

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2010-009-002712
[2016] NZHC 907**

BETWEEN MALLEY & CO
 Plaintiff

AND GARY OWEN BURGESS
 Defendant

Hearing: 7-10 December 2015

Written Submissions:
12 February 2016 - Plaintiff
7 March 2016 - Defendant
18 March 2016 - Plaintiff

Appearances: M E Parker for Plaintiff
 Defendant Appears In Person

Judgment: 5 May 2016

JUDGMENT OF GENDALL J

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Introduction

[1] This judgment relates to longstanding ongoing litigation between the defendant, Gary Owen Burgess (Mr Burgess), and his former lawyers, the plaintiff Malley & Co. The matter has a long history and it occupied the allocated four days of hearing time in this Court from 7 December 2015 to 10 December 2015, without finishing.

[2] At the conclusion of this four day in-person hearing, there had been time only for the plaintiff and the defendant to call their evidence and each requested some time to provide final written submissions to be considered by me. Rather than simply adjourning this matter at the time part-heard I agreed, and in a 10 December 2015 minute I issued, I made directions for the filing of submissions from the parties through January and February 2016, culminating in reply submissions from the plaintiff to be provided by 11 March 2016.

[3] On 28 January 2016 however, at the request of the parties, amended timetable directions were made. These required that the plaintiff's submissions were to be provided by 12 February 2016, the defendant's submissions in reply by 7 March 2016 and the plaintiff's final reply submissions by 18 March 2016. Closing submissions were provided in accordance with these amended timetable dates.

[4] I have now had an opportunity to consider those submissions and all the material provided at the in-person hearing of this matter, and give my decision. This decision relates to the two issues which were addressed at this hearing being, first, an outstanding legal fees claim from the plaintiff, Malley & Co, and, secondly, a substantial counterclaim from the defendant, Mr Burgess, for alleged losses and damages he says he has suffered as a result of Malley & Co's negligence and breach of duty.

Background

[5] In 2010 in the District Court Malley & Co sued Mr Burgess, seeking payment of fees for work they completed for him on a long-running relationship property dispute he had with his former wife. Malley & Co contend that this claim against

Mr Burgess is a simple debt action for fees due and owing. The Malley & Co invoices originally involved were as follows:

(a)	23 May 2008	\$7347.37
(b)	27 August 2008 (original invoice for \$4253.91)	\$1065.51
(c)	9 December 2008	\$10,578.09
(d)	22 May 2009	\$13,589.58
(e)	19 November 2009	\$23,723.15
	TOTAL	\$56,303.70

(On 28 February 2008 Malley & Co had confirmed with Mr Burgess his instruction to act on his behalf and they forwarded to him their terms of engagement which, amongst other things, set out clearly fees and billing arrangements. Under this in the section “Terms of Payment” it was provided “all fees rendered are payable on or before the 20th of the month following the date of the invoice...” and under the section “Overdue Accounts” it was provided “as we do not offer credit facilities, eleven percent per annum may be charged on all accounts, fees, disbursements and charges remaining unpaid one month after the date of issue of the account.” These terms of engagement and payment terms were accepted by Mr Burgess without demur.)

[6] In 2010, Mr Burgess then counterclaimed asserting seven causes of action which include claims that Malley & Co were negligent and in breach of various duties owed to him as his legal advisors. As a result, Mr Burgess asserts that Malley & Co have caused him substantial losses which vastly exceed the claim against him for unpaid fees. Essentially, as I understand the position, Mr Burgess has quantified this counterclaim in the following way:

Loss of farm and business	\$420,000.00	
Legal Expenses	\$67,000.00	
Costs awarded against defendant	\$40,000.00	
Potential costs – Family Court	\$30,000.00	
Loss of income	\$60,000.00	
Loss of future income	\$250,000	
TSB claim on mortgagee sale plus expenses	\$27,000.00	Plus expenses
TOTAL	\$894,000.00	

[7] On this, Mr Burgess also notes specifically that:

All losses are **estimated figures** and cannot be fully finalised until legal proceedings currently underway in the Family, District, High Courts and Court of Appeal and LCRO are finally.

(Emphasis added)

[8] In addition, onto his counterclaim Mr Burgess appears to add a general damages claim by which he seeks “stress, anxiety, embarrassment, humiliation and injury to feelings” of \$75,000 as well as exemplary damages of \$50,000.

[9] Those general damages and exemplary damages claims outlined originally in Mr Burgess’ counterclaim in the District Court have now increased following the transfer of those proceedings to this Court from \$75,000 to \$150,000 with respect to the general damages claim, and from \$50,000 to \$150,000 for the exemplary damages claim.

[10] As I have noted, following the filing in the District Court of Mr Burgess’ statement of defence and counterclaim, by agreement this proceeding was transferred to the High Court where it has continued. Significant interlocutory matters were then dealt with in this Court. It is not necessary to traverse these matters here.

[11] Finally, the Malley & Co claim for unpaid legal fees (fees that date back to invoices rendered in 2008 and 2009) and Mr Burgess’ substantial counterclaim came on for hearing in this Court commencing 7 December 2015. At that point this litigation, as noted, already had an extensive history. In addition to other matters, it had been the subject of various pre-trial determinations in the District Court and in this Court, there had been three disciplinary complaints made against Malley & Co, with a judicial review by Mr Burgess of decisions of the Legal Complaints Review Officer as well as a number of appeal proceedings, some of which may still be live. In all those stages of the litigation, the issues in dispute were thoroughly articulated and well known to the parties, as Dunningham J in this Court noted in her 28 April 2015 judgment at para [14] on unsuccessful strike out proceedings Mr Burgess had brought.

Preliminary matter

[12] Before I turn to consider the claim and counterclaim before the Court here, I need to mention a preliminary matter which was raised at the commencement of day one of this hearing before me. This was an issue raised at about 10 a.m. on 7 December 2015 by Mr Burgess, which I understand the Court had not been appraised of earlier. As to this, Mr Burgess expressed his concern as to the representation of Malley & Co at this hearing by Mr Parker and his firm, Parker Cowan. Mr Burgess said then that he intends to bring proceedings against Mr Parker and his firm alleging what he describes as “reckless and malicious use of a civil proceeding” relating to this whole litigation. Mr Burgess went on to maintain that Mr Parker and his firm therefore could not be considered to be independent in relation to this whole matter and he tentatively questioned whether they should withdraw or be removed from continued involvement here.

[13] In response, Mr Parker noted that this matter had been set down for hearing commencing that day, 7 December 2015, for some considerable time. He said quite properly that there was no formal application before the Court from Mr Burgess seeking his removal as counsel for Malley & Co. Mr Parker noted also that this issue had been raised by memorandum alone he said simply as a tactic on the part of Mr Burgess in an attempt to destabilise the trial. Thus, according to Mr Parker, the matter was raised by Mr Burgess at the eleventh hour for an improper purpose. This was simply to delay once again the hearing of Malley & Co’s unpaid fees claim and it must be seen as constituting a last minute attempt to avoid Mr Burgess having to grapple with the real issues here. Mr Parker observed also that neither he nor his firm were parties to this proceeding, nor was anyone connected with Parker Cowan to give evidence as a witness here.

[14] In response Mr Burgess, in effect, withdrew his request that Mr Parker should cease to represent Malley & Co and take no further part in this proceeding. In doing so, Mr Burgess made it quite clear to me that he was not applying to have this trial vacated. He acknowledged that it could properly continue with Mr Parker remaining as counsel for Malley & Co even though he continued his broad claim that

Parker Cowan's actions in this litigation might be in question. Mr Burgess said that in his words he "simply wanted the Court to be aware of the issue".

[15] Given this position adopted by Mr Burgess and my view that, in any event, upon all the material that had been placed before the Court, there was no question of any conflict here such that Mr Parker would be disqualified from continuing to appear as counsel for Malley & Co, no rulings were required. The hearing of this matter then proceeded.

I. Malley & Co's claim for outstanding fees

[16] It is appropriate here to turn first to consider Malley & Co's fees claim against Mr Burgess which I now do. Malley & Co says this claim is a straightforward one and it is just a simple debt action for fees due from Mr Burgess which are long outstanding and interest thereon. After considering this fees claim and Mr Burgess' defence to the claim, I will turn to address his counterclaim. This counterclaim raises, amongst other things, allegations of negligence, breach of duty and breach of a retainer contract against the relevant Malley & Co partner who was involved at the time in acting for Mr Burgess, Mr Ernest Tait (Mr Tait).

[17] Turning now to Malley & Co's claim this is outlined in its amended statement of claim dated 28 November 2014. Before me Mr Parker confirmed, however, that the total amount now claimed has reduced from the \$56,303.70 referred to at para [5] above to a new figure of \$54,594.81 plus interest. This was said to include a small adjustment arising from a decision by Malley & Co not to pursue certain disbursements previously charged. Mr Parker said also that this revised figure was in accordance with evidence provided to the Court by Mr Tait which concluded with his acknowledgment "that we would rest on the figure" of \$54,594.81.

[18] Essentially the work undertaken for Mr Burgess by Mr Tait related to proceedings between Mr Burgess and his then wife (Ms Beaven) over the division between them of relationship property, the quantum of which in dispute seems to be approximately \$45,000. There is no dispute that Mr Burgess admits he engaged Malley & Co, and in particular Mr Tait, for this work which related to the position in which Mr Burgess had found himself in February 2008. Primarily this included

seeking to persuade the Family Court to adjust the apportionment of relationship property between Mr Burgess and Ms Beaven in a hearing that took place in June 2008, appealing the ensuing negative decision to the High Court (before Fogarty J), and conducting concurrent appeals to the Court of Appeal against that Fogarty J decision and a previous decision in the High Court (of Hansen J) at which a self-represented Mr Burgess was unsuccessful in overturning a first decision by Judge Strettell in the Family Court.

[19] In the Court of Appeal Mr Tait succeeded on behalf of Mr Burgess. In evidence before me of Andrea Manuel (Ms Manuel), an experienced lawyer in matrimonial property matters, her objective assessment of the work done by Mr Tait was that it was ably and properly done throughout with the result achieved in the Court of Appeal extremely beneficial for Mr Burgess. Ms Manuel noted that this effectively “turned the tide” for Mr Burgess. Ultimately she said it allowed him to be successful in the Supreme Court, although it does seem the benefits of this have still not apparently accrued to either Mr Burgess or Ms Beaven, as litigation between them remains on foot.

[20] Over the various times between 23 May 2008 and 19 November 2009 invoices were rendered by Malley & Co to Mr Burgess. These included those invoices outlined at [5] above. Generally, I am satisfied that in the main Mr Burgess took no initial exception to any of these. Certainly it does seem from the evidence before the Court that he made no real protest at the time, nor did he suggest that either the outcome he wanted had not been achieved, or his instructions had not been followed, or the fees were unwarranted or excessive. Indeed it might be thought to be of some significance that two of the invoices were paid by Mr Burgess.

[21] Nor, despite contentions which Mr Burgess now appears to make, was there any evidence of a fees agreement being reached either for some deferred payment arrangement or for some other basis for payment upon completion. What is apparent from the evidence, however, is that Malley & Co were aware Mr Burgess was in some financial difficulty at the time and the firm appeared to accommodate this to the point of making payment on his behalf of \$5000 for security for costs required in the Court of Appeal. This last step was clearly known to Mr Burgess. Indeed, when

this \$5000 security for costs payment was refunded by the Court of Appeal direct to Mr Burgess he simply retained the money himself and did not reimburse the firm for what is now some considerable time, notwithstanding that the original payment to the Court of Appeal was made by the lawyers.

[22] Contemporaneous correspondence before the Court seems to show also that Mr Burgess only began to take exception to the fees accounts rendered to him in the third quarter of 2009. This was at a time when, understandably, Malley & Co wanted to put in place an arrangement for payment even though, to their credit, the firm did not appear to be pressing then for full reimbursement of the outstanding amount. Only then does it appear to me that Mr Burgess began to take exception to the work done on his behalf by Mr Tait and to raise complaints.

[23] On behalf of Malley & Co, Mr Parker submitted before me that on the balance of probabilities the firm has clearly discharged the onus on it to show that it is entitled to be paid for what he describes as the relatively modest sums claimed for fees, fees that were discounted at times, and which related to the largely beneficial legal services Mr Tait provided to Mr Burgess and for which he took advantage.

[24] Subject to a full consideration of Mr Burgess' counterclaim, which I will address shortly, I agree. The legal services undertaken by Mr Tait on behalf of Mr Burgess were properly charged for work competently carried out and which achieved results which largely for the first time were favourable to Mr Burgess. This was clearly confirmed in the largely unchallenged evidence before me of the expert witness in relationship property matters, Ms Manuel.

[25] Malley & Co also rely here upon a certificate issued by the Legal Complaints Review Officer dated 4 April 2012 pursuant to s 161 Lawyers and Conveyancers Act 2006. That certified the sum of \$59,492.10 as owing to Malley & Co by Mr Burgess. Earlier, the Standards Committee had reviewed the same fees charged by Malley & Co that are at issue here and held that they were not excessive but fair and reasonable in all the circumstances and, indeed, there was even a reduction in the order of \$10,000 made in those fees charged from the actual time properly recorded.

This conclusion was endorsed subsequently by the Lawyers and Conveyancers Review Officer.

[26] But even leaving on one side the Lawyers and Conveyancers Review Officer's decision,¹ under basic breach of contract principles and issues of quantum meruit (where Mr Burgess is precluded from avoiding payment of Malley & Co's proper fees, on the basis of a reasonable payment being required for work undertaken and results achieved) in my view, there can be no doubt here that Malley & Co complied with the scope of its retainer with Mr Burgess and is entitled to the fees it is claiming.

[27] As to that retainer, although its terms were piecemeal, it does seem that on 27 February 2008 at least Mr Burgess in his letter of that date provided a retainer instruction when he stated:

I understand that you (Mr Tait) will handle matters in the Family Court from now at \$250 per hour and that you will look at the High Court appeal issued (including post-separation contribution) on your return in mid-March. Meantime I will continue in the HS with filings as required.

[28] No issues of limitation arise here. I am satisfied, particularly bearing in mind the virtually unchallenged evidence of the independent expert Ms Manuel, it is beyond doubt, first, that Mr Tait carried out the work he was retained by Mr Burgess to undertake in a competent and professional manner, secondly, that Mr Burgess received considerable benefit from that work and, thirdly, on their face the fees (the quantum of which is generally unchallenged by Mr Burgess in any real way and, under all the circumstances given the work involved, must be seen as entirely reasonable) are properly claimed, long-outstanding and should be paid, together with the agreed contractual interest for delayed payment, subject to the counterclaim by Mr Burgess not being made out here. I now turn to consider that counterclaim.

¹ And in this regard s 161(3) Lawyers and Conveyancers Act 2006 states:

[3] The Certificate of the Standards Committee or, as the case may be, the decision of the Legal Complaints Review Officer on a review of the determination is final and conclusive as to the amount due.

But this, on this see *Wynn Williams v Kain* [2011] 3 NZLR 709 where the Court held that the s 161 certificate in that case was conclusive only as to matters of quantum, not of liability.

II. Counterclaim by Mr Burgess

[29] In his counterclaim, as best I can tell, Mr Burgess sets out various alleged causes of action as follows:

- (a) Negligence – advice upon division of property;
- (b) Negligence – the relationship property agreement and memorandum;
- (c) Negligence – general complaints;
- (d) Breach of retainer contract;
- (e) Breach of fiduciary duty;
- (f) Breach of fiduciary duty in operation of the trust account;
- (g) Claims against Parker Cowan partners/employees;
- (h) Lodging notice of claim;
- (i) Lodging caveat; and
- (j) Fraud.

[30] It is appropriate to address each of these causes of action in turn which I now do.

(a) First cause of action – Negligence – Advice upon division of property

[31] In his counterclaim Mr Burgess describes this cause of action as:

First cause of action

- (a) Negligence in failing to give adequate or explicit advice on implementing the division of relationship property awarded by the Family Court.

[32] By way of background, when Malley & Co were instructed, Hansen J in the High Court had confirmed that there would be unequal sharing of the relationship property between Mr Burgess and Ms Beaven, constituting in the main the property at 563 Medbury Road, Canterbury, (the Medbury property), and he ordered the matter go back to Judge Strettell in the Family Court for division. On instructions from Mr Burgess, Mr Tait appeared before Judge Strettell on 30 June 2008 and the Family Court ordered the relationship property to be divided 62% in favour of Ms Beaven and 38% to Mr Burgess. This compared with the previous finding of that court that division should be on a 65% - 35% basis.

[33] Mr Burgess then instructed Mr Tait to appeal Judge Strettell's decision. In the meantime Mr Burgess was under some pressure as he was trying to avoid a mortgagee sale of the Medbury property consequent upon his being unable to meet mortgage payments over the property. It is not disputed that, in order to give effect to Judge Strettell's orders and to protect the Medbury property from mortgagee sale, effectively with instructions from Mr Burgess, Mr Tait negotiated an agreement with Ms Corry, counsel for Ms Beaven recorded in a memorandum between the parties (the Memorandum).

[34] Before me and in the various causes of action pleaded by Mr Burgess it is a feature that his arguments essentially focused upon matters arising from the agreement reached in the Memorandum. Mr Burgess has sought to suggest that this agreement was one made without his knowledge or understanding but on all the evidence which is before the Court that claim is simply not sustainable. I am satisfied Mr Burgess was fully informed by being included in correspondence and, in particular, being provided with a copy of the Memorandum in draft form by Mr Tait who requested Mr Burgess' comments. Mr Tait was a credible and reliable witness and I accept his evidence on this, evidence which is supported by documentary evidence before the Court.

[35] Broadly speaking, Mr Burgess appears to complain that the advice given to him by Mr Tait was negligent in that it failed to advise upon matters which might be summarised in the following way:

- (a) The merits of either selling or becoming the outright owner of the Medbury property;
- (b) “How to obtain the relationship property awarded to Mr Burgess by Judge Strettell”;
- (c) The risks inherent in having the mortgage in Mr Burgess’ sole name in circumstances where he did not have beneficial or legal ownership of the Medbury property;
- (d) The fact that the fixed term “table” mortgage was an “on demand” mortgage, which could be called in at any time;
- (e) The contents and implications of the Memorandum, including the removal of a Notice of Claim (the Notice) pursuant to s 42 of the Property (Relationships) Act 1976 (the PRA); and
- (f) The practical steps upon being notified of Mr Burgess’ financial stress, in particular, first, his becoming in arrears under the TSB mortgage and, secondly, crop failures on the Medbury property.

[36] In his 30 June 2008 Family Court decision Judge Strettell ordered that to give effect to his new relationship property apportionment of 62% in favour of Ms Beaven and 38% in favour of Mr Burgess, Mr Burgess was required to either arrange for the Medbury property to be sold or to make payment of the full amount required to Ms Beaven. As I see the position that would seem to provide the practical answer to complaint (b) above as to how the actual division of the relationship property would operate in practice.

[37] As to particulars (a), (c), (d) and (f) above, arguably these are purely financial matters which would not be within the retainer under which Mr Tait or Malley & Co

was instructed. I am satisfied that at least on this aspect, there may be some confusion in Mr Burgess' mind now as to what constitutes legal advice and financial advice here. But this changes nothing over what occurred in 2008/9.

[38] As this Court noted in *Hunt v Kensington Swan*:²

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 Courts must beware of imposing on solicitors or on professionals in other spheres, duties which go beyond the scope of what they are requested and undertake to do.

[39] And in any event here, there can be no question in my view that in concluding the Memorandum in conjunction with counsel for Ms Beaven, Mr Tait managed with a degree of skill to stave off the impending mortgagee sale of the Medbury property, a sale which was imminent because of Mr Burgess' continuing mortgage payment default.

[40] For the reasons I have noted above, I conclude that Mr Tait had no real duty of care to Mr Burgess to proffer unsought financial advice in respect of the claims noted under paras (a), (c), (d) and (f) and it must follow, therefore, that there cannot be a breach of duty relating to those issues.

[41] Turning to the claim made by Mr Burgess in para (e) above, I find that the agreement comprised in the Memorandum was very much in Mr Burgess' own interests and the subsequent loss of the Medbury property is down to his inability to service the refinancing that he had put in place.

[42] There has already been significant comment, both judicial and otherwise, as to the enforceability of the Memorandum in the stream of litigation which Mr Burgess has brought relating to the removal of the Notice of Claim from the title. This occurred long after the Notice had in fact been removed and indeed the Medbury property repossessed or sold by the mortgagee. In the Family Court Judge Somerville in fact has ruled Mr Burgess to be vexatious in pursuing litigation in relation to the Notice in circumstances where the Medbury property, to which the Notice related, had in fact been repossessed and sold.

² *Hunt v Kensington Swan* HC Auckland, CP1230/91, 8 July 1997 at p 7.

[43] I also find, on all the evidence before the Court, that Mr Burgess was fully informed as to the contents and implications of the Memorandum and that he accepted it without real question at the time. Mr Burgess was in a difficult and pressing situation given his mortgage default and the impending mortgagee sale. That evidence before the Court satisfies me that Mr Tait acted in a proper and, indeed, skilled fashion in negotiating a viable way to protect the relationship property at issue. That later the Medbury property should be lost must be seen as entirely down to Mr Burgess' inability to service the mortgage refinancing that he had put in place, a refinancing which in itself would not have been even a possibility had agreement not been reached in the Memorandum with Ms Beaven earlier.

[44] And as to arguments relating to s 21F of the PRA, the evidence before me, including that of the expert Ms Manuel, concluded:

- (a) The Memorandum was an agreement to which s 21 of the PRA applied and s 21F rendered such an agreement void if certain requirements were not complied with.
- (b) The advice given by Mr Tait to Mr Burgess met the standard of a competent lawyer and therefore complied with s 21F of the PRA.
- (c) In any event, and importantly, s 21H of the PRA allows the Court to give effect to an agreement despite the formal requirements having been dispensed with. I am satisfied that would have been the case here.
- (d) Importantly too, the Legal Complaints Review Officer and this Court in earlier decisions of French J and Dunningham J have all found that the advice given by Mr Tait in relation to the Memorandum met the relevant professional standards and I am satisfied this finding is unassailable here.

[45] In conclusion on this aspect of Mr Burgess' counterclaim I refer back to the evidence of Ms Manuel before the Court to the effect that in all relevant respects the

advice given by Mr Tait to Mr Burgess relating to division of the relationship property, in terms of his retainer, was professional, sound and proper.

[46] I conclude that there is nothing in this particular cause of action advanced by Mr Burgess.

(b) First cause of action – Negligence – the Relationship Property Agreement and Memorandum

[47] On this Mr Burgess contends that Mr Tait and Malley & Co were negligent in:

- (a) Implementing a “void relationship property (agreement)”;
- (b) Acting upon the application for Family Court “orders” where no such orders had been made;
- (c) Undertaking transactions without informed consent; and
- (d) “Was otherwise negligent”.

[48] It would seem that this claim is largely separate from the claim that insufficient advice was given to Mr Burgess regarding the Memorandum. Rather, these allegations appear to relate to:

- (a) A claimed failure to translate the Memorandum into sealed orders of the Court; and
- (b) The payment, allegedly without authority, by Malley & Co to Ms Beaven, of \$36,250 plus interest from their trust account upon the failure of Mr Burgess’ appeal to the High Court.

[49] I will deal with each of these claims in turn.

(i) Memorandum not sealed

[50] In Mr Tait's evidence before me, he said that the Memorandum was forwarded to Ms Corry, counsel for Ms Beaven, by correspondence dated 9 September 2008 with the request that it be filed in the Family Court. This filing, however, Ms Corry acknowledges never occurred. It seems however that the reality is that nothing flows from this. The terms of the Memorandum were complied with just as if orders of the Court had been made. The only possible way in which Mr Burgess could claim damages as a result of this failure is if he suffered some loss as a result of the orders not being complied with. In that case he may have had a valid argument that he had lost the benefit of relying upon the orders for enforcement. That did not happen however.

[51] Significantly, as a matter of law, in this Court French J held in *Burgess v Beaven*:³

[54] I have no doubt that had the memorandum been filed a consent order would have been made. It was a sensible and fair solution to a difficult practical problem which had arisen and the Judge had expressly reserved the right to the parties to apply for further directions. The memorandum in my view can properly be characterised as an attempt to put the Family Court decision into effect.

[52] I accept entirely that this is the position. There is nothing in Mr Burgess' argument on this aspect.

(ii) Payment without authority

[53] The payments of \$36,250 and \$554.31 for interest were made to Ms Beaven on 26 February 2009 and 30 March 2009 respectively.

[54] In terms of the Memorandum, the sum of \$36,250 was to be held in the trust account of Malley & Co on interest bearing deposit pending the outcome of the appeal in the High Court. It was agreed that at the conclusion of that appeal this sum and interest would be paid forthwith to Ms Beaven. This was agreed to by Mr Burgess.

³ *Burgess v Beaven* (HC) Christchurch CIV-2010-409-876, 4 October 2010 at [54].

[55] The relevant appeal was determined in the High Court by Fogarty J in Ms Beaven's favour. Accordingly there can be no doubt that as Mr Burgess agreed in the Memorandum to this course, the disbursement by Malley & Co was both appropriate and required. Indeed the Standards Committee in its decision on this particular matter (2157/2010 para [31](a)) found as much.

[56] There can be no question in my view that the memorandum provided Malley & Co with authority to make the payment of \$36,250 plus interest and actually required that this payment would be made. There can be no doubt therefore that the payment to Ms Beaven did not in any way breach any duty owed by Malley & Co and Mr Tait to Mr Burgess.

(c) First cause of action – Negligence – General complaints

[57] Under this cause of action, which Mr Burgess entitles "Negligent Conduct of the Client's Legal Affairs", as well as general complaints that Malley & Co failed to properly advise Mr Burgess in the ways which I have addressed above, Mr Burgess alleges that Mr Tait:

- (a) Acted on behalf of the opposing party, Ms Beaven;
- (b) Fraudulently or falsely certified and lodged a notice of claim;
- (c) Provided a false or fraudulent "lawyers certificate" to TSB; and
- (d) "Required" Mr Burgess to sign the caveat and agreement to mortgage in favour of Malley & Co.

[58] I turn to deal now with each of these allegations in turn. The first, relating to an allegation of "acting for the opposition" concerns the Notice required to be lodged pursuant to s 42(1) of the PRA in order to give effect to the terms of the Memorandum between the parties. This Notice in turn which the Memorandum directed would be filed, allowed Mr Burgess to refinance the Medbury property and thus at the eleventh hour to escape the impending mortgagee sale and remain both in possession of the property and with a real prospect of retaining it.

[59] The section 42(1) Notice is similar to a caveat and effectively prevents any dealing with the land until its removal. This notice, as I have mentioned, was required pursuant to the terms of the Memorandum and I find that it was specifically agreed to when Mr Burgess approved those terms.

[60] I find too that there is no basis whatever for the allegation that Mr Tait acted in any way inappropriately in executing the Notice or that in doing so this might have caused Mr Burgess any loss. If Mr Tait had not signed the Notice on behalf of Ms Beaven it would have been signed by someone else and the result would have been the same. And in any event, a failure to execute and register the Notice against the title to the Medbury property would have constituted a breach of the agreement reached in the Memorandum.

[61] I am satisfied in all the circumstances here that Mr Tait's execution of the Notice did not comprise misconduct or unsatisfactory conduct on his part. In this regard, I note too that this finding is in strict accordance with the earlier conclusions reached both by the Standards Committee and the Legal Complaints Review Officer earlier.

[62] Looking at matters objectively, there can be no doubt Mr Tait was acting in the interests of Mr Burgess in all respects and Mr Burgess chose to take advantage of this at the time in order to preserve his short term interests in retaining the Medbury property. This action on the part of Mr Tait was pragmatic and expedient. Mr Burgess' allegations to the contrary, in my view, are both unreasonable and unsupportable in any way and, in any event, no loss of any kind flowed from Mr Tait's actions.

[63] I conclude that Mr Tait's execution of the Notice did not constitute any professional failing on his part. It did not prejudice Mr Burgess' position nor cause any loss to him. Rather it achieved the contrary in enabling Mr Burgess to have an opportunity to retain the Medbury property, an opportunity which Mr Burgess himself lost simply because of his own actions in being unable almost from the outset to service the new mortgage he had arranged.

(d) Second cause of action – Breach of retainer contract

[64] Under this heading in his counterclaim Mr Burgess notes as a second cause of action “Breach of contract, in failing to give advice, or in failing to give proper or sufficient advice on implementing the division of relationship property awarded by the Family Court”.

[65] It will be obvious that these claims largely follow those set out in Mr Burgess’ first cause of action which I have noted at paras [31] to [63] above.

[66] What is notable here is that the alleged terms of the retainer are not clearly pleaded. In her evidence before me Ms Manuel expressed her expert opinion on the scope of Mr Tait’s retainer. Particularly, she noted that was limited as a result of Mr Burgess maintaining conduct of specified proceedings himself.

[67] The terms of that retainer I am satisfied were as discussed between the parties and in part as outlined at para [27] above. The duties of Malley & Co relating to that retainer do not go any further than as advanced by Mr Burgess in his tortious negligence claims noted at paras [31] to [63] above. In my view the present claim in contract is answered similarly by the findings I have made on those negligence claims, all of which I have found to be without merit.

[68] For these reasons I also dismiss this particular cause of action advanced by Mr Burgess.

(e) Third cause of action – Breach of fiduciary duty

[69] As to this cause of action, Mr Burgess makes a general claim that the “actions and failings” of Malley & Co, in particular “as set out under the first cause of action” represent a breach of the fiduciary duty owed by lawyer to client.

[70] Here, Malley & Co quite properly accept that as between themselves and Mr Burgess a solicitor client fiduciary duty is owed, this being a duty of loyalty and care and a duty to protect the interests of Mr Burgess as their client at all times.⁴

⁴ *Simms v Craig Bell & Bond* [1991] NZLR 535 (CA).

[71] Although it is somewhat difficult to understand the pleading in this area advanced by Mr Burgess, it does seem that his claim here is based upon a complaint over Mr Tait's execution of the Notice on behalf of Ms Beaven. I have already addressed this aspect, however, at paras [59] to [63] above and there is no need to repeat these arguments and my findings here. Suffice to say that I reject the claim that there has been any breach of fiduciary duty owed by Malley & Co to Mr Burgess as pleaded in any way whatever.

(f) Fourth cause of action – Breach of fiduciary duty in operation of the trust account

[72] Under this head, Mr Burgess alleges breach of fiduciary duty on the part of Mr Tait and Malley & Co, based upon the payments made from that firm's trust account to Ms Beaven. Again, it is important to remember that those payments were required and were made in accordance with the Memorandum as I have referred to at para [54] above. Again for the reasons outlined in those particular paras [53] to [56] above I find that there has been no breach of fiduciary duty owed towards Mr Burgess in this regard. His claim under this head is rejected.

(g) Fifth cause of action – claims against Parker Cowan partners/employees

[73] Under this heading which Mr Burgess entitles "Fifth cause of action: further causes of action in torts/malicious (civil) prosecution and use of civil proceeding and/or abuse of process" he purports to outline a claim against the partners and an employee of Parker Cowan Lawyers who are the solicitors representing Malley & Co in the claim constituted by this litigation.

[74] Significantly, no application for joinder to bring Parker Cowan Lawyers in as a party to this proceeding has been made here. Instead Mr Burgess proposes but does not amend his counterclaim to include claims against partners of Parker Cowan Lawyers, Mr Michael Parker and Ms Maree Cowan and employee Ms Alaina Nash. No proceedings, however, have been initiated against these parties and they are clearly not parties to the present action. On that basis alone, this cause of action must be dismissed and I now do so.

[75] In passing I note however, for completeness, that as best I can tell, there also appears to be nothing before the Court which in any way supports the allegations Mr Burgess endeavours to make in this particular cause of action.

(h) Sixth cause of action – Lodging Notice of Claim

[76] Again, this particular cause of action appears in substance to relate to the claim Mr Burgess makes of an alleged unauthorised lodgement of the Notice of Claim pursuant to s 42 of the PRA by Mr Tait, which I have referred to at paras [58] – [63]. The arguments outlined in those paras apply precisely to this sixth cause of action and for those reasons this claim by Mr Burgess is also rejected.

(i) Sixth cause of action – Lodging caveat

[77] On this cause of action Mr Burgess disputes Mr Tait’s authority to lodge the caveat against the Medbury property which Malley & Co did. The purpose in doing this was to ensure there were sufficient funds to meet any costs award in their favour. The argument advanced by Mr Burgess appears to be that as the Memorandum is allegedly invalid, so therefore must be the caveat. I have found, however, that the Memorandum was valid and therefore this submission fails.

[78] In addition, and in any event, this claim made for wrongful lodgement of a caveat brought under s 146(1) of the Land Transfer Act would fail in my view for an additional reason. This is that if there was no basis for lodging the caveat (and this is denied), in any event no damage has been sustained by Mr Burgess as a result of its lodgement, and there is simply no evidence to the contrary before the Court.

(j) Seventh cause of action – Fraud

[79] Mr Burgess entitles this head “Seventh cause of action: fraudulently or unlawfully obtaining High Court orders to sustain caveat”. Obviously any allegation of fraud is a serious one and this allegation against Malley & Co is no different. As I understand the position, on previous occasions Mr Burgess has been warned of

making groundless allegations of fraud, for example in this Court's decision in *TSB v Burgess*.⁵

[80] No particulars have been provided by Mr Burgess in any event here as to the facts on which he seeks to rely in this fraud claim. It goes without saying that there would simply be no purpose in Malley & Co sustaining the caveat for the benefit of Ms Corry's client Ms Beaven. I repeat, no evidence of fraud of any kind is before the Court. This claim must fail.

Causation - Counterclaim

[81] Malley & Co's primary position here is that there was no failure on its part to properly advise Mr Burgess and, further, that in fact the advice and representation he was given was not only appropriate but showed considerable skill in that Mr Tait found practical solutions to the difficult circumstances in which Mr Burgess found himself.

[82] The stance of Malley & Co is that, even if Mr Burgess was able to point to an instance where Mr Tait's advice was wrong in law or failed to disclose an appropriate strategy (both of which possibilities are strenuously denied by Malley & Co), it could not be said that any such breach was causative of loss Mr Burgess says he has suffered here. Malley & Co contends that Mr Burgess has not in any way established that the losses he maintains he incurred, losses which are denied in any event, are a consequence of Malley & Co's conduct.

[83] Certainly from the evidence before me both of Ms Manuel and Mr Tait, which I accept, I am satisfied that the real causes of any losses Mr Burgess may have suffered here were his continuing failures to maintain mortgage payments. This conclusion can only be seen in all the circumstances as a compelling one. This, too, is linked to what has been suggested as a preoccupation on the part of Mr Burgess to expend time, energy and resources in litigation against his ex-wife, Ms Beaven, against Malley & Co and Mr Tait and, latterly, against the TSB in both the High Court and the Court of Appeal.

⁵ *TSB v Burgess* [2013] NZHC 3291 at [10](f) and [100].

[84] Even if it were to be found that Mr Tait and Malley & Co in some way breached a duty owed to Mr Burgess (and I have found otherwise) it is difficult to reach any other conclusion than the fact here that Mr Burgess, if he has suffered losses, has been the author of his own misfortune. Despite his contentions to the contrary, the reason for the negotiation of the Memorandum in the first place was to allow Mr Burgess to refinance the Medbury property with TSB, thereby avoiding the impending SBS mortgagee sale. Thereafter, the transfer of the Medbury property into Mr Burgess' sole name did not assist him in any way in his choosing to default on his mortgage repayments to TSB, and he fell into significant arrears. This eventually resulted in the mortgagee sale, the responsibility for which must fall at the feet of Mr Burgess. This in turn resulted in the debt to TSB for the shortfall.

[85] Furthermore, it is clear that in other proceedings Mr Burgess has sought to blame his ex-wife, Ms Beaven, for his losses which in itself must be seen as inconsistent with the evidence he has purported to give in the present proceeding. As to this, the Supreme Court in *Burgess v Beaven*⁶ held:

...[Mr Burgess] claims that the mortgagee sale was a result of unreasonable insistence by Ms Beaven on her rights under the judgments and order made in the Family Court at a time when, given the terms of the leave judgment of the Court of Appeal, it was very likely that Mr Burgess' appeal would succeed.

[86] The Supreme Court went on to dismiss Mr Burgess' claim against Ms Beaven.

[87] For all these reasons I conclude that in any event, if there had been any breach by Mr Tait or Malley & Co of their obligations to Mr Burgess this could not be said to be causative of loss Mr Burgess claims to have suffered here.

Quantum - Counterclaim

[88] Lastly, and simply for the sake of completeness, I turn to Mr Burgess' quantum claim which I have outlined at para [6] above. At this point I simply repeat my earlier conclusion that, if there has been any loss to Mr Burgess here, it must be

⁶ *Burgess v Beaven* [2012] NZSC 71 at [50].

seen simply because of his own failure to service the mortgage borrowings he undertook personally and would have been a loss suffered by him in any event.

[89] Notwithstanding this and turning to the quantum claim, before me in his evidence and under cross-examination, Mr Burgess conceded he was not able to support any of the heads of damage he had set out in his pleadings. On their face it is difficult to come to any other conclusion but that largely his claim for these amounts is entirely fanciful. As one example of this, Mr Burgess' allegation that he has lost \$395,000 representing the value of the farm property and this loss is due to him from Malley & Co. That farm property, the Medbury property, was sold from under Mr Burgess by TSB in a legitimate mortgagee sale consequent upon his repeated and prolonged defaults in making payments he had agreed to under the mortgage.

[90] I find there is no legal or rational basis for Mr Burgess' allegation that Malley & Co are liable for this \$395,000 amount or that Mr Burgess might ever have had an interest in the Medbury property (after repayment of any mortgage) that would entitle him to such a sum, even if he could support a valuation of such amount.

[91] A similar example is the claim by Mr Burgess for an indemnity from Malley & Co for costs payable to Ms Beaven. In my view, this claim also has no legal or factual basis. No evidence was presented by Mr Burgess before me regarding these costs or their quantum.

[92] What is clear to me, and confirmed in her evidence by the independent expert Ms Manuel, is that Mr Tait achieved an excellent result for Mr Burgess in the Court of Appeal that allowed him to go on and claim some qualified success in the Supreme Court. Sadly the advice to Mr Burgess from the Supreme Court and the parties generally to that litigation seems to have fallen on stony ground as those proceedings still seem to be on foot.

[93] In the hearing before me, Mr Burgess appeared to concede that, leaving all other matters on one side, he cannot support his quantum claims as he has put

nothing before the Court to substantiate these and to this extent his counterclaim is deficient. Indeed, in the transcript of this proceeding at page 239 at line 8 it would seem that Mr Burgess conceded he could not support these heads of quantum and said that:

...the Court has no choice but to disregard all those matters...

Conclusion – On the counterclaim

[94] As I have noted at para [16] above, on the one hand Malley & Co's claim in this proceeding was a simple one for payment of its long-outstanding fees. On the other hand, this was responded to by Mr Burgess' extensive counterclaim.

[95] For all the reasons I have outlined above, I find that this counterclaim is wholly unfounded and must be dismissed.

[96] Marked in the trial process in this litigation but also in all the procedural steps taken in this Court, in the District Court and in the Legal Complaints Review Authority proceedings, has been one unfortunate point. This is that at no stage on any issue has Mr Burgess even possibly conceded that Mr Tait and Malley & Co have achieved anything desirable for him apart from certain reluctant concessions he did make in cross-examination before me. Certainly Mr Burgess has made no concession first, that anything he has done contributed to the circumstances in which he finds himself nor that, secondly at any point was he personally able to service the borrowings on the Medbury property and this has been the real reason for him being responsible for his loss of this property.

[97] For all the reasons I have outlined above, Mr Burgess' counterclaim fails and is dismissed.

III. Result

[98] In all the circumstances here I am satisfied that on the balance of probabilities Malley & Co has discharged its burden of proof to show that the sum of \$54,594.81, long outstanding for its fees and disbursements in this matter, is properly due and

payable by Mr Burgess. Conversely, there is nothing before the Court to show that Mr Burgess' counterclaim is able to succeed.

[99] The claim by Malley & Co therefore succeeds and the counterclaim by Mr Burgess fails.

IV. Orders and costs

[100] Judgment is now entered in favour of Malley & Co against Mr Burgess and the following orders are now made:

- (a) Mr Burgess is to pay to Malley & Co their outstanding costs and disbursements of \$54,594.81.
- (b) In addition, Mr Burgess is to pay to Malley & Co interest which that firm has chosen to charge on that amount of \$54,594.81 at the rate of 11% per annum from the default date for each respective invoice in question up to the date of final payment. That default date is to be one calendar month after the 20th day of the month following the date the respective invoice was rendered to Mr Burgess.

(This order relating to interest on the outstanding amounts is made in terms of the paragraph headed "Overdue Accounts" in the Terms of Engagement entered into between Malley & Co and Mr Burgess from 28 February 2008.)

- (c) As to costs, I see no reason why costs should not follow the event in the usual way here. Costs are therefore awarded to Malley & Co on this proceeding as the successful party. As to the quantum of those costs, in the absence of the parties being able to agree on the question of costs, they may file memoranda sequentially (Malley & Co first, followed by Mr Burgess secondly, with a brief reply from Malley & Co thirdly) and, in the absence of either party indicating they wish to be heard on the question of costs, I will decide that question of costs based upon the material then before the Court.

[101] Leave is reserved for either party to approach the Court further on 48 hours' notice if any dispute may arise over calculation of the interest amounts to be payable by Mr Burgess pursuant to para [100](b) above.

.....
Gendall J

Solicitors:
Parker Cowan, Queenstown

Copy to Mr Burgess