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IN THE COURT OF APPEAL OF NEW ZEALAND

CA481/2013
[2015] NZCA 34

BETWEEN	ROSS WINSTON BLACKWELL Appellant
AND	LEITH ROGER CHICK AND ROSEMARY CHICK Respondent

CA476/2013

AND BETWEEN	EDMONDS JUDD Appellant
AND	ROSS WINSTON BLACKWELL First Respondent
	LEITH ROGER CHICK AND ROSEMARY CHICK Second Respondent

Hearing:	12 and 13 November 2014
Court:	Ellen France P, Randerson and Harrison JJ
Counsel:	C T Gudsell QC and R J Southall for Appellant in CA481/2013 and First Respondent in CA476/2013 M G Ring QC and J Parker for Appellant in CA476/2013 M D Branch and K A McDonald for Respondent in CA481/2013 and Second Respondent in CA476/2013
Judgment:	27 February 2015 at 3 pm

JUDGMENT OF THE COURT

A The appeal in CA481/2013 is dismissed.

B The appellant in CA481/2013 is to pay the respondent's costs on a standard appeal on a band A basis together with usual disbursements.

C The cross appeal in CA481/2013 is dismissed. There is no order as to costs.

D The appeal in CA476/2013 is allowed and the judgment in the High Court for damages and costs is set aside.

E The respondent in CA476/2013 is to pay the appellant costs on a standard band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Contents

Introduction

[1] The late Ross Blackwell (Ross) owned a dry stock farm in the Waikato. He agreed to lease the property to his friends and neighbours, Leith and Rosemary Chick, with an option to purchase at an agreed price. It is common ground that when the option was exercised some years later the agreed price was less than half of the property's then market value and that the agreed rental for part of the term was significantly below market rates.

[2] Ross' brothers, Derek and Basil (the Blackwells), who were by then managing his affairs, refused to settle when the Chicks exercised the option. In defence of the Chicks' consequential application to the High Court for an order for specific performance the Blackwells pleaded that, first, Ross lacked mental capacity when granting the option and, second, the bargain was unconscionable.

[3] Following trial, Rodney Hansen J dismissed the Blackwells' defences and ordered Ross to perform the agreement (the first judgment).[1] However, he gave judgment for Ross against the firm of Edmonds Judd, his former solicitors, who had acted for him on the lease transactions and who admitted negligence; for $1,831,700 being the difference between the agreed sale price and the property's then market value together with rental shortfalls (the second judgment).[2] The Judge dismissed the Chicks' separate claim against Edmonds Judd for legal costs in the event that they failed in their primary claim against Ross (the third judgment).[3]

[4] Ross died after trial. The Blackwells, as Ross' litigation guardians, appeal against the first judgment on the ground that Rodney Hansen J erred in dismissing each of their affirmative defences.[4] Edmonds Judd appeals against the second judgment on the ground its negligence did not cause Ross any loss. The Chicks cross appeal against the third judgment. All three appeals were heard together but, as will become apparent, it will be unnecessary for us to determine the merits of the Chicks' cross appeal.

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1 *Chick v Blackwell* [2013] NZHC 1525 at [1]–[146] and [177].
2 At [156]–[176] at [179].
3 At [147]–[153] and [178].
4 The Blackwells were joined as parties to these appeals by order of this Court.

Facts

[5] By way of introduction we recite that the judgments are based on findings of fact made by Rodney Hansen J relating to the transactions. In this Court counsel have subjected the foundations for those factual findings to sustained challenges, particularly on the Blackwells' appeal against the first judgment. It is appropriate to note that the Judge heard from many witnesses, some of whom were extensively cross-examined. The trial was of three weeks duration. While we have independently reviewed the Judge's factual findings, we acknowledge immediately the particular advantage he enjoyed from presiding over the trial and absorbing the evidence as the trial progressed.[5] That observation applies particularly to the first judgment which is based primarily on direct findings of fact, some of them on credibility: by contrast, the second judgment is founded on inferences drawn from the same evidence.

[6] We acknowledge also that our factual summary is taken largely from Rodney Hansen J's comprehensive narration which was in turn taken largely from evidence given by Leith Chick, whose credibility is under attack on appeal. Nevertheless, we are satisfied that our summary provides an accurate contextual setting for considering the specific grounds of both substantive appeals.

[7] In 1979 Ross, who was then a 21 year old single man, bought a farm including a residence at Arohena in the Waikato. In 1993 he bought an additional property. His farm then comprised both properties, a total of 324 hectares, and was run as a dry stock operation known as Haupouri. In 1984 the Chick Family Trust bought a dry stock farm of about 200 hectares nearby.

[8] A close friendship developed between Ross and the Chick family including the Chicks' son, Adam. Their houses were only a few hundred metres apart and they saw a lot of each other. Each assisted the other in operating their respective farms.

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5 *Jay v Jay* [2014] NZCA 445 at [22]–[23], citing *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13] and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 197 and 199.

[9] In 1993 Ross married Margaret Catchpole. Unfortunately she did not settle into farming life and in 1996 the couple moved to the nearby town of Te Awamutu. Nevertheless, Ross continued to commute daily to his farm.

[10] In June 2000 Ross was diagnosed with an inoperable brain tumour. He was advised he had about six months to live. Shortly afterwards, he executed an enduring power of attorney in favour of his two brothers (it was not acted upon until 2008). In October and November 2000 Ross was treated with what is known as Grays whole brain radiotherapy.

[11] Over this period Ross approached the Chicks to enquire whether they would lease Haupouri. In November 2000 the parties signed an agreement to lease the farm at an annual rental of $63,000 (reduced from a market rental of $65,900 pa because the Chicks did not wish to rent the farm house). The lease was for a term of three years commencing on 1 April 2001 with rights of renewal for a further three years and also of first refusal should Ross decide to sell the property. The Chicks suggested both rights because they planned to invest some $250,000 in extra stock and wanted certainty that if Ross died Haupouri would not be sold to their detriment. The Blackwells do not challenge Ross' capacity to enter into that transaction, which was outwardly on commercial terms.

[12] In September 2001 Ross executed a will appointing his brothers as his executors and trustees. He gave life interests in his estate to his wife and his brothers, with the residue to go to the latter two.

[13] Ross confounded the medical profession. As Rodney Hansen J noted[6] the seizures which Ross suffered following treatment steadily diminished and he progressively recovered to the point where from November 2002 he had resumed work on his farm.

[14] In early February 2004 Ross and Mr Chick discussed a renewal of the lease. They agreed on a rental for the next three years of $65,900 which included the

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6 At [42].

house. By then Adam Chick and his partner, Jana, were living there. Adam had resumed a fencing contract business and Jana worked for Mr Chick.

[15] What happened next was described by the Judge as follows:

> [17] In February 2004, while Mr and Mrs Chick were away in the South Island, Ross Blackwell suggested to Adam and Jana that they could buy his farm. …. Adam said he was "gobsmacked" as he had always assumed that Ross' brothers would get the farm. He asked Ross what his reasons were. Ross said he did not want to talk about it but would tell him one day. He told Adam he wanted to talk to his father as soon as he returned. (Adam said Ross told him the reasons many years later, in August 2007, when they were coming back from Auckland together. Ross told him the reason was that his brothers and their families had been "horrible to Margaret" (Ross' wife).)
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> [18] Ross Blackwell and Mr Chick met after the Chicks returned from the South Island. Mr Chick said Ross said to him, "I want you guys to have my farm. I would really like to leave it to Adam in my will". Mr Chick said he told Ross he could not do that; he had Margaret to consider and his will could be challenged. Ross then asked him, "How do we do it then?" After discussion, Mr Chick suggested an option to purchase. Mr Chick said Ross made it clear to him that he wanted to continue owning the farm while he was still alive and that, in the end, he would like Adam to have it. Mr Chick was to be "the caretaker".
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> [19] They discussed a purchase price. At this time the government valuation was $1,165,000. Ross told Mr Chick that he had spoken to the valuer who had previously valued the lease. He had estimated a value for the farm of $1.8m. Mr Chick said Ross was concerned that the farm should be affordable for Adam and suggested a price of $900,000 based on the productive worth of the land. Mr Chick said he told him that was too low. After some discussion, a price for the option of $1.5m was agreed. Ross Blackwell asked that nothing be said about the option, specifically saying that his brothers should not be told.

[16] Ross and Mr Chick each instructed their solicitors, respectively Mandy Rasmussen and Richard Gray of Edmonds Judd (the same firm acted for both parties on all relevant transactions). In April 2004 Ross and the Chicks signed an agreement, drafted by Edmonds Judd on Ross' instructions, to renew and vary the lease. The rent was fixed at $65,900 annually plus GST. An option to purchase was included at $1.5 million (GST exclusive) if settlement occurred by 30 April 2007 or at an agreed valuation of market value or by arbitration or by valuation experts if settlement took place after that date. For the purposes of this litigation the parties agree that the market values of the property in April 2004 and April 2007 were $2.07 million and $3.2 million respectively; and that the annual market rental in April 2004 was $82,500 plus GST.

[17] In 2005 Adam and Jana took over management of the farm. In April 2005 the parties signed a variation of the agreement. The Judge noted:

> [21] ... Early in 2005 Mandy Rasmussen was instructed by Ross that he wanted to vary the term of the option by extending the date by which the farm could be purchased for $1.5m, to 30 April 2010. A variation of lease was prepared by Mandy Rasmussen and sent to Richard Gray on 21 February 2005. Leith Chick said the variation of lease "came out of the blue". Ross had not discussed it with the Chicks. They signed the variation which was executed on 5 April 2005 by Ross. Mr Chick said that the next time he saw Ross he asked him why he had wanted to extend the lease. Ross said that it was to give them more time. …

[18] In April 2007 the parties signed an agreement to renew the lease, again prepared by Edmonds Judd, at an annual rental of $69,600 plus GST. A further right of renewal was granted but there was no variation of the option price of $1.5m. The parties now agree the market value of the farm in April 2010 was $3.2 million, and the annual market rental in April 2007 was $106,000.

[19] Between March and July 2008 Ross suffered a series of strokes. Assessments of his cognitive abilities demonstrated that he was then afflicted by a severe impairment of memory. In July 2008 he was admitted to a hospital and, a few months later, to a rest home. In August 2011 he was shifted to a facility with hospital level care where he remained until his death.

[20] In March 2010 the Chicks visited Ross and requested him to renew and vary the lease to provide two further rights of renewal, extending the option date to purchase at $1.5 million to 30 April 2016. The parties agreed on terms and Mr Chick instructed Mr Gray to prepare a formal agreement. However, Derek and Charles then intervened in exercise of their powers as Ross' attorneys.

[21] The Chicks responded by serving notice of their intention to exercise the existing option, nominating 30 April 2010 as the settlement date and, after the Blackwells refused to settle, issued this proceeding.

Appeal in CA481/2013

(1) Lack of mental capacity

(a) Defence

[22] The Blackwells' first affirmative defence to the Chicks' claim was that to the Chicks' knowledge Ross lacked the mental capacity to understand the general nature of the 2004, 2005 and 2007 transactions. On the first element of the defence of Ross' capacity, the Blackwells pleaded that when signing the three agreements:

(1) Ross was and had been at least prior to June 2000 a person of limited intellectual capacity.

(2) Following his diagnosis of a brain tumour in June 2000, Ross underwent a radical course of radiotherapy which impacted on his cognitive abilities and also suffered from seizures for which he was taking medication.

(3) As a consequence, Ross' cognitive abilities were so impaired that he did not possess the mental capacity to understand either the terms or legal effect of the first renewal in 2004, its variation in 2005 or the second renewal in 2007.

[23] On the second element of the Chicks' knowledge, the Blackwells pleaded that the Chicks knew or ought to have known from their dealings with Ross that he was in ill health, continued to suffer from the effects of an inoperable brain tumour and was subject to ongoing medical treatment which was affecting his mental capacity. In view of his rejection of the first element of the defence, Rodney Hansen J did not make findings on the second element.

(b) Pre-morbid intellectual capacity

[24] At trial the Blackwells' defence of Ross' lack of mental capacity relied upon a combination of direct, anecdotal and medical evidence. The Judge's starting point, which is not challenged by Mr Gudsell QC on appeal, is that Ross had the requisite

capacity to enter into the original lease in November 2000.[7] The Judge nevertheless undertook an evaluation of Ross' intellectual capacity at that time – his so-called pre-morbid intellectual capacity. That was because the way in which Ross functioned prior to becoming unwell provided a benchmark against which evidence of his subsequent decline could be measured. The medical evidence suggested that the combined effect of a brain tumour and radiotherapy on the cognitive functioning of a person of low intellect is likely to be greater than on a person of higher intellectual capacity.[8]

[25] There was no objective evidence of Ross' pre-morbid intellectual capacity.[9] The Blackwells relied on evidence from Ross' general practitioner, Dr Richard Ballantyne, and his mother-in-law, Joy Catchpole, a retired teacher, lecturer and inspector of schools. The former described Ross as being of borderline intellect prior to his brain tumour; the latter considered he had a level of intelligence in the bottom 10 per cent of normal people excluding those with significant intellectual disabilities. While acknowledging that both witnesses had a degree of expertise and experience in their respective fields, the Judge found that neither witness was competent to express an authoritative opinion in the absence of clinical testing and specialist expertise.[10]

[26] The Judge took into account other evidence, particularly about Ross' farming and general financial management abilities, before concluding that Ross was highly competent and possessed the necessary intellectual and psychological qualities to maintain an independent lifestyle, and that in 2000 he did not fit the profile of a man of borderline intelligence with the intellectual capacity of a 13 year old.[11]

[27] On appeal Mr Gudsell challenged this finding. He submitted that the Judge erred in failing to determine that in November 2000 Ross was as pleaded of limited intellectual capacity. In particular, he submitted, the Judge failed to give appropriate weight to the evidence of Dr Ballantyne and Mrs Catchpole and of other witnesses

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7 At [31].
8 At [31].
9 At [32].
10 At [32].
11 At [37].

who described Ross variously as "a bit naïve", as having a "poor understanding of the English language", of being a "very low level basic person", "mentally impaired" and "an odd ball" and also in understating the evidence of Ross' academic history. He submitted that the Judge further erred by focussing on Ross' farming abilities as opposed to his intellectual abilities.

[28] We are not satisfied that the Judge erred in his evaluation. The success or otherwise of the Blackwells' defence did not require proof that Ross was of limited intellectual pre-morbid capacity before he was diagnosed with a brain tumour and underwent radiotherapy treatment. It was unnecessary for the Judge to make an affirmative finding on this allegation. It was not a legal element of the defence. All that was required was a general evaluation of the type undertaken.

[29] In any event, to the extent that Ross' pre-existing capacity was relevant, the Judge was entitled in the absence of a cognitive assessment to take into account the full range of available evidence including, relevantly to this litigation, Ross' ability to manage his own financial affairs. The Judge was not bound by the evidence of Dr Ballantyne or Mrs Catchpole given that neither was competent to express other than a general impression based on dealings with Ross. An affirmative finding of limited intellectual capacity required more than impressions.

[30] Similarly, a person's mental capacity for legal purposes is not determined by his or her academic ability or how he or she may present to others. The Judge was not bound by those simplistic measures. He was entitled to take into account the different picture painted by other witnesses of Ross's mental and intellectual capacity. One observed that Ross was "a lot more intelligent that people gave him credit for".[12] Another called him a "clever man and quite a deep thinker".[13]

(c) Subsequent medical history

[31] The next step in the Blackwells' defence was that Ross' mental or intellectual capacity subsequent to his diagnosis in June 2000 was adversely affected by the nature of his brain tumour and the effects of the radiotherapy treatment and

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[12] At [36].
[13] At [36].

medication to control seizures. It was common ground that Ross declined physically and mentally in the period after he signed the original lease in November 2000. Also, as Mr Gudsell emphasised, the medical experts were agreed that Ross' "tumour and the radiotherapy treatment led to significant brain damage which inevitably would have caused cognitive impairment".[14] The contentious issue was about the extent of Ross' impairment when he signed the contracts at the material times in 2004, 2005 and to a lesser extent in 2007.

[32] A number of health care professionals were called at trial. The Blackwells relied on three specialists in particular: Dr Paul Timmings, a neurologist who treated Ross between June 2000 and May 2008; Dr Anthony Falkov, a radiation oncologist at Auckland City Hospital; and Dr Gill Newburn, a neuropsychiatrist.

[33] In summary the medical evidence was that:

(1) In June 2000 Ross was diagnosed as suffering from a high grade brain tumour. He was referred for radiation therapy. It was apparent to Dr Timmings that Ross was then under the impression that his life expectancy might be as short as a few months or as long as a couple of years.[15]

(2) In October and November 2000 Ross underwent a course of whole brain radiotherapy.[16]

(3) In 2001 and 2002 Ross was on medication to control ongoing seizures which diminished in frequency and appeared to have ceased altogether by May 2002. Regular MRI scans during this period showed a progressive shrinkage of the tumour and the cystic mass. By November 2002 Ross was reported to be well and back working on his farm.[17]

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14 At [63].
15 At [39]–[40].
16 At [41].
17 At [42].

(4) In February 2005 Dr Ballantyne reported that Ross had presented to him with bizarre behaviour changes and headaches, saying that his head seemed to be full of water. The Judge found that this was an isolated episode and was likely the result of delirium, a clinical syndrome characterised by a reversible acute state of confusion which usually has more than one medical or pharmacological cause.[18] In July 2006 Ross reported a worsening of his coordination over the previous five months. But otherwise he had been fine with no decline in his short term memory deficit.[19]

(5) A specialist who saw Ross for his annual examination in July 2007 noticed that his condition, including his coordination, had improved remarkably over the previous year.[20]

(6) Dr Timmings, who saw Ross in February 2008, noted memory problems but said they were not a major concern.[21]

[34] As the Judge recited:

> [46] MRI scans over the period 2001 – 2007 showed that Ross developed radiation encephalopathy or softening of the brain. This is a known "late" side-effect of radiotherapy and involves the loss of normal brain cells to a significant degree. The consequences will vary for individual patients. However, Dr Falkov said that it is almost inevitable, given time, that a patient treated with the dose of radiotherapy Ross received will develop significant complications, including cognitive impairment. He said some patients do not live long enough for such late side-effects to become manifest. In his view, the records show that Ross developed radiation encephalopathy which would have produced irreversible cognitive decline and progressive impairment of memory and judgment.

[35] A further brain scan in March 2008 revealed that Ross had suffered a small stroke. A mental state assessment showed that he was suffering serious cognitive impairment. By then Dr Timmings had noted a perceptible deterioration in Ross' condition.[22]

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18 At [56].
19 At [43].
20 At [44].
21 At [45].
22 At [47].

[36] The anecdotal evidence confirmed the medical evidence of a progressive decline in Ross' physical and mental health. The Judge was satisfied that until the first of the strokes in 2008 Ross was apparently competent to manage his affairs. He was described as generally extremely careful with money.[23]

[37] Ross' accountant, who met with him every two months, noted a deterioration in his physical and mental condition in 2008. While Ross was latterly seen as becoming something of a spendthrift, the Judge was satisfied that this change was not due to a brain function deterioration but was rather the result of a radical change in his circumstances. Ross was financially secure with almost $1 million in the bank and a steady income stream in excess of his basic needs. His prognosis was uncertain. He was apparently enjoying the financial fruits of his work.[24]

(d) Opinion evidence

[38] Mr Gudsell submitted that in finding Ross was of competent mental capacity when he signed the renewals in April 2004 and April 2007 and the variation in 2005 the Judge understated or ignored the experts' uncontested views on the effect of the tumour and the radiotherapy treatment on Ross' cognitive capability and capacity. Mr Gudsell emphasised medical evidence that a major brain tumour is the equivalent of a frontal lobotomy, resulting in a lack of judgment and disinhibition. Also, he referred to evidence that the prescribed medication can have mind altering effects.

[39] Mr Gudsell relied particularly on: (1) Dr Newburn's opinion that the high dosage radiotherapy left Ross with pathological changes "in cerebral white matter", with the MRI scans showing signs of impairment in 2001 and a gradual progression or at least mapping of the disturbance and white matter function over the next three to four years; (2) Dr Newburn's opinion that by 2005 Ross had lost sufficient white matter tissue as revealed by MRI scans to suggest that he would have had significant difficulties in "connecting up the signals in the brain and … formulating opinions adequately"'; and (3) Dr Timmings' opinion that the long term neurocognitive and cerebral degenerative consequences of whole brain radiotherapy would have started somewhere between two and five years after it was administered.

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[23] At [57]–[59].
[24] At [60]–[61].

[40] In summary, Mr Gudsell submitted that the judgment was deficient both in its reasoning and result because the Judge omitted to conduct a more detailed and critical analysis of the large body of medical evidence adduced at trial which, when coupled with common sense, must necessarily lead to the conclusion that at the relevant times Ross was in a cognitively compromised mental state.

[41] We do not accept Mr Gudsell's submission. The Judge was not obliged to rehearse all the medical evidence, much of which had no relevance to the issue in dispute. As Mr Branch submitted, the detailed medical evidence largely confirmed what was common ground and was ultimately of little assistance to the High Court. Mr Gudsell was unable to identify any material error in the Judge's concise summary of the effect of the medical evidence which we do not need to recite or analyse and with which we agree.[25]

[42] The decisive question was whether at the relevant times Ross lacked the mental capacity to understand the general nature of the transactions. In answering that question the Judge took into account Dr Newburn's opinion that by early 2004, when he signed the renewal of lease, Ross would have been suffering an irreversible cognitive decline and a degree of impairment caused principally by the radiotherapy, a condition which worsened in 2005 and 2007. Dr Timmings confirmed that the extent and timing of the agreed impairment of Ross' mental capacity could not be known. The Judge had a sufficient evidential basis for concluding that brain damage as recorded in MRI scans is not of itself an accurate indicator of cognitive impairment. Also, there was nothing to link Ross' medication to his mental state other than in a general way. The Judge cannot be faulted for accepting Dr Newburn's opinion that whether a person like Ross suffering from diminished cognitive functioning had the required capacity would depend upon the complexity of the transaction under consideration and any explanations given for it.

[43] We note two other relevant factors. First, the Blackwells do not contend that Ross lacked the necessary capacity to sign powers of attorney in their favour in June 2000; to enter into the original lease in November 2000 with rights of renewal and of first refusal to purchase; and to sign a will in September 2001, a year after

[25] At [63]–[67].

commencing treatment. The will, as Mr Branch pointed out, significantly advantaged Ross' brothers to the detriment of his wife. Second, Dr Timmings saw Ross frequently from 2001 but apparently did not consider it was necessary to arrange cognitive testing until 2008.

[44] The specific question for us to consider on appeal is whether the Blackwells have proved that in the period between September 2001 and the first renewal in 2004 or the 2005 variation (and to a lesser extent the second renewal in 2007) Ross' mental capacity had deteriorated to the point where he did not understand the general nature of the transactions. In the absence of any direct evidence to support this proposition we must, like Rodney Hansen J, approach the question by examining the circumstances of each transaction, taking account of the medical evidence to the extent that it bears upon Ross' capacity to understand the general nature of them.

(e) Transactions

(i) 2004 Renewal

[45] The Judge's consideration of the circumstances of the relevant transactions started with the 2004 renewal. He found materially as follows:

(1) Ross made a considered decision to give the Chicks the right to buy Haupouri if they wanted,[26] because:

> [71] The Chicks had been good neighbours of Ross … and had become good friends. They had been and continued to be thoughtful and kind to him. He obviously approved of the way they farmed his property. They were happy to accommodate his wish to have a continuing involvement in the farm and to respect his wish that he should remain the owner until he died.

(2) Ross plainly appreciated that his decision would probably mean the farm would not remain with the Blackwell family. But he had his reasons for preferring the Chicks, in particular his concern about the way his family members had treated his wife.[27]

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[26] At [70].
[27] At [72].

(3) Ross was "an independent thinker", very much his own man.[28]

(4) The option price, discounted below market value by $300,000, conferred a significant benefit on the Chicks but Ross' concern was that the farm should be affordable for Adam.[29]

(5) The sale of Haupouri to the Chicks would not affect Ross' intention that the Blackwell family should ultimately be the major beneficiaries of his estate and receive a substantial benefit on his death. Ross had accumulated close to $1 million in cash investments and was without debt. His wife would also be well cared for. The concession of $300,000 on the sale price to the Chicks would not have a major effect on his asset position.[30]

(6) The way in which the renewal of lease and option was progressed gave no cause for concern that Ross understood the general nature of the transaction.[31]

(7) While the Judge had reservations about the detail of Ms Rasmussen's recollection of her meetings with Ross, he accepted that Ross conveyed to her that he had a special relationship with the Chicks whom he regarded as family and was clear that he did not want another property valuation. The Judge had no reason to question Ms Rasmussen's confidence that Ross understood the essential nature of the transaction.[32]

[46] Of particular significance is the Judge's finding that:

> [80] … the failure to give contractual effect to these matters[33] reflects and is consistent with the peculiarly personal nature of the arrangement overall, as well as the level of trust that existed between

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28 At [73].
29 At [75].
30 At [74]–[75].
31 At [76].
32 At [77]–[78].
33 Three important terms which Mr Chick said were agreed verbally but were not included in the 2004 renewal. We shall address the omission of these terms later in this judgment.

> the parties. Ross' ability to visit the farm whenever he pleased relied on the goodwill of the parties. By 2004, the arrangement had worked happily for three years. The Chicks fully understood [Ross'] wish to retain ownership of the farm. It gave effect to an emotional attachment which they respected and honoured. Indeed, they would not have exercised the option in 2010 if the Blackwells had been prepared to extend the lease. There was an expectation that Adam and Jana would farm the land and use it for dry stock farming (and they did). It would have been quite contrary to the nature of the arrangement overall to convert such expectations into contractual commitments.

(ii) 2005 Variation

[47] On the 2005 variation, the Judge accepted that the likely timing of Ross' initial instructions to Ms Rasmussen to prepare the variation agreement (sometime before 10 February 2005) raised issues about his state of mind. It was very proximate to Ross' report to Dr Ballantyne that his head seemed to be full of water and his bizarre behaviour. However, Ross appreciated but was unconcerned about the prospect of the farm's value increasing.[34] While there was a concern that Ross instructed Ms Rasmussen when his judgment was impaired, by the time he signed the variation almost two months later the symptoms of delirium appeared to have gone.[35]

[48] The Judge concluded:

> [86] The reasoning behind Ross' unilateral decision to extend the fixed price option is difficult to fathom. Certainly it makes no sense in commercial terms. The explanation he gave to Ms Rasmussen is not much help. The timing seems strange. An extension could have been given at any time before 30 April 2007 and the option made provision for the parties to agree on a price (as an alternative to market price) after that date. I infer that Ross thought it would assist the Chicks to know that their right to purchase at the fixed price would continue until 2010. It is also conceivable that he saw that an extension would remove an incentive to exercise the option before 30 April 2007.
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> [87] *There is nothing to show that Ross did not understand what he was doing. The variation could not have been more simple.* On the basis that symptoms of delirium had passed, as appears to have been the case, I conclude that [Ross] knew what he was doing when he signed the deed of variation.
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> (Emphasis added.)

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34 At [82].
35 At [85].

(iii) 2007 Renewal

[49] The Judge was satisfied that the 2007 renewal was relevant only to the Blackwells' claim for loss of rental because if the 2004 and 2005 transactions were valid the Chicks were entitled to exercise the option on 31 March 2010 without relying on the 2007 renewal. He was also satisfied that Ross understood the general nature of the transaction: it was simply a renewal at a slightly higher rental.[36] At a later stage in his judgment, when considering the Blackwells' alternative defence of unconscionable bargain, Rodney Hansen J confirmed his finding that Ross understood the salient features of all the relevant transactions.

(f) Leith Chick's evidence

[50] In finding that Ross had the necessary capacity to understand, the Judge was influenced by his apparent acceptance of Mr Chick's evidence about the close and trusting nature of their friendship. As noted, however, the Blackwells challenge the Judge's acceptance of Mr Chick's credibility.

[51] In summary Mr Gudsell raised these particular grounds for submitting that Rodney Hansen J should have rejected Mr Chick's evidence:

(1) Mr Chick and Adam were driven by self interest. They stood to gain significantly from the fixed price option and rental at below market values and Ross was unable to provide a counterbalance in evidence at trial. Careful scrutiny of the Chicks' evidence was thus required.

(2) In Mr Chick's view Ross still had the necessary mental capacity when the two of them met at the rest home in March 2010. However, when that view is examined against other evidence, starting with the medical consensus that Ross was suffering significant cognitive impairment in 2008, it was plainly wrong. This conflict struck at the heart of Mr Chick's credibility and threw into doubt his evidence on all disputed issues.

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[36] At [91].

(3) There were inconsistencies within the Chicks' evidence as to the origins of the 2004 option to purchase and the 2005 variation – neither of which are referred to in the judgment. Also, there was a striking contrast between their evidence as to Ross' objectives and the terms of the options ultimately granted. In cross-examination Mr Chick had said that Ross wished (a) to retain title to Haupouri while he was still alive, which was reflected in the existence of a verbal side agreement whereby the Chicks would not exercise the option during his lifetime; (b) Haupouri to go to Adam; and (c) the farm to be affordable for Adam. Mr Chick accepted that the contractual instruments made no provision in these terms.

[52] We reject Mr Gudsell's submission. Rodney Hansen J specifically found Leith and Adam Chick and Adam's wife Jana to be truthful and careful witnesses.[37] He accepted their accounts of how the option came into being. Mr Branch is correct that the judgment is underpinned by this finding, made in the context of determining the threshold issue of whether Ross understood the general nature of the option to purchase. The Judge's favourable conclusion that the Chicks were witnesses of integrity is reflected in his rejection of an allegation that they acted improperly when taking the benefit of the bargain inherent in the option price.

[53] We note that Mr Gudsell cross-examined Mr Chick at trial for a full day. The written transcript exceeds 100 pages of the notes. Mr Gudsell questioned the witness on every possible area of challenge, exploring in close detail all the circumstances surrounding each transaction.

[54] Having reviewed the transcript for ourselves, we are satisfied that it was well open to the Judge to accept Mr Chick's evidence. As noted earlier,[38] this Court cannot replicate the benefits enjoyed by the trial judge, particularly where the judge has the opportunity to evaluate the credibility of a witness who is subject to prolonged cross-examination. To adapt words recently used by this Court, this is

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37 At [70].
38 At [5] above.

quintessentially a case where the trial judge's views on credibility should carry meaningful weight.[39]

[55] To the extent that we can draw our own conclusions from the transcript, it creates the flavour of a witness who was striving to be accurate and truthful. Mr Chick freely acknowledged that when viewed from the outside the terms of the transactions looked "terrible". He was referring to the acknowledged disparity between the agreed prices and actual market value, both of the farm and the rental. He did not attempt to downplay or diminish this factor. But he properly and fairly set the context within which the apparent disparity was objectively justifiable. As the questioning went on, Mr Chick's answers reinforced the impression conveyed by the contractual documents of a special relationship between the parties, reflecting Ross' primary objective to benefit the Chicks in a real financial way.

[56] The critical step in Rodney Hansen J's reasoning was his rejection, which we have upheld, of the factual basis for the Blackwells' defence that Ross was not of competent mental capacity in a general sense. The Chicks' evidence was material in that respect but not decisive. Its true relevance lay in the Judge's assessment of Ross' understanding of the transactions themselves. We repeat again that they were not complex. In concluding that Ross well understood their general nature, the Judge was entitled to give appropriate weight to the Chicks' evidence once he found it was credible and reliable.

[57] We add three material points. First, the Chicks' account is corroborated objectively by the consistent pattern of Ross' intentions found in the terms of the contractual documents and his instructions to Edmonds Judd and the fact that, consistent with the underlying relationship of trust between the parties,[40] Ross secured the right to use the farm daily as if it was his own even though he had surrendered legal and physical possession to the Chicks.

[58] Second, Rodney Hansen J was not bound to answer each element of criticism directed at Mr Chick's evidence. He was entitled to form an evaluation of

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39 *Jay v Jay*, above n 5, at [22].
40 At [80].

Mr Chick's evidence as a whole. We can understand, for example, why the Judge did not treat Mr Chick's opinion on Ross' mental capacity in 2010 as a disqualification on credibility – it was simply a factor, and a relatively insignificant factor, to be taken into account. And the Judge specifically answered Mr Gudsell's submission about the omission from the contractual documents of Ross' three objectives as identified by Mr Chick. In the Judge's view, which we are satisfied was open to him on the evidence, the omission was consistent with the "peculiarly personal nature of the transaction overall, as well as the level of trust that existed between the parties".[41]

[59] The Judge's acceptance of Mr Chick's evidence that the Chicks would not exercise the option while Ross was alive explained in part why Ross was prepared to grant an option at below market value. And the fact that Mr Chick did in fact exercise the option while Ross was alive is not material, given that Ross' health by then had deteriorated substantially – it was obvious that he would never be able to return to the farm – and his affairs were under his brothers' control with the intimation that they would not honour the option's terms.

[60] Third, at trial and again on appeal Mr Gudsell relied on evidence from Basil Blackwell about events occurring when he and Derek Blackwell first became aware of the option to purchase in 2009. The Judge rejected Basil Blackwell's evidence, with this detailed explanation:[42]

> [92] In March 2009, Basil and Derek Blackwell (who were looking after Ross' affairs pursuant to the enduring power of attorney he signed in 2000) met with Ms Rasmussen. They wanted to know when the lease was to be renewed. Basil Blackwell said at that time they were told that the Chicks had an option to buy the farm for $1.5m. Basil said he and Derek were shocked. They believed the price to be considerably lower than what the farm was worth. They were also "stunned" because Ross had said he would never sell his farm. In his evidence in chief, Basil Blackwell said they did not question Ms Rasmussen further as they were in shock and believed there was nothing they could do until the lease came up for renewal in 2010.
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> [94] I do not find it at all surprising that Ross did not tell family members about the option to purchase. He had asked the Chicks not to mention it. I

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41 At [80]. See also the discussion at [138]–[140].
42 At [92]–[97].

> assume that he anticipated family members would object to the farm being sold outside the family. He told his brother-in-law, Cameron Henwood (his wife's sister's husband), that the lease had a right of purchase. Mr Henwood could not put a date on this comment, which was made in passing, but said it was "well into his illness".
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> [95] Basil Blackwell equivocated in evidence about discussions with Ross after he found out about the option. I am bound to say I found his evidence on the issue unconvincing. He maintained that Ross had always said he would like to keep the farm in the family and that he was "stunned" and "beside himself with worry" to find that he was committed to selling it for substantially less than its true value. In cross-examination he initially said he could not recall whether he had talked to Ross about it. He then said he and his brother did talk to Ross. They asked him if he had sold his farm and he said "no". Basil rejected the suggestion that Ross told them he was happy with the arrangement and that was why they did not do anything. He said there was a discussion about the value of the farm in which Ross agreed that it was worth a great deal more than $1.5m but continued to maintain there was no discussion about the option. He was at a loss to explain why, when there was such a large sum of money at stake, he and his brother did nothing about it until almost a year later.
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> [96] I consider it inconceivable that Basil and Derek Blackwell would not have spoken to Ross after finding out about the option even if, as Basil Blackwell maintained, they were misinformed about the date by which the option could be exercised. They had been confronted with the reality that, contrary to their settled expectations, the farm could be sold outside the family for less than half its true value. I believe they spoke to Ross and did nothing more because he confirmed to them that he knew of the option and was happy with it, provided that the farm was not sold in his lifetime. He did not become resistant to what was going on until 2010 when, faced with the choice of exercising the option (contrary to their understanding with Ross) or losing the right to purchase, the Chicks exercised the option.

[61] Having examined the transcript of Basil Blackwell's evidence, we are satisfied that this finding was well open to the Judge. Moreover, Basil Blackwell's evidence about events in 2009 appears rather tangential to the main issue of Ross' state of understanding in 2004, 2005 and 2007.

(g) Conclusion

[62] The Blackwells carried the burden of proving that Ross lacked the mental capacity to understand the transactions when entering into them. The capacity required is related to the impugned transaction.[43] The three transactions were relatively straightforward. They were entered into within the framework of a close

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[43] *Scott v Wise* [1986] 2 NZLR 484 (CA) at 491.

and trusting friendship. The legal instruments were a necessary means of formalising what was in essence a personal, not a commercial, arrangement.

[63] Significantly, as we have noted, the Blackwells do not challenge Ross' capacity to enter into the 2000 agreement to lease even though, according to the Blackwells' defence, Ross was then of limited intellectual capacity and would have been adversely affected by radiotherapy treatment for his brain tumour. That transaction comprised both an agreement to lease and a right of first refusal to buy Haupouri. Nor do the Blackwells allege that in September 2001, nearly a year after completing his intensive radiotherapy treatment, Ross lacked the requisite capacity to sign a will favouring them over his wife. Nor do the Blackwells allege that Ross lacked the capacity to enter into subsequent agreements to renew the lease in 2004 and 2007. Significantly, also, the Blackwells do not allege that Ross did not know the market value of Haupouri at the relevant times or the market rental figure or did not understand that he was offering the farm to the Chicks at a concessionary price and rental.

[64] As pleaded and advanced, the Blackwells' defence was limited to allegations that Ross lacked the capacity to understand the general nature of the 2004, 2005 and 2007 transactions. The focus was on the option to purchase and Ross's capacity to understand that he was granting the Chicks an option to purchase at the fixed price of $1.5 million if settlement took place within the three year term; and that he had relinquished the right to determine whether the property was sold to the Chicks during that time. To a lesser extent, the challenge was to Ross' knowledge that he was leasing the farm at a rental below market rates. The challenge was not to Ross' understanding of the values or rates themselves.

[65] In assessing Ross's capacity to understand the transactions Rodney Hansen J was entitled to take into account Ross' undoubted knowledge that the benefits ran both ways.[44] In particular Ross knew that, in reliance on the inevitability that the option would be exercised, the Chicks were expending money and labour in improving the farm. Ross granted the first lease with a right of first refusal when he had been given a poor medical prognosis. It can properly be inferred that Ross knew

[44] The specific elements are set out in greater detail at [71] and [104] of this judgment.

he had a limited life span, even when the later transactions were entered into, and that throughout he wanted the Chicks to acquire the farm at a concessionary value and to use it in the meantime at a concessionary rental.

[66] It was common ground at trial and before us that Ross was suffering from a diminished or impaired mental condition when entering into the three impugned transactions. However, we are not satisfied that Rodney Hansen J erred in concluding that Ross' impairment did not adversely affect his understanding of the transactions' general nature. It is thus unnecessary for us to consider the second element of the defence that the Chicks knew Ross lacked the requisite capacity except to refer to and endorse the Judge's finding that the bargain was not unconscionable and the Chicks did act improperly to the contrary the Chicks, the Judge found, were satisfied throughout that Ross was not acting under a disability and they had no reason to believe that he was not receiving adequate legal advice. The Blackwell's appeal against the dismissal of the incapacity defence must fail.[45]

(2) Unconscionable bargain

(a) Defence

[67] As Rodney Hansen J recited, the Blackwells had to satisfy two elements to establish a defence that the transactions were unconscionable bargains: (1) that Ross was under a qualifying disability or disadvantage; and (2) if so, the Chicks' conduct was such that it would be unconscionable for them to take the benefit of the bargain.[46]

[68] Mr Gudsell acknowledged before us that there is necessarily an overlapping evidential foundation in proving the substantive defences of lack of capacity and unconscionability. However, as the Judge recognised,[47] a finding that Ross' reduced mental capacity did not prevent him from understanding the legal effects of the transactions was not decisive against proving the first element of the discrete unconscionability defence. The Blackwells allege that Ross' ability to assess what

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45 At [140].

46 At [102], citing *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 and *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735.

47 At [105].

was in his best interests – to make a worthwhile judgment – was significantly diminished and that he was under a special disability or disadvantage.

[69] Rodney Hansen J rejected both elements of the Blackwells' unconscionability defence. The Blackwells challenge those findings. On appeal on the first element, Mr Gudsell submitted that, while Rodney Hansen J correctly identified the key issue, he failed to apply the correct test of whether Ross was under a significant disability or disadvantage taking into account all the relevant evidence.

(b) Special disadvantage or disability

[70] The Judge made these findings relating to the 2004, 2005 and 2007 transactions:[48]

> [108] At the time the option to purchase was granted in 2004, Ross had been advised the value of the farm was $1.8m. The parties agree that market value at that time was actually $2.07m and market rental was $82,500. I do not find the differences to be material. Ross knew he was giving the Chicks the opportunity to buy at an undervalue. The price was ultimately determined by reference to what was "affordable" for a dry stock operation. *In my view, Ross would not have acted any differently in 2004 or 2005 if he had known the true value of the farm.*
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> [109] By 2007, the capital value and market rental of the farm had rocketed. They were, respectively, $3.2m and $106,000 per annum. Only the market rental had relevance to the renewal in 2007. There is nothing to show Ross knew what it was but I accept Mr Chick's evidence that Ross was well aware that much higher returns were available if the land was leased for dairy grazing. *He knew that the agreed net rental was well under market.*
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> [110] *Ross understood the salient features of the three transactions. He knew that he could have done better if he had leased the farm on the open market.* He knew that the option price was advantageous and was likely to become more so. Any special disadvantage must arise from other factors which prevented him from appreciating what was in his best interests.
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> (Emphasis added.)

[71] In relation to these three transactions the Judge concluded:

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[48] The highlighted passages will be relevant to our assessment of Edmonds Judd's appeal against the second judgment in CA476/2013.

(1) Financial considerations were not paramount for Ross who originally suggested the lease.[49] Mr Chick's request for a right of first refusal was sensible. Ross initiated the discussion which led to the grant of the option and his initiative triggered the 2005 extension.[50]

(2) The lease and the variation were simply an extension of the close and mutually supportive relationship which had grown between Ross and the Chicks. Their agreement to allow him to have free access to Haupouri was an act of friendship and was not the sort of arrangement possible in a normal arms length commercial relationship.[51] Ross was able to enjoy the farm to the extent his health permitted. He shared the pleasures of ownership without the burdens.[52]

(3) Retention of ownership of Haupouri during his lifetime was very important to Ross. A side agreement between the parties – that the option would not be exercised while he was alive – secured that objective.[53] The informal arrangements allowed a happy, though unorthodox, working relationship to continue within a conventional legal framework.[54]

(4) The benefit of the 2004 option must be seen in the context that Adam and Jana were actively seeking to buy their own farm and a commitment to lease Haupouri effectively took them out of the market. A fixed price option was a hedge against increasing farm prices.[55]

(5) Ross was well placed to make a judgment in general terms about the financial constraints facing the Chicks. He understood the economics of farming including the fact that the market was being driven by the

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49 At [111] and [112].
50 At [116].
51 At [117].
52 At [118].
53 At [119].
54 At [120].
55 At [123].

returns available from dairy grazing. He wanted Haupouri to continue as a dry stock operation, knowing that would not optimise returns.[56]

(6) By the time the Chicks were effectively obliged to exercise the option, they had worked the farm for 10 years and had foregone the capital appreciation which would have inured from the purchase of their own farm. Adam and Jana had spent over $12,000 on races; $25,000 on pipes, troughs and a tank; and $71,370 on new fencing.[57]

[72] These findings of the Judge also have particular relevance:[58]

> [142] The point that Ross "never wavered" is important. Dealings between Ross and the Chicks over the farm spanned ten years. It was a process that began with a largely conventional leasing arrangement entered into at a time when Ross was not expected to live. The parties effectively worked together for the next three years. By 2004 Ross, though confounding the initial prognosis, knew he would never farm again. He was clear that he wanted the Chicks to continue running the farm and ultimately for it to become theirs. The arrangements he proposed would secure that outcome. His dealings with the Chicks and others and the steps he took from 2004 onwards were consistently directed to that end.
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> [143] *Ross was well aware of the financial benefits that would result for the Chicks. I accept Mr Chick's evidence that Ross kept himself abreast of developments in the property market. But he never deviated from the course he set in 2004*, even in 2009 when his brothers intervened who, I believe, would have challenged the option had it been his wish.
>
> (Emphasis added.)

[73] It is true that the question of whether Ross was under a special disability or disadvantage such that he was unable to assess what was in his best interests is different from whether he had the requisite mental capacity. However, Mr Gudsell relied in substance on the same evidence and arguments for both. He attempted to distinguish the factual bases for each argument by emphasising in this context Ross' ignorance of legal matters. He gave as the primary example the parties' omission from the option agreement of provision for Ross' three objectives, particularly the

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56 At [124].
57 At [127].
58 The highlighted passages will also be relevant to our assessment of Edmonds Judd's appeal against the second judgment.

side agreement that the Chicks would not exercise the option while Ross was alive.[59] We have already upheld the Judge's rejection of that argument.

[74] Mr Gudsell also challenged the Judge's finding in this context that Ross was not under a material misapprehension as to the capital and rental values of Haupouri at the relevant times.[60] We note that the Blackwells' defence does not plead this alleged misunderstanding; it is confined instead to the same alleged misunderstanding of the legal effect of the transactions as is pleaded on the capacity defence. However, to the extent that the submission should be taken into account, we note that it is based upon Ross' alleged failure to obtain a market valuation after the first transaction in 2000. That alleged omission is immaterial especially when viewed against evidence that Ross had obtained an estimate from a valuer in 2004. More fundamentally, the evidence available from Ross' solicitor which the Judge accepted is that in 2004 Ross did not want to obtain another valuation.[61] All this is consistent with Ross' underlying objective, not to obtain the best or market value but to confer a special benefit on the Chicks.

[75] Mr Gudsell also submitted that Ross was seriously disadvantaged in his dealings with the Chicks. He pointed to Mr Chick's intelligence and comfort in business dealings. By contrast Ross was a simple man who had suffered further brain damage from medical treatment, and who lived for his farm and wanted to ensure he retained ownership during his lifetime. The result was a seriously disadvantageous transaction benefiting the Chicks, ultimately forcing Ross to sell the farm during his lifetime at less than half the current market value.

[76] The Judge did not accept this portrayal of the transactions, and neither do we. We can do no better than refer to our summary of the Judge's evaluation of the relevant factors.[62]

[77] Finally, Mr Gudsell submitted that Ross' emotional attachment to the farm demonstrated a sentimentality which adversely affected his ability to assess his own

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59 See above at [51](3).
60 At [107].
61 At [77].
62 See above at [71].

best interests. However, this submission is answered by the Judge's findings on mental capacity, Ross' understanding of the transactions and his reasons for entering into transactions which, the Judge found, were entirely reasonable.[63]

(c) Impropriety

[78] Rodney Hansen J addressed the issue of impropriety, notwithstanding his rejection of the first or threshold element of the defence of unconscionability. Mr Gudsell submitted that the Judge also erred in his finding of no impropriety by the Chicks but it was against the contingency that we may differ from the Judge on his first finding. Given our endorsement of that finding, we do not need to consider this ground of appeal in detail except to record our agreement with the Judge's finding that the Chicks did not act improperly.

[79] In summary, we endorse Rodney Hansen J's conclusion that Ross was well aware of the financial benefits which would result for the Chicks;[64] that it was not a case of a stronger party exploiting a disadvantaged weaker party in a morally reprehensible way;[65] and that the imbalance in financial terms resulted from a series of deliberate and rational decisions which when seen in the particular context that existed in dealings between Ross and the Chicks achieved a fair and morally defensible result.[66]

[80] The Blackwells' appeal against the dismissal of their unconscionability defence must fail.

Result

[81] The Blackwells' appeal is dismissed.

[82] The Blackwells must pay costs on a standard appeal on a band A basis together with usual disbursements.

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63 At [145].
64 At [142]–[143].
65 At [144].
66 At [144].

[83] This conclusion also renders it unnecessary for us to determine the Chicks cross-appeal against the third judgment which was filed out of what Mr Branch called an abundance of caution designed to protect the Chicks' position if their primary claim for specific performance failed. Accordingly, we dismiss the cross appeal against the third judgment. There will be no order for costs.

Appeal in CA476/2013

(a) The Blackwells' claim

[84] The Blackwells claimed an indemnity from Edmonds Judd against any loss Ross sustained if the Chicks secured an order for specific performance of the agreement for sale and purchase of the farm at the price of $1.5 million. Judgment was sought for: (1) the difference between that amount and the current market value of the property as at 30 April 2010; and (2) a shortfall in rental payments, also assessed by reference to market value over the relevant periods, 1 May 2007 to 1 May 2010. The total amount claimed by the Blackwells, and for which judgment was entered, was $1,831,700.

[85] The Blackwells' allegations of negligence fell into three categories. First they alleged and Edmonds Judd admitted that it breached its duty on the relevant transactions in failing to obtain Ross' informed consent to acting for both parties and to ensure that each was referred to independent solicitors. However, it was common ground that that breach was not of itself sufficient to prove loss. The Blackwells had to show that Edwards Judd's negligence caused Ross financial damage.

[86] Second, the Blackwells alleged and Edmonds Judd admitted that the firm was negligent in failing to advise Ross:

(1) On the 2004 lease:

(a) of his right under the terms of the lease to review the rental;

(b) that the market rental had likely increased since 2000 and the proposed rental of $65,900 plus GST pa was likely to be significantly below market value; and

(c) to obtain a valuation as to the current market rental.

(2) On the 2005 variation:

(a) that the purchase price of $1.5 million under the option clause if settlement occurred on or before 30 April 2007 was likely to be well below market value in 2004 and/or the reasonable anticipated market value in April 2007; and

(b) to obtain a valuation as to the current market value of the property.

(3) On the 2007 renewal:

(a) as to his ability to review the rent;

(b) that the market rental had increased and the proposed annual figure of $69,600 (plus GST) was significantly below market value; and

(c) to obtain a valuation as to current market rental.

[87] Third, the Blackwells alleged and Edmonds Judd denied that the firm was negligent in failing to identify that Ross lacked the mental capacity to understand the transactions and/or to take appropriate steps to protect his interests by advising him of the implications of proceeding, advising him to obtain a medical opinion, and if that opinion did not support competence, advising him to consider contacting his brothers.

(b) The High Court findings

[88] When determining the Chicks' claim for specific performance, Rodney Hansen J found that Ross understood the legal effect of the transactions he was entering into as a result of the legal advice he received.[67] That advice was also sufficient to enable Ross to understand the general nature of the transactions.[68] However, the Judge held that Edmonds Judd's obligations as his solicitors went further. The firm was in dereliction of its duties in failing "to explore with [Ross] the full implications of both transactions".[69]

[89] On the Blackwells' claim against Edmonds Judd, the Judge found:

(1) The option associated with the 2004 lease was highly advantageous to the Chicks and disadvantageous to Ross and the option price and rent were unsupported by current valuations. Even if Edmonds Judd was assured that this was what Ross wanted, it should have spelled out to him nevertheless the full implications of the proposed deal and the further steps he should take before committing to it.[70]

(2) While the 2005 variation was simple, it was also highly advantageous to the Chicks. The Judge observed that "[t]he reason for it is not obvious and should have been more fully explored by [Edmonds Judd]".[71]

(3) The same finding applied to the 2007 renewal.[72]

[90] Rodney Hansen J accepted that to establish liability the Blackwells had to show Edmonds Judd's acts or omissions were a material and substantial cause of loss.[73] A helpful first step was to enquire whether Ross would have suffered the losses claimed but for the breaches. If not, Edmonds Judd's wrongful conduct was a

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67 At [130].
68 At [132].
69 At [135].
70 At [159]
71 At [160].
72 At [161].
73 At [162]; citing *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) and *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

cause of loss; if, however, the loss would have arisen without the firm's negligence, liability is unlikely to follow.[74] The Blackwells were obliged to prove that Ross would have acted differently if Edmonds Judd had not breached its duty.[75] The question of whether the Blackwells did in fact discharge that burden is central to Edmonds Judd's appeal.

[91] The ratio of Rodney Hansen J's judgment on causation is as follows:

> [164] In my view, if Ross Blackwell had had the benefit of competent independent advice in 2004, it is unlikely that he would have entered into the lease on the terms then agreed. I doubt that the rental would have been higher and it may be that an option price of $1.5m would have been provided for. *But, if Ross Blackwell had been competently advised, I consider the terms of the option would have contained some sort of mechanism to enable the option price to be adjusted to reflect changes in market value. Had his objectives been properly explored and the means of achieving them canvassed, I have little doubt the option would have been granted on terms which would at least have given Ross the ability to adjust the option price if he had wanted to.* By this means his concern to achieve "affordability" for the Chicks would have been recognised, while protecting him against a sudden and unexpected spike in market values or other unforeseen change of circumstances.
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> [165] In the hands of independent lawyers, and with a lease on different terms, it becomes difficult to foresee how subsequent events might have unravelled. It seems most unlikely that the 2005 variation would have occurred. It was a unilateral initiative by Ross. It was a gratuitous act which conferred a valuable advantage on the Chicks for no apparent reason. It was unnecessary. If Ross Blackwell had been properly advised, I consider it unlikely that he would have proceeded with the initiative. He would have appreciated that the prudent and sensible course would be to do nothing until 2007. That would keep his options open without foreclosing his proposed course of action.
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> …
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> [167] I am satisfied that, were it not for Edmonds Judd's failure to properly advise Ross Blackwell, he would not have granted and extended the option on terms which effectively gave the Chicks the right to buy at a fixed price at a time of their choosing. It is impossible to predict the course of events had Ross been competently advised. It is conceivable that in 2004 the parties may not have been able to come to an agreement that represented an acceptable outcome for both sides when properly advised. What can be said with confidence, however, is that it is unlikely that Mr Blackwell would have ended up under an obligation to sell his farm for half its market value. The losses arising from that outcome must be laid at the door of Edmonds Judd.
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> (Emphasis added.)

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74 At [162].
75 At [163].

[92] In terms of loss of capital value, the Judge found the die was cast by the 2004 renewal. Among other things, it gave the Chicks an option to purchase at $1.5 million if exercised by 30 April 2007. By that date the agreed market value was $3.2 million. The extension of the option in 2005, to be exercised by 30 April 2010, was of little material effect because the market value of the property was largely the same as in 2007.

(c) Mental capacity

[93] In apparent recognition of the difficulties faced by the Blackwells in upholding the Judge's grounds, Mr Gudsell sought to support the judgment on another ground. He submitted that the Judge erred in dismissing the Blackwells allegation that Edmonds Judd was negligent in failing to take appropriate steps to protect Ross' legal interests given his lack of mental capacity.

[94] The Judge found:

> [157] I am not persuaded that Ms Rasmussen should have taken steps to establish that Ross had capacity by arranging for a medical examination or otherwise. Leaving to one side the episode of bizarre behaviour witnessed by Dr Ballantyne in February 2005, the evidence shows that the way in which Ross presented himself would not have given any particular cause for concern. The fact that he had suffered from a brain tumour would not of itself have provided sufficient grounds to enquire into his medical condition if outward indications were that he had recovered sufficiently to give instructions and receive and understand advice.

[95] In challenging this finding Mr Gudsell referred to evidence given by two experienced property solicitors that Ross' medical diagnosis would have raised doubts about his capacity in the mind of a prudent lawyer. When this factor was coupled with the apparently disadvantageous nature of the proposed transaction concerning Ross' major asset, Edmonds Judd should have been extra careful when taking instructions from him in 2004 and 2005. Mr Gudsell noted that Ms Rasmussen made no enquiry about Ross' medical condition. In his submission where there is doubt as to his client's capacity a competent lawyer should have sought medical advice. If the opinion was adverse on capacity, the lawyer should have either sought court orders or liaised with the clients concerned.

[96] We do not accept Mr Gudsell's submission. It must fail on the facts. The Judge had evidence to confirm that Ross' presentation would not have caused particular concern; and that the existence of a brain tumour would not of itself have justified enquiries into Ross' medical condition. In any case the Blackwells were unable to prove a medical practitioner would in fact have determined that Ross lacked the requisite mental capacity in 2004, 2005 or 2007. In that sense the argument ultimately fails for largely the same reasons as the Blackwells' defence based on mental incapacity failed.

(d) Causation

(i) Principles

[97] The primary focus of argument on appeal was on whether the Blackwells had proved that Edmonds Judd's breaches of duty caused a loss to Ross' estate. The principles governing the causation enquiry can be stated shortly:

(1) The Blackwells had to show that Edmonds Judd's negligence was a material and substantial cause of loss to Ross.[76] The breaches must have had a real influence on that result.[77] It is not enough that the firm's negligence simply provided an opportunity for loss.[78] For this reason, the "but for" approach is of limited value in negligence claims.[79]

(2) In this case, where the solicitors' negligence consisted of omissions, the Blackwells had to establish on the balance of probabilities that Ross would have acted otherwise – that is, he would have accepted competent legal advice and as a result the transactions would not have proceeded or, if they did, they would have proceeded on a different basis.[80]

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76 *Kwan*, above n 73, at [28]; *Scandle v Far North District Council* [2012] NZCA 52 at [31].
77 *Kwan*, above n 73, at [28].
78 *Kwan*, above n 73, at [28].
79 At [27]–[28].
80 *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA) at [47].

(3) To satisfy this hypothetical test, the Blackwells must establish a sufficient evidential foundation to support the inference that must necessarily be drawn.[81] If they fail in this respect, then they are unable to show that Edmonds Judd caused Ross any loss.

[98] At the heart of the Blackwells' claim were allegations that Edmonds Judd failed to advise Ross properly on values. This, it was said, caused Ross to sell Haupouri at an undervalue and to lease the farm at below market rates. On the 2004 lease and the 2007 renewal the solicitors' failure was to advise on rights relating to current market value and rental; on the 2005 variation the failure was to advise on rights relating to current market value.

[99] The Judge, however, found that on the 2004 lease Edmonds Judd's negligence went further – it was in failing to advise Ross that the option should contain "some sort of mechanism to … reflect changes in market value".[82] We note that this finding did not reflect the pleaded allegation and that the Judge did not identify the mechanism, which was not apparently the subject of evidence at trial.

(ii) Appeal

[100] Mr Ring QC for Edmonds Judd focussed on identifying inconsistent findings made by the Judge on the Chicks' primary claim against Ross and his claim for indemnity. In his submission the essential findings underpinning the two judgments could not be reconciled. Mr Ring relied particularly on the Judge's conclusion when dismissing the Blackwells' affirmative defences that Ross made a considered decision to fix the option price and lease rentals at values and rates which were favourable to the Chicks and well below market value. The Judge had described Ross' actions as "a series of deliberate, rational decisions which, seen in a wider context, sought to achieve and brought about a fair and morally defensible outcome".[83] In Mr Ring's submission, the Judge erred in finding on the claim for indemnity that but for Edmonds Judd's breaches of duty Ross would not have entered into the transactions on the agreed terms.

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81 *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 (CA) at 1609H–1610G, adopted in *Benton*, above n 80, at [48].

82 At [164].

83 At [145].

[101] Rodney Hansen J's principal findings on the Chicks' claim against Ross set the context for considering Mr Ring's submission. We refer to these findings in particular:

(1) When granting the option in 2005, Ross knew that he was allowing the Chicks the opportunity to purchase Haupouri at an undervalue. The price was deliberately fixed by what was affordable for a dry stock operation.[84]

(2) Ross would not have acted any differently in 2004 or 2005 if he had known the true value of the farm.[85]

(3) Ross knew in 2007 that the agreed net rental was well below market value.[86]

(4) Ross understood the salient features of all three transactions and that he could have done better if the property was leased on the open market. And he knew that the option price was advantageous for the Chicks and likely to become even more so.[87]

(5) Financial considerations were not paramount for Ross.[88] He was fully aware of the financial benefits which the transactions would bring for the Chicks.[89] He was in a position to make financial concessions to the Chicks without in any way compromising his moral duty to his wife and family.[90]

(6) From 2004 onwards, Ross "never, ever wavered" from his intention that the Chicks would ultimately own the farm by buying it for $1.5 million and would enjoy its use in the meantime.[91]

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84 At [108].
85 At [108].
86 At [109].
87 At [110].
88 At [112].
89 At [143].
90 At [113].
91 At [141], quoting from Leith Chick's evidence in response to cross-examination.

(iii) 2004

[102] In summary, on the Chicks' claim for specific performance Rodney Hansen J accepted that, even if Ross had been properly advised to obtain a market valuation in 2004, he would still have agreed to grant the Chicks an option to purchase at $1.5 million and at a rental of $65,900 (plus GST) annually. He found that Ross throughout wanted the Chicks to have the farm at that price.

[103] It must follow from that finding that there was no proper evidential basis from which to infer that Ross would have accepted competent advice to include in the option a mechanism to enable him to adjust the price if he wished. Acceptance of such advice would have been antithetical to Ross' unwavering intention to give the Chicks an option at $1.5 million. More fundamentally, there was no evidence that Ross ever wished to adjust the price upwards from $1.5 million – all the evidence pointed the other way. Inclusion of a price adjustment mechanism linked to changes in market value would not have served a meaningful purpose for Ross when market value was not what motivated him. But for Mr Chick's suggestion, Ross would have been happy to grant an option at $900,000 which Ross knew was half of the farm's then market value. Ross' agreement on price was influenced by many other factors.

[104] Our satisfaction on this central point is supported by the Judge's findings when dismissing the Blackwell's impropriety defence to the Chick's primary claim. The Judge found that the terms of the bargain were fair and reflected Ross' assessment of all the factors relevant to the price. In particular he found:

(1) No impropriety could be inferred from the nature of the bargain itself.[92] Consideration was not to be measured simply by a gross disparity between option and rental prices and market value.[93] The option was a term of the lease. It effectively took Adam out of the market to buy his own farm but it was necessary that the price gave him a hedge against increasing farm prices.[94]

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92 At [122]–[123].
93 At [123].
94 At [123].

(2) Both the option price and rental were fixed by what was regarded as affordable for Adam, that touchstone being measured by reference to the borrowings which the farm could support and rental by expected incomes.[95] Ross was well placed to make a judgment in general terms of the financial constraints facing the Chicks. He understood the economics of farming, including that the market was being driven by the returns available from dairy grazing.[96] He wanted Haupouri to continue as a dry stock operation, knowing that use would not optimise returns.[97]

(3) However, when the 2004 and 2005 transactions were entered into, there was no certainty that farm values would continue to rise. While there was a general expectation of rising prices, those of the order that occurred were not expected and a decline in value was a theoretical possibility.[98]

(4) By the time the Chicks were obliged to exercise the option they had worked the farm for 10 years, and foregone the capital appreciation that would have enjoyed if they had purchased their own farm. Additionally, as noted earlier, Adam and Jana had spent at least $100,000 on capital improvements as well as expending considerable labour.[99]

[105] We add our endorsement of the Judge's findings that while Ms Rasmussen was entitled to proceed on the basis that Ross had the necessary capacity to enter into the transactions she breached her duties in failing to explore with him the full implications of the transactions, to have recorded her advice and to have confirmed that advice in writing.[100] However, those breaches are not decisive. The Blackwells must prove that performance of them would have dissuaded Ross from granting or extending the option on the terms he did.

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95 At [124].
96 At [124].
97 At [124].
98 At [125]–[126].
99 At [127].
100 At [135].

[106] Mr Gudsell sought to support the Judge's findings on the 2004 lease on two principal grounds. First, he submitted that the agreement to fix the purchase price for a limited period placed Ross in a powerless position, notwithstanding his clear intention that the fixed purchase price offer was for a limited time after which current market value applied; and that he wanted to retain the property during his lifetime. Inclusion of a mechanism of the type referred to by the Judge would have precluded the Chicks from exercising the fixed price option in 2010. By then, the option would have been at current market value.

[107] However, Mr Gudsell's submission ignores the finding which lay at the heart of the Judge's rejection of the Blackwells' defence to the Chicks' claim. We repeat his finding was that Ross' intention was unwavering that the Chicks should have the farm for $1.5 million. He was simply not interested in extracting current market value from them. He was not entering into a commercial deal. It was, as we have said, primarily a personal arrangement and the price reflected Ross' independent assessment of all the relevant factors. The die was cast from 2004 or 2005 and there is no evidence that whatever happened subsequently would have altered Ross' underlying wish.

[108] Second, Mr Gudsell submitted that, if Ross had been advised to obtain a market value in 2004 and if he had accepted such advice, he would have learned that the farm was worth $2.07 million – the now agreed market value. That would have provided a starting point of some $270,000 more than the $1.8 million figure used by Ross to strike the option price based on the informal valuation assessment he told Mr Chick that he had obtained.

[109] However, Mr Gudsell's submission faces two obstacles. One is an assumption that in 2004 a valuer would have given the figure now agreed as market value. The other is Ross' disinterest in the exact figure. We repeat that he simply wanted to fix a price which he thought was affordable to Adam and which reflected all the other elements of the transaction.

(iv) 2005 and 2007

[110] Similarly, we disagree with Rodney Hansen J's finding that if competently advised Ross would not have entered into the 2005 variation. The Judge found that with the benefit of such advice Ross would have realised that the sensible course would be to do nothing instead of acting for no apparent reason.[101] However, with respect, the Judge apparently overlooked the inference he had earlier drawn that Ross had decided in early 2005 that (1) it would assist the Chicks to know their option to purchase at a fixed price would continue until 2010 and (2) an extension would remove an incentive for the Chicks to exercise the option before 2007, thus preserving Ross' right to use the farm in the interim.[102] Ross had already told Mr Chick that was his reason for acting. His reason was objectively rational and reasonable.

[111] In any case, the weight of evidence was that if Ross had not extended the option date in 2005 he would simply have renewed or rolled over the lease in 2007 including the option on its existing terms. We note there was little change in the property's market value in the intervening three year period.

[112] In this respect the structure of the arrangements is relevant. The options were plainly intended to run with the three year term of the lease which the parties regarded as reasonable: it is reasonable to infer that for as long as the Chicks wanted to renew the lease, Ross would always have granted an option to purchase; and the longer the lease arrangement endured the more likely it was that the Chicks would exercise the option to purchase once they decided they did not wish to continue to lease.

[113] The 2005 renewal disrupted the natural symmetry of the arrangements. But the Chicks' renewal of the lease in 2007 restored the settled order. In the result there were two successive options to be exercised on the same terms and for the same amount in 2007 and 2010. It would not have mattered on a liability assessment whether the Chicks exercised the option on either date because there was no material change in value over that period.

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[101] At [165].
[102] At [86].

[114] The Judge was apparently influenced by the fact that the formal terms of the agreements did not protect Ross against the contingency that the Chicks were entitled to exercise the option while he was alive, depriving him of the essential benefit of being able to use the farm during his lifetime. However, once the Judge had accepted Mr Chick's evidence of a side agreement,[103] whereby the Chicks would not exercise the option while Ross was living, that reservation must disappear. While we accept that it would have been preferable if the term had been recited in writing, its omission was, as the Judge himself emphasised, consistent with the personal nature of the arrangement. The fact that strictly speaking Mr Chick breached the agreement does not alter its existence. Moreover, he exercised the option at a time when the Blackwells had indicated they would not renew the lease and it was plain to all that Ross would never be physically able to use the farm again.

(v) Conclusion

[115] The understandable judicial reluctance to absolve a negligent lawyer from liability is always subject to the overriding principle accepted by the Judge that liability cannot be imposed for a loss which would have been incurred even if the lawyer had given competent advice. The Supreme Court has recently reaffirmed this principle in the same context of a claim for damages against an admittedly negligent solicitor.[104] A failure to exercise a duty cannot sound in damages where one is not causative of the other. It cannot be said that Edmonds Judd's negligence was a material and substantial cause of or had a real influence on a loss suffered by Ross where he intended throughout to bear any financial detriment inherent in the difference between market and agreed values if the Chicks exercised the option to purchase and to accept a rental at below market rates in the interim.

(e) Damages

[116] In that respect, even if liability had been established, we are satisfied that the measure of damages payable would have necessarily been discounted substantially from the touchstone of market value or rates. The Judge briefly justified the damages award for lost value on the premise that if competently advised Ross was

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103 At [139].
104 *Tauranga Law v Appleton* [2015] NZSC 3.

unlikely to have ended up with an obligation to sell Haupouri at half market value.[105] However, even if that inference was correct, it does not necessarily follow, with respect, that the measure of any loss must be fixed according to the commercial yardstick of market value.

[117] As noted, Ross' original intention was to offer the Chicks an option at $900,000 or half of what he understood was market value: it was only in response to Mr Chick's suggestion that Ross agreed on $1.5 million. At best, the Judge found, Ross was only interested in what he regarded as fair value – "a fair and morally defensible outcome"[106] not the objective touchstone of market value. That would only become relevant in a default situation, in the unlikely event that the Chicks did not exercise the option to purchase at the expiry of the three year term.

[118] The Judge's inference that if competently advised Ross was unlikely to have been burdened with an obligation to sell Haupouri at half market value proceeded on two further premises. One was that Ross would have wanted to adjust the price to market value; the other was that the Chicks would have accepted such a term. As noted, that approach is contrary to the Judge's satisfaction that sale at the agreed price was precisely what Ross wanted. Ross was, as the Judge found, an "independent thinker, very much his own man".[107] An inference is also available from the evidence that the longer the arrangement endured, the less interested Ross was in securing anything more than $1.5 million for the farm.

[119] The same conclusion is true of Ross' willingness to accept a rental at below market rates. As Mr Ring submitted, the Judge's doubt that if properly advised in 2004 Ross would have required a higher rental is decisive against an award of damages under that head.[108] And his finding that if properly advised in 2007 Ross would have insisted on rental at "much closer to market levels" cannot translate into a commercial measure.[109] With respect, the Judge's error lay in approaching the liability inquiry through the formal lens of a strictly commercial transaction when he

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105 At [167].
106 At [145].
107 At [73].
108 At [164].
109 At [166].

had already found that Ross was, as Mr Ring submitted, motivated to enter into an essentially personal arrangement by non-commercial and non-financial factors.

Result

[120] The Blackwells have failed to prove that Edmonds Judd's negligence caused Ross any loss. They are unable to establish that Ross would probably have acted otherwise if he had the benefit of competent independent legal advice. The weight of the Judge's primary finding was unequivocally to the contrary. Edmonds Judd's appeal is allowed and the judgment against the firm in the High Court is set aside.

[121] The Blackwells are to pay Edmonds Judd costs on a standard appeal on a band A basis together with usual disbursements.

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