IN THE COURT OF APPEAL OF NEW ZEALAND

CA333/2015
[2016] NZCA 32

BETWEEN	ANTHONY PRATT KAYE AND MORVA KAYE Appellants
AND	NORRIS WARD MCKINNON Respondent

Hearing:	17 February 2016
Court:	Harrison, Fogarty and Toogood JJ
Counsel:	Appellants in Person T Taptiklis as McKenzie Friend M J Dennett for Respondent
Judgment:	29 February 2016 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are ordered to pay the respondent costs as on a standard appeal on a band A basis together with usual and reasonable disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] Anthony and Morva Kaye brought a proceeding in the High Court at Hamilton against their former solicitors, Norris Ward McKinnon. The essence of the

Kayes' claim was that the firm breached its contract of retainer when representing them, first, on the purchase of a business and associated properties and, second, in implementing instructions to sue their former solicitors. The Kayes sought damages of $5,581,228 (since amended to $5,340,288).

[2] Following trial Peters J dismissed the Kayes' claim.[1] She found that Norris Ward was not negligent in performing its contract to provide professional services on the business purchase transaction but had negligently delayed in issuing a proceeding against the Kayes' former solicitors. However, the Judge found that this latter negligence did not cause the Kayes any loss.

[3] The Kayes appeal against the judgment, challenging in particular Peters J's dismissal of their first claim of Norris Ward's negligence on the business acquisition.

Background

[4] Between May and July 2005 the Kayes or their nominee agreed to buy a Palmers Garden Centre business in Cambridge. The transaction comprised three principal agreements with the vendor, Robyn Wade:

(1) The purchase of the land where the garden centre was situated known as Lot 3. The price was $725,000 of which $510,000 was to be borrowed from the Southland Building Society (SBS). Settlement was due on 31 August 2005;

(2) The purchase of the business for a price shown on the face of the agreement at $449,000 comprising individual values attributed to goodwill, stock in trade, and plant and equipment. The vendor agreed to lend $244,000. The agreement provided that the price for stock was to be confirmed at the date of possession, subject to a maximum value adjustment of 5 per cent, as well as a price adjustment for variations in plant and equipment by seeking a current valuation. The final purchase price was to be settled by 31 August 2006. Failing

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1 *Norris Ward McKinnon v Kaye* [2015] NZHC 1025 [HC decision].

settlement by then the Kayes or their nominee would incur penalty interest of 15 per cent on the purchase price (penalty interest of or at least $1,236 per week); and

(3) The purchase of an adjoining property known as Lot 1 for $375,000. Settlement was due for 31 August 2006.

[5] Another law firm, Tanner Fitzgerald Getty, was then acting for the Kayes. It is common ground that the firm negligently performed its instructions by paying Ms Wade the purchase price for Lot 3 without first obtaining her undertaking to transfer title on receipt of payment. Ms Wade refused to transfer title with the result that SBS's mortgage security could not be registered.

[6] However, on or about 31 August 2005 Ms Wade had allowed the Kayes to take possession of Lot 3 and the garden centre, which was operated by the Kayes' nominee, Room Outside Limited (ROL).

[7] The Kayes found themselves in an increasingly difficult position partly as a result of Tanner Fitzgerald's negligence. They had paid over the full purchase price for Lot 3 but were unable to obtain title and were separately facing problems in financing other settlement obligations.

[8] The Kayes first instructed Paul Barris of Norris Ward on 16 August 2006, two weeks before they were due to settle the purchase of both Lot 1 and the garden centre. They also remained unable to settle the purchase of Lot 3. The Kayes had been introduced to Norris Ward through an SBS representative who had advised Mr Barris of the nature and extent of the difficulties faced both by the Kayes and the society.

[9] Mr Barris was right to assess the Kayes situation at that time as dire and only likely to deteriorate if the agreements were not settled promptly. But plainly he could not advise on an appropriate course of remedial action without access to the agreements for sale and purchase and Tanner Fitzgerald's files. For that purpose he sent to the Kayes on 17 August 2006, the day after their meeting, an authority to be

signed by them to uplift Tanner Fitzgerald's files. The Kayes did not return the signed authority to him until about 29 August 2006.

[10] Mr Barris immediately sent the Kayes' signed authority to uplift to Tanner Fitzgerald. However, Tanner Fitzgerald refused to comply until the Kayes paid their final invoice for fees and Norris Ward undertook to register the SBS mortgage. Sometime in early September the Kayes settled Tanner Fitzgerald's outstanding account. Norris Ward gave the undertaking as required and received the files in exchange.

[11] Mr Barris confirmed these things from reading Tanner Fitzgerald's files:

(1) Tanner Fitzgerald had in fact paid the purchase price for Lot 3 a year earlier. But without Ms Wade's consent, whether forced or voluntary, the Kayes could not obtain title.

(2) SBS was threatening to call up the Kayes' mortgage. If they were unable to settle the purchase of Lot 3, the Kayes would have been left in the position of attempting to recover $725,000 from Ms Wade while subject to an obligation to repay SBS's loan of $510,000.

[12] Mr Barris also learned that:

(1) Ms Wade was refusing to provide the transfer of Lot 3 because (a) she believed all three agreements were to be settled contemporaneously and (b) because the parties were in an unresolved dispute about the value of the stock in trade and plant and equipment being sold under the business agreement.

(2) The Kayes had entered into a term loan agreement with Marwa Ltd to finance the purchase price of the garden centre, with penalty interest to run 15 per cent per annum if the principal was not repaid by 31 August 2006.

(3) The parties had varied the agreement to buy Lot 1 whereby Ms Wade had granted the Kayes a licence to occupy at $34,080 per annum, with the purchase price to be current market value at settlement on 31 August 2006. Both Ms Wade and the Kayes had been performing their obligations under the licence to occupy Lot 1. However, the agreed valuation to settle the purchase price of Lot 1 had yet to be carried out, even though the settlement date had passed. The Kayes were in default of their obligations.

[13] Mr Barris was satisfied that the Kayes must immediately take all possible steps to settle their outstanding obligations under the various agreements, including registration of the SBS mortgage. The Kayes agreed with this sensible proposal; it was the only course realistically open to them. They wanted to reach a position of owning the land and business without having to continue dealing with Ms Wade, leaving them free to run the garden centre. In this respect they advised Mr Barris that the business had been trading at a turnover of about 25 per cent less than the previous year, and they were also carrying a large amount of debt.

[14] After protracted negotiations between Mr Barris and Ms Wade's solicitors, the parties were able to reach agreement on a final figure for the plant, equipment and stock at an adjusted figure of $432,663. Mr Barris assessed that the underlying reason for this protraction was a personality conflict between the parties. Ms Wade often took positions which were without legal merit and the Kayes wanted to revisit unconditional contractual obligations which they had assumed in 2005. For example, the Kayes believed that the price agreed for the business was excessive and that they could also negotiate the value of the stock down by as much 50 per cent, even though their agreed maximum leeway was 5 per cent. Mr Barris found also that the Kayes were unwilling to accept legal advice which did not accord with their own views of their rights and obligations.

[15] In November 2006 Mr Barris was able to arrange settlement of the purchase of the garden centre and register the transfer of Lot 3 to the Kayes and the SBS mortgage. However, settlement of the Lot 1 agreement proved a problematic exercise. The Kayes had not arranged finance to settle, leading to advice from

Ms Wade's solicitors in December 2006 that she would exercise her contractual rights unless the Kayes confirmed by 19 January 2007 that they definitely had finance in place. In December 2006 and January 2007 the Kayes raised further finance secured against two residential properties in Wellington in order to meet their funding obligations under Lot 1.

[16] In March 2007 the Kayes were finally able to settle the purchase of Lot 1, some six months late. It is unnecessary to narrate what happened as the year progressed except to note that they were constantly refinancing, on a very substantial scale, their loan obligations.

[17] By February 2008 the Kayes had decided to sell the land and garden business. It had not been a financial success. A substantial offer from prospective purchasers was rejected. Difficulties then arose with ROL's franchiser, Palmers Franchise Systems Ltd. It appears that the Kayes eventually sold the property and the business at a substantial loss and that they were later forced to sell their two Wellington properties to meet mortgage commitments. In early 2009 the Kayes terminated their instructions to Norris Ward.

High Court

[18] The Kayes' pleadings are prolix and difficult to follow. However, they pleaded their claim of breach of contract against Norris Ward with appropriate specificity, alleging that the firm was negligent in failing to exercise reasonable skill and care from the outset of their engagement in:

(1) failing to act promptly to secure a cost efficient resolution of the legal issues that would allow the Kayes to operate their business free of legal impediments and business disruption by Ms Wade; Norris Ward waited a full month before acting;

(2) failing to offer or invoke alternative dispute resolution procedure;

(3) failing to establish the true extent of Tanner Fitzgerald's negligence and breach of contract upon which to base advice to the Kayes; and

(4) causing the Kayes to have to raise extra financing of $139,239 to complete the 16 March 2007 vendor settlement with adverse consequences for the Kayes' working capital and debt loadings.

[19] The first two and the fourth allegations fall within the one category of Norris Ward's negligence in discharging its duty on the business acquisition. The third was a discrete allegation which the Kayes characterised before us as a failure to take effective steps to repair the firm's three other alleged breaches. Peters J determined the claim by reference to these two discrete claims.

First claim

(a) High Court

[20] In the High Court, as before us, the Kayes submitted that in August 2006 they instructed Norris Ward to advise them generally, taking into account all and not excluding any material circumstances in relation to protecting their affairs. The Kayes' theme was that Norris Ward should have negotiated more advantageous contractual terms with Ms Wade. In support they relied on this extract from the firm's client registration form:

> The following sets out the Terms and Conditions upon which we may accept a retainer to act for you ...
>
> 1. OUR SERVICE
> ... We will pursue your work conscientiously. ... We will work with you to develop an understanding of your expectations. We will work together to establish achievable goals and timelines.
>
> 2. INSTRUCTIONS
> In order to carry out your instructions we will act in your best interests. ...

[21] Peters J's reasons for dismissing the Kayes' claim were expressed briefly. In summary they were that (1) the Kayes' failure to call expert evidence as to what a competent solicitor acting reasonably would have done in the circumstances precluded a finding of breach on the facts;[2] (2) the scope of the Kayes' instructions to Norris Ward was limited to settling the contracts, not to advising them or their

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2 At [30]–[31].

company generally;[3] (3) as a general rule a solicitor is under no duty to go beyond instructions by offering unsought advice on the wisdom of the transaction;[4] and (4) the client registration form was irrelevant.[5] Accordingly the Kayes had failed to prove any breach.

(b) The Kayes' appeal

[22] On appeal the Kayes argued that the Judge erred because she failed to give any or proper weight to Norris Ward's representation in its client registration form that it would work with the Kayes to develop an understanding of their expectations and work together to "establish achievable goals and timelines".

[23] In developing this proposition the Kayes submitted that the retainer imposed a duty on Mr Barris to act promptly and carefully to comprehend their funding constraints, obliging Mr Barris to take positive and effective steps during what the Kayes called the "Golden fortnight". This was the two weeks between accepting the Kayes' instructions on 16 August 2006 and settlement of the agreements due on 31 August. According to the Kayes, prompt action by their solicitor in this period would have avoided or minimised "triggering contract default and business disruption risks" especially given that Norris Ward "held the tactical high ground as 'neutral broker' detached from the circumstances which had given rise to the impasse. Their role was to bring authority and certainty to the situation." Mr Barris, the Kayes said, just acted as an experienced conveyancing clerk when the scope of his duty was much wider.

[24] In amplification of this argument the Kayes submitted that Norris Ward was required to be cognisant of its retainer terms and in particular: to acknowledge that the crisis which was not of their making required urgent attention; to talk to them to understand what they wanted to achieve; to gather all pertinent facts and information as soon as practicable including a range of documents and insisting on Tanner Fitzgerald's cooperation to hand over the files; to identify and assess the Kayes' risks; to establish whether it was viable to launch litigation proceedings

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3 At [33]–[34].
4 At [36].
5 At [37].

against Tanner Fitzgerald and quantify damages; to understand the Kayes' financing constraints; to evaluate assisted dispute resolution and mediation options; and to formulate an unspecified proposal for submission to Ms Wade before 31 August 2006 to allow her time to respond.

(c) Decision

[25] The starting, and indeed decisive, point in our analysis is to identify the scope of Norris Ward's retainer. The Judge, supported by Mr Dennett on appeal, gave adverse weight to the Kayes' failure to call an experienced solicitor to give expert advice about the duties expected of a competent lawyer in the particular circumstances.[6] However, that failure is of no consequence where the evidential foundation for the alleged scope of the solicitor's duty does not approach the necessary threshold of tenability. The Kayes' claim is one of those cases.

[26] In our judgment the Kayes' claim must be determined by reference to a lawyer's primary duty to exercise reasonable skill and care when advising a client on his or her rights and obligations.[7] The importance of its proper performance is highlighted where to the lawyer's knowledge the clients are already in default or at risk of further default in satisfying their own pre-existing contractual obligations. It is axiomatic that in discharging his or her duty in circumstances such as these the solicitor must have access to all primary contractual documents to which the clients are parties and any relevant correspondence or reports. A solicitor cannot give informed and competent advice otherwise.

[27] The Kayes' claim fails at its point of inception about the nature and scope of Norris Ward's professional duties. That alleged scope set the framework for particular breaches alleged by the Kayes. The Kayes thesis depends for its success on ignoring these critical facts spanning the so-called "Golden fortnight", any one of which would be decisive against the Kayes' claim but which in combination show its untenability:

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6 Above n 2.

7 *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 (CA); Consumer Guarantees Act 1993, s 28.

(1) At the date of the Kayes' instructions to Norris Ward on 16 August 2006 they were subject to unconditional obligations to settle three substantial contracts by 31 August 2006, two weeks away.

(2) The Kayes were already in significant default of those obligations. Tanner Fitzgerald were responsible for the breach of the Lot 3 agreement but the Kayes themselves had failed to arrange financing or valuations as required by the garden centre and Lot 1 agreements.

(3) The Kayes delayed for almost the entire "Golden fortnight" in returning the authority to uplift Tanner Fitzgerald's files.

(4) Norris Ward did not have access to the essential legal documents, namely the agreements for sale and purchase and all associated correspondence and other material until early September.

[28] If Norris Ward had adopted the course of conduct within the scope of the duties propounded by the Kayes, the firm would have been justifiably exposed to a claim of gross negligence. The folly of the Kayes' argument, and their underlying failure to understand the nature and extent of a solicitor's professional function, is shown by a brief examination of some of the elements of the duty alleged by the Kayes (at [24] above).

[29] For example, by reference to each of the Kayes' specific allegations:

(1) What is significant is that Mr Barris was aware from 16 August of the importance of prompt action and took the necessary steps the next day to start the process of obtaining Tanner Fitzgerald's files. There was nothing to be served by acknowledging that the crisis faced by the Kayes was not of their making. Indeed, Norris Ward learned on access to Tanner Fitzgerald's files that the Kayes had contributed towards the crisis by failing to secure finance sufficient to settle their obligations by 31 August 2006 and to obtain appropriate valuations.

(2) It was common ground that Mr Barris did confer with the Kayes on 16 August for the purpose of obtaining their instructions and that their agreed primary objective was to resolve the Kayes' legal problems as soon as possible.

(3) Norris Ward took immediate steps to gather what the Kayes call "all pertinent facts and information … including a range of documents". As noted, the day after they first met, the firm sent the Kayes an authority to uplift Tanner Fitzgerald's files. The Kayes alone must accept responsibility for their failure to return the authority for nearly the entire "Golden fortnight". And Norris Ward had no legal right to insist on Tanner Fitzgerald handing over the files until a signed authority was sent and, more importantly, the Kayes themselves had discharged the solicitors' lien for outstanding fees.

(4) There was little or no point in advising the Kayes immediately on the viability of issuing proceedings against Tanner Fitzgerald and quantifying damages. That step would not solve the Kayes' current crisis. The immediate requirement was to advise the Kayes of whatever steps were available to them to settle their contractual obligations.

(5) An understanding of the Kayes' financing constraints was important but not decisive. Mr Barris could only know the nature and extent of the Kayes' financing obligations, and hence any constraints, by securing access to the agreements and all related correspondence. Once Mr Barris was aware from the primary documents of the Kayes' own defaults in arranging finance, he was able to advise them with a full understanding of the difficulties inherent in their situation.

(6) For much the same reasons, Mr Barris was unable to make an assessment of unspecified dispute resolution and mediation options or formulate a proposal for submission to Ms Wade before settlement date to allow her to respond. A proposal made in the vacuum of

> knowledge of the parties' contractual rights and obligations would have been nonsensical. Tellingly, the Kayes themselves acknowledged at trial that the parties had reached "an intractable impasse", to which on Mr Barris' evidence both had contributed and in which he had played no part.

[30] Norris Ward's client registration form did not advance the Kayes' claim: it was simply an amplification of a lawyer's obligation to exercise reasonable skill and care. The document neither guaranteed a result nor expanded the scope of the duties imposed by law on Norris Ward. In argument the Kayes accepted that Norris Ward's performance of a contract of retainer of the scope they advocated could not have guaranteed their salvation and that their argument was founded on a number of hypotheses which, in our judgment, are simply unsustainable on the evidence.

[31] We would add that the untenability of the Kayes' claim is reinforced by the fact that by November 2006, about two months after the due dates, the Kayes had been able to arrange settlement of their purchases of both the garden centre and Lot 3. That result reflected favourably on Norris Ward and on the Kayes themselves. The Kayes could not suggest that the two month delay caused them any significant loss, where they were throughout in possession of and operating the garden centre business.

[32] It was, we repeat, settlement of the Lot 1 agreement which proved problematic. The Kayes' delays in that respect were plainly the result of their own failure to secure adequate financing unrelated to anything Norris Ward may or may not have done. The Kayes did not and could not assert that the firm assumed an obligation to advise them on arranging funds and they have no evidential basis whatsoever for asserting that the firm's alleged negligence caused them an extra financing loss of $139,239.

[33] In summary, we are satisfied that the Kayes' claim falls at the first hurdle of failing to establish that Norris Ward owed them a duty of the scope and nature alleged. While our approach differs from that adopted by the Judge, we agree with her dismissal of the claim for breach of contract relating to the business acquisition.

Second claim

(a) High Court

[34] As noted, Peters J found that Norris Ward was in breach of its contract of retainer in advising the Kayes on their rights of recovery against Tanner Fitzgerald.[8] The firm failed unduly to advise the Kayes on the correct measure of damages recoverable from their former solicitors. It is plain that the solicitor employed by Norris Ward, John Bolton, who was responsible for advising the Kayes on their litigation rights, failed to understand and advise the Kayes of the true nature and extent of Tanner Fitzgerald's liability.

[35] It is equally plain, however, that the Kayes' expectation of their rights of recovery against Tanner Fitzgerald were, as with other aspects of this litigation, unrealistic. For example, in February 2007 they advised Norris Ward that their losses attributable to Tanner Fitzgerald's negligence were $233,000. In March 2008, on the Kayes' instructions, Norris Ward filed an application for summary judgment in the High Court for damages exceeding $384,585. By April this assessment had increased to $637,000. It appears that by February 2009, after they had terminated their instructions to Norris Ward, the Kayes had revised their claim upwards yet again[9] to $1.8 million.

[36] An Auckland barrister, Neil Campbell, introduced a long overdue element of reality. In February 2009 he advised the Kayes that their right of recovery from Tanner Fitzgerald was about $60,000. At mediation the following month Tanner Fitzgerald agreed to settle the Kayes' proceeding by paying damages of this amount.[10]

[37] Mr Kaye's evidence at trial was that if in February 2008 Tanner Fitzgerald had given him the competent advice given by Mr Campbell a year later he would have accepted unconditional agreements to buy Lot 3 and the business. Instead the

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8 HC decision, above n 1, at [42]–[55].
9 At [45].
10 At [46].

firm caused the Kayes to sell the assets sometime later in a situation of financial distress for a much lower amount.[11]

(b) Decision

[38] The Judge's rejection of Mr Kaye's evidence and finding on causation cannot be challenged. By February 2008 Norris Ward had advised the Kayes that their maximum right of recovery from Tanner Fitzgerald was about $100,000. While this realistic advice was well overdue, the delays in its provision were irrelevant. The Kayes did not change their position materially in reliance on Norris Ward's failure in the interim. Instead, they themselves progressively escalated the amount of the damages claim.

[39] The Kayes' rejection of Norris Ward's advice is shown by their upward revision of their claim, to $1.8 million, a year after terminating the firm's retainer. In rejecting the offer made for Lot 3 and the business in February 2008, the Kayes advanced a counter offer at an increased price of $125,000, despite Norris Ward's advice on the limitation of Tanner Fitzgerald's liability. Any loss on resale was the Kayes' responsibility.

[40] Moreover, the Judge accepted uncontested expert evidence from Grant Graham, a highly qualified and experienced accountant called by Norris Ward. In his opinion the Kayes and ROL were insolvent either in March 2007, when all transactions were settled, or shortly thereafter.[12] Income from the business was insufficient to service the Kayes' borrowing between 90 and 100 per cent of the purchase prices payable under the three agreements, and franchise and marketing fees due to Palmers. The Judge correctly found that the collapse of the garden centre with substantial consequential losses to the Kayes were inevitable. This regrettable consequence was attributable solely to commercial decisions made and unconditional contractual commitments assumed by the Kayes well before they ever engaged Norris Ward.

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11 At [57]–[58].
12 At [62].

[41] We must record that this litigation has served to confirm Mr Barris' observation about the Kayes' fixed but misplaced views of their rights. They sought damages of $5,581,228 from Norris Ward when at best, even if they had proven causative breaches of the firm's duties, the measure of their damages would have been very modest indeed. The 17 volume trial record of briefs and notes of evidence and a vast number of documents illustrate the extent to which this proceeding lost perspective, reflecting a pervasive absence of objectivity and a determination to transfer blame to others for losses for which the Kayes alone must accept responsibility.

[42] We add also our satisfaction that, far from breaching any contractual duties, Mr Barris discharged his professional obligations with commendable skill and care in very difficult circumstances.

Result

[43] The appeal is dismissed.

[44] The Kayes are ordered to pay Norris Ward costs as on a standard appeal on a band A basis together with usual and reasonable disbursements.

Solicitors:
Kennedys Law, Auckland for Respondent