Bilbe v Unkovich

District Court Auckland CIV-2008-004-1809
31 May; 1, 2 June; 9 July 2010
Judge Wilson QC

Lawyers and conveyancers — Negligence — Duty of care — Sale and purchase agreement — Whether solicitor obligated to advise client on risks arising from agreement — Contributory negligence — Clients' failure to mitigate loss — Expert evidence as to duties of solicitor — Resource Management Act 1991, ss 223 and 225; High Court Rules, Schedule 4; Contributory Negligence Act 1947.

The plaintiffs signed an unconditional agreement to purchase a unit "off the plans". They entered into the agreement following their own inquiries and representations made to them by a Blue Chip investment advisor. In particular, the plaintiffs were attracted to the investment given that it would be managed by Blue Chip.

The plaintiffs were advised to instruct the defendant as their solicitor because he was familiar with the Blue Chip operation. They did not have any contact with the defendant before signing the agreement. On signing the agreement, the plaintiffs paid a deposit of $107,000 to the vendors and $15,352.50 to Blue Chip New Zealand.

Some months later the plaintiffs learned of problems with Blue Chip. They sought advice from the defendant. The defendant advised that the deposit was lost into the subsidiary shelf companies of Blue Chip which were of no value, and that the deposit clause in the agreement had been deleted. He also passed on to the plaintiffs an offer from the developer pursuant to which they could purchase the unit for $442,500.

The plaintiffs chose not to proceed with this proposal and instead sought recovery of their losses from the defendant as the solicitor who acted for them claiming that he had breached his duty of care to them. It was common ground that the agreement, as signed, had significant legal issues and shortcomings.

The defendant's case was that he acted for the plaintiffs on a limited retainer and had no duty to advise them about the documentation especially given that they had signed up before they consulted him.

It was common ground that:

(a) the plaintiffs did not instruct the defendant until after they had signed the agreement unconditionally;

(b) the plaintiffs did not ask the defendant or his staff for advice about the documentation; and
(c) the defendant gave no advice about shortcomings in the agreement or the opportunity to be released from the arrangements under s 225 of the Resource Management Act 1991.

The main issue was what was the obligation of a reasonably competent solicitor to advise the client who did not specifically seek advice about risk factors arising from the form in which the agreement for sale and purchase had been prepared? Was the defendant negligent in failing to give that advice?

Held (reserved decision granting judgment to the plaintiffs)

It was the defendant's duty to offer advice whether sought or not unless the clients specifically restricted the retainer to implementing the transaction. Clearly there could not be contributory negligence in failing to seek advice. In the Court's view the signing of the agreement was not causative of any loss. The clear cause of loss was Mr Unkovich's failure to advise Mr and Mrs Bilbe on risk elements including that Parley Ltd did not own the property, the deposit was excessive and that the Bilbes had the right to cancel the agreement under s 225 of the Resource Management Act. The Court found that, as Mrs Bilbe said, the advice would have indicated that they had been lied to by the Blue Chip agent. The Court found that had the Bilbes received that advice their confidence in the transaction would have been shaken to the point that cancellation would have followed and there would have been no loss (see [78], [79]).

Cases mentioned in judgment

Bartle v GE Custodians [2010] 1 NZLR 802 (extract), (2009) 9 NZBLC 102,748; [2010] NZCA 174, [2010] 3 NZLR 601.
Bindon v Bishop [2003] 2 NZLR 136 (HC).
Bloor v IAG New Zealand Ltd HC Rotorua CIV-2004-463-425, 19 March 2010.
Camdoola Investments Ltd v Cavell Leitch Pringle & Doyle CA43/93, 28 October 1994.
Clarkson v Whangamata Metal Supplies Ltd [2007] NZCA 590, [2008] 3 NZLR 31.
Gilbert v Shanahan [1998] 3 NZLR 528 (CA).
Hansen v Young [2003] 1 NZLR 83 (HC).
J & JC Abrams Ltd v Ancliffe [1978] 2 NZLR 420 (SC).
Kendall Wilson Securities Ltd v Barraclough [1986] 1 NZLR 576 (CA).
McLaren Maycroft & Co v Fletcher Development Co Ltd [1973] 2 NZLR 100 (CA).
Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm) [1979] Ch 384, [1978] 3 All ER 571.
Mouat v Clark Boyce [1992] 2 NZLR 559 (CA).
Walop No 3 Ltd v Para Franchising Ltd CA20/03, 23 February 2004.

Action

The plaintiffs sued the defendant alleging breach of solicitor's duty of care.

D Grove for the plaintiffs.
P Napier and *Mrs Perry* for the defendant.

JUDGE WILSON.

Introduction[1]

[1] The plaintiffs, the Bilbes, sue their solicitor, Mr Unkovich, alleging that he breached his duty of care to them because he failed to advise them of the nature of the Blue Chip transaction into which they had entered. Mr Unkovich says he was under no duty to advise them of the nature of the unconditional contract they had signed especially where they had not specifically asked for any advice.

[2] On 3 May 2007, the plaintiffs signed an unconditional agreement, the agreement, to purchase "off the plans" a property described as Unit 15, 46 Carlos Drive, Flatbush (the property). The purchase price of $495,000 and other costs of the investment were raised on 100 per cent finance through the Auckland Savings Bank. The transaction included a property management agreement between the Bilbes and Bribane Property Group Ltd together with a lease between the vendor and Auckland Residential Tenancies Ltd which lease was guaranteed by Blue Chip New Zealand Ltd (the transaction).

[3] The Bilbes entered into the agreement following their own inquiries and representations made to them by a Mr Sam Shaikh, a Blue Chip investment advisor.[2] In particular, the Bilbes were attracted to the investment given that it would be managed by Blue Chip which "avoided [the Bilbes] being involved in something with which [they] were unfamiliar".[3] Mr Shaikh told them it was a very low-risk investment which required minimal input from themselves. He said that Blue Chip had a valuation of the property and that they were buying at valuation.

[4] The Bilbes were impressed with the Blue Chip model and they "did not undertake detailed research on the purchase. [They] relied on Blue Chip and the fact that [they] thought it had expertise in property development".[4]

[5] They instructed Mr Unkovich because Mr Shaikh advised them that he was familiar with the Blue Chip operation.[5] Mr Bilbe deposed that because Mr Unkovich had been recommended and was familiar with the documents he and his wife:

> ... assumed that if there were any difficulties with the documents or anything we needed to know that Mr Unkovich would have explained those issues to us. We trusted him entirely to look after our interests.

[6] Mr Shaikh had completed the necessary loan application[6] and Mrs Bilbe had dealt with the lender directly.[7] The Bilbes had had not had any contact with Mr Unkovich before signing the agreement.

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1 The background summary is adapted from the opening submissions of counsel for the defendant.
2 Bilbe affidavit 25.07.08, paras 11, 12, 15, 16, 21, ABD Vol 1 pp 55 and 56.
3 Bilbe affidavit 25.07.08, para 12, ABD Vol 1 p 55.
4 Bilbe affidavit 25.07.08, para 22, ABD Vol 1 p 56.
5 Bilbe affidavit paras 24 and 25.
6 Bilbe affidavit 25.07.08, para 28, ABD Vol 1 p 57.
7 Bilbe affidavit 25.07.08, para 29, ABD Vol 1 p 57.

[7] The first Mr Unkovich could have known of the Bilbe's instructions was when he received the loan documents sent under cover of a letter dated 6 May 2007. The agreement arrived under cover of a letter dated 7 May 2007.[8] A solicitor employed by Mr Unkovich wrote to the Bilbes on Mr Unkovich's behalf on 9 May 2007[9] confirming receipt of those documents and stating:

> We are glad to act for you in your purchase of the above investment property ...

[8] On 11 May 2007 the Bilbes borrowed a total of $145,000 from the ASB Bank of which:

- the deposit of $107,000 was paid to Walters Law the vendors' solicitors pursuant to the agreement;
- the sum of $15,352.50 was paid to Blue Chip New Zealand Ltd in payment of:
  - brokerage fee of $14,602.50;
  - property valuation fee of $400.00; and
  - chattels and fit out valuation fee of $350.00; and
- the balance of $20,929.80 was paid in part to the Bilbes ($15,185.20) and in part by the defendant to the Bilbes' credit ($5,744.60).

[9] From August 2007 Blue Chip made various interest payments to the Bilbes as a contribution towards interest on the deposit received but these stopped in December that year.[10]

[10] Mr Shaikh first told the Bilbes in August 2007 that the development was delayed. When in October 2007 they learned of problems with Blue Chip, Mr Shaikh again assured them that everything was still "stable and progressing well". In 2008 the Bilbes learned of Blue Chip's ultimate demise from media reports.[11]

[11] Accordingly, on 29 February 2008 the Bilbes sought advice from Mr Unkovich. This was the first time they had met him in person since they had dealt with his staff originally. Mr Unkovich advised that the deposit was lost into the subsidary shelf companies of Blue Chip which were of no value, and that the deposit clause had been deleted. He advised them to make inquiries at the building site and keep asking who the owner was until they got a contact.[12]

[12] That same day Mr Unkovich passed on to the Bilbes an offer from the developer pursuant to which they could purchase the property for $442,500 less a deposit of $17,500 already paid to Concepts 124 Ltd by Parley Ltd leaving a balance payable of $425,000.[13]

[13] The Bilbes chose not to proceed with this proposal and instead sought recovery of their losses from Mr Unkovich as the solicitor who

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8 Bilbe affidavit 25.07.08, paras 30 and 31, ABD Vol 1 p 57.
9 ABD Vol 1 p 142 and ABD Vol 2 p 149.
10 Bilbe affidavit 25.07.08, paras 50 and 54, ABD Vol 1 pp 59 and 60.
11 Bilbe affidavit 25.07.08, paras 48, 53 and 55, ABD Vol 1 pp 59 and 60.
12 CR Bilbe NOE pp 4 and 5.
13 Bilbe affidavit 25.07.08, para 61, ABD Vol 1 p 60.

acted for them claiming that he breached his duty of care to them.[14] The case started as a summary judgment application. Summary judgment was refused in part because of fundamental disputes between solicitors called to give expert evidence on either side. The matter was transferred to the standard track. Affidavits filed for the summary judgment application were sensibly treated as briefs of evidence at the hearing before me and supplemented by further oral vidence.

[14] The defendant's case is that he acted for Mr and Mrs Bilbe on a limited retainer and had no duty to advise them about the documentation especially given that they had signed up before they consulted him.

[15] It is common ground, and I find, that the agreement, as signed, had significant legal issues and shortcomings:

- *The vendor was not the registered proprietor of the property.* Parley was an unlisted $100 company. Mr Unkovich did not tell the Bilbes this until February 2008.
- *The deposit stakeholder provision had been deleted.* The provision is part of the printed standard general terms of sale of the 8th Edition Agreement for Sale and Purchase form which was used here. The clause in the agreement if not deleted would have provided as follows:

> Clause 2.4 The person to whom the deposit is paid shall hold it as a stakeholder until:
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> (i) The requisition procedure under cl 5.0 is completed without either party cancelling this agreement; and
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> (ii) Where this agreement is entered into subject to any condition(s) expressed in this agreement, each such condition has been fulfilled or waived; or
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> (iii) This agreement is cancelled pursuant to subcl 5.2(iii)(c) or avoided pursuant to subcl 8.7(vi).

- The deletion of cl 2.4 meant that the usual protection for a purchaser requiring a stakeholder to hold the deposit undispersed for a time was not present. The removal of this protection carried an element of risk[15] because it involved releasing the deposit to a $100 vendor company which did not own the property. Further, there was no evidence of any means by which Parley could legitimately gain title to pass on. Accordingly there was no ability to caveat the title to protect the Bilbes interests.
- This assumed even greater seriousness because the *deposit* payable under the agreement was set at $107,000 or 21.6 per cent of the purchase price. That was more than twice the normal maximum deposit of 10 per cent of purchase price.
- This was a *purchase "off the plans"* yet copies of the plans and specifications for the development were not with the agreement or other documents. Without those it was impossible to be sure what the purchasers were actually buying.

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14 Bilbe affidavit 25.07.08, para 73, ABD Vol 1 p 61.

15 See for instance the evidence of RV Eades NOE p 63, [15]–[19].

- The agreement contained no common conditions for the benefit of the purchasers such as a diligence condition or a solicitor's approval condition. The absence of a finance condition was not significant in this case (as Mr Eades said) because the Bilbes had pre-arranged their finance and none was needed.

Statutory right to cancel

[16] Neither Mr Unkovich nor his staff advised the Bilbes of their statutory right to cancel the agreement under s 225 of the Resource Management Act 1991 within 14 days of the date of the agreement. The agreement was signed on 3 May 2007. Mr Unkovich acknowledged by letter that he had the agreement and other papers by 7 May 2007 well within the 14-day cancellation period. The right to cancel arose because it was a sale off the plans. That is, the agreement related to the sale of part of a building which constituted a subdivision that was made before the appropriate survey plan had been approved under s 223 of that Act.

[17] It is common ground that any reasonably competent solicitor would be familiar with this provision. Counsel differed as to whether Mr Unkovich had a duty to advise the Bilbes of this statutory escape route. I will return to that issue.

No advice expressly sought and none given

[18] It is common ground that:

- the Bilbes did not instruct Mr Unkovich until after they had signed the agreement unconditionally;
- the plaintiffs did not ask Mr Unkovich or his staff for advice about the documentation; and
- the defendant gave no advice about shortcomings in the agreement or the opportunity to be released from the arrangements under s 225 of the Resource Management Act.

Issues for determination

[19] What was the scope of Mr Unkovich's retainer, namely, what advice was Mr Unkovich duty bound to give the Bilbes about the agreement? In other words, what is the obligation of a reasonably competent solicitor to advise the client who does not specifically seek advice about risk factors arising from the form in which the agreement for sale and purchase has been prepared? Was Mr Unkovich negligent in failing to give that advice?

[20] Would the Bilbes have changed their position, and in particular sought to cancel the contract, if the advice about the right to cancel had been given?

[21] Should the damages claimed be reduced by the alleged contributory negligence of the Bilbes in failing to seek professional advice in respect of the agreement prior to signing or from Mr Unkovich after they signed?

[22] Should the damages claimed be reduced because of the Bilbes alleged failure to mitigate their losses by accepting the offer made by the third party developer to purchase the property in late February 2008?

Evidence for the plaintiffs: outline and assessment

[23] Mr and Mrs Bilbe gave evidence on their own behalf. I had the advantage of seeing and hearing their evidence including under cross-examination. I was impressed with both of them as witnesses of the truth. Their evidence was consistent with such contemporaneous documentary evidence as there was. They made concessions where needed and their responses mostly seemed to me to be consistent with what might be expected. Mr Unkovich did not give evidence on his own behalf and no member of his staff did either. This meant that the Bilbes' evidence on their dealings with his firm went uncontested in the evidence apart from cross-examination by Mr Napier.

[24] Mr Napier conducted a lengthy and appropriate cross-examination of Mr Bilbe in particular. Except for one area Mr Bilbe was unshaken. The exception was when he said that he did not consider whether the agreement was a binding document or not when he signed it.[16] That response troubled me as contrary to a related document[17] which he conceded he had seen from Blue Chip which asserted just that and suggested investors take independent advice.[18] Mr Napier submitted that his evidence on this issue was "not credible" and suggested I should regard the whole of Mr Bilbe's evidence as tainted accordingly.

[25] I have given careful consideration to this submission. I did have the advantage of seeing and hearing Mr Bilbe give evidence over quite some time.[19] While the Bilbes had experience of one previous property purchase in New Zealand when they bought their family home, this was their first entry into an investment purchase let alone one off the plans. The Blue Chip document advising caution and suggesting purchasers obtain independent legal advice was dated 20 March 2007 and related to the Blue Chip "Premium Income Product" whereas the Bilbes were in the "Premium Growth Product" and the agreement was not signed until 3 May 2007. The warnings in the document were read at some earlier time concerning a different type of investment. No similar document was produced concerning the Premium Growth Product.

[26] I saw no advantage to Mr Bilbe in falsely asserting that he did not turn his mind at the time of signing to whether the agreement was binding or not. I cannot say that his evidence on this point was not truthful. While I regarded Mr Bilbe's evidence on this point with caution, there was no other aspect of his evidence which concerned me about his veracity or reliability. My overall assessment of him is as a credible and reliable witness. I accept the evidence of both Mr and Mrs Bilbe on the essential points as being reliable and truthful.

[27] The only other witness for the plaintiffs was an experienced solicitor Mr PH Nolan who was called to give expert evidence on appropriate legal practice. I will return to his evidence in detail.

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16 NOE evidence of Mr Bilbe under cross-examination at p 10.
17 NOE evidence of Mr Bilbe under cross-examination from p 9.
18 ABOD p 1.
19 The log notes record him giving evidence on 31 May 2010 from 10:39 to 12.05 and when recalled from 2:17 to 2:20 p.m.

Evidence for the defendant: outline and assessment

[28] At the start of the defence case Mr Napier advised for the first time that Mr Unkovich would not be giving evidence. This was surprising given that the proceedings alleged he had breached his duty of care to the plaintiffs as his clients.

[29] There was no witness from his practice not even of the law clerk who had attended the Bilbes at their home to attend to the signing of bank security documents, and no-one from Blue Chip.

[30] The first defence witness was Mr JJ Cregten who was called to give expert evidence as a chartered accountant and business consultant. His evidence was to the effect that, according to the public documents about the Blue Chip Group, namely its audited unqualified financial statements, it was solvent and growing at the time the Bilbes instructed Mr Unkovich. Under cross-examination he acknowledged a "fundamental uncertainty" in the release by Blue Chip of $42 million of investor's money to a third party. He said that was disclosed in the publically available report.[20] He had not mentioned that in his evidence-in-chief.

[31] I accept Mr Grove's point that Mr Cregten's evidence, at best, related to the Blue Chip Group as a whole, not to the risks arising from the agreement in this case about which he knew nothing. He had no information about the financial position of Parley. I found Mr Cregten's evidence of limited assistance. I note there is no evidence about any knowledge Mr Unkovich had on the point.

[32] The second witness for the defendant was an experienced solicitor Mr RV Eades who was called to give expert evidence on appropriate legal practice. Curiously it seems he was briefed to give evidence on the assumption that Mr Unkovich was instructed on a limited retainer. I will return to his evidence in detail.

[33] Ms CN Smith was called to give expert evidence valuing the property. I will deal with her evidence further in the context of damages.

Expert evidence as to the duties of a solicitor

[34] The plaintiffs' expert, Mr Nolan, had been in continuous practice as a solicitor since his admission in January 1976. He had extensive experience at partnership level for 19 years before he set up his own practice on 12 September 2005 specialising in property law. I am satisfied that he qualifies to give expert opinion evidence on the critical issues here including his opinion of the obligations of a legal practitioner of reasonable experience, competent or held out as competent in the matters at issue and observing the usual practises, conventions and responsibilities of such a practitioner at the times when the matters at issues occurred. I will deal separately with Mr Napier's submission that his evidence was inadmissible.

[35] The defendant called Mr Eades who is currently a consultant with Wynyard Wood, solicitors of Auckland. He was admitted as a barrister and solicitor in 1956 and entered partnership in 1958, retaining partnership status until 2002. He has held significant roles with the

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20 BOD p 217. Transcript p 55(d) from l 1.

Auckland District Law Society, being its president in 1987/1988, and has sat on the Council of the New Zealand Law Society rising to vice president of that Society in 1988/1989. I am satisfied that he also is qualified to give expert evidence about the practice of a legal practitioner of reasonable experience, competent or held out as competent in the matters at issue and observing the usual practises, conventions and responsibilities of such a practitioner.

[36] I accept the proposition that independently of the views of a profession as to duty of care, the Court must "retain its freedom to conclude that the general practice of a particular profession falls below the standard required by law".[21] It is for the Court to assess the duty of care on the whole of the evidence.

[37] Mr Nolan and Mr Eades both deposed that they had read the code of conduct for expert witnesses in Schedule 4 to the High Court Rules and undertook to abide by it. However both were criticised for lapsing into a degree of advocacy of the positions of the party for whom they were called. This would be inconsistent with the code of conduct for expert witnesses which provides:

> (i) an expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise; and
> (ii) an expert witness is not an advocate for the party who engages the witness.

Was Mr Nolan's evidence admissible?

[38] Mr Napier submitted that the second affidavit of Mr Nolan was "effectively a legal argument, replete with supporting legal text, and concessions where they must be made for the sake of the argument. For example, paras 7 and 8 of Mr Nolan's second affidavit provide:

> 7. I accept that Mr Unkovich did not make any representations of that nature to Mr and Mrs Bilbe, but I expect nevertheless he would have been aware of how he was being held out by Blue Chip's representatives.
> 8. I accept that Mr Unkovich did not have any obligations to advise on the wisdom of the transaction. However, I believe he still had a duty pursuant to his general retainer to advise on the legal aspects of the transactions, and I believe in this respect Mr Unkovich failed in his duty.

[39] This evidence can be regarded as favouring the plaintiffs' case but it does, in my view, sufficiently relate to aspects of "currently acceptable practice"[22] to avoid the ultimate sanction of exclusion.

[40] Evidence requiring exclusion is illustrated by Justice Harrison in this way concerning the evidence of a solicitor:

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21 Richmond J in *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA) at 108.

22 To adopt Justice Harrison's apt phrase from *Bindon v Bishop* [2003] 2 NZLR 136 (HC) at [17] which is set out below.

> [19] ... Mr Gallie's supplementary brief should not have been admitted on a separate ground. It was no more than a detailed dissection of Mr Bishop's brief. It was tendentious and partisan. It formed no part of the expert's role. He or she is called to provide independent assistance to the Court, not as an adjunct to counsel's submissions.

[41] Mr Nolan did not descend to the level of being "tendentious and partisan" to use Justice Harrison's phrase. His evidence as set out in para 7 above was of an expectation based on significant experience and was an opinion which was clearly admissible and helpful.

[42] Mr Napier also submitted that Mr Nolan's evidence was not admissible because he did not expressly purport to give evidence of the practice of the majority of reasonably competent solicitors as Mr Eades had expressly done at para 26 of his affidavit where he deposed:

> It follows from what I say in paragraphs 24 and 25, where I have adopted the standard of the competent lawyer as earlier defined, that I do not believe that *the majority of such lawyers exercising reasonable care and skill* would have volunteered advice on the effect of section 225 of the Resource Management Act nor would they at any stage have given advice on the wisdom of the transaction. [Emphasis added by Mr Napier.]

[43] Mr Napier relied on *Bindon v Bishop*[23] where Harrison J stated:

> [16] ... First, I am satisfied that Mr Gallie's evidence was irrelevant to the primary issue for determination. Accordingly, it was not admissible. There is no doubt that Mr Gallie is an expert property lawyer. Indeed, as his brief of evidence discloses, he is a perfectionist who practises exemplary standards.
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> [17] However, the Courts only allow evidence from other professionals in claims for negligence for a specific and well-settled purpose. It is to assist the Judge in determining the factual questions of compliance with professional standards. To qualify for admissibility the witness' brief must give evidence of currently acceptable practice. *He or she must depose to what the majority of experienced solicitors exercising reasonable skill and care would or would not have done in the circumstances.* The witness' own practices are irrelevant (*Sulco Ltd v ES Redit and Co Ltd* [1959] NZLR 456 (CA) at p 88; *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA) at pp 107–109 per Richmond J; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384 per Oliver J at p 402). [Emphasis added by Mr Napier.]
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> [18] In this case Mr Gallie made no attempt to qualify his evidence according to this fundamental requirement. In contrast, Mr Eades did so. Mr Gallie's principal and supplementary briefs and viva voce evidence proceeded entirely according to his own precepts of proper practice – of what he would or would not have done if he had been acting in Mr Bishop's place. Mr Gallie did not at any stage suggest that what he regarded as an appropriate standard or practice was the same standard practised by experienced, skilled and careful members of the profession in Waikato in 1995. Plainly his evidence was irrelevant. It should never have been admitted at trial.

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23 [2003] 2 NZLR 136.

[44] In that case Mr Gallie gave evidence of his own exemplary practice. That was why the evidence was held to be inadmissible. It was in that context that Justice Harrison used the highlighted passage which seems to derive from the judgment of Richmond J in *McLaren Maycroft & Co v Fletcher Development Co Ltd*.[24]

[45] Mr Nolan could have briefed and deposed as to his understanding of the practice of the majority of experienced solicitors exercising reasonable skill and care on what to do and what not to do in the circumstances. But there was no need to conduct some sort of poll to ascertain this as Mr Napier's cross-examination and submissions suggested. After all Mr Eades did not say he had conducted a poll either.

[46] I am satisfied that both solicitors gave evidence of their understanding of current practice amongst experienced reasonably competent conveyancing solicitors. I rule that Mr Nolan's expert evidence is relevant and admissible in this case.

Assessing the evidence of Mr Eades

[47] Mr Eades' opinions, assumptions and approach were challenged but not the admissibility of his evidence. However I have come reluctantly, but firmly, to the view that much of Mr Eades' evidence is irrelevant and therefore inadmissible. I also hold that where Mr Eades' evidence conflicts with the evidence of Mr Nolan on major points I must reject the evidence of Mr Eades. In deference to his long and distinguished career, I now set out the reasons for that conclusion. The starting point for these is the nature of a solicitor's retainer.

The nature of a solicitor's retainer

[48] Mr Grove submitted that Mr Unkovich should have advised the plaintiffs of the clearly unsatisfactory aspects of the agreement. He put the following statement of principle from the decision of the Court of Appeal in *Gilbert v Shanahan*[25] at the forefront of the plaintiffs' case. Mr Napier[26] accepted this as "an accurate statement of the law on this issue". Tipping J said at 537:

> Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer.

[49] In *Hansen v Young*,[27] Wild J said:

> I consider the relevant principles to be these:
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> (a) The term "retainer" describes the contract between a solicitor and client for the provision of legal services; *Laws New Zealand* Law Practitioners, paragraph 62; *Wong v Kelly* (1999) 154 FLR 200 at p 206 per Stein JA.

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24 *McLaren Maycroft & Co v Fletcher Development Co Ltd* at 107, ll 52 and following.
25 *Gilbert v Shanahan* [1998] 3 NZLR 528.
26 Closing submissions for the defendant [3.2].
27 *Hansen v Young* [2003] 1 NZLR 83 (HC) at [77].

(b) He who alleges a retainer must prove both its existence and its scope and terms.[28]

(c) The type and extent of advice required of a solicitor in fulfilment of the solicitor's professional responsibility depends on the nature or subject matter of the retainer and the nature of the client.

(d) Quality legal advice is the basic professional responsibility of a solicitor. Solicitors can be retained to give other than strictly legal advice. Before a Court can hold that such advice is given by the solicitor in a professional capacity, it must have the requisite connection with legal practice.

Both counsel referred to Duncan Webb's book *Ethics, Professional Responsibility and the Lawyer* (2nd ed, 2006); Mr Grove drew my attention to the helpful discussion on the issue of a solicitor's retainer beginning at 174. At [5.4.1] the author states:

> In the absence of clear indications that the contrary was intended, it is presumed that the parties intend a general retainer under which the lawyer is expected to advise in all legal aspects of the client's affairs with which he or she is dealing. The extent of the duty to advise generally will be determined in part by the client's knowledge and sophistication.

And further at 177:

> The fundamental principle is that the extent of the work required of the lawyer is to be determined by the retainer's terms. However, in the absence of express terms limiting the general nature of the retainer the solicitor runs the risk that a Court will presume that the parties intended a broad retainer.[29]

Finding on the nature of the retainer in this case

[50] I accept those statements of principle. In the absence of a specific restriction on the retainer I hold that the retainer was not limited but rather that the parties intended a general retainer under which Mr Unkovich was rightly expected to advise on all legal aspects of the transaction in which the Bilbes were involved.

[51] It became clear (under cross-examination particularly) that Mr Eades' evidence was conditional on the assumption that the lawyer was being asked simply to implement the transaction including the agreement that had already been entered.[30] He must have been briefed on that basis. I have found his assumption to be unfounded in this case. Accordingly I did not have the advantage of Mr Eades' great experience on the basis that the retainer was not so limited.

[52] He was asked in cross-examination:

> Q. But you are saying there, are you that the retainer was limited to just putting into effect the agreement for sale and purchase that had already been signed?

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28 While Mr Napier sought to distinguish this case he commended this aspect of it to me.

29 As Mr Grove points out, for the first of these propositions the author relies on the decision of the Court of Appeal in *Camdoola Investments Ltd v Cavell Leitch Pringle & Doyle* CA43/93, 28 October 1994 and for the second the author relies upon *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384 at 402–403.

30 Page 66, ll 1–10.

A. Whilst I think it is for his Honour to decide what the retainer was. What I am saying is that if that was the retainer, then my evidence follows that premise.
Q. Your evidence, to put it in another way round, is all contingent on the retainer being limited in that respect you refer to?
A. Yes.[31]

Mr Eades then acknowledged that there was nothing in the email from Mr Unkovich's office to the Bilbes of 9 May that explicitly said that the instructions were limited solely to implementing the transaction.[32] The email read in part: "We are glad to act for you in your purchase of the above investment property".[33]

[53] Mr Eades assumed in favour of Mr Unkovich (who was not called to give evidence) that the title search Mr Unkovich charged for perusing would have been of the Bilbes' home (which was the security for the bank advance to fund the investment) rather than that of the investment property. Of course his assumption might be right. If so, the question whether the solicitor should act for purchasers of an investment property without checking whether the vendor had title or could provide a chain of title to pass on arises.

[54] Mr Eades did recognise in cross-examination that it was appropriate for a solicitor to raise questions that go to title with clients and went on to say:[34]

> The lawyer should inform the client of the title position, explain the sequence that would be necessary for clear title [to] be given at eventual settlement. The chain may have been already explained to the client or not, or may not have been satisfactorily explained at the Blue Chip or agent level and the lawyer should certainly advise what would be required to ensure that title would eventually be available. If there had not been satisfactory explanation already, the lawyer should offer to obtain it, it is for the client to decide how far the lawyer should go.

He went on to say that the lawyer should flag that issue.

[55] This concession was properly made and aligned the two experts on the point.

[56] Mr Eades disagreed with Mr Nolan's description of the deposit as "excessive" as Mr Nolan said[35] before he ultimately agreed under cross-examination that it was higher than usual and that 10 per cent was more often than not the usual deposit. In my view in the context of this case the description of "excessive" was justified.

[57] Mr Eades did not agree with Mr Nolan's opinion that it was most unusual and irregular for cl 2.4 of the standard agreement to be deleted. It was his evidence that in the absence of a question or concern on the part of the purchasers to have the agreement explained that the lawyer could reasonably assume that there was no necessity to draw "again" to the purchasers' attention a clause that had clearly been crossed out and

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31 Transcript, p 73, ll 7 and following.
32 Transcript, p 74, ll 1–29.
33 ABD p 139.
34 Transcript, l 31 to p 71, l 5.
35 NOE under cross-examination at p 62.

would ordinarily have been.[36] That assumption was unfounded in the evidence.

[58] Mr Eades did not agree with counsel's proposition that an ordinary lay person would not understand the legal consequences of deleting the stakeholder clause and specific parts of the agreement for sale and purchase.[37]

[59] This evidence surprised me. I asked Mr Eades:

> Q. How does the lay client understand the implications of deleting clause 2.4 without being advised by a lawyer?
> A. Well again in my experience Sir most do because there is an awareness of the standard form that is approved by the Real Estate Institute and by the Auckland Law Society and because that is what all people or I would say 99 per cent of people purchasing a property will be confronted with.

[60] That answer did not meet the question. The issue was not simply awareness of the standard form but the effect of the deletion. In my view a solicitor who assumes any level of understanding of such a technical matter in a lay client without checking would be proceeding in breach of his or her duty to the client. There is no evidence that the Bilbes understood the effect of the deletion. No-one from Mr Unkovich's office asked them what their level of understanding was. Had they been asked they would have said they thought they had signed a completely standard agreement for sale and purchase.

[61] I do not accept Mr Eades' evidence that a solicitor could be excused from giving advice about a risky conveyancing transaction because the advice might not be welcome. I have no doubt it would have been welcome to the Bilbes.

[62] I do not accept part of Mr Eades' evidence which suggested that solicitors were now too busy to offer detailed advice.[38] The duty of care is not to be constrained by mere convenience. Neither should the possibility of increased cost, as he seemed to suggest, excuse a failure to give advice. As Mr Nolan said, costs can be discussed with the client beforehand.

[63] Furthermore, a solicitor has recently been found liable for inadequate advice given without retainer ahead of a transaction on which the solicitor expected to be retained.[39] That solicitor was familiar with the Blue Chip investment package, but unlike Mr Unkovich, did not have actual documentation in front of him. It emerged that Mr Eades had given similar evidence in that case to his evidence before me. Mr Eades' part in that case was revealed by Mr Grove in an effective cross-examination.[40]

> Q. To summarise your evidence, or paraphrase it, would it be fair to say that your position is the claim against Mr Unkovich, cannot succeed because, number one, he had no duty to advise of these issues because he wasn't

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36 Transcript, p 64, ll 5–10.
37 Page 65, ll 26–30.
38 Her transcript, p 66, l 5.
39 *Bartle v GE Custodians* [2010] 1 NZLR 802 judgment of Randerson J delivered 30 September 2009. The Court of Appeal Judgment at [2010] NZCA 174, [2010] 3 NZLR 601 was delivered 6 May 2010.
40 Transcript from p 78, l 1 to p 80, l 11.

specifically asked. And number two, some of the issues relate to the wisdom of the transaction and the solicitor has no obligation to advice in the regard?

A. I don't know that it's for me to comment on Mr Unkovich's responsibility or liability, I'm – my position is to say what I think that the competent lawyer would do.

Q. Yes, but the theme or the thrust of your evidence is the advice, which Mr Nolan says should've been given, didn't need to be given, because the Bilbes didn't specifically ask the questions and they had already entered into the agreement of sale and purchase?

A. That's how I see the facts of what I know, his Honour will have heard all the evidence and –

Q. Thank you, I'm just asking –

A. his decision.

Q. for your, the way you are presenting your evidence. And the second point that Mr Unkovich had no obligation to give advice on the wisdom of the transaction?

A. Yes, that's my position, I don't believe that lawyers are equipped generally to give advice on the wisdom of a transaction and I don't believe they should do so.

Q. You've previously given expert evidence on behalf of a Mr Mathias in relation to a claim for negligence against him in the Bartles' proceedings?

A. I was called to give evidence, I prefer not to see – be seen as giving evidence for or against anybody.

Q. You gave expert evidence in that?

A. I gave evidence, yes.

Q. And Mr Nolan gave expert evidence on behalf of the Bartles?

A. Yes.

Q. And the thrust of your evidence in that case was they didn't ask the question so he didn't need to give the advice and the advice went to the wisdom of the transaction and therefore a lawyer is not obliged to give that advice?

A. I think really that's an over simplification of what was fairly complicated circumstances.

Q. But that was the thrust of your evidence?

A. Well without going back to it, I wouldn't agree with that I try to give my evidence according to the particular case.

Q. Did you read the decision, the [*Bartle*] decision of his Honour Justice Randerson?

A. I did.

Q. And Mr Mathias was found liable wasn't he?

A. Yes.

Q. His Honour Justice Randerson's decision, went to the Court of Appeal, and the Court of Appeal, dealt with briefly the defence raised by Mr Mathias, have you read that judgment?

A. No, I haven't.

[64] Counsel referred Mr Eades to the following passage in the judgment of Hammond J[41] in the Court of Appeal in *Bartle*:[42]

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41 Mr Napier submitted that Mr Mathias was not a party to the appeal. The report describes him as the third respondent who did not appear. Both Mr Napier and Mr Grove were junior counsel at the appeal. Mr Napier also submitted that Hammond J was one of three judges "commenting upon an issue not properly before the Court". Even if Mr Napier is right, the views of three judges of the Court of Appeal are worthy of respect.

6. *Incompetent legal advice*

[91] A competent and independent solicitor would have quickly alerted the Bartles to the perils they faced. This was pleaded by the Bartles against Mr Mathias, their solicitor, and fully considered by Randerson J in his judgment.

[92] The Judge held that Mr Mathias had breached a duty of care to the Bartles in three key respects:

(a) he failed to ensure the Bartles understood the effect and implications of the transaction;
(b) he failed to explain the risks associated with the transaction including the entering into of substantial mortgages; and
(c) he failed to give the Bartles independent advice as to the risks that they faced if the Blue Chip group did not honour its obligations.

[93] In response to those allegations, Mr Mathias advanced the wishful defence that any duty of care he might have had did not extend to giving advice about the wisdom of the transaction, and was limited to giving accurate accounts to questions asked of him. Randerson J, with respect rightly, would have none of that. He said Mr Mathias had a duty to his clients to see that they understood the transaction.

[65]

Q. Do you change your view, now that you've read that?
A. No, I don't because my recollection of the [*Bartle*] situation were – is that there were differences between the circumstances and this case and that in the [*Bartle*] case, but without going back through the files and the documents I can't really assess that.

[66] I accept that there were factual differences between *Bartle* and this case. Nonetheless, I found it disturbing that Mr Eades did not feel any need to change his views when a Judge of the Court of Appeal had impliedly rejected them in such unmistakable terms. It may well be that Mr Eades' evidence represents the views of reasonably competent conveyancing solicitors in those limited and specific cases where the client expressly asks the solicitor to simply implement the agreement. But that is not the position here.

The evidence of Mr Nolan preferred and accepted

[67] I prefer and accept Mr Nolan's evidence that it is standard practice to advise on the key aspects of a transaction as even very experienced clients may not appreciate conditional dates and conditions.[43] Mr and Mrs Bilbe assumed that they were dealing with the standard form.

[68] As the evidence in this case established they had no experience of buying "off the plans". There was no enquiry as to their understanding or experience by or on behalf of the defendant. I also accept Mr Nolan's evidence that in his line of experience he had never seen an agreement like

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42 Op Cit.
43 Notes of evidence, p 44, ll 1–13 and following.

this.[44] Mr Eades deposed that he might have seen one like it in his rather longer legal career. This agreement was so unusual and risky that any reasonably competent conveyancing solicitor would have been duty bound to draw the risks to the clients' attention whether asked or not.

[69] I further accept the evidence of Mr Nolan that a client goes to a solicitor to get legal advice on all legal aspects of a transaction and that it is standard practice for reasonably competent conveyancing solicitors to advise the client of the key features of any agreement for sale and purchase.[45]

Breach of duty of care found

[70] I draw the inference that Mr Unkovich was aware that Blue Chip was referring purchasers to him because of his specialist knowledge of the Blue Chip set up. He displayed an insider's knowledge of the pit falls of the transaction when he told the Bilbes in February 2008 that the deposit was lost into the subsidary shelf companies of Blue Chip of no value, and that the stakeholder clause had been deleted.[46]

[71] By the time Mr Unkovich gave that advice in February 2008, it was too late to access the statutory escape route. I draw the inference that he knew the stakeholder clause had been deleted from the time he saw the agreement on 7 May 2007 and understood its significance in relation to at least the title issues (which both expert solicitors recognised as critical) and the high deposit. Mr Unkovich should have got the Bilbes into his office so he could advise them of the effect of the agreement they had signed, the exposed position it left them in, and the escape route available.

[72] On the contrary he so arranged matters that a staff member attended the Bilbes at their home to witness the execution of the security documents. Accordingly there was no opportunity for the Bilbes to be given the advice to which they were entitled and which I infer he knew they should have been given. He acted on the unjustified assumption that he had a limited retainer restricted to implementing the transaction.

[73] I find that Mr Unkovich failed in his basic duty to his clients to see that they understood the transaction.[47] This duty was not dependent on any question from them. He was in breach of his duty to the Bilbes as their solicitor in failing to advise them of the risks in the agreement:

- including the fact that the vendor had no clear title;
- hence the absence of a caveatable interest to protect the Bilbes and no clear way in which the Bilbes could obtain title;
- the excessive deposit which he released to the vendor which was a $100 company of no substance;
- the absence of plans setting out the project being purchased; and
- the Bilbes statutory right to cancel the agreement.

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44 Notes of evidence, p 47 top.
45 Notes of evidence, p 44, ll 1–5.
46 Incredibly at that time Mr Unkovich advised the Bilbes to make inquiries at the building site and keep asking who the owner was until they got a contact. This was an attempt to pass onto his lay clients the responsibility he had to ensure from the outset that they understood the transaction, and they realised its legal pitfalls.
47 I here adopt the words of Hammond J in *Bartle* at [93].

[74] I have inferred that Mr Unkovich must have known he was being held out as having specialist knowledge of Blue Chip transactions. This strengthens the finding of negligence I have already made. As Justice Wild said in *Hansen v Young*:[48]

> A solicitor holding himself out as a legal expert or specialist in the field of practice may be subjected to a stricter standard of care in respect of work carried out in that field – to the standard of performance of those holding themselves out as specialists in that area.

Contributory negligence

[75] The defendant pleaded that any amount that he should pay the plaintiff should be reduced because of the plaintiffs' own negligence in:

(i) entering into an agreement or agreements without properly comprehending that agreement or those agreements; and
(ii) entering into an agreement or agreements without seeking professional advice as to the obligations, benefits and risks arising from the agreement or agreements.

[76] Contributory negligence eases a defendant's burden:[49]

> Where a man is part author of his own injury, he cannot call on another to compensate him in full.

The defence arises from the Contributory Negligence Act 1947.

[77] As Mr Napier submitted there are examples of contributory negligence being found where a professional person has been found negligent and but for that negligence no loss would have been suffered: *Kendall Wilson Securities Ltd v Barraclough*.[50] Justice Cooke stated:[51]

> Nevertheless I think that there was enough in the evidence to support the Judge's obvious opinion that some reasonably possible investigation of Mercantile's affairs by Mr Sturm would have revealed a less than assured financial position. [The trial Judge] was entitled to find that reasonable prudence dictated such an investigation rather than total reliance on the security. ...
>
> It was argued for the appellant that any failure to investigate the borrower's finances and the value of the borrower's covenants was immaterial. I agree with Mr Clark that what he called Thomist logic is not appropriate in the application of the Contributory Negligence Act. The loss of part of the mortgage advance and other sums should be regarded as damage suffered by Securities partly as a result of the company's own fault and partly as a result of the valuer's fault. The damages should be reduced to such extent as the Court thinks just and equitable having regard to the share of Securities in the responsibility for the damage. ... I would favour reducing the damages by one third.

[78] Mr Napier submitted that Mr and Mrs Bilbe failed to act with reasonable prudence in entering into the binding agreement at the centre

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48 Wild J in *Hansen v Young* at [78].
49 Todd *Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2008) at 911.
50 *Kendall Wilson Securities Ltd v Barraclough* [1986] 1 NZLR 576 (CA).
51 At 595.

of a complex deal without fully comprehending the risks or seeking any advice and that their actions constituted contributory negligence. He astutely realised a degree of circulatory in the second submission that failing to ask Mr Unkovich at any later stage for advice on the documents was a further example of contributory negligence. I find that it was the defendant's duty to offer advice whether sought or not unless the clients specifically restricted the retainer to implementing the transaction. Clearly there cannot be contributory negligence in failing to seek advice.[52]

[79] In my view the signing of the agreement was not causative of any loss. The clear cause of loss was Mr Unkovich's failure to advise Mr and Mrs Bilbe on risk elements including that Parley Ltd did not own the property, the deposit was excessive and that the Bilbes had the right to cancel the agreement under s 225 of the Resource Management Act. I find that, as Mrs Bilbe said, the advice would have indicated that they had been lied to by the Blue Chip agent. I find that had the Bilbes received that advice their confidence in the transaction would have been shaken to the point that cancellation would have followed and there would have been no loss.

Duty to mitigate loss

[80] The defendant pleaded that the plaintiffs could have effectively mitigated their loss which would have reduced the defendant's liability. There is no dispute with the legal proposition that:[53]

> ... an injured party must take steps to mitigate his loss, and it is clear that the Courts will not scrutinise too closely his actions taken reasonably in good faith for this purpose, and will avoid the temptation to judge in hindsight.

[81] The Court of Appeal has put it this way:

> A situation remains, however, that in an action for damages for breach of contract the innocent party is under no obligation to prove that all reasonable steps to mitigate were taken by it. Rather, the onus is on the defaulting party to satisfy the Court that damages should be reduced because the plaintiffs have failed to take reasonable steps to mitigate loss consequent on the defendant's wrong, and should not be permitted damages in respect of any part of the loss due to the plaintiffs neglect to take such steps.[54]

[82] The defendant's proposition was that the plaintiffs should have picked up an offer from the developers of the property (the developers offer) which included:

(i) a purchase price of $442,500;
(ii) that the deposit of $17,500 already received by the developer on behalf of the plaintiffs would be deducted; and
(iii) the balance due from the plaintiffs would be $425,000.

[83] At the time of that offer the plaintiffs had lost $110,936.01 so together with the purchase price of $425,000 so they would have paid out

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52 A similar plea for contributory negligence failed in *Bartle v GE Custodians* [2010] 1 NZLR 802 at [161]–[163].
53 *J & JC Abrams Ltd v Ancliffe* [1978] 2 NZLR 420 at 432.
54 *Walop No 3 Ltd v Para Franchising Ltd* CA20/03, 23 February 2004 at [7].

$535,936.01 had they accepted this offer. This compares to the original purchase price of $495,000. The higher amount would immediately give a loss figure of $40,936.01. Mr Napier argued that that sum would be the appropriate loss. Alternatively, if the evidence of Ms Smith on the valuation were to be accepted then the value of the unit would have been $465,000 which would give a loss figure of $70,936.01.

[84] Mr and Mrs Bilbe gave evidence that they had already borrowed and paid approximately $125,000 and were incurring ongoing interest. The cost was made up of the deposit together with legal fees and brokerage fees charged by Blue Chip.[55] In order to complete the purchase at that time excluding legal costs the Bilbes would have had to borrow about $550,000 which is $55,000 above the original purchase price.

[85] They did not immediately reject the opportunity. They made enquiries to find out what rental income would be received (finding it was about $400) and what the costs of management rates and Body Corporate fees would be. Mrs Bilbe consulted with the accountants recommended by Blue Chip and received advice that the valuer's employee they consulted would not go ahead with the offer if it was her own investment.[56]

[86] The Bilbes also deposed that if they were to take up the offer they would have to supplement the income themselves to cover the mortgage at the rate of more than $300 a week, an amount that they could not afford. It was far from unreasonable of them to take this view. It was a reasonable response by a couple who had already been burnt by their investment experience.

[87] The alternative proposition based on the evidence of Ms Smith would have left the Bilbes purchasing a property for $85,000 more than it was worth. I do not need to assess that the evidence of Ms Smith in any detail here. Her evidence was challenged in cross-examination. She had confirmed that she would not rely on Blue Chip sales figures given her previous experience with them. But there is some merit to Mr Grove's point that the sales that she mainly relied on were in fact sales from Parley Ltd, that is, that they were Blue Chip sales. It is not necessary for me to analyse that challenge further here. I am content simply to hold that the Bilbes acted reasonably in electing not to take on the purchase of the unit at all given the uncertain financial future and values attached to properties as they spiralled down in those days.

[88] The defendant's claim that the plaintiffs have failed to mitigate their loss is rejected.

General damages

[89] Mr and Mrs Bilbe each claimed $5000 for general damages.

[90] Mr Napier submitted that Mr and Mrs Bilbe were purchasing an investment, not their own private home, and that in such circumstances; they should be entitled to a minimal award of general damages only.

[91] Mr Grove relied on the decision of the Court of Appeal in *Mouat v Clark Boyce*[57] where Cooke P said:

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55 Unkovich, settlement statement bundle to p 159.
56 Notes of evidence, p 29, ll 26.
57 *Mouat v Clark Boyce* [1992] 2 NZLR 559 at 569.

> Stress is an ordinary incident of commercial or professional life. Ordinary commercial contracts are not intended to shelter the parties from anxiety. By contrast one of the very purposes of imposing duties on professional persons to take reasonable care to safeguard the interests of their clients is to enable the clients to have justified faith in them. In my view an award of stress damages to the present appellant was well warranted, whether in tort or contract or as equitable compensation.

[92] In that case an award on the "high" side of $25,000 was not disturbed on appeal.

[93] In this case Mr and Mrs Bilbe gave evidence which I accept as to the considerable stress that they suffered. They feared the loss of their family home and the suffered the pressure of having to meet ongoing interest payments to the mortgagee when they should not have been placed in that position.

[94] In my view the amount of the claim for general damages is reasonable, even modest. The plaintiffs' loss of enjoyment of life was due to the failure of the defendant as their professional solicitor to take reasonable care to safeguard their interests by providing basic legal advice. An award of general damages is fully justified. Each of the plaintiffs is awarded $5000 under this head.

Special damages

[95] Mr Napier submitted that it was clear from the amended particulars of claim, the plaintiffs (exempting interest) have paid out the following sums:

(i) $107,000.00 to Walters Law;
(ii) $15,352.50 to Blue Chip New Zealand in payment of the brokerage fee, property valuation fee and chattels and fit out valuation fee; and
(iii) $1,717.70 for professional services, Franklin District Council, company formation fee, Land Information New Zealand and disbursements.

Subtotal: $124,070.20

From the sum of $124,070.20 the following should be deducted:

(i) $1,000.00 that it is conceded in a reasonable allowance for the defendants' legal fees.
(ii) $4,596.06 payment from Blue Chip and/or its subsidiary and/or a subsidiary company or companies;
(iii) Tax benefit of $7,538.13.

This makes a total of $110,936.01.[58]

[96] The figures are taken from the amended statement of claim. I have however to decide the case on the evidence.

[97] The plaintiffs' claimed $150,113.00 based on Mr Bilbe's evidence which particularised them as at 24 May 2010 as follows: Initial loan to finance deposit and Blue Chip fees $125,000.00

Credit facility obtained to pay interest on the loan	$35,943.63

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58 I have corrected this figure from the one cited which was $109,936.01.

Accountancy fees paid to Lowther & Associates in relation to transaction[59]	$832.50
Subtotal:	$161,776.13
Less:	
Reasonable fee for advice on the agreement	$1,000.00
Refund of the fees by the defendants	$3,125.00
Tax refund received by myself and my wife	$7,538.13
Total Claim as at 24 May 2010	$150,113.00

[98] Mr Bilbe's evidence on quantum was not challenged.

Interest

[99] The interest which was payable pursuant to the mortgage funding is specifically claimed in the statement of claim on the principles set out in *Clarkson v Whangamata Metal Supplies Ltd.*[60] Interest has accrued and is payable by Mr and Mrs Bilbe. This situation was clearly foreseeable by Mr Unkovich.

[100] Mr Unkovich as the solicitor who received the security documents had actual knowledge of the terms on which the Bilbes were borrowing funds to finance the purchase and Blue Chip fees and also to finance the interest payments while they waited for settlement.[61]

[101] Accordingly there is judgment for the plaintiffs against the defendant for special damages in the sum of $150,113.00. That sum includes interest to 24 May 2010 against which the Blue Chip payments of $4596.06 have been netted off against in the ASB revolving credit account.[62]

[102] Mr Napier accepted realistically that interest would have been incurred and in the event of liability being found would be properly awarded on the amount of the judgment. I invite counsel to either agree on the interest figure or make submissions by memoranda as to what the interest figure should be and from what date.

Costs

[103] The plaintiffs should have costs on these proceedings. I invite memoranda from counsel pursuant to the following timetable:

(i) The plaintiffs are to file and serve their memorandum on costs and interests on or by 4pm on the 7th day following the date of this judgment.

(ii) The defendant is to file and serve his reply memorandum on costs and interests on or by 4pm on the 14th day following the date of this judgment.

Reported by: Rachel Marr, *Barrister and Solicitor*

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59 Bundle 2 p 171.

60 *Clarkson v Whangamata Metal Supplies Ltd* [2007] NZCA 590, [2008] 3 NZLR 31.

61 *Bloor v IAG New Zealand Ltd* HC Rotorua CIV-2004-463-425, 19 March 2010 at [141]–[147].

62 CR Bilbe affidavit on quantum para 3.