IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2017-409-000054
[2017] NZHC 1138

BETWEEN	MCRAEWAY GROUP LIMITED Plaintiff
AND	LANE NEAVE Defendant

Hearing: 11 May 2017

Appearances: T J Mackenzie for Plaintiff
P Hunt and A Colgan for Defendant

Judgment: 29 May 2017

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[on plaintiff's summary judgment application]

Introduction

[1] The plaintiff was served with a statutory demand.[1] It gave the demand to its lawyers (the defendant) with instructions to dispute the claim as soon as possible. The lawyers did not provide any advice as to the time limits under the demand.[2] They did not take steps to dispute the demand within the statutory time limits. The plaintiff was therefore presumed to be unable to pay its debts.[3]

[2] During this period, the plaintiff was entitled to benefits as licensee under a licence agreement with a third party. The third party under the licence agreement had a right of cancellation in the event the licensee was presumed, as a matter of law, to be insolvent. The third party, upon becoming aware of the plaintiffs' presumed inability to pay its debts, cancelled the licence agreement.

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1 Under s 289 Companies Act 1993.
2 Ten working days for the filing of a setting aside application (s 290 Companies Act) and 15 working days for satisfaction of the demand (s 289(2)(d)) Companies Act.
3 Companies Act 1993, s 287(a).

[3] The plaintiff was unable to resurrect the licence agreement.

[4] The plaintiff sues for the losses incurred through its inability to trade under the licensed brand.

[5] The plaintiff seeks summary judgment as to the defendant's liability (but not as to the amount of damages).

[6] By the time the licence agreement was cancelled, the plaintiff had received a second statutory demand. It also gave that demand to the lawyers to deal with. The lawyers again failed to provide advice or to dispute the demand within the statutory time limits. A presumption of insolvency also arose on this second demand. While the plaintiff pleads that the defendant was negligent in relation to both demands, there is, by reason of the analysis which follows, no need to examine in detail the aftermath of the second demand.

The relevant facts

The MHL/McRaeway licence agreement

[7] The plaintiff (McRaeway) traded as a house building company with a long established brand "McRaeway". In January 2015, McRaeway sold the business to McRaeway Homes (2015) Ltd (MHL). Under the sale agreement McRaeway was licensed to use the branding "McRaeway Christchurch" in parts of North Canterbury. McRaeway had for some 10 years used Lane Neave (a Christchurch law firm) as its lawyers. Lane Neave acted for McRaeway in transacting (but not negotiating) the sale. After settlement, Lane Neave drafted and negotiated the terms of a more detailed licence agreement, first drafted around February 2015. It was ultimately (in final form) executed by McRaeway on 17 June 2015 and by MHL on 21 September 2015. Under the licence agreement, MHL was entitled to immediately terminate the agreement if (among other events) McRaeway was presumed, as a matter of law, to be insolvent.

The chronology of Lane Neave's breaches of duty

[8] On Friday, 25 July 2015, a company called Recreate Ltd (Recreate) served on McRaeway a statutory demand for $1,216.43 relating to building materials. The demand was physically received by Christopher Randall, a director of McRaeway. He deposes to having no familiarity with statutory demands.

[9] On Monday, 28 July 2015, Mr Randall emailed the demand to Andrew Logie, the Lane Neave partner with whom he dealt and who had drafted the licence agreement. They spoke by telephone. Mr Randall explained that companies associated with Mr Randall's brother (in particular, Recreate and Kieran Randall Ltd (KRL)) had breached the terms of a subcontract by trying to shift clients from McRaeway to KRL and trying to take over an insurance job from McRaeway. Mr Logie recognised from the discussion that McRaeway would likely have a counterclaim against KRL in excess of the amount in the statutory demand. The pair also discussed the amount demanded, by reference to an earlier email exchange in which Mr Randall had identified a credit which McRaeway might claim.

[10] There is common ground as to those points of the discussion between McRaeway's and Lane Neave's deponents. There is one point of difference in the evidence as to the discussion. Mr Logie deposes that he requested during the 28 July discussion a copy of the McRaeway/KRL subcontract whereas Mr Randall deposes that he believes the request for that document came in a later telephone call from Mr Logie (on 10 August 2017). The Court cannot resolve that difference in a summary judgment context. Having regard to the particulars of Lane Neave's admitted negligence, the difference between the deponents on the subcontract is immaterial.

[11] Lane Neave sent to McRaeway a written summary of the instructions received. The summary records the instructions as having been received on 28 July 2015. It contains the following description:

> Summary of work required by you: Dispute claim
>
> Work timetable: As soon as possible

[12] By reason of the date of service of the statutory demand, McRaeway had until 7 August 2015 to file and serve a setting aside application and until 14 August 2015 to satisfy the demand (the time limits).

[13] The 7 August time limit (for the filing of a setting aside application) passed with Lane Neave having neither provided advice as to the time limits nor taken any other step in relation to the demand.

[14] On 10 August 2015, Mr Logie made the telephone call to Mr Randall in which Mr Randall says Mr Logie requested a copy of the subcontract. Mr Logie asked for some factual details about the demand and the dispute which McRaeway was raising. Mr Logie said he would send a letter to Cavell Leitch (KRL's solicitors). Mr Logie did not mention that the 15 working days time limit was due to expire on 14 August 2015. In response to what Mr Randall says was a first request for the subcontracting agreement, Mr Randall emailed a copy of the contract to Mr Logie that evening.

[15] The 14 August time limit (for compliance with the statutory demand) then passed, with Lane Neave again having neither provided advice as to the time limits nor taken any further step (other than the 10 August 2015 conversation with their client) in relation to the demand.

[16] The next significant event for McRaeway was the receipt of a second statutory demand, this in the name of KRL. KRL demanded payment of $14,375 for management fees under the subcontract. The demand was served on 22 August 2015. McRaeway forwarded it to Lane Neave. Lane Neave then took some action, sending McRaeway a draft dispute letter on 25 August 2015 which was finalised and sent to KRL's solicitor on 1 September 2015. Some correspondence followed, leading to Lane Neave on 11 September 2015 proposing a meeting with KRL's solicitors. In the meantime, both the time limits in relation to the second demand had expired without Lane Neave having given any advice to McRaeway as to those time limits. With the second demand not satisfied on 11 September 2015, McRaeway was thereby once again presumed to be unable to pay its debts.

[17] On 15 September 2015, Mr Logie had McRaeway pay into the Lane Neave trust account the total sum identified by the two demands ($15,591.43). The next day Lane Neave advised KRL's solicitors of that arrangement. Correspondence between Lane Neave and KRL's solicitors ensued. KRL's solicitors on 24 September 2015 threatened to file liquidation proceedings if a meeting did not take place the next day.

[18] On 24 September 2015, MHL (through its solicitors) gave notice to McRaeway (through Lane Neave) that it was cancelling the licence agreement with immediate effect.

[19] On 29 September 2015, McRaeway's and KRL's solicitors met and negotiated a settlement of KRL's demands, the terms of which were agreed the following day. That day, Lane Neave made payment of the demanded amounts, together with costs on the statutory demands.

[20] Following MHL's cancellation notice, Lane Neave sought to persuade MHL's solicitors that, notwithstanding the express right of cancellation of the licence agreement, McRaeway could cut across the cancellation by proving its solvency. Lane Neave suggested that MHL would need to pursue an injunction to establish the validity of its cancellation.

[21] By letter dated 10 November 2015, MHL's solicitors finally rejected Lane Neave's arguments. They recorded that the licence had been terminated. They recorded:

> Should your client persist in using the IP, then they will need to account for profits and damages in due course.

[22] Colin Hair, one of McRaeway's directors, has deposed that Lane Neave, throughout this period, advised McRaeway that a court would find that the licence agreement had been validly terminated. Some months later, in March 2015, Lane Neave advised McRaeway to take independent advice. On 6 April 2016, Lane Neave referred McRaeway to Mr Mackenzie (who now appears for the plaintiffs).

The evidence as to what McRaeway would have done

[23] The parties have presented competing evidence as to what McRaeway would have done had Lane Neave fulfilled in a timely way its duty to advise McRaeway of the time limits and the procedure for dispute.

[24] In summary, McRaeway has had its two deponents (Mr Randall and Mr Hair) speak to what they believe they would have done. On the other hand, Lane Neave's Mr Logie identifies his "past experience" of the business approach of both Mr Randall and Mr Hair, before concluding that he is sure how the two would have responded to advice.

Mr Logie's evidence

[25] It is convenient to begin with relevant excerpts from Mr Logie's evidence.

[26] Mr Logie deposed as to the following matters:

(a) His evidence was based on his "past experience" with both Mr Hair and Mr Randall;

(b) He has known and worked with Mr Hair throughout his legal career of 23 years, Mr Hair being a "highly experienced and capable businessman, having been the CFO at Pyne Gould Corporation for many years". Mr Hair does not require "over-the-top, exaggerated, unnecessary or impractical legal advice";

(c) Lane Neave has acted for Mr Randall and his various companies over ten years on approximately 60 matters. Mr Logie has been involved in that relationship for approximately six years, during which time he has developed a "good understanding of [Mr Randall], how he operates and how he prefers the delivery of legal advice". Mr Logie views as an example of Mr Randall's "no nonsense" approach the fact that Mr Randall himself negotiated, drafted and executed the

agreement for sale and purchase between McRaeway and MHL (above at [13]);

(d) Mr Logie then deposed:

> I find it difficult to accept that neither [Mr Hair] nor [Mr Randall] understood the implications of the statutory demands … and that neither of them read the demands which set out the implications of failing to pay the demanded amount within the specified timeline.
>
> …
>
> I am confident that Chris [Randall] would have laughed at me if I had suggested filing an application to set aside a statutory demand for $1,216.43. Given the usual approach by the [McRaeway] directors, this would simply not have been an efficient way of approaching the dispute.
>
> …
>
> Given their approach to matters generally, I am confident that they would not have instructed Lane Neave to prepare a Court application to set aside the $1,216.43.
>
> …
>
> Again, I am sure that if I had suggested filing an application to set aside the August statutory demand, the directors would not have instructed me to proceed to do so in the circumstances. Given past experience with both Mr [Randall] and [Mr Hair], they would have opted for neither formal applications nor upfront payments of the full amounts claimed by KRL.
>
> …
>
> I do not believe that the [McRaeway] directors required exhaustive advice as to the implications of the statutory demands. Indeed, these were largely set out in the body of the single-paged demands themselves.
>
> …
>
> Given that the directors always took a pragmatic approach to resolving disputes and preferred negotiations over costly formal legal process, it seems to me implausible that they would have instructed Lane Neave to file an application to set aside a statutory demand for a little over $1,200.

[27] Against this background, Mr Logie deposed that there was a "strategy" in relation to the July demand. For Lane Neave, Mr Hunt identified the strategy by

reference to the three options which Lane Neave accepts should have been (but were not) explained to McRaeway, namely:

(a) Option 1 – to apply to have the statutory demand set aside;

(b) Option 2 – to pay the amount of the demand;

(c) Option 3 – to seek to resolve the matter with KRL without paying the demand or applying to set it aside.

[28] On Mr Logie's evidence, it is clear that Mr Logie embarked upon option 3 without obtaining McRaeway's confirmation that Lane Neave was to proceed on option 3.

[29] Mr Logie explained the strategy of adopting option 3 in this way:

> The strategy in relation to the July statutory demand was influenced by the instructions given by [McRaeway], the associated costs, the likelihood of liquidation, [McRaeway's] ability to pay the demanded amounts, the absence of evidence of insolvency, factors indicating solvency (such as a signalled substantial refinancing of the Randall Group) and the likelihood that liquidation proceedings would never be filed.

and:

> … the risk of liquidation proceeding would have been small (especially where we were engaging in active negotiations to resolve the dispute), and the possibility of wider implications (such as MHL becoming aware of the statutory demands and purporting to terminate the IPLA) extremely remote.

The plaintiff's evidence

[30] For McRaeway, both Mr Randall and Mr Hair gave evidence as to what they believed they would have done if properly advised.

[31] Mr Randall dealt with the history of the matter before coming to what McRaeway did to limit the damage and what would have been done differently if earlier advice had been received. Mr Randall deposed:

> 58. The file was then [upon receipt of the letter from KRL's solicitors dated 24 September 2015 (above at [17])] passed to Rebecca

Hopkins at Lane Neave, a litigation lawyer. Ms Hopkins emailed [Mr Hair] and I on 23 September regarding the meeting and potential liquidation proceeding

59. Shortly thereafter the demands were paid to avoid liquidation proceedings as KRL was intent on liquidation proceedings and we were in a weak position due to the expired demands.

60. We paid the money because of the position we were advised we were in, and because it was a relatively small amount in order to get rid of the problem and keep trading a profitable company. We did not accept the validity of the demands and would have preferred to dispute them in court, but given the amount and our position, chose to pay them.

61. If we had been advised about the urgent timeframes and the options available, we would have either applied to the Court to set aside the demands, or alternatively may have even just paid them. The amounts at issue were small compared to how the company was going and the damage an insolvency event would cause was not worth the risk. Unfortunately we received no advice about any of these options.

62. I certainly would never have let the company risk an insolvency event so that the licensing agreement could be terminated, even if that meant paying the demands.

[32] Mr Randall filed an affidavit in reply to Mr Logie's evidence, in which he deposed:

6. I have had various experience [sic] with buying, selling and running businesses. I am comfortable for instance undertaking negotiations for the sale and purchase of a business.

7. What is completely foreign to me is a statutory demand, the relevant sections of the Companies Act, High Court Rules, and Insolvency Act. I only know now that you can apply to set it aside in this Court – the demand didn't mention that.

8. That is exactly why I turned to Lane Neave immediately, and instructed Mr Logie to dispute the claim as soon as possible. I didn't know and nor was I advised what a dispute actually entailed.

9. What was also different about this company from many others was that we had shareholders to account to. It was not simply up to me to sit back or take a lackadaisical approach (which I did not in any event).

10. Mr Logie was our solicitor and was dealing with all matters. He had drafted the licensing agreement and at almost the same time as he was dealing with that, had received the statutory demands.

11. The dispute I had wanted raised was, as stated by Mr Logie, relating to both the amount of the demand and a claim back against KRL for breaching the agreement. To me there were plenty of issues to try and fight off the demand with.

…

14. Mr Logie claims I would have "laughed at him". My instructions were already clear – to dispute the demand. As already stated I was not made aware of the steps he might be able to take and when they needed to be taken by.

15. What I would have laughed at would have been if Mr Logie had said he had a strategy to do nothing, let the demand expire, and let us commit an act of insolvency. Yes, it was only a small amount, but if the choices were between doing nothing and filing in Court, I would have opted to file in Court. I would not have let this situation occur. Alternatively if he had sought out information on the dispute and advised us that we couldn't dispute it and had to pay, I would have considered that, if KRL wouldn't accept a dispute and paying avoided an act of insolvency.

16. In the end Lane Neave advised us that we had little choice but to pay as KRL was threatening liquidation proceedings over both demands. We were in a weak position at that point, due to the demands having expired unchallenged. Whilst Mr Logie says he perceived the liquidation risk as "near nil", that was not the reality as can be seen in the Lane Neave letter of 30 September 2015 (page 24 to Mr Logie's exhibits).

…

19. Whilst Mr Logie suggests I am now relying on hindsight, that is not what I said in paragraph 18 of my first affidavit. The point I am making is that if we had received advice about the potential consequences of a statutory demand expiring, i.e. that it meant the company was presumed to be insolvent, that in itself would have made us ensure that it didn't happen.

20. Again Mr Logie refers to his "strategy" and that there were no "extenuating risks". I do not accept this. There was no strategy discussed. He was to dispute the demand. He didn't. The risks of doing nothing came true for us when the licensing agreement was cancelled.

[33] Mr Hair's initial evidence was primarily addressed to the second demand as that demand had been served on him personally. He focussed on what he would have done as a director of McRaeway, if properly advised, in a single paragraph:

18. If the defendant had disputed the first demand as instructed, we may have filed in court to set it aside, if we had been advised about this option. Or we may have even paid the amount as it was relatively small for the company at that time. What is certain however is that I

would never have let the company risk an act of insolvency through the statutory demands expiring. If I had been advised of that risk, or of it approaching, I would have ensured we avoided it.

[34] In reply to Mr Logie's evidence, Mr Hair deposed:

> 2. …although I am experienced in commercial and finance matters, these have never included dealing with statutory demands. That is why I sent it straight to our lawyers, Lane Neave.
>
> 3. Whilst Chris Randall and I deal with some things ourselves which others might utilise lawyers for, this was not one of them. I was not under any impression from Mr Logie that he thought, and nor did I give him any such impression, that I knew all about the statutory demand procedure and that he didn't have to advise us.
>
> …
>
> 7. It is not necessarily correct that we would not have instructed Lane Neave to try to set aside the August demand. Before it expired, we would have liked to have received advice of the options available, including how a dispute could be raised, negotiation, and court options if that was unsuccessful. Unfortunately we were never given the opportunity to progress any of these. If it had been the case that a dispute was raised in good time, and KRL would not budge on the demand, we may well have applied to set it aside, rather than paying it. Instead the time limit to apply to set it aside passed with only a letter going out to Cavell Leitch and no other advice or action occurring.

The issues

The summary judgment regime

[35] The usual principles in relation to a plaintiff's application for summary judgment under r 12.1 High Court Rules are well settled and counsel had no difference in relation to them.[4] Rule 12.3 High Court Rules makes further provision in relation to judgment liability providing:

> **12.3 Summary judgment on liability**
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> The court may give judgment on the issue of liability, and direct a trial of the issue of amount (at the time and place it thinks just), if the party applying for summary judgment satisfies the court that the only issue to be tried is one about the amount claimed.

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[4] Mr Mackenzie correctly referred to *Gidden v IAG New Zealand Ltd* [2016] NZHC 948 at [61] as containing a recent summary of the applicable principles.

[36] A difference then arises between counsel as to the caution the Court will exercise, first in relation to summary judgment on a claim of professional negligence, and secondly in relation to a claim for liability only.

[37] For Lane Neave, Mr Hunt referred to the judgment of McGechan J in *Economy Services Ltd v Smith & Hughes* (*Economy Services*) as appropriately identifying the factors which make it difficult for a plaintiff, in a professional negligence case, to satisfy the summary judgment test.[5] McGechan J observed:[6]

> Given the usual nature of negligence cases, and a fortiori professional negligence cases, in reality the required degree of satisfaction as to absence of defence is not easily achievable. Frequently, there will be differences over matters of primary fact with decisions required upon credibility. Any motor vehicle collision case furnishes an example. Frequently, there will be disputed factual questions relevant to foreseeability, standard of care, and remoteness. Often factual questions bearing on contributory negligence will arise. In the particular professional negligence area, particularly if matters actually reach the litigation stage, there may well be a sharp conflict as to both the events which occurred and the professional standards involved. In the residue of cases which pass through these barriers, there will of course remain the question of ultimate discretion under r 136.[7]

[38] For recognition that summary judgment for liability only is relatively rare, Mr Hunt referred me to my own judgment in *246 Investments Ltd v Herbert* in which I observed (in relation to a claim for contravention of s 9 Fair Trading Act 1989) that:[8]

> The dearth of "liability only" judgments has come about not by chance, but by principled reasoning. That reasoning is exemplified in the judgment of Eichelbaum J in *Ghent v Brinkman*.[9] That case involved a claim for breach of fiduciary duty and breach of a duty of care. At pages 12-13 Eichelbaum J said this:
>
> > Even had I taken a different view of the issues discussed so far, I would not have felt able to accede to the plaintiffs' application for judgment on liability. This is not a case where there is any clear dichotomy between issues affecting liability on the one hand and damages on the other. The claims for aggravated and exemplary damages appear to open up virtually the whole field of the conduct of the respective parties, necessarily leading to an examination of all aspects of the relationship between them. Likewise with the question

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5 *Economy Services Ltd v Smith & Hughes* (1989) 2 PRNZ 657.
6 At 660.
7 Rule 136 is the predecessor of what is now r 12.2 High Court Rules.
8 *246 Investments Ltd v Herbert* HC Auckland CIV-2008-404-6612, 10 July 2009, at [63].
9 *Ghent v Brinkman* HC Wellington CP379/87, 11 September 1987.

> of the possible reduction of the plaintiffs' damages, whether on the basis dealt with in *Day v Mead* or (on the second cause of action) by way of a plea of contributory negligence on conventional grounds. Thus the Court would perforce have to examine and pronounce upon the very issues which by virtue of a summary judgment would have been presumed to have been decided in favour of the plaintiffs. Not only would that mean that the summary judgment procedure would have conferred little advantage from the point of view of saving expense and time but it would put the Court in the position where it might make findings which would not readily be reconciled with a holding that there was no tenable defence. For these reasons therefore I would in any event decline to enter summary judgment.

[39] For McRaeway, Mr Mackenzie identified *Ball v NZ Debt Repay (in liq*) as a claim based on solicitors' negligence in which Master Faire referred to both *Economy Services* and *Ghent v Brinkman*.[10] Master Faire recited the passage which I have quoted from McGechan J's judgment in *Economy Services* (above [37]). Master Faire then continued:[11]

> His Honour … drew attention to the difficulties that professional negligence cases throw up in the area of foreseeability, standard of care and remoteness. I have added the further issue of causation. The difficulty is highlighted in this case. It was recognised by Mr Eade, the solicitor who gave evidence supporting the plaintiffs' cases. It is this. A solicitor who is advising a client on either the entry into a transaction or the confirmation of a transaction cannot stop the client from entering into a foolish transaction. At the end of the day, it is the client's right to do what he or she wishes. That position, however, needs to be contrasted with the position of a solicitor who fails to take a particular course of action when he has been instructed to do so. *Economy Services Ltd v Smith & Hughes* is, of course, an example of the latter. In that case the solicitor failed to take action to obtain an order that a caveat not lapse pursuant to s 145 of the Land Transfer Act 1952. The failure to take that action was, on its face, a clear cut breach of the contract of retainer. As a result, judgment for liability was entered.

[40] Mr Mackenzie likened the failure to take action in earlier cases (such as the solicitor's failure in *Economy Services* to take action to obtain an order that a caveat not lapse) to Lane Neave's failure to take action, as instructed, to dispute the statutory demand in this case.

[41] Mr Mackenzie referred also to the judgment of Associate Judge Christiansen in *Hole v Snedden.*[12] The solicitor in *Hole v Snedden* was found to have been

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10 *Ball v NZ Debt Repay (in liq)* HC Auckland CIV-2002-404-2006, CP 490/02.
11 At [24].
12 *Hole v Snedden* [2012] NZHC 1907.

negligent both in relation to the advice he gave and the advice he did not give, rather than having been negligent through failing to take action when instructed to do so. Associate Judge Christiansen recognised, citing *Economy Services,* that the Court will usually be cautious before granting summary judgment on a negligence case and especially in professional negligence cases,[13] but, nevertheless, found on an extensive review of the affidavit evidence that the defendant had no arguable defence to judgment for liability.

[42] These various cases establish no hard-and-fast rule as to the inappropriateness of summary judgment in professional negligence cases or in relation to judgment for liability only. The rules which the Court must apply are those in r 12.2 and 12.3, as the case may be. What the cases emphasise in relation to professional negligence claims is, as recognised in *Hole v Snedden,* that the Court will be cautious before granting summary judgment in professional negligence cases. The same observation applies to applications summary judgment on liability only.

The issues

Lane Neave's notice of opposition

[43] Lane Neave, by its notice of opposition, asserted that it has five arguable defences relating to:

(a) the scope of its duty to McRaeway;

(b) whether its breach (if any) caused McRaeway to suffer loss;

(c) whether the event triggering the loss claimed was reasonably foreseeable in the ordinary course of events;

(d) whether McRaeway contributed to any loss suffered; and

(e) whether McRaeway took adequate steps in mitigate its loss.

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13 At [73].

The scope of Lane Neave's duty

[44] Mr Logie himself recorded for McRaeway the instructions on which Lane Neave was to act, namely to dispute the (25 July 2015) claim as soon as possible.[14]

[45] Mr Hunt inevitably conceded that the instructions encompassed a duty to provide appropriate advice as to the requirements of and approach to dispute. Such scope of duty is recognised in Tipping J's judgment in *Gilbert v Shanahan* where his Honour observed:[15]

> Solicitor's 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. It was within the scope of Ms de Bernardo's retainer to act for Mr Gilbert personally in the transaction, to familiarise herself with any preliminary agreement there might be, to identify her client's legal position and to advise him accordingly.

[46] As McRaeway's solicitors, Lane Neave's overarching duty of care to McRaeway (as pleaded) was to act with reasonable skill and care in carrying out its instructions.

[47] The July instructions specifically included a requirement to dispute the statutory demand. Implicitly (as accepted by Mr Hunt), the instructions required Lane Neave to provide appropriate advice to McRaeway as to the requirements attaching to any dispute and appropriate approaches to protecting McRaeway's interests.

[48] Mr Hunt submitted, in relation to the instruction to "dispute claim", that the instruction related to the taking of "a wider dispute with KRL". As Mr Logie accepts he did not obtain instructions to pursue option 3 and the plaintiffs do not assert he had any duty (or right) to pursue option 3, it is unnecessary to consider it in relation to a scope of duty.

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14 Above at [11].

15 *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.

Breach?

[49] Lane Neave, by its notice of opposition, elliptically raised the possibility that it may arguably not have acted in breach.

[50] In his submissions, Mr Hunt conceded that Lane Neave had failed to provide any advice to McRaeway in relation to the first demand. To that extent, there was beyond argument a breach of duty.

[51] However, in his written synopsis, Mr Hunt asserted that it was arguable that Lane Neave had not breached the duty to "dispute demand". In particular, Mr Hunt recorded:

> It is not correct to say that the defendant took no action or did not carry out the plaintiff's instructions. A dispute was raised with KRL in relation to both demands and the apparent breach of the subcontracting agreement, the defendant engaged with KRL's solicitors, and ultimately an agreement was reached to resolve all matters between MGL and KRL concurrently.

[52] This submission ran together events which took place over an extended period. When one focuses on the first demand, which was the specific subject of the instructions recorded by Lane Neave, it is plainly incorrect. Lane Neave took no action within the time limits relating to the first demand. It did not carry out McRaeway's instructions.

[53] In this regard, Mr Logie's extensive evidence as to "option 3" and the "strategy" is a digression. Whatever Mr Logie's strategy may have been (and assuming for this purpose that it existed), Lane Neave concedes that it was not communicated to McRaeway before the first demand expired and the presumption of McRaeway's insolvency arose, triggering MHL's entitlement to cancel the licence agreement. McRaeway's original instructions stood throughout this period, unaffected by any strategy which Mr Logie had conceived.

[54] Through its failures to take any step to dispute the first demand within the time limits and to provide advice to McRaeway, Lane Neave was beyond argument in breach of its contractual duty.

Causation

[55] Mr Hunt identified the importance to Lane Neave of its causation argument by recording in his written synopsis:

> … perhaps the most significant dispute of a factual nature is as to the counterfactual of how the plaintiffs would have proceeded with the benefit of the advice they say they should have received.

[56] Mr Hunt continued in his synopsis by accepting that there had been a breach of duty (which he identified as a duty to communicate the options and different strategies to the plaintiff at the outset). He then continued as to what he submitted was the difficulty for Lane Neave in establishing causation. Mr Hunt recorded:

> …this was not a simple failure to act case. The failure to communicate the available options and the alternative strategies was a failure to advise. Absent that advice it is difficult to assess what the plaintiff's instructions would have been, and it is necessary to have a full examination of the evidence on this. The affidavit evidence establishes, at least, that the instructions would have involved tackling wider contractual issues with KRL as well as the statutory demands.

[57] Mr Hunt submitted that, whereas the evidence of Mr Randall and Mr Hair is that they would not have let the statutory demands expire, they are "equivocal" as to exactly what they would have instructed Lane Neave to do.

[58] Mr Hunt also emphasised that Mr Logie has deposed that he doubts whether Mr Randall and Mr Hair would really have opted to incur fees in excess of $3,000 to set aside a statutory demand for less than half that sum. Mr Hunt noted the background in which Mr Randall wished to raise a concurrent claim based on KRL's breaching the subcontracting agreement. Mr Hunt submitted that, against the background of that evidence, both option 1 and option 2 would have been unattractive to McRaeway. A decision as to how to proceed would have required a balancing of the relative costs and risks. Mr Hunt submitted that the likelihood of MHL finding out about McRaeway's failure to meet a statutory demand (and the consequential risk of cancellation of the licence agreement on that ground) was modest.

[59] Mr Hunt submitted that the evidence of Mr Randall and Mr Hair must be seen as statements by people speaking with the benefit and certainty of hindsight, evidence which must be treated with caution.[16] He submitted that here the Court should treat Lane Neave's breach as a "failure to advise" case rather than a "failure to act on instructions". Mr Hunt submitted in particular that, if it had been the case that McRaeway had instructed Lane Neave to apply to have the demands set aside and Lane Neave had failed to do so, causation would have been straightforward. He contrasts that situation with what he submits is the failure to advise in this case.

[60] For McRaeway, Mr Mackenzie submitted that the proper analysis is that Lane Neave breached both a duty to act (to dispute the demand as soon as possible) and a duty to advise (as conceded by Lane Neave).

[61] Mr Mackenzie noted that, while Mr Randall and Mr Hair expressed uncertainty as to exactly how they would have dealt with particular options, both were unequivocal in their evidence that they would not have allowed acts of insolvency to occur. It is precisely because acts of insolvency occurred that McRaeway has lost the benefit of the licence agreement.

[62] I recognise that in any case of this nature the Court must exercise caution in accepting hindsight evidence as establishing (on the summary judgment standard) how a plaintiff would have acted but for an established breach of duty. Instances of causation being established beyond argument will be rare, particularly if the permutations of outcome are complex (as in *Gilbert v Shanahan*). This, however, is not a *Gilbert v Shanahan* type of case. Here Lane Neave accepted instructions to act (to dispute the demand as soon as possible) and failed to do so, with the consequence that the demand expired unmet. Mr Logie received instructions as to the cross-claim which McRaeway could have asserted. Mr Logie recognises in his evidence that it appeared from Mr Randall's instructions that McRaeway would likely have a counterclaim against KRL in excess of the amount demanded by KRL. Mr Logie

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[16] Mr Hunt referred in particular to the observation of Tipping J in *Gilbert v Shanahan*, above n 15, at 537, that statements by people of what they would have done using hindsight must be used with caution. There the Court had to assess what Mr Gilbert would likely have done if advised he did not have to execute a guarantee, given that negotiations which would not necessarily have been an all or nothing affair would have followed. The Court assessed Mr Gilbert's prospect of avoiding entry into the guarantee as a 20 per cent chance.

also deposed that this appeared to be one of those situations in which the Court might regard the (KRL) use of the statutory demand process as a misuse because the debt was disputed. Mr Logie did not return to Mr Randall within the time limits of the demand to establish any further information that could be used as evidence to support an originating application. He neglected to take the steps required to dispute the demand. The presumption of insolvency arose. Mr Logie's failure to act on his instructions was a cause of McRaeway's subsequent loss of the licence agreement.

[63] I am further satisfied on the evidence that this is, in relation to the failure to give proper advice to McRaeway, one of those unusual cases where the plaintiff has satisfied the Court that the failure to properly advise the client caused loss.

[64] While the defendant is entitled to point to any course of conduct that would have been possible in the event of proper advice being provided, the evidence in that possibility must create a real doubt as to causation. A plaintiff's claim does not fail by reason of a fanciful doubt.

[65] A significant aspect of Lane Neave's opposition to this application lies in Mr Logie's evidence as to what he believes Mr Randall and Mr Hair would have done in the light of his experience of them. Mr Logie states what his experience of them has been, namely that they are highly experienced, competent and capable businessmen. They are very pragmatic and they do not require impractical legal advice.

[66] Mr Logie appears to suspect that both Mr Randall and Mr Hair would have "understood the implications of the statutory demands" and understood the implications of failing to pay the demanded amount within the specified time line. His evidence in that regard did not address the fact that his instructions did not involve arranging payment – rather he was instructed to raise McRaeway's dispute. The form of statutory demand adopted in this case does not identify the 10 day time limit for an application to set aside the demand. It identifies only the 15 day time limit to meet the demand.

[67] Before the expiry of the 10 day and 15 day time limits respectively, McRaeway had available to it option 1 or option 2, which Mr Logie identifies as options in his evidence but did not communicate to McRaeway's directors.

[68] Both deponents frankly recognise a degree of uncertainty as to which option (option 1 or option 2) they would have pursued if properly advised. It is however clear beyond doubt (having regard to Mr Logie's direct evidence as to the business acumen of both directors) that McRaeway, if properly advised as to their options and consequences, would not have allowed an act of insolvency to occur. The very risk that a liquidation proceeding might flow from an unpaid claim of $1,216.43 strongly indicates as much. When there is the added consequence of non-compliance (that KRL was immediately able to cancel the licence agreement), the suggestion that either Mr Randall or Mr Hair would have supported Mr Logie's "option 3" is unsustainable. It is not credible to suggest that businessmen of Mr Randall's and Mr Hair's conceded acumen would have taken a risk as to such eventualities.

[69] In reaching this conclusion, I have taken into account a matter which Mr Hunt submitted might have led Mr Randall and Mr Hair to assess as modest the risk of cancellation of the licence agreement. Mr Hunt referred to evidence which Mr Logie gave to the effect that there was a "high probability" that the demands would be negotiated or met, to be contrasted with "negligible risk" that MGL would ultimately be liquidated. Mr Logie conceded that he had not reviewed MGL's banking documents and that the risk that the Recreate/KLA demands would somehow trigger an attempt to terminate the licence agreement was "not considered nor discussed". Mr Logie continued that the possibility of a purported termination of the licence agreement actually occurring must have been extremely remote as Lane Neave (and on his understanding, the MGL directors) had no knowledge of any interaction between KRL and MHL by which KRL would have come to know of the presumption of insolvency and therefore its right of cancellation.

[70] These matters, gathered under the heading of "causation" in Mr Logie's evidence, appear intended to suggest that Mr Randall and Mr Hair, if presented with option 3, may well have elected to take modest risks associated with non-compliance with the demand.

[71] In his submission, Mr Hunt (by reference to Mr Logie's evidence) noted that Lane Neave considered the exact likelihood of MHL seeking to terminate the licence agreement was "low". Mr Hunt's submission missed the point that, in considering causation (in relation to the counter-factual), what is relevant is how the plaintiff (not the defendant) would have assessed matters and acted. As it is, the Court in this case must regard Mr Logie's assessment of a "low" risk as clearly incorrect. Mr Logie, in what was in fact argument as to causation, asserted that McRaeway, correctly advised, would have recognised as "extremely remote" the possibility that KRL would learn of the act of insolvency. Mr Logie arrived at that conclusion through his belief that there was no interaction between KRL and MHL. But such interaction was only one way, and not the most obvious, by which KRL might learn of an act of insolvency. Another more public alerting would have arisen if and when either creditor applied for a liquidation order and advertised the proceeding.

[72] It is inconceivable that highly experienced and competent businessmen such as Mr Randle and Mr Hair would have accepted the degree of risk inherent in Mr Logie's "option 3".

[73] Causation is established beyond argument.

Foreseeability

[74] Mr Hunt, in his synopsis, summarised his submission as to foreseeability in one paragraph:

> Factual issues relating to foreseeability were recognised by the Court in *Economy Services* … as militating against the entry of summary judgment on liability. Proper resolution of the question of whether MHL's notice of determination was foreseeable requires a thorough examination of the circumstances, what was known by the parties, and potentially testimony from expert witnesses.

[75] The submission as to foreseeability has its basis in the evidence which Mr Logie gave as to the perceived risks (or lack of risk) in relation to his "option 3". It is an aspect of the causation submissions with which I have dealt (at [69] – [72]).

[76] Lane Neave's case in relation to foreseeability can be stated in terms that Lane Neave did not foresee the precise way in which KRL came to be informed as to McRaeway's act of insolvency. But the events that were foreseeable were that KRL might by some means become aware of one or both of McRaeway's acts of insolvency and that McRaeway would, as a consequence, lose its licence agreement.

[77] For the purposes of establishing liability for damage, it is relevantly established beyond argument that the type of loss McRaeway has suffered could foreseeably flow from Lane Neave's established breaches of duty.

Contributory negligence

[78] The extent and central role of Lane Neave's negligence in causing McRaeway's loss cuts across the suggestion that McRaeway could have contributed to the negligence to such an extent as to expunge Lane Neave's responsibility for the damage. In these circumstances, the identification and assessment of any contribution is properly a matter for a trial as to the amount of damages.

[79] I will therefore only briefly refer to the three limbs of Lane Neave's allegations as to contributory negligence on the part of McRaeway.

[80] First, Lane Neave asserts that McRaeway's directors knew, or ought to have known, of the urgency required in paying or setting aside a statutory demand. Given that such is precisely the subject matter of advice which Lane Neave, as a matter of its duty, ought to have provided, the failure of the lay client to appreciate a matter such as the 10 day time limit for a setting aside application (unstated in the statutory demand) is not a matter which could count for much, if anything, by way of contributory negligence.

[81] Secondly, Lane Neave suggests that McRaeway's failure to provide a copy of the KRL subcontracting agreement at an earlier date contributed to McRaeway's loss. This is the matter on which, as identified above at [10], there is an irresolvable dispute in the evidence of Mr Logie and Mr Randall. If Mr Logie's evidence is ultimately found to be correct (with a request for the document made on 28 July 2015), then Mr Logie's subsequent failure to pursue the document until 10 August

2017 (after the expiry of the 10 day time limit and shortly before the expiry of the 15 day time limit) must also be seen to have contributed to the consequences which flowed. As it is, Mr Logie does not depose to having acted immediately on receipt of the document on 10 August 2015. At that point McRaeway could still have paid Recreate the $1216.43 demand, thereby avoiding an act of insolvency.

[82] Thirdly, Lane Neave attribute to McRaeway a responsibility for delay in meeting with KRL after the second (KRL) demand had been served. That alleged conduct lacks the significance it may have had if it was delay while the first demand remained unexpired. But any delay in relation to meeting with KRL relates only to the second demand.

Mitigation

[83] In his synopsis, Mr Hunt identified Lane Neave's allegation that McRaeway had failed to mitigate its loss in this way:

> The defendant's position is that, had the engagement, whether by negotiation or proceedings, continued with MHL's solicitors on all these issues, there was a reasonable prospect that the resolution would be reached resulting in a restoration of the plaintiff's benefits and no loss to the plaintiff.

[84] The mitigation argument assumes that the plaintiff has established an entitlement to damages. The main loss incurred by the plaintiff is the value of the licence agreement.

[85] The evidence establishes that McRaeway continued to engage Lane Neave after MHL had cancelled the licence agreement. The engagement was now for the purpose of negotiating a reinstatement of that agreement. That Lane Neave continued to act in such circumstances is surprising but the fact is that it did, not referring McRaeway for independent advice until April 2016.

[86] The assertion that McRaeway failed to act reasonably in efforts to have the licence agreement restored is weakened by the fact that Lane Neave remained McRaeway's solicitors through that period. Lane Neave does not allege that McRaeway failed to act on its advice in this period. The allegation of failure to take reasonable steps is further weakened by the fact that Mr Hair's evidence in relation

to Lane Neave's advice during this period remains unchallenged. In particular Mr Hair deposed:

> Lane Neave advised us that they thought a Court would find that the licensing agreement was validly terminated, hence months of correspondence with no Court action taking place.

[87] Mr Hunt's submissions (above [83]) contained the proposition that McRaeway should have either issued litigation or negotiated harder to obtain a reinstatement of the licence agreement. It is very unlikely that McRaeway's ultimate acceptance of its plight will be viewed as an unreasonable failure to negotiate or litigate when Lane Neave itself gave advice that a Court was likely to uphold MHL's cancellation.

[88] Lane Neave may pursue mitigation arguments at a quantum trial if it sees fit to do so, but the possibility of issues arising as to mitigation is not a matter which cuts across Lane Neave's liability.

Outcome

[89] McRaeway has established that Lane Neave has no arguable defence to the claim that Lane Neave is liable for damages.

Costs

[90] Costs and disbursements must follow the event. It is appropriate that the costs be on a 2B basis, together with a certificate for counsel's reasonable cost of travel and accommodation.

Orders

[91] I order:

(a) There is judgment for the plaintiff as to the defendant's liability.

(b) The defendant is to pay the costs of the plaintiff's summary judgment application on a 2B basis, together with disbursements to be fixed by

the Registrar (with a certificate for counsel's reasonable costs of travel and accommodation).

(c) I direct that there be a trial of the issue of amount at such time and place as the Court later directs.

(d) The defendant is to file and serve its defence as to the damages within the time prescribed by the High Court Rules.

Associate Judge Osborne

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Counsel: T J Mackenzie, Barrister, Christchurch
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