firm breach s 161 when it issued the proceedings, it was dilatory in staying the claim despite the fact he had alerted them to the breach.

[110] Mr Burgess argues Malley & Co's conduct was deliberate and amounts to malicious prosecution. We disagree. We accept Mr Tait's evidence it was simply an honest mistake and that any subsequent delay was attributable to disruption caused by the Christchurch earthquake in February 2011 and the file being referred to insurers as Malley & Co was required to do. The counterclaim was in excess of $1 million and there was already what was later described by the Legal Complaints Review Officer as a complex interlocking of Court and disciplinary conduct proceedings.

[111] We note too that Mr Burgess has not been prejudiced in any way. The Legal Complaints Review Officer found that Mr Tait had not behaved in a dishonest manner over the matter and that the delay was attributable to a number of other

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[39] Lawyers and Conveyancers Act 2006, s 161(4).

factors, other than simply a failure on Mr Tait's part. He dismissed Mr Burgess' complaint. We agree with those findings.

[112] The counterclaim pleads also as part of the fifth cause of action that Malley & Co falsely represented to the District Court that its claim was live despite Mr Burgess drawing its attention to the fact its claim had "lapsed" under the District Courts Rules 2009. In support of this contention, Mr Burgess relies on a decision of Judge Neave which he says Gendall J ignored.[40] According to Mr Parker, Judge Neave's decision was overturned on appeal anyway.

[113] We have found the material submitted to us on this issue particularly confused and confusing.

[114] Judge Neave's decision refers to Malley & Co's claim filed on 24 September 2010 as having lapsed on 27 June 2011. Submissions filed on behalf of Malley & Co suggest that far from "falsely" representing to the contrary, the firm itself advised Judge Neave that was the case under r 2.17.6 of the District Courts Rules because of its failure to file a notice of pursuit of claim.

[115] Mr Burgess did not adduce any evidence about the alleged representations and it was never put to Mr Tait. Similarly, Mr Burgess did not adduce any evidence to support his further allegation that Malley & Co falsely (in the sense of maliciously) represented to the Court that Mr Burgess' counterclaim had lapsed or that he had no defence to their claim for recovery of fees.

[116] Regardless of who said what about the claim or counterclaim lapsing, the fact remains that until 12 April 2012 Malley & Co was precluded by s 161 of the Lawyers and Conveyancers Act from progressing its claim.[41] It was only then that Mr Burgess' complaint to the Law Society about fees was finally determined and rejected. Those being the circumstances it follows that if even the claim had lapsed in June 2011, it would, we are confident, have been reinstated.

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40 *Malley & Co Lawyers v Burgess* DC Christchurch CIV-2013-009-596, 26 September 2013.
41 Lawyers and Conveyancers Act, s 161(4)(b).

[117] As it was, Malley & Co chose to issue fresh proceedings relying on a certificate which the Legal Complaints Review Officer had issued certifying the due amount of the fees. The procedural quagmire into which the District Court proceedings had fallen was eventually resolved and the proceedings transferred to the High Court.

[118] We agree with Gendall J that the fifth cause of action was without any evidential foundation.

Rejection of seventh cause of action — fraud

[119] The seventh cause of action was a claim of fraud. As pleaded it is based on an allegation that Malley & Co obtained orders to sustain the caveat in its name for the benefit of Ms Beaven by making false representations to the High Court. According to Mr Burgess, TSB had sought to remove the caveat and this had been opposed by Malley & Co without any reference to him.

[120] One of the reasons Gendall J gave for dismissing the claim was that "there would simply be no purpose in Malley & Co sustaining the caveat for the benefit of… Ms Beaven".[42] As is apparent from another passage in the judgment, the Judge made that comment because he was under the erroneous impression that the purpose of lodging the caveat was to ensure there were sufficient funds to meet any costs award in the firm's favour.[43]

[121] However, that was not correct. As already mentioned, Mr Tait's evidence about the caveat was that it flowed from the provisions of the memorandum relating to future costs awards in favour of Ms Beaven and the obligation on Malley & Co to obtain an irrevocable authority from Mr Burgess in order that they could fulfil the undertakings and requirements imposed upon them and Mr Burgess. To that extent, the Judge's reasoning cannot stand.

[122] However, the only evidence about allegedly false representations made to the High Court was a passing reference in Mr Burgess' brief of evidence to an affidavit

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42 HC judgment, above n 1, at [80].
43 At [77].

sworn by the Malley & Co's legal executive for the purposes of the High Court caveat proceedings. Mr Burgess says the affidavit falsely states the caveat was required by the orders of the Family Court.

[123] It was never put to Mr Tait in cross-examination that any inaccuracy was deliberate, despite the allegation being one of fraud. And for that reason alone the claim must fail. We would also observe it is reasonable to assume that at the time the affidavit was sworn, Malley & Co was still labouring under the misapprehension that orders had been made in the Family Court.

Unauthorised deduction of legal fees

[124] It is common ground that when Malley & Co received the loan monies from TSB into its trust account at the time of the re-financing, it deducted fees owing to it in the sum of approximately $11,000 without first obtaining Mr Burgess' authority. Mr Burgess complained about the deduction to the Standards Committee of the Law Society. The complaint was upheld.

[125] Mr Burgess relies on the wrongful deduction as part of his claim for breach of fiduciary duty.

[126] This aspect of the claim was not addressed by Gendall J. However, the evidence establishes that once Malley & Co became aware Mr Burgess objected to the deduction, it promptly reimbursed Mr Burgess in full and he then paid the same amount to Malley & Co. The exchange of cheques happened in November 2008.

[127] In all the circumstances, we do not consider the unauthorised deduction is capable of amounting to a breach of fiduciary duty. Further, Mr Burgess suffered no loss. He did not make a complaint to the Law Society about this until after he terminated the retainer in November 2009.

[128] For completeness we add that while the Standards Committee made a finding of unsatisfactory conduct against Mr Tait in relation to the matter, it did not impose any orders. On review, the Legal Complaints Review Officer noted it was arguable

the finding of unsatisfactory conduct was somewhat unfair because the deduction had been actioned by a legal executive. However Mr Tait accepted responsibility.

Failure to file application for leave to appeal John Hansen J's decision in time

[129] It will be recalled that John Hansen J delivered his decision in 2007, but that the application for leave to appeal was not filed in this Court until 2009. This Court was critical of the delay and awarded costs against Mr Burgess despite granting him leave.

[130] Mr Burgess blames Mr Tait for the delay and says it amounted to negligence.

[131] This claim was not addressed by Gendall J. Mr Burgess did not however raise it as a ground of appeal in his notice of appeal, but only mentioned it in submissions. Mr Parker did not raise any objection.

[132] Having reviewed the evidence, we are satisfied the claim has no basis. Justice John Hansen delivered his decision on 27 November 2007 remitting the matter back to the Family Court. Mr Tait was not retained until the end of February 2008. The basis of the retainer was that Mr Tait would deal only with the pending Family Court re-hearing and that challenges to the John Hansen J decision would be attended to by Mr Burgess himself.

[133] In evidence Mr Tait said that once leave to appeal was refused by the High Court in April 2008, the options were to seek special leave from this Court or seek to persuade Judge Strettell to allow further evidence to be called at the then pending second hearing and argue equal sharing in the Family Court. In light of comments made in John Hansen J's decision about the paucity of evidence at the first hearing in the Family Court, and in light of comments made by Judge Strettell at a pre-trial conference suggesting he might be receptive to allowing new evidence, the decision was made to focus on the Family Court proceedings. The new evidence Mr Tait had obtained and wanted to adduce in the Family Court was the same evidence that persuaded the Court of Appeal to later grant leave.

[134] Mr Tait acted promptly to appeal Judge Strettell's second decision to the High Court. Once that appeal was heard and dismissed by Fogarty J in December 2008, Mr Tait acted promptly to prepare an application to the Court of Appeal for leave to appeal John Hansen J's decision.[44] A draft application was forwarded to Mr Burgess for approval in January 2009 and filed in February 2009. Mr Tait's submissions in support of the application for leave were comprehensive and ultimately persuasive.

[135] Throughout all of the above, Mr Tait kept Mr Burgess informed and Mr Burgess took an active part in the decision making. We are satisfied that in the circumstances the advice given by Mr Tait and his conduct of the litigation did not fall below that of a reasonably competent lawyer.

Faulty reasoning on causation

[136] Mr Burgess submits that Gendall J's reasoning on causation was contrary to established case law. In particular, he contends the Judge failed to recognise that it was Mr Tait who created the situation whereby Mr Burgess was unable to meet the payments to the bank. Accordingly, the case was on all fours with authorities such as *Heslop v Cousins*.[45]

[137] Strictly speaking it is unnecessary for us to consider this point in light of the fact we have concluded nothing Mr Tait did or did not do was actionable. However, we agree with Gendall J's conclusion on causation. There was no evidence other than Mr Burgess' unfounded assertion that he would have been able to service the debt had it not been for the notice of claim. The evidence pointed strongly to the contrary.

[138] The evidence established that the crisis that arose in September 2008 was not the first time the Southland Building Society had threatened a mortgagee sale. There had been an earlier default when Mr Burgess, who had remained in occupation of Medbury, got into arrears. On that occasion, it was Ms Beaven who averted a

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[44] And also acted promptly to file an application for leave in the High Court to appeal Fogarty J's decision.

[45] *Heslop v Cousins* [2007] 3 NZLR 679 (HC).

mortgagee sale by paying $3,800. That occurred before Mr Tait became involved. Then after the re-financing, Mr Burgess was unable almost from the outset to service the new mortgage he had arranged with TSB. He could not continue to borrow unless his financial position improved. It did not and the loss of the property was thus inevitable.

[139] We agree with Gendall J that the evidence about causation was compelling. The operative cause of any losses Mr Burgess may have suffered were his continuing failures to maintain mortgage payments. Neither his ex-wife nor Malley & Co can be blamed for that.

Result

[140] The application for leave to adduce further evidence is declined.

[141] The notice of appeal listed 35 grounds of appeal. Two more were raised in submissions. None of them had any merit and the appeal is accordingly dismissed.

[142] As regards costs there is no reason why costs should not follow the event. Malley & Co applied for increased costs. We are satisfied that increased costs are warranted. Mr Burgess contributed unnecessarily and unreasonably to the cost of the appeal by raising a multiplicity of arguments that were without merit.

[143] We accordingly order Mr Burgess to pay the respondent costs for a standard appeal on a band A basis with a 25 per cent uplift and usual disbursements.

Solicitors:
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