IN THE COURT OF APPEAL OF NEW ZEALAND

CA82/2017
[2017] NZCA 620

BETWEEN	WILLIAM GEORGE GRAHAM CAMERON CLEARY Appellant
AND	EWART & EWART Respondent

Hearing:	29 November 2017
Court:	Clifford, Dobson and Collins JJ
Counsel:	L Herzog for Appellant P M Fee and F C Jones for Respondent
Judgment:	20 December 2017 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] The issue in this appeal is whether Edwards J in the High Court erred when she dismissed Mr Cleary's claims against his lawyer Mr Ewart (the principal of the respondent, Ewart & Ewart).[1]

[2] Mr Cleary claims Mr Ewart failed to act in his best interests or comply with his instructions when he did not submit a deed of release to the vendor of a property in Fiji, and when he also discussed with the vendor's solicitor issues associated with an option deed relating to the property.

[3] This judgment explains why we are satisfied Edwards J was correct when she found in favour of Mr Ewart.

Background

[4] In 2012, Mr Cleary decided to purchase Lot 38 of a beach resort that was being developed on the island of Malolo in Fiji by Vunabaka Bay Fiji Ltd (the company). Mr Cleary became a "foundation" purchaser in the development, meaning he was offered the opportunity to purchase Lot 38 at an advantageous price. The development involved the construction of a hotel, private residences, shops, restaurants, two marinas, tennis courts and other facilities.

[5] Lot 38 is a leasehold waterfront section which the company offered to sell to Mr Cleary for USD 550,000. Under Fijian law, title to Lot 38 could only be passed to Mr Cleary with the approval of the iTaukei Land Trust Board or its delegate (Fiji Land Trust Board) which had, under Fijian legislation, "absolute discretion" to determine whether or not the sale could proceed.[2] Mr Cleary paid an initial deposit of USD 5,000 on 18 September 2012.

[6] On 7 June 2013, Mr Cleary signed an option deed that appears to have been designed to address the requirements of Fijian laws governing the control of foreign ownership of land in that country. Under the terms of the option deed, Mr Cleary

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1 *Cleary v Ewart & Ewart* [2017] NZHC 39.
2 Native Land Trust Act 1940 (Fiji), s 12.

agreed to pay the company USD 165,000, and the company obtained the option to require Mr Cleary to purchase Lot 38 after the Fiji Land Trust Board had given its consent to the sale and purchase. The option deed required the parties to "do all things necessary and reasonable" to obtain the approval of the Fiji Land Trust Board for the transaction.

[7] Mr Cleary paid the option price to the company in separate stages, with the last payment being made in April 2014.

[8] In early 2014, Mr Cleary decided he would like to purchase a unit in the resort hotel instead of progressing with the purchase of Lot 38. He mentioned this idea to Mr Lucas (a director of the company) and he also had discussions with a real estate agent whom he knew in Fiji. Mr Cleary said in evidence that beachfront sections were at this time selling for over USD 1,000,000, but that the directors of the company were not happy with him speaking to a real estate agent (as they did not want "on-sales through agents").

[9] In early April 2014, Mr Cleary met with Mr Lucas who offered, on behalf of the company, to purchase Lot 38 from him. The offer involved the company paying Mr Cleary USD 440,000, comprising the return of the USD 165,000 that had been paid by Mr Cleary plus an additional payment of USD 275,000, payable when the title to Lot 38 was issued. It was anticipated the title would be available in October 2014.

[10] Mr Cleary engaged Mr Ewart. They met on 10 April 2014 to discuss the agreement reached by Mr Cleary and Mr Lucas. At this stage, Mr Ewart had not seen the option deed and assumed that it conferred upon Mr Cleary the option to purchase Lot 38. During their meeting Mr Cleary and Mr Ewart telephoned Mr Lucas and learned that Mr Beca of Beca & Co (an Auckland law firm) would be acting for the company.

[11] On 16 April 2014, Mr Ewart sent a letter of engagement to Mr Cleary in which it was recorded that Mr Ewart would peruse the option deed, confer with Mr Beca and prepare the documentation required for Mr Cleary to surrender what were assumed to be his rights under the option deed.

[12] On 28 April 2014, Mr Ewart and Mr Beca conferred. Neither had seen the option deed at this time. Soon thereafter, Mr Ewart read the option deed and immediately appreciated that it conferred on the company the option to require Mr Cleary to purchase Lot 38. Mr Ewart sent Mr Cleary an email on 29 April 2014 in which he pointed out that the option deed conferred rights upon the company, and that Mr Cleary had paid USD 165,000 "for the privilege of not much at all". Mr Ewart advised Mr Cleary that he was in a difficult position because he had "no rights to give up".[3]

[13] On 30 April 2014, Mr Cleary emailed Mr Ewart instructing him not to share his concerns with others and said that Mr Lucas was an honourable person who knew that the company could "cancel" with Mr Cleary but that would be contrary to what Mr Lucas and the company were trying to achieve with the development. Mr Cleary also said that he was going to be away overseas and that he would not return to New Zealand until 13 May 2014.

[14] There were further brief email exchanges between Mr Cleary and Mr Ewart during the first week of May 2014. On 6 May 2014, Mr Ewart sent an email to Mr Cleary in which again he pointed out the difficulty of preparing a deed of release in favour of Mr Cleary when the option deed did not provide him with a right to purchase Lot 38. Mr Ewart also said it would be advisable to consult with Mr McCurrach of WHK Gosling Chapman (Mr Cleary's accountant). Mr Ewart told Mr Cleary that he was concerned the proposed arrangements were "likely to create tax nasties" for Mr Cleary. On 7 May 2014, Mr Cleary sent an email to Mr Ewart instructing him to "run it past" Mr McCurrach.

[15] On 9 May 2014, Mr Ewart said in an email to Mr Cleary that he was awaiting Mr McCurrach's input and that he was concerned about what would happen when the vendor realised that, by not exercising its option it would gain a significant windfall. Mr Cleary responded that same day saying that if the vendors had "wished to have screwed [him] they would have before now", that the vendor "[knew] what their option

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[3] A strike out decision of Associate Judge Christiansen confirmed the option deed did not provide Mr Cleary with a right to compel the company to enter into an agreement to sell the property: *Cleary v Ewart & Ewart* [2015] NZHC 3259 at [40].

[was]" and that they had "behaved with integrity in all dealings to date". Later that day, Mr Ewart sent another email to Mr Cleary proposing that he confer with Mr Beca, explain the problem openly and draft a deed that would give effect to the oral agreement between Mr Cleary and the company. Mr Ewart told Mr Cleary that he should not "hide anything because the problem is so obvious". Mr Cleary responded a few minutes later instructing Mr Ewart to draft up a deed of release but not contact Mr Beca at that stage. Mr Ewart responded with a draft deed of release on the proviso it needed to be "checked".

[16] On 13 May 2014, Mr Cleary met with Mr Ewart, Mr McCurrach and a Ms Tyrell from Mr McCurrach's office. Mr Ewart's file note recorded his concern that the deed of release created a gift for Mr Cleary, which Mr Ewart erroneously thought could incur gift duty. His file note also recorded:

> Long discussion about how to best proceed. Preferred option is to have [the company] exercise the option and then surrender agreement. [Mr Ewart] to talk to [Mr] Beca.

[17] Mr Cleary did not recollect agreeing to this approach. On 14 May 2014, Mr Ewart spoke to Mr Beca. In his reporting email to Mr Cleary the following day, Mr Ewart said that it took Mr Beca about 10 minutes to suggest in "a joking way" that the company "simply not exercise the option and walk away". On 15 May 2014, Mr Ewart sent Mr Beca a copy of the option deed. After reading that document, Mr Beca sent an email to Mr Ewart on 19 May 2014 which said:

> … as you say, my client has no obligation to sell the section to your client, nor for that matter, if it does not exercise the option, does it appear to have any obligation to refund the [option price].

[18] Mr Ewart forwarded Mr Beca's email to Mr Cleary warning that Mr Beca's email "sounds ominous". In an email sent to Mr Ewart on 19 May 2014, Mr Cleary said the best way forward was to "politely turn down" Mr Lucas' offer and continue to purchase Lot 38. Mr Ewart conveyed Mr Cleary's revised position to Mr Beca on 19 May 2014.

[19] A file note of Mr Ewart dated 20 May 2014 records that Mr Beca had telephoned Mr Ewart saying that his client had decided that "as there [was] some bad

blood between" his client and Mr Cleary, they would not exercise the option but instead pay back the option deposit, even though the company was not obliged to repay that sum to Mr Cleary. Mr Ewart conveyed this news to Mr Cleary, who acknowledged that at least his capital would remain intact.

[20] On 5 June 2014, Mr Cleary and the company executed a deed terminating the option deed. The company then repaid Mr Cleary the option deposit of USD 165,000.

[21] In his evidence, Mr Cleary said that Lot 38 was subsequently sold by the company for what Mr Cleary understood to be USD 1,300,000.

The claim

[22] In his fifth amended statement of claim, Mr Cleary pleaded two causes of action against Ewart & Ewart. First, he alleged Mr Ewart was negligent when he failed to carry out his instructions and protect his interests. The second and alternative cause of action alleged Mr Ewart breached the fiduciary duties he owed Mr Cleary. It is accepted there is no material difference between the two causes of action.

[23] In relation to both causes of action, Mr Cleary alleged Mr Ewart breached the duties he owed Mr Cleary by failing to draft and present to the company an agreement that complied with Mr Cleary's instructions, and by proffering "unsolicited advice" to Mr Beca on 14 May 2014 that was contrary to Mr Cleary's instructions and his interests.

[24] It was Mr Cleary's case that the company would have executed the deed of release if it had been presented to the company. Mr Cleary quantified his loss by seeking damages in the sum of USD 275,000, being the difference between the option price that was repaid to Mr Cleary and the sum of USD 440,000 that the company, through Mr Lucas, offered to pay Mr Cleary.

[25] There is no dispute Mr Ewart owed Mr Cleary a duty of care and fiduciary obligations. Mr Ewart denied breaching the duties he owed Mr Cleary or that any breach on his behalf caused the loss Mr Cleary claimed to have suffered.

High Court judgment

[26] Edwards J heard evidence from Mr Ewart, Mr Cleary, Mr McCurrach, Mr Beca and two expert witnesses who provided different opinions as to whether Mr Ewart breached any duties.[4] In relation to the claim that Mr Ewart had breached his duty of care to Mr Cleary by failing to follow instructions, Edwards J found:

(a) Mr Cleary's instructions to Mr Ewart were not confined to preparing the deed of release.[5] Mr Cleary's instructions included the need for Mr Ewart to examine the option deed and confer with Mr McCurrach in relation to tax issues.[6] Mr Ewart's duties extended to advising Mr Cleary on any issue that he considered to be pertinent.[7]

(b) Mr Cleary's instruction on 9 May 2014 to not contact Mr Beca was revoked during the meeting on 13 May 2014 between Mr Cleary, Mr Ewart, Mr McCurrach and Ms Tyrell.[8] Mr Ewart was acting consistently with Mr Cleary's instructions when he contacted Mr Beca and discussed with him the issues caused by the terms of the option deed.[9]

(c) Mr Cleary authorised Mr Ewart to discuss with Mr Beca the possibility of the company exercising its option under the option deed so as to confer rights upon Mr Cleary that he could then surrender.[10]

(d) Mr Ewart did not tell Mr Beca the company had no obligation to refund the option price.[11]

[27] In relation to the claim Mr Ewart pursued a strategy that was flawed and contrary to Mr Cleary's interests, Edwards J concluded:

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4 The expert evidence was from Mr Nolan and Mr Haynes. Mr Rendell, a licenced real estate agent also gave evidence on the Lots and sale prices.
5 *Cleary v Ewart & Ewart*, above n 1, at [35].
6 At [35].
7 At [38].
8 At [43].
9 At [51].
10 At [55].
11 At [55].

(a) It was reasonable for Mr Ewart to candidly discuss with Mr Beca the obvious difficulties facing Mr Cleary because of the terms of the option deed.[12]

(b) The strategy of inviting the company to exercise its option so that Mr Cleary would acquire rights that he could surrender was reasonable in the unusual circumstances of this case.[13]

(c) Mr Ewart was not specifically concerned with gift duty. He was, however, concerned about the tax implications arising from Mr Cleary receiving USD 440,000 in circumstances where he was not surrendering any rights.[14]

[28] In relation to the claim that Mr Ewart's acts and alleged omissions caused the loss that Mr Cleary claimed to have suffered, Edwards J concluded:

(a) The company's decision not to exercise its option was due to "bad blood" between the company and Mr Cleary. That "bad blood" arose from Mr Cleary's attempts to list Lot 38 with a real estate agent.[15]

(b) Mr Beca would have advised the company of the legal effect of the option deed regardless of his discussions with Mr Ewart.[16]

(c) Upon being advised by Mr Beca of the legal effect of the option deed, the company would have decided not to proceed with the deal discussed by Mr Cleary and Mr Lucas.[17]

[29] In summary, Edwards J concluded that Mr Ewart had not breached the duty of care or the fiduciary obligations he owed Mr Cleary. She held Mr Ewart acted in accordance with Mr Cleary's instructions when he told Mr Beca to discuss the

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12 At [62].
13 At [62].
14 At [64].
15 At [73].
16 At [78].
17 At [81].

problems caused by the terms of the option deed. The approach to Mr Beca did not involve any error of judgment on the part of Mr Ewart and was not contrary to Mr Cleary's interests. Edwards J also concluded Mr Ewart's acts and alleged omissions did not cause the loss that Mr Cleary claimed to have suffered.[18]

Grounds of appeal

[30] The grounds of appeal are confined to the findings made by Edwards J in relation to the claim based in negligence. The claim based upon breach of fiduciary duty is no longer pursued.

[31] The gravamen of Mr Cleary's appeal is that Edwards J's findings that Mr Ewart did not breach his duty of care to Mr Cleary, and that his conduct did not cause any loss to Mr Cleary, were contrary to the weight of the evidence.

[32] We shall analyse the grounds of appeal by focusing upon the following three questions:

(a) Did Edwards J err when she concluded Mr Ewart complied with the duties he owed to Mr Cleary by not presenting a deed of release to the company?

(b) Did Edwards J err when she concluded Mr Ewart complied with his duties when he discussed with Mr Beca the legal effect of the option deed?

(c) Did Edwards J err when she found Mr Ewart's conduct did not cause the loss claimed by Mr Cleary?

Failure to present a deed of release

[33] Mr Cleary maintains his instructions to Mr Ewart were simply to prepare a deed of release in accordance with the agreement he and Mr Lucas had discussed. It

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[18] At [83].

was also claimed Mr Ewart needed to act promptly so as not to lose the agreement Mr Cleary had negotiated.

[34] We agree with Edwards J that the evidence clearly demonstrated Mr Ewart's instructions encompassed much more than simply preparing a deed of release. Our reasons for reaching this conclusion can be distilled to the following three points.

[35] First, the letter of engagement sent by Mr Ewart to Mr Cleary on 16 April 2014 clearly recorded Mr Ewart's instructions included "pursuing option deed; discussions with vendor's solicitor about form of transaction; documentation of surrender of rights in return for payment; attending to settlement …".

[36] Mr Cleary took no issue with the terms of his instructions to Mr Ewart at the time he instructed Mr Ewart. His claim that Mr Ewart was instructed to simply prepare a deed of release conflicts with the contemporaneous written record of the terms of Mr Ewart's engagement. We agree with Edwards J that the written record is to be preferred over Mr Cleary's assertions.

[37] Secondly, there can be no doubt Mr Ewart's duty to Mr Cleary involved him advising Mr Cleary on issues associated with his instructions. It was incumbent upon Mr Ewart to advise Mr Cleary on the legal consequences of the option deed and the issues that arose from Mr Cleary not having any rights that he could surrender under the proposed deed of release. Mr Ewart also had a duty to alert Mr Cleary to the possibility of him incurring a tax problem if the proposed arrangements were carried through.

[38] Thirdly, Mr Cleary's instructions to Mr Ewart evolved in response to the developments that occurred during the period of engagement. The most significant change of instructions occurred on 13 May 2014, when Mr Cleary and Mr Ewart met with Mr McCurrach and Ms Tyrell to develop a sensible strategy. Mr Ewart's contemporaneous file note records that they had a "long discussion about how to best proceed". That discussion resulted in Mr Cleary accepting that the best solution to the problem caused by the terms of the option deed was for the company to exercise its option and for Mr Cleary to surrender the rights he would then have acquired.

Mr Cleary gave Mr Ewart instructions to pursue that strategy and to talk to Mr Beca about the proposal to deal with the problems generated by the option deed.

[39] Against the background to these facts, most of which are recorded in file notes and emails, Edwards J was correct to conclude Mr Ewart complied with his instructions from Mr Cleary.

[40] Mr Herzog, counsel for Mr Cleary, suggested in oral submissions Mr Ewart did not act quickly enough once Mr Cleary had instructed him to prepare a deed of release. That criticism was not pleaded as a particular of negligence. In any event, we see little merit in this point. The six week timeframe between instructions having been given to Mr Ewart and the company electing not to exercise its option was not excessive, particularly as the key strategy meeting on 13 May could not occur earlier because Mr Cleary was overseas.

[41] Mr Herzog also submitted Mr Ewart's misunderstandings as to tax implications formed the basis of his decision not to present the draft deed of release, resulting in an error of judgment and a breach of his duty to act in Mr Cleary's best interests.

[42] In cross-examination Mr Ewart acknowledged that he would never have spoken to Mr Beca if there was not a tax issue associated with the proposed deed of release. That acknowledgement was not, however, as profound as Mr Herzog would have us believe.

[43] While Mr Ewart was mistaken if he thought the proposed arrangements may have generated a gift duty problem, there were nevertheless potential tax issues with the proposed arrangements that needed to be fully considered. On the basis of what was understood at the time, the strategy agreed upon at the meeting of 13 May provided a reasonable solution to any potential tax problem.

The legal effect of the option deed

[44] In the High Court Mr Cleary argued that Mr Ewart had inappropriately informed Mr Beca about two matters. First, that the option deed conferred upon the company the option to require Mr Cleary to purchase Lot 38. Secondly, that under the

option deed, the company could retain the option price if the company elected not to exercise its option.

[45] Edwards J concluded that Mr Ewart had only informed Mr Beca of the first of these matters. Mr Cleary challenges that finding as being against the weight of the evidence.

[46] In our assessment, the email sent by Mr Beca to Mr Ewart on 19 May 2014, the relevant part of which we have set out in [17], supports the conclusion reached by Edwards J.

[47] Nothing, however, hinges on Mr Cleary's suggestion that Mr Ewart informed Mr Beca about the company's ability to retain the option price. The reason for this is that any lawyer reading the option deed would have immediately appreciated the only option created in the option deed was in favour of the company and that the option deed did not provide for a refund of the option price in the event of the company not exercising its option. Moreover, Mr Cleary had told Mr Ewart that Mr Lucas knew how the option worked, but would not take advantage of that. As it transpired, the company elected to refund Mr Cleary the option price in circumstances where it may not have had to do so.

[48] The contemporaneous file notes and emails demonstrate Mr Ewart's discussions with Mr Beca on 14 May 2014 occurred after it was agreed at the strategy meeting on 13 May 2014, that Mr Ewart would candidly discuss with Mr Beca the proposed way forward. That was in the circumstances a reasonable strategy that was pursued in Mr Cleary's best interests and did not constitute negligent conduct on the part of Mr Ewart.

Causation

[49] Mr Cleary argues that Edwards J was wrong to conclude the company elected not to exercise its option because of "bad blood" between Mr Cleary and the company.

[50] Mr Ewart's file note of 20 May 2014 recording Mr Beca's advice that there was some "bad blood" between the company and Mr Cleary was confirmed by

Mr Beca, who explained in his evidence that the directors of the company harboured ill-feelings towards Mr Cleary because he had attempted to sell Lot 38 through a real estate agent. The evidence from Mr Beca demonstrates the directors took a dim view of Mr Cleary when they learned he was attempting to take advantage of the capital gain on Lot 38 before he had title to that property. There was no evidence from the directors of the company to refute Mr Beca's evidence. In these circumstances, Edwards J was entitled to conclude the directors elected not to exercise the company's option because of their negative views about Mr Cleary's conduct. Mr Herzog suggested that any bad blood would have dissipated when Mr Lucas and Mr Cleary agreed the terms of the release of the option. There is no evidence to support that proposition, beyond the fact of that agreement itself. Even if that were the case, it is equally possible that bad blood may have reappeared when Mr Cleary instructed Mr Ewart that he would not proceed with that agreement but would go ahead and sell himself. At the end of the day, Mr Ewart's evidence is what it is.

[51] We are also satisfied that the causation analysis conducted by Edwards J which we have set out in [28](b) and (c) was entirely correct. Once the directors of the company appreciated that all the cards were in their hands, it was highly likely they would have acted in the way they did. There was therefore no need to quantify damages.[19]

[52] In reality, the genesis of Mr Cleary's grievance lies in the fact that he chose to sign the option deed and pay the company the option price. He has to shoulder the responsibility for those decisions. Edwards J was correct when she concluded that Mr Ewart could not be liable for Mr Cleary's inability to secure what would have been a gratuitous payment of USD 275,000 from the company.

Result

[53] As there is no merit in any of the grounds of appeal advanced on behalf of Mr Cleary, the appeal is dismissed.

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[19] *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA) at [50], referred to in *Cleary v Ewart & Ewart,* above n 1, at [75].

[54] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Smith & Partners, Auckland for Appellant
Fee Langstone, Auckland for Respondent