IN THE COURT OF APPEAL OF NEW ZEALAND

CA118/2014
[2014] NZCA 554

BETWEEN	MACALISTER MAZENGARB Appellant
AND	ANNAN LAW Respondent

Hearing: 29 September 2014

Court: French, Venning and Dobson JJ

Counsel: A B Darroch for Appellant
A C Challis and H K Harkess for Respondent

Judgment: 17 November 2014 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal against the finding of liability is dismissed.

B The appeal as to the extent of liability apportioned to the appellant is allowed. The equal apportionment ordered by the High Court is substituted for an apportionment of 20 per cent to the appellant and 80 per cent to the respondent.

C The cross-appeal is dismissed.

D The appellant is entitled to costs on a band A basis with usual disbursements on both the appeal and cross-appeal. The High Court costs order remains in place.

REASONS OF THE COURT

(Given by Dobson J)

The appeal

[1] This is an appeal from a decision apportioning liability between two firms of solicitors that successively advised the purchasers of a unit in an Auckland residential development promoted by the Blue Chip group of companies (Blue Chip).[1] The purchasers of the unit, Mr and Mrs William and June Samuel (the Samuels), suffered substantial loss on the transaction following the collapse of Blue Chip.

[2] In June 2012, the Samuels commenced proceedings against the respondent (Annan Law), which firm completed the purchase transaction and associated legal work for them in September 2006. Annan Law issued a third party claim against the appellant (Macalister Mazengarb) in January 2013, in relation to advice that firm had given to the Samuels during the earlier part of their dealings with Blue Chip. Annan Law settled the Samuels' claim in October 2013 for $512,500 and the claim for contribution from Macalister Mazengarb as a joint tortfeasor was heard in the High Court at Tauranga in December 2013.

[3] In February 2014, Andrews J delivered a judgment in which she found that the solicitor involved at Macalister Mazengarb, Mr Robin Buxton, had breached a relevant duty of care owed to the Samuels in the advice he provided in relation to the transaction.[2] The Judge was satisfied that Mr Buxton's breach of duty was a contributing cause of the loss subsequently suffered by the Samuels.[3] The Judge apportioned the liability equally as between the two firms of solicitors, with the result that Macalister Mazengarb became liable for one half of the settlement sum.[4]

[4] Macalister Mazengarb appealed the finding that it was liable in any respect that contributed to the loss suffered, and also challenged the apportionment of

[1] *Samuel v Annan Law* [2014] NZHC 128.
[2] At [44]–[50].
[3] At [60].
[4] At [65]–[66].

50 per cent of the liability. It argued either that all liability, or a substantially greater portion of it, should have been attributed to Annan Law.

[5] Annan Law cross-appealed, contending that Macalister Mazengarb ought to have been liable for more than 50 per cent of the settlement sum.

The factual circumstances

[6] Between March and early June 2006, Mr Ray Meadows, an adviser with Blue Chip, approached the Samuels and promoted to them the purchase of an apartment in a complex being developed by Blue Chip in Parnell, Auckland. On 6 June 2006 the Samuels signed an unconditional agreement for sale and purchase in respect of the apartment as well as a form of addendum to a joint venture agreement, a disclosure document and a management agreement. The dialogue between Mr Meadows and the Samuels, and their execution of the documents, occurred in Tauranga, where they lived as a retired couple.

[7] The Samuels completed those documents without taking any legal advice and Mr Meadows recommended that they have Mr Annan of Annan Law, who practised in Tauranga, act for them in relation to the transaction. Despite Mr Samuel indicating that Mr Buxton acted for them and that they would refer the matter to him, Mr Meadows endorsed Annan Law as the firm acting for the purchasers in the documents that were signed.

[8] Within three days of the Samuels signing the documents, Blue Chip sent copies of the documents to them. Blue Chip also sent copies of the documents that had been signed by the Samuels to Annan Law, together with further joint venture documentation, a copy of a lease document and Blue Chip invoices.

[9] On 15 June 2006, Annan Law wrote to the Samuels, contemplating that they were likely to receive instructions from the Samuels to act on their behalf in the transaction. The letter enclosed a flyer that the firm had produced to promote its services. It introduced its "Blue Chip team", listing first Mr Annan, who was described as the person who would "manage the Blue Chip transaction with the assistance of his secretary, Olivia".

[10] The Samuels did not respond to Annan Law's letter and at about that time asked Mr Buxton, who practised in Wellington, for advice in respect of the transaction.

[11] Messrs Samuel and Buxton had attended school together in Wellington in the 1950s and Mr Buxton had acted for the Samuels since the 1970s in relation to property, family and business matters. Mr Buxton had also acted for the Samuels when they moved to Tauranga and bought a residence and a business there.

[12] Mr Samuel characterised his request for advice from Mr Buxton as being in a context that Mr Buxton was "a friend more than anything". On the implicit premise that the Samuels would accept Blue Chip's recommendation to have Mr Annan act on the transaction for them, Mr Samuel stated: "I probably was a bit naughty by ringing Robin Buxton but I did."

[13] Mr Buxton had difficulty understanding the rationale for the transaction from a perusal of the documents that were provided to him. On 21 June 2006 he wrote to the Samuels identifying a range of potentially material concerns. His opening comment was that he was "somewhat sceptical that these type of deals provide reasonable value". He raised concerns about the structure of the body corporate that was intended to operate the apartment complex, a lack of information about the market rent for the properties, a failure to address the potential liability for taxes on involvement in the investment, contradictory figures as to the value or cost of the property being acquired and a concern about the assumption that property prices would double in the succeeding nine and a half years. In addition, Mr Buxton questioned the nature and extent of the fees, some of which seemed exorbitant or unwarranted.

[14] The 21 June 2006 letter was followed by telephone discussions between Mr Buxton and either or both of the Samuels. Mr Buxton's recollection was that, in his ongoing dialogue with the Samuels, he continued to raise his concerns at the risks created by the transaction and uncertainties as to the full terms on which it would occur.

[15] On 26 July 2006, Mr Buxton wrote to Blue Chip seeking clarification on nine issues that caused him concern from the Samuels' perspective. Mr Buxton noted the limit on indemnities specified in the documentation, which was inconsistent with the Samuels' understanding. He stipulated that the relevant wording would need to be changed if the indemnity were to coincide with the Samuels' understanding. He requested confirmation that the joint venture agreement would be modified in this respect. The last substantive paragraph began: "If and when our clients proceed …", raising the prospect that the Samuels might not complete the transaction.

[16] Mr Buxton received a prompt reply, but it left him with substantial reservations.

[17] By 11 August 2006, Mr Buxton was due to leave New Zealand for a previously planned overseas trip. On that day, he wrote to Annan Law, enclosing the correspondence he had entered into in relation to the matter on the assumption that Annan Law would thereafter act for the Samuels on the transaction. Mr Buxton completed his involvement without opening a file, and without rendering a fee.

[18] Mr Buxton's own evidence on the point that had been reached when he handed the matter over to Annan Law was to the effect that he had taken the matter as far as he could and he did not think that he could get any further with it. When asked by Mr Samuel as to what the Samuels should do, he thought he probably said: "Well go back to the people you've already had contact with who apparently know all about it". He accepted that he did not explicitly advise the Samuels not to proceed with the transaction.

[19] Thereafter, Mr Annan acted for the Samuels. Mr Samuel's evidence was that when they questioned whether they were doing the right thing in making the investment, Mr Annan's response was that it was a good idea, that one of his staff had invested in a Blue Chip development, that the structure provided protection to them and that it was Blue Chip that was taking the risk. Mr Annan proceeded to draft numerous documents, including a trust deed for a family trust, fresh wills and powers of attorney, as well as mortgage documents that included the Samuels providing a mortgage over their then unencumbered Tauranga home.

[20] The transaction was duly settled on 22 September 2006. The extent of borrowings that had been arranged exceeded the amount required to settle all aspects of the purchase by some $33,300. Under the guise of a requirement for the Samuels to provide "working capital" for the development, but without any precise contractual obligation or demand to make the payment, or instructions from the Samuels to do so, Annan Law paid the full extent of the balance directly to Blue Chip. In all other aspects of the transaction, Blue Chip had solicitors acting for it.

[21] Blue Chip collapsed in early 2008 and the Samuels sold their apartment for a substantial loss later that year.

The High Court judgment

[22] At trial, Annan Law called both Messrs Samuel and Annan. In addition, evidence was called from Mr Kevin Miles, who had been employed by Blue Chip at the relevant time. The effect of his evidence was that Blue Chip had been relatively relaxed at allowing purchasers to cancel unconditional agreements for sale and purchase, such as the Samuels had entered into, in certain circumstances.

[23] The Court also heard from three expert conveyancing practitioners, Mr Robert Eades called for Annan Law and Messrs Peter Nolan and John Greenwood called for Macalister Mazengarb.

[24] Andrews J found that Mr Buxton had acted for the Samuels from mid-June until 11 August 2006 on what should be treated as a general retainer.[5] That gave rise to a duty to protect the Samuels' interests, and to exercise reasonable skill and care.

[25] On the basis of the evidence from the conveyancing experts, the Judge found that a prudent solicitor in Mr Buxton's position should have at least raised the prospect of pursuing cancellation of the contract, and that Mr Buxton was negligent in that regard.[6]

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5 At [24].
6 At [46].

[26] The Judge accepted Mr Samuel's evidence that if he had been told that the Blue Chip investment was a bad deal and that there was a chance of pulling out, he would have taken that advice and sought to extricate them from it.[7] The Judge found further that the circumstances in which the instructions to act for the Samuels were transferred to Annan Law, and how the matter was handled thereafter, did not result in a break in the chain of causation. The Judge adopted the commentary from *The Law of Torts in New Zealand* to the effect that "intervening conduct which is part of the risk engendered by the initial wrongful conduct is also a foreseeable consequence of that conduct".[8]

[27] The Samuels' claim had been brought on the basis that Annan Law's negligence in not advising them of the adverse risks of the transaction had deprived them of the chance to avoid the losses that flowed from it. The Judge further found that the Samuels would have had a substantial chance of extricating themselves from the Blue Chip investment had they been advised to do so.[9] This was on the basis of Mr Miles' evidence and an acknowledgement by Mr Greenwood to the effect that it was known within the legal community that Blue Chip was relatively liberal in allowing purchasers in contracts with it to cancel. Because of Mr Buxton's failure to provide advice to that effect, the Samuels lost the chance to pursue cancellation so that Macalister Mazengarb's breach of its duty to them was a direct cause of the Samuels' subsequent loss.[10]

[28] The Judge accepted an argument for Annan Law to the effect that the Samuels' lost opportunity to extricate themselves from the contract was the same when both firms were acting for them.[11] Essentially because both negligent solicitors had an equal opportunity to extricate the clients from the investment, the Judge concluded that the only proper result was to apportion liability equally between the two firms.[12]

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7 At [56].

8 At [57] quoting Stephen Todd "Causation and Remoteness of Damage" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [20.4.02(7)].

9 At [59].

10 At [59]–[60].

11 At [62].

12 At [65].

Issues on the appeal

Breach of duty

[29] Mr Darroch raised a number of matters that he argued were sufficient to reverse the finding that there had been a breach of the duty of care owed by Mr Buxton, in the circumstances that pertained at the time. First, Mr Buxton had not been provided with all of the documents that reflected the detail of the commitment the Samuels had made. He had only been provided with a draft form of the joint venture agreement, the final form of which would be relevant to assessing the extent of the risks the Samuels would be assuming as well as the extent of any misrepresentation by Mr Meadows as to the scope of indemnities that Blue Chip would provide.

[30] We do not accept that submission. Mr Buxton was able to identify a range of material concerns on the documents initially provided to him. After a visit by a Blue Chip representative intended to aid his understanding of the relatively complex structures involved, he was able to identify a range of additional issues on which he sought clarification from Blue Chip. We are not persuaded that any doubts as to the final form of some of the documents reduced the scope of Mr Buxton's duty to the Samuels to an extent that relieved him of the obligation to warn them in more explicit terms that the contract they had committed to was ill-advised.

[31] The second factor that was argued as reducing the prospect of a breach of duty by Mr Buxton was that the consequences of attempting to cancel the unconditional contract the Samuels had signed were not straightforward. An assessment would be needed as to whether grounds for cancellation existed, together with some assessment of the risks involved in pursuing that course, and the likely costs that would be incurred.

[32] We accept that Mr Buxton cannot be criticised for not knowing that Blue Chip might agree to let the Samuels out of the contract. He ought prudently to have considered that option for the Samuels on the assumption that Blue Chip would seek to hold the Samuels to the unconditional contract so that grounds for cancellation would need to be made out.

[33] The uncertainties about Blue Chip's response, and the need to assess the relative strength of any grounds on which the Samuels might cancel the contract, could not justify a failure to put the prospect of pursuing that course squarely to the Samuels. The Judge accepted Mr Samuel's evidence that, if advised that the Blue Chip investment was a bad deal and that there was a chance of pulling out, they would have taken that chance and sought to extricate themselves from it.[13] Mr Darroch submitted that this evidence from Mr Samuel was self-serving, and needed to be treated with caution. That is valid but, in the context of whether Mr Buxton was negligent, it cannot alter the point that the Samuels ought to have been given explicit advice to consider cancelling the contract, and they were not.

[34] There are variations on the prudent course that Mr Buxton might have adopted. However, a sensible first step would have been to tell the Samuels that he considered it was a bad deal with adverse risks for them, and to recommend that they test the water with Blue Chip as to its attitude to cancellation. That would be coupled with a recommendation that they commit resources to researching whether grounds could be found to justify cancellation.

[35] Thirdly, it was argued for Mr Buxton that he was attempting to warn the Samuels off the transaction with Blue Chip, to the extent he was able to understand the detail of it, but that the Samuels appeared not to be taking his advice. This raises a question of the adequacy of the advice he conveyed, in the particular context of his relationship with the Samuels. The concerns raised in Mr Buxton's 21 June 2006 letter to the Samuels would certainly be sufficient to warn a client with any significant commercial experience to reassess the prudence of the transaction.

[36] However, the Judge found that the Samuels did not appreciate they were being warned off the transaction, and it is implicit in Mr Buxton's argument that he appreciated they still thought it was appropriate to proceed. Given dealings of that type, it is not tenable for Mr Buxton to explain away an absence of a more explicit warning to the Samuels on the basis of a belief that they would not have heeded his advice in any event.

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13 At [56].

[37] The final points Mr Darroch raised in arguing there had been no breach of Mr Buxton's duty were that when Mr Buxton was in a position to consider advising the Samuels he was about to go overseas, and that during the period in which he was acting for them there was no change in their legal position. That is, they had signed the unconditional contract before consulting him, but there was no material change in their legal position between then and when he passed the matter on to Annan Law. The Samuels had not paid a deposit and, at that stage, Blue Chip was not pressing for settlement. Accordingly, there was no immediate urgency to pursue steps to cancel the contract. Any options that were open for the Samuels to take that course remained the same at the time Mr Buxton handed the matter on as when he received instructions.

[38] These circumstances do not justify the lack of explicit advice by Mr Buxton to the Samuels, to the effect that the transaction was disadvantageous for them, and that they should consider the prospects of cancelling it. They are, however, relevant considerations in a broader inquiry as to the relative standards of conduct by Messrs Buxton and Annan, and we return to them in considering the issues on apportionment of liability.

[39] Accordingly, we agree with Andrews J's finding that Mr Buxton breached the duty of care he owed to the Samuels by failing to provide explicit advice that they should attempt to avoid the transaction.

Causation

[40] The Judge adopted a counterfactual analysis that involved, first, an assumption that if Mr Buxton had given the Samuels clear advice to attempt to cancel the contract, they would have pursued that course.[14] The Judge also considered that there was a substantial chance that such an initiative would have succeeded, on the basis of the evidence from Mr Miles to the effect that Blue Chip had a liberal attitude towards letting purchasers out of contracts they were committed to. Accordingly, the Judge considered that there would have been a substantial

[14] At [56].

chance of the Samuels avoiding the loss that they subsequently incurred, had they received competent advice from Mr Buxton.[15]

[41] Mr Darroch sought to re-argue the causation analysis. He submitted that Mr Buxton's work did not create the risk of the Samuels being exposed to a loss from the transaction. Rather, it preserved the prospect of the Samuels avoiding that risk by passing on to Mr Annan all the concerns Mr Buxton had identified, at a time when no deposit had been paid, and further documents to effect the transaction were still to be completed. Arguably, it was reasonable for Mr Buxton to anticipate that Mr Annan would pick up the concerns Mr Buxton had identified and pursue them further in the Samuels' best interests. Mr Annan was described to Mr Buxton as a practitioner familiar with the structure of the transactions Blue Chip undertook, on the basis of prior experience with such transactions. Arguably, it was not within Mr Buxton's reasonable contemplation when he passed the matter on that Mr Annan would be negligent in so fundamental a way as to ignore the concerns that Mr Buxton had identified, and instead positively recommend the transaction.

[42] On these grounds, it was argued that there was a sufficient break in the chain of causation of the losses subsequently suffered to sever the necessary causal link between Mr Buxton's omission, and the loss subsequently suffered by the Samuels.

[43] Ms Challis accepted that if Mr Buxton had provided explicit advice that the Samuels should attempt to cancel the contract, and the Samuels had rejected that advice and proceeded to complete the transaction, then their doing so in reliance on negligent advice from Mr Annan would have constituted a break in the chain of causation. That concession was appropriately made.

[44] Ms Challis also submitted that a competent solicitor in Mr Buxton's position should have contemplated that a subsequent solicitor in Mr Annan's position might negligently overlook the adverse features of the transaction from the Samuels' perspective, and fail to advise the Samuels to pursue a cancellation of the contract. Despite being a sad indictment on professional standards, that point is realistic. It means that in the analysis on causation, Mr Buxton could not rely on an assumption

15 At [59]–[60].

that a subsequent solicitor would agree with the provisional reservations he had raised, and advise more firmly against the Samuels completing the transaction.

[45] In *Benton v Miller & Poulgrain (a firm)*, this Court considered the use of a counterfactual analysis in relation to the plaintiff's loss of the chance to avoid the damage that was subsequently incurred to determine whether there was a sufficient causal link between the loss suffered by the plaintiff and the breach of duty owed by the defendant.[16] It was recognised that the dividing line between circumstances in which judges should use an "all or nothing" basis, and circumstances in which they should use a loss of chance approach, is not well defined.[17] The Court adopted the approach of the English Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons (a firm)*.[18] The passages from that decision cited in *Benton* include the following:[19]

> (3) In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case does the plaintiff have to prove on the balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
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> Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct.

[46] Starting with a causation analysis that ignores the subsequent involvement of Annan Law, the loss of a chance analysis described in the last paragraph could have been made out had the Samuels pursued a claim against Macalister Mazengarb.

[47] On this analysis, the next issue would be whether the intervention of Mr Annan's conduct and omissions, between Mr Buxton referring the matter on to Mr Annan and the Samuels completing the transaction that subsequently caused

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16 *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA).
17 At [44].
18 *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 (CA).
19 *Benton v Miller & Poulgrain (a firm)*, above n 16, at [48] quoting *Allied Maples Group Ltd*, above n 18, at 1611.

them loss, constitutes a sufficient break in the chain of causation to relieve Macalister Mazengarb of liability.

[48] The question has been characterised as whether the intervening conduct or omission "snapped the chain of causation" or whether, as a matter of common sense, the defendant's conduct remained a cause of the harm.[20] The defendant's act or omission must constitute a material and substantial cause of the plaintiff's loss.[21] It is not enough that the act or omission simply provided the opportunity for the occurrence of the loss and the act or omission must have made a more than de minimis or trivial contribution to the occurrence of the loss. Ultimately, it is a question of common sense judgement.

[49] The consequences of successive breaches of duty owed to a plaintiff by separate tortfeasors were considered by the High Court of Australia in *Bennett v Minister of Community Welfare*.[22] In that case, a ward of the state suffered a substantial physical injury and the state agency responsible for his care breached a duty to provide him with competent advice about his entitlement to pursue a claim for the consequences of the injury suffered. Subsequently, and before the time for commencing an appropriate claim had expired, the ward sought advice from a barrister, who negligently advised that he did not have a basis for pursuing a claim.

[50] The High Court of Australia found that the earlier negligence by the Director of the state agency had not been superseded by the negligent advice from the barrister. Both breaches of duty were causative, and continued to operate until the limitation period within which the plaintiff could pursue a claim had expired. The High Court reasoned that the ward had sought and obtained advice from a barrister only because the Director was in breach of his duty of care. The Court observed:[23]

> That circumstance in itself makes it difficult, if not impossible, to conclude that, in the situation described, the [barrister's] advice superseded the Director's breach of duty as the sole cause of the subsequent loss.

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20 Todd, above n 8, at [20.3.01].
21 *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28].
22 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408.
23 At 414 per Mason CJ, Deane and Toohey JJ.

[51] On the present facts, if Mr Buxton had provided the competent advice the Samuels were entitled to, then the process of attempting to extricate them from the contract would at least have been underway by the time he departed for his holiday. Unless he was entitled to expect Mr Annan to positively recommend that the Samuels attempt to cancel the contract, there is no break in the causative chain between Mr Buxton's breach and the subsequent loss incurred by the Samuels.

[52] The invocation of common sense involves an assessment of the extent of the causal link between the absence of competent advice from Mr Buxton, and the subsequent circumstances that caused loss to the Samuels. On that approach, the terms of advice provided to the Samuels by both solicitors contributed to their commitment to complete the transaction. It was a continuing course of conduct, and each of the solicitors had an opportunity to advise a change of stance for the Samuels that would have created for them the chance of avoiding the loss they subsequently suffered. It is the loss of that chance the Samuels relied on in pursuing their claim against Annan Law.

[53] The subsequent opportunity that the Samuels had to receive competent advice that would have created the chance for them to avoid the transaction is not causally distinct from the advice received from Mr Buxton as the first solicitor to consider their position. Each solicitor had an opportunity to save himself and the other from a claim for negligence. Neither did enough to do so. Accordingly, we agree with the Judge that Mr Buxton's breach of duty was causative of the loss claimed.

Apportionment

[54] If the appeal against liability were unsuccessful, Mr Darroch argued in the alternative that equal apportionment was wrong, and did not reflect a just and equitable division of liability in terms of s 17 of the Law Reform Act 1936.

[55] At trial, Ms Challis had argued for Annan Law that Macalister Mazengarb ought to assume a greater than equal portion of liability. Those arguments were acknowledged by the Judge, but rejected. They were repeated in support of Annan Law's cross-appeal against the equal apportionment of liability.

[56] Such apportionments are undertaken pursuant to the terms of s 17(2) of the Law Reform Act, which provides as follows:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
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> …
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> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

[57] The Judge began by accepting the submission for Annan Law that the value of the lost chance for the Samuels to extricate themselves from the Blue Chip transaction was the same when both solicitors were acting for them.[24] The Judge rejected arguments for Annan Law that Macalister Mazengarb's portion ought to be greater because Mr Buxton's opportunity was the first in time, and also because Mr Buxton had a greater familiarity with the personal circumstances of the Samuels.[25]

[58] The Judge also rejected an argument for Annan Law to the effect that Mr Buxton should assume a greater portion of the liability because he appreciated the concerns, whereas Mr Annan did not, and therefore did not trigger an obligation to communicate such concerns.[26]

[59] We agree with the Judge's rejection of these and other arguments advanced in support of the cross-appeal seeking a greater than equal contribution to the liability from Macalister Mazengarb. Our reasons for rejecting the cross-appeal are sufficiently reflected in the reasons for upholding the appeal for a lesser portion of liability being attributed to Macalister Mazengarb than Annan Law.

[60] It may be that the Judge was influenced in her decision on the apportionment as between the two firms by an answer she received to a question she posed of

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[24] *Samuel v Annan Law*, above n 1, at [62].
[25] At [63].
[26] At [64].

Mr Nolan, which was to the effect that the duties of the two firms were co-existent.[27] It might readily be inferred that a co-existing duty of care imposed on successive solicitors should be reflected in co-extensive extents of liability. If that was an implicit underpinning for the Judge's conclusion that the only proper basis for apportionment was that each firm had to bear an equal share of the loss, then with respect we do not agree with it. The prospect that each solicitor had an equal opportunity to avoid the loss that was subsequently incurred is not an adequate premise on which to determine the just and equitable contributions to the liability under s 17.

[61] A first significant difference between the two practitioners is that Mr Buxton recognised a range of significant causes for concern in the documents that were provided to him. Although the restrained terms in which he recorded such concerns in his letter to the Samuels have been found to be inadequate to put them on notice, that preliminary advice may well have been sufficient to warn off a more commercially experienced client.

[62] In contrast, there is no evidence that Mr Annan assessed any aspect of the transaction the Samuels had committed themselves to in a critical way. His response to their enquiry as to whether it was a good deal for them was encouraging and apparently without reservation. He was given notice of the material concerns that had been raised by Mr Buxton, first with the Samuels and secondly with Blue Chip itself. However, there is no suggestion that he followed up on any of those concerns. In short, Mr Buxton missed complying with his professional responsibilities by a relatively narrow margin, whereas Mr Annan missed by a very wide margin.

[63] The just and equitable assessment under s 17 can extend to a broad assessment of culpability where performance by two tortfeasors is being compared in circumstances such as the present. A further feature of Mr Annan's conduct is a cause of real concern in this regard. As we noted at [20] above, Annan Law appears to have conducted itself after the settlement of the purchase of the apartment for the Samuels in an extraordinary way that was contrary to the interests of the Samuels as their clients. Without instructions from the Samuels, Annan Law assumed that

27 At [36] and [58].

$33,300 in excess of the amount required to settle that had been received from mortgagees who advanced money to the Samuels should be paid directly to Blue Chip on account of a "working capital" requirement that had been referred to in some of the documents.

[64] No demand for such payment was made by or on behalf of Blue Chip. In circumstances where Annan Law was seeking to encourage instructions from Blue Chip, the firm paid all of the excess directly to Blue Chip.

[65] The sample documents provided to the Samuels by Blue Chip at the outset suggested that they would have a liability for working capital in the vicinity of $29,000. No specific contractual obligation to pay that or any other amount was drawn to our attention, nor was it suggested that Blue Chip had made a demand for that amount or any other. Accordingly, Annan Law was making a voluntary payment on behalf of the Samuels of an amount that was included in the indebtedness they had assumed, in circumstances where Annan Law had not satisfied itself of the contractual obligation to make the payment at that time.

[66] This conduct was not the subject of a separate pleaded criticism by the Samuels against Annan Law, and we were not advised whether it was a factor in the settlement reached between the Samuels and Annan Law.

[67] In circumstances where Annan Law was actively encouraging instructions from Blue Chip, the prospect of a conflict of interest arises. Even if that troubling factor is ignored, the circumstances of that payment as they were described to us constitute negligence of the most basic kind. To whatever extent Mr Buxton ought reasonably to have apprehended the risk of negligent advice by a subsequent lawyer in analysing the risks involved in the transaction for the Samuels, there are no circumstances in which he might have been expected to contemplate the dealing that occurred, with money borrowed by the Samuels used in this unauthorised way, contrary to their interests.

[68] Had the issues as between the Samuels and Annan Law focused on this discrete criticism, it is likely that Annan Law would not have any basis for seeking a

contribution from Macalister Mazengarb to the liability for the extent of the loss incurred by the Samuels as a result of the unauthorised payment. The claim for contribution from Macalister Mazengarb did not separately quantify the loss attributable to this conduct, and it is not appropriate to address apportionment from that different perspective in the present appeal.

[69] We are left with a separate material component of the conduct by Annan Law that involved either a deliberate prejudicing of the Samuels' interests for the sake of the ongoing relationship between Annan Law and Blue Chip, or an instance of gross negligence if the payment was made without appreciating the breach of Annan Law's duties to the Samuels as the clients for whom they were acting in the relevant transaction. Assuming it was negligent rather than intentional misconduct, it draws a stark contrast between the genuine attempts Mr Buxton made to discharge his obligations, and a serious failure on the part of Annan Law to even appreciate what the scope of their responsibilities were. This contrast cannot be overlooked in the broader evaluation of a just and equitable apportionment of contributions to the liability in issue.

[70] Although we accept that both solicitors had a more or less equal opportunity to provide competent advice on the risks involved in the Blue Chip transaction, there are differences in the contexts in which the respective opportunities arose. In the period during which Mr Buxton was instructed, the final form of the documents to be executed by the Samuels had not been produced, and they did not pay a deposit. Accordingly, the legal position confronting the Samuels remained the same from the time they sought advice from Mr Buxton, until he referred the matter on to Mr Annan. Throughout that time, Mr Buxton did not have the classic opportunity to reiterate to the clients the nature of the risks facing them that conventionally can be conveyed at the time the clients attend to execute documents. That stage of the transaction only occurred after Mr Annan had the carriage of it for the Samuels.

[71] Mr Annan started with the advantage of two series of concerns that had been identified and addressed by Mr Buxton, in his letters first to the Samuels, and secondly to Blue Chip. There is no evidence that Mr Annan considered and responded to any of those concerns.

[72] Instead, Mr Annan responded positively to the Samuels enquiry as to whether the transaction was a good one for them, in circumstances where they emphasised they had never done anything like it before, and that it was a very significant commitment for them. Mr Annan expanded the conveyancing into the creation of a family trust and the execution of new wills, and allowed the Samuels to execute all the formal documents that were prepared by his firm, apparently without any reference to the risks they were assuming.

[73] The sequence in which events occurred, with Annan Law's claim for a contribution from Macalister Mazengarb only determined after the Samuels' claim had been settled, gives rise to a further distinction that is relevant to the broad assessment required in determining what are the just and equitable contributions to the loss.

[74] There would have been a tenable basis for Macalister Mazengarb to raise contributory negligence in response to a claim by the Samuels if pursued directly against that firm. Although the Court accepted that the terms of Mr Buxton's communications with the Samuels were inadequate to sufficiently put them on notice of the risks they were assuming, numerous material risks were identified and Mr Samuel would have been vulnerable to criticism for not heeding the risks conveyed, albeit in muted terms.

[75] In contrast, no such tenable basis for a claim of contributory negligence could be asserted by Annan Law.[28]

[76] In this respect, the settlement concluded in Macalister Mazengarb's absence deprived them of the opportunity to argue for a lower settlement sum with the Samuels, on terms that were not credibly available to Annan Law. We were not referred to any evidence as to the terms of those negotiations, or any identification of the factors influencing the sum that was accepted by the Samuels.

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[28] The affirmative defence of contributory negligence pleaded on behalf of Annan Law relied predominantly on the advice that had been provided by Macalister Mazengarb.

[77] Ms Challis advised that Macalister Mazengarb were invited to contribute to settlement discussions, but declined to do so. That point is only a partial answer in assessing the two firms' respective contributions to the loss that had been paid to the Samuels. Macalister Mazengarb could credibly expect a meaningful deduction in any settlement with the Samuels to reflect the risk that the Samuels would have been found contributorily negligent during the course of their dealings with Mr Buxton, when no equivalent vulnerability for the Samuels could have arisen in the negotiation between them and Annan Law. If indeed the Samuels made some concession on account of a defence of contributory negligence, then Annan Law was only credibly able to negotiate that reduction because of Mr Buxton's conduct, so his firm should get recognition for it.

[78] This consideration is not able to be reflected in arithmetic calculations, but supports the conclusion we have reached that it would be unjust and inequitable to see the requirement for contributions from the firms as being anything like equal.

[79] We are satisfied that it is wrong in all these circumstances to apportion the liability equally between Messrs Buxton and Annan. We are satisfied that the just and equitable apportionment takes into account:

(a) the level of negligence;

(b) the nature of the opportunities available to provide competent advice;

(c) that a claim of contributory negligence could be advanced on behalf of Macalister Mazengarb, but not credibly on behalf of Annan Law in relation to that firm's own conduct;

(d) the potential compromising of Annan Law's position because of its interest in a relationship with Blue Chip; and

(e) the additional component of the negligence (if that is what it is confined to) involved in disbursement directly to Blue Chip of the

surplus proceeds of the borrowings that had been arranged for the Samuels.

[80] We accordingly allow the appeal as to the extent of apportionment and substitute the equal apportionment with an apportionment of 20 per cent to Macalister Mazengarb and 80 per cent to Annan Law. The cross-appeal is dismissed.

Costs

[81] Macalister Mazengarb has achieved a sufficiently meaningful extent of success to be entitled to costs on the appeal and on the cross-appeal. We order costs in favour of Macalister Mazengarb on a band A basis with usual disbursements.

[82] The scope of issues was somewhat different in the High Court, and the circumstances in which there has been a measure of success for Macalister Mazengarb do not warrant revisiting the costs orders made in the High Court. They remain in terms of the High Court judgment.

Solicitors:
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