IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2009-019-1473
[2015] NZHC 1025

	BETWEEN	NORRIS WARD MCKINNON Plaintiff/Counterclaim Defendant
	AND	ANTHONY PRATT KAYE AND MORVA KAYE Defendants/Counterclaim Plaintiffs

Hearing: 28 April to 1 May and 11 - 13 November 2014

Appearances: Counterclaim Plaintiffs/Defendants in person
R J Latton and C A Robertson for Plaintiff/Counterclaim Defendant

Judgment: 14 May 2015

JUDGMENT OF M PETERS J

This judgment was delivered by Justice M Peters on 14 May 2015 at 4.45 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Kennedys, Auckland

Copy for: Counterclaim Plaintiffs / Defendants

Introduction

[1] The Counterclaim Plaintiffs ("Mr and Mrs Kaye") bring these proceedings against the Counterclaim Defendants, Norris Ward McKinnon ("Norris Ward"), for breach of contract, alternatively in negligence for breach of duty of care. Although Norris Ward commenced this proceeding, in November 2012 they advised that they would not pursue their claim and so this judgment is concerned only with Mr and Mrs Kaye's counterclaim.

[2] Norris Ward acted for Mr and Mrs Kaye or their company, Room Outside Limited ("ROL"), in two matters.

[3] The first concerned settlement of agreements relating to Mr and Mrs Kaye's and ROL's purchase of a "Palmers" garden centre in Cambridge ("business") and associated land. Mr Barris of Norris Ward had the day to day conduct of this aspect of Mr and Mrs Kaye's instructions, which were given between mid-August 2006 and March 2007.

[4] The second matter was litigation that Mr and Mrs Kaye and ROL commenced against their previous solicitors, Tanner Fitzgerald Getty ("TFG"), in March 2008. Mr John Bolton acted on these instructions from May 2007 until August 2008, and Mr Samuel Hood thereafter. The proceedings against TFG were settled at mediation in March 2009.

[5] Norris Ward terminated their retainer with Mr and Mrs Kaye in February 2009.

[6] The business was unsuccessful. In April 2009, on the application of Palmers Franchise Systems Limited ("Palmers"), the Court ordered that ROL should be wound up. Following this, lots 1 and 3 (referred to below) and two residential properties that Mr and Mrs Kaye owned were sold at mortgagee sale.

[7] Mr and Mrs Kaye's case is that Norris Ward breached their duty to exercise reasonable skill and care in carrying out Mr and Mrs Kaye's instructions. There is no dispute that Norris Ward owed this duty. The issues for determination are

whether Norris Ward breached their obligation and, if so, whether their breach caused loss. Mr and Mrs Kaye's case is that they sustained losses of approximately $2,500,000.[1]

[8] For the reasons set out below, I am not persuaded that Mr Barris breached his obligation to the Kayes and the claim as it concerns him fails. I am, however, satisfied that Norris Ward were in breach between, say, June 2007 and February 2008 in respect of advice that they gave or failed to give regarding the litigation. The Kayes have not established, however, that this breach caused loss and so the claim as it concerns the litigation fails on that ground.

Proceedings

[9] As I have said, Norris Ward commenced this proceeding, seeking judgment for legal fees of more than $70,000. Mr and Mrs Kaye counterclaimed for the losses to which I have referred. ROL, which is in liquidation, is not a party to the proceeding. Had the Kayes succeeded, it would have been necessary to look closely at the damages claimed to ensure that only losses they had sustained were considered.

[10] I commenced hearing the proceeding on 28 April 2014. Mr and Mrs Kaye sought to file an amended statement of counterclaim shortly before the hearing but ultimately decided to proceed on their first amended counterclaim dated 20 February 2012.

[11] Mr and Mrs Kaye were not represented at the trial. Mr Kaye was their sole witness. The Kayes did not call expert evidence in respect of their allegations as to the manner in which Mr Barris completed the conveyancing aspects of their instructions, although I gave them many opportunities to do so and explained that part of their case would be likely to fail without it. The matter of expert evidence was also addressed in a case management conference on 5 March 2014.[2]

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1 First Amended Counterclaim dated 20 February 2012, at [138].
2 Minute of Brewer J dated 5 March 2014, at [4](a).

[12] At the conclusion of the first week of what was to be a two week trial, Norris Ward contended that the parties had reached a binding settlement the night before. Mr and Mrs Kaye disputed that a settlement had been reached. Several interlocutory applications followed. On 12 September 2014, I granted leave to Norris Ward to amend their pleading so as to plead the alleged settlement as an affirmative defence, which Norris Ward could pursue when I resumed hearing the claim in November 2014.[3] Norris Ward chose not to plead that defence at that time but reserved their position.

Background

[13] Between May and July 2005 Mr and Mrs Kaye (or nominee) entered into several agreements relating to the purchase of what is referred to as "lot 1", "lot 3" and the garden centre business, being goodwill, plant and equipment and stock. The garden centre was situated on lot 3. The vendors were Ms Robin Wade, Ms Wade's Family Trust and her company Marwa Limited ("Marwa") in respect of the business. Ms Wade, a real estate agent, drafted the agreements.

TFG/Agreements for Sale and Purchase

[14] Mr and Mrs Kaye instructed TFG to act for them in mid-August 2005. This was some two weeks before the date for settlement of the purchase of lot 3 and the business, being 31 August 2005. The Kayes' purchase of lot 1 was to be settled a year later, on 31 August 2006.

[15] The purchase price for lot 3 was $725,000, with Mr and Mrs Kaye borrowing $575,000 of that from Southland Building Society ("SBS"). TFG, however, made a fundamental error by paying the purchase price to the vendor without obtaining her undertaking to transfer title on receipt of payment. The vendor declined to transfer title and so SBS's mortgage security could not be registered.

[16] Issues also arose under the agreement between ROL, nominated as the purchaser, and Marwa for the sale and purchase of the business. Marwa had agreed to lend ROL the purchase price for the business, that loan to be interest free and

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3 *Norris Ward v Kaye* [2014] NZHC 2215.

repayable on 31 August 2006, but to accrue penalty interest if there were a default in repayment on that date (which there was).

[17] The purchase price for the business, as shown on the face of the agreement, was $449,000, comprising the individual values ascribed to goodwill, stock in trade and plant and equipment. Under the terms of the agreement however there was some possibility of adjustment of the price for stock and perhaps plant and equipment. Accordingly, the final purchase price and so the amount of Marwa's loan to ROL depended upon the price for those two items. Plainly any discussions between ROL and Marwa on those matters were best attended to immediately on settlement. ROL did not attend to the matter however. The vendor relied on the failure to withhold title to lot 3 and the issue led to considerable ill will between the parties.

[18] In any event, as of 31 August 2005, Mr and Mrs Kaye had possession of lot 3 and ROL of the business assets. Mr and Mrs Kaye were also in occupation of lot 1 pursuant to a Licence to Occupy and Palmers (or its assignors) had granted a franchise agreement to ROL dated 1 September 2005, with Mr Kaye guaranteeing ROL's obligation under the agreement.

[19] In about mid-2006, SBS suggested that Mr and Mrs Kaye instruct Norris Ward as a firm that could "sort matters out". Mr Barris's recollection was that SBS telephoned him, that its patience had run out, that it was particularly unhappy with TFG and that it saw no option but to take action against Mr and Mrs Kaye and possibly against TFG if its mortgage were not registered quickly.

[20] Mr and Mrs Kaye submitted that Norris Ward were conflicted and, in effect, acting for SBS. I accept Mr Barris's evidence, however, that he had no instructions to act for SBS.

[21] Mr and Mrs Kaye's first contact with Mr Barris was on 16 August 2006, when they forwarded him a copy of their email that day to a mortgage broker. Although counsel for Norris Ward cross-examined Mr Kaye closely regarding his email to the broker, on the basis that it contained many inaccuracies and untruths,

this decision does not turn on issues of credibility. Given that, it is unnecessary for me to say more on that score.

[22] Mr Barris wrote to Mr and Mrs Kaye on 17 August 2006, enclosing authorities to enable Norris Ward to uplift their files from TFG and a "client registration form".[4] Mr and Mrs Kaye returned the various documents on 29 August 2006, they were then sent to TFG, TFG would only release their files when their fees were paid and Mr Barris received TFG's files in mid-September 2006.

[23] Mr and Mrs Kaye were critical of Mr Barris's delays in attending to these matters. Those criticisms are not justified. Mr Barris sent the necessary authorities to Mr and Mrs Kaye immediately. When they returned those authorities and paid TFG was a matter for them. I accept that Mr Barris required TFG's files before he could do anything useful.

[24] TFG's files contained two agreements in respect of the Kayes' purchase of lot 1, one entered into in about May 2005 and the other in July 2005. An important difference between the two agreements was that the purchase price under the July agreement was not fixed but was to be current market value as at 31 August 2006, as determined by Darragh Ferguson & Green, valuers.

[25] Mr Barris summarised the Kayes' legal position as follows:[5]

> 23. To summarise, the Kaye's legal position when I was instructed appeared to me to be that:
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> (1) The Kayes had paid $725,000 to purchase Lot 3, but Lot 3 had not been legally transferred to the Kayes;
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> (2) The Kayes occupied Lot 1 under a licence to occupy, for which they paid $34,080 (plus GST) per annum, by monthly payments of $2,840 (plus GST);
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> (3) The Kayes were obliged to purchase Lot 1 on 31 August 2006 for a sum to be fixed by a valuer, Darragh Ferguson & Green;

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4 Letter Norris Ward to Mr Kaye attaching authority to uplift and client registration form dated 17 August 2006, Vol 1 at 238 – 243.

5 Brief of Evidence of P W S Barris dated 30 April 2014, at [23] to [31].

(4) The Kayes had to agree the purchase price for the Garden Centre business by 31 August 2006. The price was $449,000 but an adjustment (of a maximum of $20,500 (5% of the value of stock in trade) could be negotiated. However, that depended on a valuation of stock and assets as at 31 August 2005. Determining those a year later would be extremely difficult;

(5) Penalty interest of 15% would begin to run on the sum of (at least) $449,000 - $20,500 = $428,500 from 1 September 2006 - i.e. penalty interest of at least $1,236 per week.

24. It was clear to me that Tanner Fitzgerald Getty had been negligent in the work that they had done for the Kayes. It was also clear that the Kayes were in a difficult financial situation. They told me that the business was trading at a turnover of around 25% less than the previous year ... They had a large amount of debt.

25. As well, they had a number of legal obligations under the agreement they had entered into. They had not yet paid for the business, and this payment had been due on 31 August 2006. Penalty interest of 15% on the purchase price of $442,000 was running. Settling this agreement was difficult because no sum for the business's stock had been agreed. The Kayes were also saying that some of the tangible assets were overvalued.

26. As far as Lot 1 was concerned, the Kayes were also obliged to settle that purchase on 31 August 2006. That required that a valuation be done to establish the purchase price. That valuation had not been done. The Kayes were accordingly technically in default of that agreement.

27. In relation to Lot 3, Southland Building Society was threatening to call up the Kayes' loan. If they were unable to settle this purchase, they could have been in a position where the Kayes were trying to recover $725,000 from the vendor of Lot 3, whilst having to repay the loan for the purchase of Lot 3 to Southland Building Society.

28. In short, my view was that their situation was only going to get worse if all the sale and purchase agreements did not settle.

29. I also formed the opinion very quickly that Tanner Fitzgerald had been negligent in their conduct of the entire transaction. In particular, Tanner Fitzgerald said it had obtained an undertaking from the vendor's solicitor to forward the memorandum of transfer of Lot 3 once the purchase price was paid. There was no such undertaking on Tanner Fitzgerald's files, and it appeared obvious from the files that no such undertaking had ever been obtained.

Finalising the Purchase

30. In my view the best way to proceed was to try to settle all the agreements as quickly as possible. The first priority was to try to get Southland Building Society's mortgage registered as quickly as

> possible, so that it did not call up its loan to the Kayes. I gave the Kayes very strong advice on these terms.
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> 31. The Kayes agreed with this. My recollection is that they were also anxious to get everything sorted out as quickly as possible. They wanted to be in a position where the land and the business was transferred to them, so they no longer had to deal with the vendor, and could get on with running their business.

[26] The purchase price under the agreement for the sale of the business became the subject of negotiations, in Mr Barris's view because both the vendor and (against advice) Mr and Mrs Kaye took unmeritorious legal positions. Mr Barris's evidence was that Mr and Mrs Kaye "became angry if things were pointed out to them that they did not like".[6] For instance, the Kayes objected to the value assigned to plant and equipment on the basis that it was too high. The only basis to challenge the value, however, was if some of the assets were not on the premises. Likewise Mr and Mrs Kaye wished to negotiate the valuation of stock down by up to 50 per cent, but the maximum adjustment under the agreement was by five per cent, up or down.[7]

[27] The parties eventually agreed on a price of $432,663.17 for the business (in October 2006), thereby fixing the amount of Marwa's loan to ROL. ROL then completed settlement of the purchase of the business, the Kayes obtained title to lot 3 and the first and second mortgages in favour of SBS and the vendor respectively and SBS's mortgage was registered. These matters were attended to in November 2006.

[28] Following the purchase of the business it remained to settle the purchase of lot 1 and repay Marwa's loan, on which penalty interest was accruing. Marwa declined to forego this interest, despite requests that it do so.[8]

[29] Mr and Mrs Kaye took responsibility for arranging finance for those two matters. Finance was in place by March 2007, with repayment of the loan and the purchase of lot 1 then being completed.

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6 Brief of Evidence of P W S Barris, above n 5, at [34].
7 At [35] and [36].
8 Letter Jackson Reeves to Norris Ward dated 25 September 2006, Vol 1 at 270.

Conveyancing

[30] I turn now to consider the respects in which Mr and Mrs Kaye allege that Norris Ward, through Mr Barris, breached their obligation to exercise reasonable skill and care. To establish a breach Mr and Mrs Kaye must prove that Mr Barris did not meet the standard of a reasonably competent solicitor. Unless the breach is patently obvious – and it is not in this case – evidence as to what a reasonably competent solicitor would have done in the circumstances is required.

[31] As I have said, Mr and Mrs Kaye's failure to call expert evidence to this effect means that there is no evidential basis for a finding of breach on the facts of the present case. To the extent I am able to express any view on the facts, it appears to me that Mr Barris more than met the standard required of him.

[32] The relevant part of Mr and Mrs Kaye's pleading is:[9]

> 107. **THE** Plaintiff failed to exercise reasonable care and skill for Room Outside Limited and the Defendants from the outset of their engagement:
>
> a. Failing to act promptly to secure a cost-efficient resolution of the legal issues that would allow the Defendants to operate their business free of legal impediment and business disruption by the vendor. The Plaintiff waited a full month before acting in the matter.
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> b. Failure to offer/invoke Alternative Dispute Resolution procedures.
>
> c. Failure to establish the true extent of negligence and breach of contract by Tanner Fitzgerald upon which to base advice to the Defendants.
>
> d. Causing the Defendants to have to raise extra financing of $139,239 to complete the 16 March 2007 vendor settlement and the consequences this had for their business (working capital) and financial situation (debt loadings).

[33] There was dispute at trial as to the scope of Mr and Mrs Kaye's instructions. Mr and Mrs Kaye submitted that they instructed Norris Ward to advise them generally, taking into account all, and not excluding any, material circumstances in

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9 First Amended Counterclaim, above n 1, at [107].

relation to protecting their affairs.[10] Consistently with this they submitted that Norris Ward should have attempted to negotiate more advantageous terms with the vendor, i.e. more advantageous than the various contracts allowed. In support of this submission Mr and Mrs Kaye relied on the following terms in Norris Ward's Client Registration form (referred to above):[11]

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

[34] Mr Barris's evidence, which I accept, was that he was not instructed to advise Mr and Mrs Kaye or ROL generally, but to settle the contracts to which the Kayes and ROL were bound.[12] Mr Barris's file note of his first meeting with Mr and Mrs Kaye on 14 September 2006 supports this:[13]

> ... They instructed me that they wanted to settle as quickly as possible and for me to approach the vendor's new solicitors with the proposal as outlined above.

[35] The "proposal as outlined above" concerned an offer made by the vendor on 14 September 2005 as to a value for stock and other matters.

[36] I accept counsel for Norris Ward's submission that, as a general rule, a solicitor is under no duty to go beyond instructions by proffering unsought advice on the wisdom of a transaction.[14] In any event, the point is somewhat academic given the contracts to which Mr and Mrs Kaye were committed.

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10 Closing Submissions of Counterclaim Plaintiffs dated 12 November 2014 at [2].
11 Client Registration Form, Vol 1 at 242.
12 Evidence of P W S Barris, Notes of Evidence at 195, 206 – 207.
13 File note dated 14 September 2006 produced as Exhibit 1.
14 *Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 648; *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.

[37] I do not consider anything turns on the express terms in the Client Registration form to which I have referred. With respect, at the hearing before me Mr and Mrs Kaye appeared to believe that a solicitor would be in breach of those terms if he were unable to extricate his clients from contractual obligations to which they had committed themselves and/or to negotiate more advantageous outcomes for them. Mr and Mrs Kaye's contractual obligations were clear and it is apparent from the contemporaneous correspondence that there was no prospect of the vendor agreeing to vary any of the agreements or of her waiving any contractual right.

[38] I dismiss this part of the Kayes' counterclaim, no breach having been established.

Litigation against TFG

[39] The Kayes are on stronger ground in their complaints as to the manner in which Norris Ward advised them in the litigation with TFG.

[40] Norris Ward advised Mr and Mrs Kaye and ROL that TFG had been negligent in two respects. The first was in their payment of the purchase price for lot 3 without first securing the vendor's undertaking to transfer title on receipt. The second concerned advice TFG had given or had failed to give (or was said to have given/failed to give) regarding adjustment of the sums due for plant and equipment and stock.

[41] On the basis of Norris Ward's advice Mr and Mrs Kaye and ROL commenced proceedings against TFG. They now claim against Norris Ward in respect of advice Norris Ward gave, or did not give, as to likely recoveries from that litigation.

[42] The Kayes adduced sufficient evidence in respect of this claim to enable me to determine it and so their failure to adduce expert evidence is not fatal. I am satisfied that the Kayes have established that Norris Ward breached their retainer from the point at which they were instructed until at least 11 February 2008. I am not satisfied, however, that such breach caused a loss.

Breach

[43] Norris Ward's litigation department received instructions to pursue the claim in May 2007. Despite this, Norris Ward did not file proceedings until late March 2008. That delay was of Norris Ward's making, and is one of the matters of which Mr and Mrs Kaye complain. The more significant complaint, however, is Norris Ward's failure to advise the Kayes/ROL as to the damages they might expect to recover, and to advise that TFG's liability might be reduced due to Mr and Mrs Kaye's/ROL's contributory negligence.[15]

[44] Mr and Mrs Kaye plead that Norris Ward advised them that they could expect to recover damages "in the hundreds of thousands of dollars" when they should have advised that the Kayes/ROL would recover no more than $60,000 to $70,000 (net of any allowance for contributory negligence).[16]

[45] The $60,000 to $70,000 estimate derives from advice given to Mr and Mrs Kaye by Mr Neil Campbell, a barrister in Auckland, on 24 February 2009. Mr Campbell said:[17]

> 83. It will be clear from my analysis that in my view the Kayes are unlikely to recover much of the damages that they are seeking. Their present claim totals almost $1.8 million (before interest and costs). In my view a realistic assessment of their prospects at trial is that they may (assuming they prove that TFG was negligent) recover in the order of $60,000 (penalty interest, additional refinancing costs, legal costs, stock adjustment (if it can be proved), stress), plus any amounts for the increase in value of Lot 1 (a claim that is not yet fully explained), and for additional interest paid (a claim that I cannot yet assess). On top of those sums they will recover interest, normally calculated at a rate of about 8% per annum from the time of the loss.

[46] Norris Ward did not dispute Mr Campbell's assessment and I propose to proceed on the basis that it was correct. Indeed, at mediation in early March 2009, it was agreed that TFG would pay $30,000 to each of ROL and Mr and Mrs Kaye in full and final settlement of the proceedings.

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15 First Amended Counterclaim, above n 1, at [111] - [113].
16 Statement of Claim dated 28 March 2008, Vol 8 at 1641.
17 Letter Mr Campbell to McCaw Lewis Chapman dated 24 February 2009, Supplementary Bundle at 37.

Loss

[47] From the time they instructed Norris Ward to commence proceedings, Mr and Mrs Kaye sent Norris Ward many different estimates of loss ranging from $600,000 to approximately $3 million. Taking the first of these estimates dated 17 April 2007 (for losses of $637,000), the Kayes and ROL advised they were seeking to recover from TFG items such as the increase in the market value of lot 1 between 1 September 2005 and 31 August 2006 ($105,000), penalty interest paid by ROL on the term loan from Marwa ($35,000), costs resulting from higher interest rates, brokerage fees and so on and the fee payable under the Licence to Occupy.[18]

[48] It is immediately apparent that such losses could not have been caused by TFG's omissions. For instance, Mr and Mrs Kaye bound themselves to settle the purchase of lot 1 on the basis of its market value at 31 August 2006. Nothing TFG did affected the increase. Another claim was for interest on extra borrowing of $100,000 for 30 years, quantified at $270,000. Again, it was fanciful to consider that TFG might be liable for such a sum.

[49] Instead of advising the Kayes to this effect, Norris Ward allowed them to continue with a false impression of what they might recover. In a letter dated 27 July 2007 Mr Bolton repeated the various heads of damage to which I have referred (without expressing any view of them) and said:[19]

> … At this early stage, I consider that you have a strong claim for negligence and reasonable prospects of securing, at least, the majority of the monies you are seeking in damages. ...

[50] Mr Kaye's evidence was that he took it from this letter that he could expect to recover more than 50 per cent of the $637,000.

[51] Counsel for Norris Ward submitted that Mr and Mrs Kaye were repeatedly asked to provide "source material" for the losses claimed but did not do so and so Norris Ward were not remiss in the advice they gave. As I understood it the source material went to quantum. Norris Ward did not require that information to advise

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18 Mr and Mrs Kaye Summary of Quantum dated 17 April 2007, Vol 3 at 633.
19 Letter Norris Ward to Mr and Mrs Kaye dated 27 July 2007, Vol 3 at 717.

Mr and Mrs Kaye of the matters to which I have referred. Mr Bolton had Norris Ward's files (including TFG's files such as they were), ready access to Mr Barris, and, as I have said, it was obvious on the face of the information supplied by Mr and Mrs Kaye that they had no prospect whatsoever of recovering many, if not all, of the losses they proposed.

[52] I consider a reasonably competent solicitor would have advised Mr and Mrs Kaye and ROL of this by June 2007 and advised them to proceed on the basis that TFG's liability might be reduced due to the Kayes' contributory negligence.

[53] The Kayes' expectations were allowed to persist until their meeting with Mr Bolton on 11 February 2008. It is common ground that during that meeting Mr Bolton took issue with some of the losses claimed and expressed the view that the Kayes and ROL might not recover more than $100,000.

[54] Mr and Mrs Kaye submitted that Mr Bolton's statement in the meeting was not considered advice and that it did not detract from his earlier, more encouraging, correspondence. However, Mr and Mrs Kaye must have taken from this meeting that Mr Bolton expected they would recover a far more modest sum than they wished. They supplied further information to Mr Bolton after this meeting but his opinion was unchanged, as appears from a letter he wrote to them in March 2008, saying:[20]

> … In terms of quantum I consider that the likely result of any Court case will be the awarding to you of a significant amount in damages exceeding $100,000 (based on the current material). However, there are always risks in any litigation and it will be for the Judge to decide the quantum of your claim subject to us being able to prove liability.

[55] For the reasons given, I consider Norris Ward breached their obligations between, say, June 2007 and 11 February 2008.

Causation

[56] In *Benton v Miller Poulgrain*, the Court of Appeal addressed what a plaintiff in a case such as the present must establish if they are to satisfy the Court that a

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[20] Letter Norris Ward to Mr and Mrs Kaye dated 17 March 2008, Vol 8 at 1618.

proven breach has caused loss.[21] The Court said that such a plaintiff must first establish on the balance of probabilities that he would have acted differently in the absence of the defendant's breach.[22] If the plaintiff establishes that matter, then it will usually be necessary to make a broad judgment as to the likely course of events thereafter.[23]

[57] Mr Kaye gave evidence that, had he received the advice to which I have referred, he and Mrs Kaye and ROL would have accepted unconditional offers made in February 2008 to purchase lot 3 and the business.[24] The purchasers offered $420,000 for the business and $1 million for lot 3, for which the ROL/the Kayes had paid $432,000 and $725,000 respectively.

[58] On 25 February 2008, the Kayes instructed Mr Barris to make counter offers – $360,862 for the business, representing an increase in the price for tangible assets but a substantial reduction in the value for stock in trade, and $1.125 million for lot 3, an increase on the offer price of $125,000.[25]

[59] Having received the counter offers, however, the purchasers advised that they did not wish to pursue the transactions any further. Accordingly, the possibility of a sale to those purchasers came to an end.

[60] Despite Mr Kaye's evidence, I am not satisfied that Mr and Mrs Kaye/ROL would have accepted the offers but for the breach by Norris Ward that I have identified. That is because Mr and Mrs Kaye knew at the time they counter offered that Mr Bolton considered they might recover approximately $100,000 from TFG. Any more optimistic view that Mr and Mrs Kaye held was their own.

[61] Had I reached a different conclusion, that is had I been persuaded the Kayes/ ROL would have accepted the offers but for the earlier breach, I consider it highly likely that the purchasers would have settled the agreements. That is because the

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21 *Benton v Millar & Poulgrain* [2005] 1 NZLR 66 (CA).
22 At [46] – [49].
23 At [50].
24 Agreement for Sale and Purchase of a Business and Agreement for Sale and Purchase of Real Estate undated, Vol 7 at 1528A and 1528B.
25 Email Mr Kaye to Mr Barris dated 25 February 2008 produced as Exhibit A.

purchasers made their offers at Palmers' instigation and went on to acquire another garden centre after rejecting the counteroffers.

[62] Norris Ward disputed that they could have been liable for any losses sustained by the Kayes. In support of this submission Norris Ward called Mr Grant Graham, an expert accountant, to give evidence. Mr Graham's evidence was that, if the Kayes and ROL were not insolvent from March 2007 when all transactions were settled, they were shortly thereafter. This is because income earned from the business and properties was insufficient to service borrowings (which were at least 90 per cent, if not 100 per cent of the purchase price of the business and lots 1 and 3), and to pay franchise and marketing fees due to Palmers. Indeed, following an email from Palmers in March 2008, Mr Barris advised Mr Kaye to arrange an appointment with ROL's accountant to discuss whether ROL might be trading while insolvent.[26] The gist of Mr Graham's evidence, which I accept, was that the collapse of the garden centre business and loss to Mr and Mrs Kaye was inevitable.

[63] That is not to say, however, that those losses would not have been mitigated if Mr and Mrs Kaye had sold lot 3 for $1 million. A sale at that price would have generated surplus funds – insufficient to avert all losses ultimately sustained but no doubt reducing indebtedness. It is not necessary for me to address the issue of loss in more detail given the conclusions I have reached.

[64] To conclude, although I consider Norris Ward breached their obligations in the respects I have identified, I am not satisfied that such breach was a cause of loss.

Result

[65] I dismiss Mr and Mrs Kaye's counterclaim. I make no orders as to costs at present. The parties may file written submissions if they are unable to agree.

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M Peters J

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[26] Email Mr Barris to Mr and Mrs Kaye dated 18 March 2008, Vol 8 at 1625.