IN THE SUPREME COURT OF NEW ZEALAND

SC 30/2015
[2016] NZSC 40

BETWEEN	DEREK NICHOLAS BLACKWELL AND CHARLES BASIL BLACKWELL AS EXECUTORS AND TRUSTEES OF THE ESTATE OF ROSS WINSTON BLACKWELL Appellants
AND	EDMONDS JUDD Respondent

Hearing:	2 February 2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	C T Gudsell QC for Appellants M R Ring QC and J R Parker for Respondent
Judgment:	22 April 2016

JUDGMENT OF THE COURT

A **The appeal is allowed. Judgment is given for the appellants in the sum of $1,000,000.**

B **Interest of five per cent is ordered from the date of settlement by Mr and Mrs Chick of the purchase of the farm.**

C **The respondent is to pay costs of $25,000 to the appellants plus all reasonable disbursements, to be fixed if necessary by the Registrar.**

D **The costs order in the Court of Appeal (CA476/2013) is set aside. Costs in that Court and in the High Court should be set by those Courts in light of this judgment.**

REASONS

(Given by Glazebrook J)

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Introduction

[1] The late Mr Ross Blackwell[1] owned a dry stock farm (known as Haupouri) at Arohena, near Te Awamutu. He was diagnosed with an inoperable brain tumour in June 2000. After his diagnosis, he leased the farm to his neighbours, Leith and Rosemary Chick, and granted them a right of first refusal and later an option to purchase the farm.

[2] When the Chicks gave notice that they wished to exercise the option in March 2010, the agreed option price was less than half the current market value.

[1] As in the courts below, we will call him Ross in this judgment to distinguish him from his brothers (the appellants in this Court). Ross died on 19 September 2014.

The agreed rental for the farm was also below market rates.[2] Ross' brothers, Derek and Charles (in their capacity as Ross' attorneys), refused to settle the purchase. The Chicks applied to the High Court for an order of specific performance. The Court ordered Ross to perform the agreement.[3]

[3] Ross also made a third party claim against Edmonds Judd for negligent advice with regard to the transactions.[4] The High Court held that the negligence of Edmonds Judd (the solicitors for both the Chicks and Ross) with regard to the lease agreement and the option caused him loss.[5] The Court awarded damages of the difference between the agreed sale price and the market value of the farm, as well as rental shortfalls from 1 May 2007 (a total of $1,831,700).[6] The Court of Appeal overturned that decision, holding that the firm's negligence had not caused loss.[7]

[4] On 19 June 2015 leave to appeal was granted by this Court on whether the Court of Appeal was correct to find that Edmonds Judd's negligence had caused no loss.[8] In order to assess this issue, we first set out the factual background in more detail. We then analyse the High Court findings on negligence and the reasons the Court of Appeal gave for overturning those findings.

Factual background

[5] For the purposes of this appeal the facts as found in the High Court were not challenged. We have therefore taken our summary largely from the High Court judgment.

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2 In the High Court the parties, after their respective valuers had conferred, agreed for the purpose of the High Court hearing on rental valuations and the market value of the farm at various critical dates. This agreement as to valuation continued for the purposes of the Court of Appeal hearing: *Blackwell v Chick* [2015] NZCA 34 (Ellen France P, Randerson and Harrison JJ) [*Blackwell* (CA)] at [16].

3 *Chick v Blackwell* [2013] NZHC 1525 (Rodney Hansen J) [*Blackwell* (HC)] at [177]. The High Court held that Ross did not lack mental capacity when granting the option and the extension of time for exercising it. Further, the Court held that he understood the nature of the transactions and that the bargain was not unconscionable. See at [76], [81], [91] and [144].

4 Ross was not well enough to participate in the High Court proceedings. His brothers acted as litigation guardians.

5 *Blackwell* (HC), above n 3, at [164].

6 At [179].

7 *Blackwell* (CA), above n 2, at [120]. The Court of Appeal upheld the High Court's decision on mental capacity and unconscionability.

8 *Blackwell v Chick* [2015] NZSC 85 (William Young, Glazebrook and Arnold JJ). This Court declined the Blackwells' application for leave to appeal with regard to contractual capacity and unconscionability.

The farm and marriage

[6] Ross purchased Haupouri in 1979 when he was aged 21. The Chicks purchased a neighbouring dry stock farm in 1984. Ross and the Chicks became good friends and the Chicks' eldest son, Adam, had a lot to do with Ross as he was growing up.[9]

[7] In 1993 Ross married Margaret Catchpole and, in the same year, purchased additional land adjacent to his farm. Margaret, however, did not take to farm life and in 1996 the couple moved into Te Awamutu where they bought a house. Ross commuted to the farm on a daily basis.[10]

Health

[8] As noted above, in June 2000 Ross was diagnosed with an inoperable brain tumour. The neurologist who saw Ross said that it appeared to him that Ross was under the impression that his life expectancy might be as short as a few months or as long as a couple of years. The neurologist's evidence was that the medical literature suggested a median survival rate with treatment of two and a half years with a five year survival rate of 30 per cent.[11]

[9] In October and November 2000 Ross underwent a course of high dose radiotherapy. Ross and his wife were told that the purpose of the radiotherapy was to control the tumour and that a full cure would be impossible.[12] During 2001 and 2002 Ross was on medication to control seizures but there was a progressive shrinkage of the tumour.[13] Apart from an episode of "bizarre behaviour" in February 2005,[14] Ross was reasonably well and active with only minor memory

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9 *Blackwell* (HC), above n 3, at [6]–[8].
10 At [9].
11 At [39]–[40].
12 At [40].
13 At [42].
14 Ross had seen his doctor on 14 February 2005 complaining of headaches. The doctor described his behaviour as bizarre. See *Blackwell* (HC), above n 3, at [43].

difficulties, up to 2008. In that year, Ross had a minor stroke.[15] The finding of the High Court was that, up to that point, Ross was competent to manage his affairs.[16]

[10] In July 2000, Ross had executed an enduring power of attorney in favour of his brothers, Derek and Charles. In December 2000 he executed a will appointing Derek and Charles as his executors and trustees. His wife, Margaret, was given a life interest in the estate and on her death the residue was to be divided equally between his brothers.[17]

The lease

[11] Around the time of his diagnosis, Ross approached the Chicks to ask if they wanted to lease Haupouri.[18] He arranged a market valuation which set a market rental for the farm (including the farmhouse) of $65,900. By agreement dated 16 November 2000, Ross agreed to lease his farm to the Chicks. Rent was set at $63,000. The discount from the valuation was because the farmhouse was not needed by the Chicks. It appears also that Ross was concerned to set the rental at a level that would enable the farm to return a reasonable profit. Mr Chick's calculations had confirmed that the farm could stand the proposed rental.[19]

[12] The lease was for a three year term beginning on 1 April 2001, with a right of renewal for a further three years. There was also a right of first refusal granted at Mr Chick's request. Mr Chick was aware that Ross could die at any time. As he was investing some $250,000 in extra stock,[20] Mr Chick wanted certainty that, if Ross died, the farm would not be sold to his detriment.[21] Mr Brown of Edmonds Judd acted for Ross on the lease arrangements. Mr Gray of the same firm acted for the Chicks.

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15 From July 2008 Ross required full time residential care. There are some inconsistencies in the findings of the courts below as to the number of strokes Ross suffered: see *Blackwell* (HC), above n 3, at [24] and [47]; *Blackwell* (CA), above n 2, at [19] and [35]. This is not material for the purposes of this appeal.

16 *Blackwell* (HC), above n 3, at [57] and [62]. The Judge held that Ross understood the nature of the transactions discussed below up to and including the 2007 renewal of the lease: at [91].

17 At [74]. There was a subsequent will made on 17 September 2001 in similar terms.

18 It appears, according to the appellants' leave application submissions, that it was suggested by Ross' brothers that Ross approach the Chicks. Ross had originally offered a lease of his farm to his brothers.

19 *Blackwell* (HC), above n 3, at [11].

20 Mr Chick had also agreed to buy sheep from Ross at a stock agent's valuation.

21 *Blackwell* (HC), above n 3, at [12].

[13] The Chicks took over the management of Ross' farm but Ross continued to go to the farm every day and most days he would do some work[22] and join the Chicks for lunch. In August 2002 the Chicks' son, Adam, and his partner Jana (later his wife) moved into the farmhouse on Ross' farm.[23]

Lease renewal and option

[14] In early February 2004 Mr Chick spoke to Ross about the renewal of the lease. They agreed to a renewal for a further three years with the rent increasing to $65,900. This was based on the 2000 market rental assessment.[24] There was to be a further right of renewal for three years.[25]

[15] In February 2004, while Mr and Mrs Chick were away in the South Island, Ross suggested to Adam and Jana that they could buy the farm.[26] Adam was surprised as he had assumed Ross' brothers would get the farm. Ross said that he did not want to talk about the reasons but would tell him one day. In August 2007 he told Adam that the reason he wanted Adam to have the farm was because his brothers and their families had been "horrible" to his wife, Margaret.[27]

[16] When Mr and Mrs Chick returned from the South Island, Ross said that he would like to leave the farm to Adam in his will. Mr Chick told Ross that he could not do that as he had Margaret to consider and the will could be challenged. Ross then asked how it should be done. Mr Chick suggested Ross grant him an option to purchase. According to Mr Chick, Ross made it clear that he wanted to continue owning the farm while he was still alive but that, in the end, he would like Adam to have it. Mr Chick was to be "the caretaker".[28]

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22 During 2002 to 2003, Ross was paid an hourly rate for his work: *Blackwell* (HC), above n 3, at [49].

23 At [14]–[15].

24 The actual market rental at that point, as agreed by the parties for the purposes of the High Court hearing, was $82,500 per annum.

25 *Blackwell* (HC), above n 3, at [16] and [20].

26 Ross had seen paperwork concerning a neighbouring farm that Adam and Jana had enquired about buying: at [17].

27 At [17].

28 At [18].

[17] They discussed a suitable purchase price. Ross told Mr Chick that he had spoken to the valuer who had previously valued the lease and he had estimated the current market value for the farm at $1.8m.[29] Ross was concerned that the farm should be affordable for Adam and suggested a price of $900,000 based on the productive worth of the land. Mr Chick considered that to be too low and, after discussion, an option price of $1.5m was agreed.[30] The Judge said that affordability was measured by reference to borrowings that the farm could support and an affordable rental was set in light of expected income from the farming operation.[31] Ross asked that his brothers not be told about the option.[32]

[18] At the time the option was entered into, Ross had no debts and had accumulated close to $1m in cash investments.[33] Rodney Hansen J considered the $300,000 discount from the valuer's estimate of market value understandable (given Ross' concerns that the farm would be affordable for Adam). In the Judge's view, this would have had a relatively minor effect on Ross' asset position.[34]

[19] Edmonds Judd was instructed to include the option to purchase in the renewal of the lease on the following terms: the option price was to be $1.5m if settlement took place before 30 April 2007[35] or at market value if settlement was after that date. The Edmonds Judd solicitor acting for Ross was Ms Rasmussen (Mr Brown having retired). Mr Gray of the same firm acted for the Chicks.

[20] In her brief of evidence Ms Rasmussen said that she discussed the option to purchase with Ross to make sure he was aware of the implications of the clause. In cross-examination she said that Ross explained to her that he got on very well with the Chicks, that he had a special relationship with them and that was why he wanted to make the lease available to them on those terms. He had also spoken very fondly of Adam.

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29 The government valuation of Haupouri was $1,165,000: *Blackwell* (HC), above n 3, at [19]. In fact the actual market value as at 2004, as agreed by the parties for the purposes of the High Court hearing, was $2,070,000.

30 At [19].

31 At [124].

32 At [19].

33 At [74].

34 At [75].

35 This was at the end of the lease, assuming no renewal.

[21] When asked what she told Ross about the nature of the transaction, she said that she could not remember the exact words but that she would have explained that with an option, the Chicks would have control over when the purchase happened, unlike the right of first refusal, where Ross as the landowner was in control. She said she would have talked to Ross about possible changes in market values but Ross did not want another valuation. She does not specifically recall discussing any other legal options with him.

[22] With regard to the change in option price to market value after 2007, she could not remember giving any specific advice about the date. She cannot recall whether Ross explained his reasoning for putting a time frame on the option exercise. She said that she did not recall discussing with Mr Blackwell that, given he had a brain tumour, he would need to make sure that Margaret was provided for in the event of his death. She said, however, that Margaret would have had an interest in the proceeds if the option was exercised.[36]

[23] Rodney Hansen J noted that Ms Rasmussen's record of the initial discussion with Ross simply noted the bare terms of the option. As to Ms Rasmussen's contention that she had advised Ross to get an up to date valuation, the Judge said that there was no record of this. Further, Ms Rasmussen had no recollection of the meeting at which Ross signed the document.[37] The Judge said that there was merit in the contention that, having read the briefs of evidence, Ms Rasmussen may have been "hard-pressed to distinguish between what she knew and what she learned subsequently".[38] Despite these reservations about Ms Rasmussen's recollection of the detail of her discussions with Ross, the Judge was satisfied that Ross understood the essential nature of the transaction.[39]

[24] It had been submitted on behalf of Ross that the agreement failed to make provision for a number of conditions associated with the option, including that the option would not be exercised until Ross died, that he could continue to access the

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36 It was unclear in Ms Rasmussen's evidence if she was indicating she said this to Ross at the time.

37 *Blackwell* (HC), above n 3, at [158]–[159].

38 At [158].

39 At [78].

farm, that the farm was not to be used for dairy farming (even though he knew this would not optimise returns[40]) and that it would be operated by Adam and Jana.[41] The Judge considered that a failure to give contractual effect to these arrangements reflected the "peculiarly personal nature of the arrangement overall, as well as the level of trust that existed between the parties". He said that it would have been "quite contrary to the nature of the arrangement overall to convert such expectations into contractual commitments".[42]

[25] We note at this point that, in cross-examination, Mr Chick said that he and Ross had an undocumented understanding that the Chicks would not exercise the option while Ross was still alive.[43] Mr Gray, the Chicks' solicitor, did not know of this understanding until 2010[44] and Ms Rasmussen was not told about it.

Variation in 2005

[26] Early in 2005 Ms Rasmussen was instructed by Ross to vary the term of the option by extending the date by which the farm could be purchased for $1.5m from 30 April 2007 to 30 April 2010. A variation in those terms was prepared by Ms Rasmussen and sent to Mr Gray on 21 February 2005. The variation had not been discussed with the Chicks. They, however, signed the variation and this was executed on 5 April 2005 by Ross.[45]

[27] In Ms Rasmussen's brief of evidence, she said that Ross had come into her office to say that he wanted to make a change to the lease arrangements to give the Chicks more time before market value kicked in.[46] She said she talked to him about getting a valuation and he was quite clear that he wanted the option to continue at

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40 At [124]. Rodney Hansen J also accepted that Ross knew that the market was being driven by the returns available from dairy grazing.

41 At [79]. Adam and Jana took over management of the farm in 2005.

42 At [80].

43 At [119]–[120], Rodney Hansen J accepted that this informal understanding existed and further that it complemented the legal agreement in allowing a happy, though unorthodox, working relationship to continue within a conventional legal framework.

44 At [139].

45 The exact date Ross requested the variation is uncertain but it was before 10 February 2005. The timing of the request for a variation raised concerns as it coincided with Ross' episode of bizarre behaviour: see above at [9], but by the time Ross signed the variation, the bizarre behaviour had ceased: see *Blackwell* (HC), above n 3, at [85].

46 This coincided with the explanation given by Ross to Mr Chick: *Blackwell* (HC), above n 3, at [82].

that price. She told Ross that property prices may have increased over time and he said that he understood but instructed her to go ahead.

[28] The 2005 variation took the option past the end of the end date of the 2004 lease renewal. Ms Rasmussen agreed in cross-examination that it would not be a common clause in an agreement to take an option beyond the term of the agreement. She did not recall considering the length of the term with Ross.

[29] Rodney Hansen J said that the "reasoning behind Ross' unilateral decision to extend the fixed price option is difficult to fathom". The Judge considered that it made "no sense in commercial terms". He inferred that Ross thought that the extension would assist the Chicks (but he did not specify why that might be so). The Judge also thought it conceivable that Ross "saw that an extension would remove an incentive to exercise the option before 30 April 2007".[47]

[30] The Judge held that Mr Chick believed on good grounds that, although very favourable to the Chicks, the terms of the option were what Ross wanted. There were "countervailing equities"[48] in that the Chicks had taken themselves out of the market for buying another farm by leasing Ross' farm. The option gave the Chicks a hedge against increasing farm prices.[49] Mr Chick said (and the Judge accepted) that Ross never wavered from his wish that they would have the right to purchase the farm at $1.5m.[50]

Lease renewal in 2007

[31] The lease was due for renewal on 1 May 2007. In February 2007 Mr Chick advised Mr Gray that he and his wife wished to exercise the right of renewal. Mr Chick discussed this with Ross and said he thought the rent should be increased and suggested $20 per stock unit ($69,600 per annum). Ross was not interested in the premium dairy farmers were paying for grazing as he wanted the rental to be affordable for Adam. The renewal with the new rental figure was subsequently

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47 At [86].
48 At [141].
49 At [123].
50 At [141]–[142].

executed on 13 April 2007.[51] A further right of renewal for three years from 30 April 2010 was also added.

[32] Ms Rasmussen had no independent recollection of receiving instructions from Ross on the renewal. She had made a file note recording the existing and proposed new rental. This closely corresponded to a note written by Mr Chick found among Ross' possessions. The Judge considered it likely that Ross relied on that note when instructing Ms Rasmussen.[52] The Judge was satisfied Ross understood the general nature of this transaction.[53]

Later events

[33] In March 2010, Mr Chick met with Ross at his rest home. They agreed on a renewal of lease (with an increased rent of $72,000 per annum) and an extension of the option to purchase at $1.5m to 30 April 2016. Mr Chick instructed Mr Gray accordingly. At this point Derek and Charles intervened. When it became clear that the lease would not be renewed, on 26 March 2010, the Chicks served Ross with a notice exercising the option.[54] The High Court proceedings followed the refusal to settle by Derek and Charles.

High Court findings on negligence

[34] As we note above, the Judge found that the advice Ross was given by Ms Rasmussen ensured that he understood the legal effect of the transactions he was entering into.[55] The Judge, however, accepted the evidence from Mr Eades, an experienced solicitor called on Ross' behalf, that a competent lawyer acting for Ross should have ensured that he was aware of market rentals and prices and, if he were not, should have advised him that a valuer should be consulted. He said particular advice should have been given about the option to purchase at the fixed figure, the extension of the option and the 2007 renewal.[56]

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51 At [22] and [89].
52 At [90].
53 At [91].
54 At [26]–[27].
55 See above at n 16, [23] and [32].
56 *Blackwell* (HC), above n 3, at [133].

[35] Mr Eades said a competent independent lawyer would have explored with Ross the basis of, and reasons for, the option to purchase at a fixed sum and would have questioned the exercise of the option at the original price, given the likelihood that the value of his farm would increase over the intervening years. Mr Eades said that a note should have been made that these matters were discussed and a letter written to Ross recording the advice. Mr Haynes, called by the Chicks, agreed with the general tenor of Mr Eades' evidence.[57]

[36] The Judge held that Ms Rasmussen's advice to Ross did not meet the required standards in relation to any of the three impugned transactions (the option, the variation in 2005 and the 2007 lease renewal). He considered that Ms Rasmussen was entitled to proceed on the basis that Ross had the requisite capacity to enter into the transactions but that she was in dereliction of duty in failing to explore with him the full implications of both the option and the variation of the option, to have made a record of the discussions and to have confirmed her advice in writing.[58] There was also a conflict of interest involved in each of the transactions. From at least 2004, Edmonds Judd should have declined to act and the parties should have been independently advised.[59] We summarise the Judge's specific findings on each of the impugned transactions below.

Lease renewal and option

[37] The Judge recognised that the option associated with the lease renewal in 2004 was highly advantageous to the Chicks and disadvantageous to Ross. The option price and rent were unsupported by a current valuation.[60] The Judge accepted that Ms Rasmussen may well have been assured that this was what Ross wanted. He said that it was nevertheless incumbent on her to spell out the full implications of the proposal and the further steps that should be taken before he committed to it. Her advice should have been confirmed in writing. He said that, in the absence of a

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57 At [133]–[134].
58 At [135].
59 At [136].
60 We note, however, that, while there was not a formal valuation, the Judge had found that Ross had consulted a valuer who had valued the farm at $1.8m: see above at [17].

contemporary record, he was unable to rely on Ms Rasmussen's unaided memory to establish that adequate advice was given.[61]

[38] The Judge said that it would be for Ross to show on the balance of probabilities that he would have acted differently in the absence of a breach of duty.[62] The Judge considered that, if Ross had had the benefit of competent independent advice in 2004, it is unlikely that he would have entered into the lease on the terms then agreed. The Judge doubted that the rental would have been higher and it may be that an option price of $1.5m would have been maintained. However, he considered that the terms of the option would have contained some kind of mechanism to enable the option price to be adjusted to reflect changes in market value. At the least, Ross would have had the ability to adjust the option price had he wanted to. By this means Ross' concern to achieve affordability for the Chicks would have been recognised, while protecting him against a sudden and unexpected spike in market values or other unforeseen changes of circumstances.[63]

The 2005 variation

[39] As to the extension of the option in February 2005, the Judge noted that Ms Rasmussen's record of instructions simply recorded the proposal and was not dated. There was no record at all of what was said when Ross came in to execute the variation. While the variation was simple, it was highly advantageous to the Chicks. The reasons for it were not obvious and should have been fully explored by Ms Rasmussen. Again her advice should have been recorded and confirmed in writing. The Judge was unable to assume that the full implications of the variation were adequately canvassed with Ross.[64]

[40] The Judge went on to say that, in the hands of independent lawyers, it would have been most unlikely that the 2005 variation would have occurred. It was a gratuitous act which conferred a valuable advantage on the Chicks for no apparent reason. It was also unnecessary. If Ross had been properly advised, the Judge considered that Ross would have appreciated that the prudent and sensible course

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61 *Blackwell* (HC), above n 3, at [159].
62 At [163].
63 At [164].
64 At [160].

would be do nothing until 2007. That would have kept his options open without foreclosing his proposed course of action.[65]

[41] The Judge said that although he could not predict the course of events had Ross been competently advised, he was satisfied that, were it not for Edmonds Judd's negligence, Ross would not have granted and extended the option on terms which effectively gave the Chicks the right to buy at a fixed price at a time of their choosing. He considered that the losses from that outcome must be laid at the door of Edmonds Judd.[66]

The 2007 renewal

[42] The Judge said that much the same can be said of the 2007 renewal. Ms Rasmussen conceded that she did not know who had instructed her, how she had been instructed or when she was instructed in relation to this renewal. She witnessed Ross' signature but there is no record of the meeting. Ms Rasmussen had no recollection of advising Ross that a valuation should be obtained in order to establish the current market rental. The Judge was therefore bound to conclude that Ms Rasmussen failed to ensure that Ross understood the full implications of the transaction and that loss ensued.[67]

[43] The Judge considered that, although Ross was content to continue leasing the farm at below market rates, it was unlikely if properly advised that he would have entered into a lease at a rental so far below market rates in 2007. The Judge considered that the advice he had received from Ms Rasmussen on this aspect of the transaction was seriously deficient. The rental appears to have been settled without discussion on the basis of the note written by Mr Chick. Since the original lease was signed at a rental close to market rental, the market had moved significantly. Even having regard to the concerns that the rental should remain affordable, had Ross been properly advised, the Judge considered that a rental much closer to market value would have been negotiated.[68]

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65 At [165]. We are assuming that the Judge took into account the understanding that the option would not be exercised until Ross' death.

66 At [167].

67 At [161].

68 At [166].

The Court of Appeal judgment

[44] The appeal to the Court of Appeal by Edmonds Judd was on the basis that any negligence had not caused loss.[69] The Court of Appeal accepted this submission, holding that the High Court Judge's findings on loss were not consistent with his factual findings with regard to the Chicks' claim for specific performance. Rodney Hansen J had accepted that, even if Ross had been advised to obtain a market valuation in 2004, he would still have agreed to a rental of $65,900 annually and granted the Chicks an option to purchase at $1.5m. The Judge had also found that Ross had throughout wanted the Chicks to have the farm at that price. The Court considered that it must follow from those findings that there was no proper evidential basis from which to infer that Ross would have accepted competent advice to include in the option a mechanism to enable him to adjust the price if he wished. In the Court of Appeal's view, that would have been antithetical to Ross' unwavering intention to give the Chicks an option at $1.5m.[70] The Court also said that the inference was available from the evidence that the longer the arrangement endured, the less interest Ross had in securing anything more than $1.5m for the farm. The same conclusion applied to Ross' willingness to accept a rental at below market rates.[71]

[45] The Court said that market value was not what motivated Ross and the price was influenced by many other factors. Indeed, Ross would have been happy to grant an option at $900,000 which he knew was half the farm's then market value but for Mr Chick's suggestion.[72] The option price gave the Chicks a hedge against increasing farm prices and both the option price and the rental were fixed by what was regarded as affordable for Adam. By the time the Chicks were obliged to exercise the option they had worked the farm for ten years and foregone the capital appreciation they would have enjoyed if they had purchased their own farm. Further,

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69 *Blackwell* (CA), above n 2, at [4]. It was accepted in the High Court and Court of Appeal that Edmonds Judd was negligent in failing to obtain informed consent and ensuring that both parties were referred to independent solicitors: *Blackwell* (HC), above n 3, at [156]; *Blackwell* (CA), above n 2, at [85]. Counsel for Edmonds Judd accepted in the Court of Appeal that Edmonds Judd was negligent in its advice regarding the 2004 lease, the 2005 variation and the 2007 renewal: *Blackwell* (CA), above n 2, at [86].

70 At [102]–[103].

71 At [118]–[119].

72 At [103].

Adam and Jana had spent at least $100,000 on capital improvement as well as expending considerable labour.[73]

[46] The Court of Appeal said that it would have been preferable if the agreement had included a term that the Chicks would not exercise the option while Ross was living, but agreed with Rodney Hansen J that its omission was consistent with the personal nature of the arrangement.[74] The Court accepted that the Chicks had breached the understanding they had with Ross on this issue, but said that they had exercised the option at a time when Derek and Charles had indicated that they would not renew the lease and when it was plain that Ross would never physically be able to use the farm again.

[47] The Court of Appeal considered that Ross' reasons for the 2005 variation were objectively rational and reasonable. It would assist the Chicks to know their option to purchase at a fixed price would continue until 2010 and an extension would remove an incentive for the Chicks to exercise the option before 2007, thus preserving Ross' right to use the farm in the interim.[75] Further, at the time the transactions in 2004 and 2005 were entered into, there was no certainty that farm values would continue to rise. The Court did, however, note the Judge's findings that there was a general expectation of rising prices, although a decline in value was a theoretical possibility.[76]

[48] In any event, the Court considered that, if Ross had not extended the option date in 2005, he would simply have renewed or rolled over the lease in 2007 including the option on its existing terms. The Court considered that it was reasonable to infer that, for as long as the Chicks wanted to renew the lease, Ross would have always granted an option to purchase at $1.5m.[77] In the Court's view, the High Court Judge's error lay in approaching the liability inquiry through the formal lens of a strictly commercial transaction when he had already found that Ross

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73 See *Blackwell* (HC), above n 3, at [123]–[127].
74 *Blackwell* (CA), above n 2, at [114].
75 At [110], referring to [86] of the High Court judgment.
76 At [104], referring to [126] of the High Court judgment.
77 At [111]–[112].

was motivated to enter into an essentially personal arrangement by non-commercial and non-financial factors.[78]

[49] For all of the above reasons the Court held that Edmonds Judd's negligence was not a material and substantial cause of, or did not have a real influence on, the loss suffered by Ross. This is because he intended throughout to bear any financial difference inherent in the difference between the market and agreed values when the Chicks exercised the option to purchase and to accept rental at below market rates in the interim.[79] The Court held that it was not proved that Edmonds Judd's negligence had caused Ross any loss.[80] The judgment against the firm in the High Court was set aside.

[50] The Court said that, even if liability had been established, it was satisfied that the measure of damages would have been discounted. At best, the High Court Judge found Ross was only interested in what he regarded as fair value and not the objective touchstone of market value. The Court said that, even assuming Ross would have wanted to adjust the price to market value, another issue was whether the Chicks would have accepted such a term.[81]

Our assessment

[51] The issue in this appeal is whether Ross proved that he would have acted differently had he been properly advised. In order to answer this question we must first assess the advice that Ross should have been given. We then analyse Ross' objectives in entering into the transactions and the extent to which the transactions met his objectives. Finally, we assess the likely effect of competent advice on the transactions.[82]

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78 At [119].
79 At [115].
80 At [120].
81 At [116]–[118].
82 The parties referred the Court to a number of authorities, including the Court of Appeal decision of *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA) (Glazebrook, Hammond and William Young JJ). Because of the view we take on the facts, we have not found it necessary to engage with these authorities.

[52] We propose to deal with each of the relevant transactions in turn, but first make two general comments.

[53] We accept the criticism of the Court of Appeal approach made on behalf of the appellants. It was submitted that the findings on causation made by the High Court Judge, in rejecting the affirmative defence of unconscionable bargain, could not in themselves be determinative of the question of what the position would have been had Ross been properly advised. This is because Ross' actions had occurred without him having been properly advised.

[54] We would also caution against too ready a conclusion that serious failings on the part of a firm (such as occurred in this case) did not lead to loss. It must be remembered that to hold no loss is proved, a court must be of the view that even if competent advice had been given, it would more likely than not have been ignored.[83] The Court of Appeal referred to this Court's decision in *Tauranga Law v Appleton*[84] as an example of a case where the loss would have occurred even if the lawyer had given competent advice.[85] In that case, this Court did hold that the actions of the solicitors had not caused loss but this was not because of a deficiency in the advice provided by the solicitors. It was because Mr Appleton had taken no notice of the letter of advice because of his confidence in the transactions.[86]

Lease renewal and option

[55] Rodney Hansen J's findings on the respects in which Edmonds Judd were negligent were not challenged before us. We therefore proceed on the basis of those findings. In addition to the matters specifically addressed by the Judge,[87] we would add that Ms Rasmussen in 2004 should have explored with Ross the reasons for the three year option period and the market value option exercise price after that period.

[56] Ms Rasmussen should also have inquired more generally about the reasons for the transaction. Had she done so, she would no doubt have been told that Ross

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83 Meaning that the plaintiff has failed to prove loss on the balance of probabilities.

84 *Tauranga Law v Appleton* [2015] NZSC 3, [2015] 1 NZLR 814 (Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ).

85 *Blackwell* (CA), above n 2, at [115] and n 104.

86 *Tauranga Law*, above n 84, at [53]–[59].

87 See above at [34]–[36].

did not want the option to be exercised in his lifetime and most likely about the informal understanding with the Chicks in this regard. It is also likely that Ross would have told the solicitors of his wish that the farm should continue to be used for dry stock farming and that he could continue to work on the farm as long as he was able to do so. In addition, his wish to benefit Adam and the reasoning behind that wish would have been explored. We comment that, had the respondent taken these steps, it would not have been necessary for the High Court to rely on the (necessarily) one-sided evidence of Mr Chick as to the reasons for the transactions as there would have been contemporaneous file notes setting out Ross' motivations.

[57] We add that it was a major failing of Edmonds Judd not to recognise the conflict of interest and ensure that Ross had independent advice on what was, on its face, not a run of the mill transaction and which was in addition very different from the lease with a right of first refusal granted in 2000. Further, while the standard of advice fell short of what would have been expected had Ross been in perfect health, special care was needed because of Ross' known health issues (even if, as has been found to be the case, he was capable of managing his own affairs).

[58] Turning now to Ross' objectives with regard to this transaction, the parties are essentially in agreement. Ross' main objectives were:

(a) that the farm be affordable for Adam (both as to rental and the option price); and

(b) to retain the farm during his lifetime.

[59] The first of the objectives was met but we note that the discount to market price offered was only $300,000, Ross having spoken to a valuer who had estimated the market value of the farm at $1.8m. That discount had only a minor effect of Ross' asset position.[88] Further, the $1.5m exercise price was time limited, reverting to market value from 30 April 2007.

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[88] See above at [18] and n 34.

[60] The agreement as entered into did not deal at all with the second of these objectives. We do not accept the conclusion of the courts below that it would have been contrary to the "personal nature" of the arrangement overall that this be dealt with formally in the agreement.[89] The dangers of relying on an informal arrangement of this sort for achieving a primary objective of the transaction are well illustrated in this case. The informal understanding with the Chicks did not prevent them exercising the option in 2010. The understanding therefore did not protect Ross and ensure his objective of retaining the farm while he was alive was achieved.

[61] A competent legal advisor would have strongly advised that a term that the option could not be exercised while Ross was alive should be included in the agreement.[90] Ross would have been warned that there would be difficulties in enforcing any understanding that the option would not be exercised in his lifetime (including the difficulty of proving the understanding existed). Thus there was a major risk that the understanding would not protect him in the event the Chicks, despite their friendship, decided to exercise the option while he was still alive. Even if Ross completely trusted the Chicks, Ross would have been advised that the difficulties of enforcement would be even greater if anything happened to the Chicks. Any executor of their estate may not even know about the understanding. On a point which was so important to Ross, an informal understanding was very risky and competent legal advice would have made this clear.

[62] We also accept the submission made on behalf of the appellants that the time limited application of the $1.5m purchase price was in fact antithetical to Ross' purpose of retaining the farm during his lifetime as it created an incentive for the Chicks to exercise the option while the fixed purchase price remained, even if Ross was still alive. Competent legal advice would have pointed this out.

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89 As the High Court held: see above at [24]. We also consider that the objective that the farm continue to be used for dry stock farming and Ross' access to the farm would have been dealt with in the lease documentation but that has no bearing on the current dispute.

90 The respondent suggests that competent legal advice would have also asked Ross whether the option could be exercised if he was no longer physically or mentally capable. Even if this were so, it is impossible to know what Ross' decision on this would have been. In any event he did not become incapacitated until after 30 April 2007 and so the Chicks would not have been able to exercise the option at the $1.5m price even if that had been included.

[63] In light of the above, and given the importance of Ross' objective of keeping the farm while he was still alive, we are of the view that Ross would have accepted advice to include a condition that the option not be exercised in his lifetime. We consider that the Chicks would have accepted this condition. Had they refused, this would have been tantamount to admitting that they wished, despite their friendship with Ross, to retain the flexibility to breach their informal understanding.

[64] Although we are of the view that the Chicks would have agreed to include a term that they would not exercise the exercise the option while Ross was alive, it is likely that they would have asked for an extension of time for exercising the option at a reduced price in the event Ross lived beyond 30 April 2007 and the lease was renewed. Given the friendship between the parties and his wish to benefit Adam, we consider that Ross would have agreed to an extension of the option exercise period at a favourable price. However, we do not accept, assuming competent advice, that he would have accepted an extension of the $1.5m exercise price past 30 April 2007.

[65] A competent lawyer would have advised Ross to include a market adjustment mechanism if the option exercise period were extended, given that farm values were generally expected to rise.[91] It would have been pointed out that a market adjustment mechanism had already been provided for under the proposed transaction as the option exercise price reverted to market after three years. The need to consider the position of his wife, Margaret, and her likely future needs, would have been stressed.[92]

[66] In terms of Ross' objectives of affordability, a competent lawyer would have pointed out that rising farm prices would increase affordability insofar as that concept was related to the ability to borrow on the security of the farm.[93] Ross would have been advised that any other future affordability concerns could be addressed (if necessary) at a later stage and that a market value adjustment option preserved flexibility in case his or Margaret's situation or market conditions

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91 See above at [47].

92 The High Court judgment notes that Margaret was herself disabled to some extent: *Blackwell* (HC), above n 3, at [62].

93 See above at [17].

changed.[94] Ross would also, however, have been advised that, to the extent affordability rested on the land being used for dry stock farming, there would be no practical way it could be ensured post sale that there would not be a dairy conversion either by the Chicks or by a subsequent purchaser.[95] Setting an exercise price on the basis of dry stock farming was thus likely to confer an unwarranted advantage on the Chicks.

[67] We are satisfied that Ross would have accepted this advice. The situation has to be assessed as at 2004. Ross had shown himself not impervious to advice at that time. He had accepted Mr Chick's advice that he could not leave the farm to Adam in his will as that would be unfair to Margaret. He had also accepted Mr Chick's advice that it would be unfair to set the option price at $900,000. Our impression is that the dry stock farming was most important to Ross during his lifetime as it meant that he could continue to have input into a familiar farming operation. He would have understood that he could not control this after his death.

[68] We do not accept the respondent's submission that Ross was not driven by commercial considerations, at least in 2004. The rent had been increased to take account of the fact that Adam and Jana were living in the farmhouse. While his personal feelings for Adam were important, Ross had also sought advice from a valuer as to the market value of the farm.[96] The option price as agreed was only discounted by $300,000 from the valuer's estimate of market value and it reverted to market value after 30 April 2007. The Court of Appeal therefore was not correct when it said that it was Ross' unwavering intention to give the Chicks an option at $1.5m.[97] In any event, any unwavering intention, as we note earlier, existed in the absence of competent legal advice.[98]

[69] We consider therefore that it is more likely than not that Ross would have extended the option period (conditional on the lease being renewed) but there would

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94 The High Court made a similar point on flexibility: *Blackwell* (HC), above n 3, at [164].

95 For the purpose of the lease, dry stock farming could have been made the only permitted lease.

96 See above at [17] and n 29.

97 See above at [44]. This was based on a finding of the High Court based on Mr Chick's evidence (see above at [30]). As we note, that finding cannot stand as at 2004 in the face of the documentation.

98 See above at [53].

have been a market adjustment mechanism after 30 April 2007. Given Ross' concern about affordability, we consider that the option price that would have been suggested for the extended period would have been market value less a discount of between 15 and 25 per cent. The exercise price for the first three years was at a discount of some 16.67 per cent from the estimated market value in 2004 and a discount of between 15 and 25 per cent would have reflected the relatively minor effect on his financial position (and that of Margaret) that Ross had been comfortable with in setting the $1.5m option price, while taking into account issues of affordability and the wish to benefit Adam.[99]

[70] We see no reason why the Chicks would not have accepted this arrangement. Relevant to this assessment is the fact that they had already leased the farm for three years with only a right of first refusal rather than an option, and that they had already agreed to renew the lease before the option was discussed at all.[100] This reduces the significance of the "hedge against increasing farm prices" relied on by the High Court and the Court of Appeal.[101] Further, there must have been a reasonable chance, given Ross' state of health, that he would not live for three years, and so a reasonable chance that they would be able to exercise the option at $1.5m. Even if Ross did not die within the three year period, the Chicks would still have the option of purchasing the property at a similar discount to market value after the three year period as the $1.5m represented in 2004. This would still have bestowed a substantial advantage on them.

[71] We have not overlooked the possibility that, assuming competent independent advice tailored to Ross' objectives and taking account of his vulnerability because of the state of his health, the option may have been abandoned altogether and the transaction structured in some other manner. The nature of any restructuring would affect the extent of any loss. For example, had there been a return to merely a first right of refusal, the farm could have been sold for full market value in 2010. Given

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99 We do not consider that merely an ability for Ross to adjust the option exercise price, as suggested by the High Court at [164], would have been acceptable to Ross or to the Chicks. It would have created too much uncertainty. It may also have been that the documentation would have taken into account explicitly the wish to benefit Adam but again that is of no moment in the current dispute.

100 See above at [14].

101 See above at [30] and [45].

the dynamics of the relationship between the Chicks and Ross, however, we consider it more likely than not that the basic structure of the transaction would have remained the same but that it would have been amended to meet both parties' objectives (in the manner set out above).

2005 Variation

[72] When Ross went to see Ms Rasmussen about the extension of the period for exercising the option he gave as his explanation that he wanted to give the Chicks more time. There is no indication in the evidence that there was any reason the Chicks needed more time to exercise the option. Indeed, the evidence was that the Chicks were considering purchasing a farm in 2004 and so presumably had the means to do so, even if they continued leasing Ross' farm, they having already agreed to a renewal of the lease before the option was mentioned.[102] This means that the second reason given by the Courts below for the extension (that it would remove an incentive for the Chicks to exercise the option before 2007) was in fact the likely reason. We agree with the Court of Appeal that this was a rational reason for Ross asking for the extension.[103] It made it much more likely that the Chicks would honour the informal understanding not to exercise the option before Ross' death, assuming he lived beyond 30 April 2007.

[73] We agree with the appellants that "the die was cast" in 2004.[104] If a term had been added in 2004 that the option could not be exercised within Ross' lifetime, then the 2005 variation would not have been necessary. Competent legal advice would have pointed this out, in the very unlikely event that Ross mistakenly thought that the variation was still necessary. Again we see no reason why Ross would not have accepted this advice. We therefore hold that, had Ross received competent advice in 2004 and 2005, the 2005 variation would not have been made.

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102 See above at [14].

103 *Blackwell* (CA), above n 2, at [110]. This was contrary to Rodney Hansen J's conclusion in the High Court that the variation was "difficult to fathom": see above at [29].

104 *Blackwell* (CA), above n 2, at [92].

2007 Renewal

[74] It follows from what we say above that when the lease came to be renewed in 2007 Ross, as well as agreeing to a renewal of the lease and granting a further right of renewal, would also have been amenable to extending the option past 30 April 2010 assuming the lease was renewed on the same terms as agreed for the period up to that date. We consider, however, that the Chicks would have asked for the ability to exercise the option in the event that the lease was not renewed in 2010 even if Ross was still alive. By 2007, Adam had become more committed to Ross' farm and farm prices were increasing. Staying out of the market was thus starting to affect Adam more starkly. Given Ross wished Adam to have the farm, we consider he would have agreed to this request. He had already lived much longer than had been expected and by this stage was not able to have the same active role in the farm as he had in 2004. In these circumstances, continued ownership of the farm in his lifetime must have been of diminishing importance to him.

[75] We do not consider that Ross would, assuming competent legal advice, have agreed to an extension of the $1.5m exercise price for a period beyond the original three year period for essentially the same reasons as we have set out above in relation to the position in 2004. We accept that there may be something in the Court of Appeal's view that the longer the arrangement endured, the less interest Ross had in securing more than $1.5m for the farm.[105] However, had there been competent advice, the 2005 variation extending the $1.5m price would not have occurred and therefore the $1.5m price would only have been for the first three year period. In any event, as we have already noted, any attachment to the $1.5m figure was in the absence of competent legal advice.

[76] We have not overlooked the possibility that, had the 2005 variation not taken place, the Chicks may have decided to purchase another farm because they may have been concerned about rising farm prices and may have not have wished to take the risk that Ross would live beyond the end of the three year period. However, we consider that the Chicks would still have renewed the lease and agreed to the option price (which was still at a favourable level). After all, they had agreed to renew the

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[105] See above at [44].

lease in 2004 despite the fact that they were looking at purchasing another farm and before the option was even discussed.

[77] As to the rental set in 2007, the High Court Judge was of the view that, assuming competent advice, the rental would have been set at market rates. There is evidence to support the view that Ross may well have accepted advice to seek a rental valuation. Despite his friendship with the Chicks, Ross had worked on the basis of a valuation setting the market rental when entering into the lease in 2000, having been assured that this would enable the farm to return a reasonable profit. Ross was also obviously not averse to an increase in rent in 2007, having accepted Mr Chick's suggested increase of rent.[106]

[78] The more difficult issue, however, is the effect the rental valuation would have had on the rent actually charged. The High Court Judge found that Ross wanted the property to be used for dry stock farming and that he wanted the rent to be calculated on a basis that was affordable for Adam. The Judge held that Ross was not interested in the premiums being paid by dairy farmers for grazing.[107] We assume that such premiums would have influenced the rental valuations agreed by the parties' valuers for the purpose of the High Court hearing. There is nothing in the evidence to suggest what a fair market rental would have been, not taking into account the dairy farmer phenomenon. There is thus no basis in the evidence for assessing what the rental would have been assuming competent advice. The claim for loss of any additional market rental must fail for want of proof of the quantum of loss.

Conclusion on the option exercise price

[79] The respondent submits that the case should be decided in terms of the pleadings, which were that the firm had failed to advise Ross properly on market value, both with regard to the option exercise price and rental.[108] The respondent says that it was not pleaded that it failed to ensure that Ross retained the use of the farm during his lifetime. Had it been, Ross' loss would only have amounted to the

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106 See above at [31].

107 See above at [31].

108 The Court of Appeal seems to have accepted that the submissions of the parties had narrowed to focus on the negligent valuation advice: *Blackwell* (CA), above n 2, at [98].

loss of enjoyment of the farm during his lifetime leading to general damages and, indeed because of the proceedings, the farm was not in fact transferred until after his death.

[80] We do not accept that submission. In the amended statement of claim a general duty to exercise all due professional care skill and diligence was pleaded, along with a breach of that duty. Particulars included the failure to ensure Ross had independent advice and a failure to advise on the lease renewal and the option. It is true that the failure to get a valuation was referred to, but this cannot detract from the generality of the claimed breaches and limit the inquiry to one aspect of the flawed advice only.

[81] As to the consequences of the negligent advice, the main argument on behalf of the respondent is that Ross was not motivated by commercial considerations and that he saw the transaction only in terms of what was affordable for Adam. The respondent refers to Ross' deliberate and clear intent to benefit the Chicks at his own expense. The respondent points to the finding of the High Court that Ross never wavered, from 2004 onwards, from his intention that the Chicks would ultimately own the farm for $1.5m.

[82] The difficulty for the respondent (as we have already explained) is that the High Court finding on Ross never wavering from the $1.5m exercise price is that this finding cannot be reconciled with the terms of the option entered into in 2004. The $1.5m was time limited and the exercise price reverted to market value after 30 April 2007. This structure was in the context of a general expectation of rising farm values and therefore an expectation that the market value of the farm in three years time would be higher than in 2004.

[83] While Ross did envisage benefiting Adam to his own detriment, he also set limits on that benefit to take into account Margaret's needs, as evidenced by the original discount on the option price of only 16.67 per cent and the reversion to market value after three years. In any event, any unwavering attachment to the $1.5m exercise price was held in the absence of proper independent legal advice.

Ross had shown himself amenable to taking advice in 2004 and we consider he would also have similarly listened to advice in 2005 and 2007.

[84] We have therefore held that, had Ross been given competent advice in 2004, the option agreement would have provided that the option would not be exercised during Ross' lifetime but that the parties would have agreed, after the initial three year period, that the option price would be at a discount of between 15 and 25 per cent on market value. We have also held that the 2005 variation would not have taken place and that the option would have been extended on the same terms in 2007 past 30 April 2010 but with an ability to exercise the option on that date if the lease were not renewed (and even if Ross were still alive).

[85] We have assumed that the Chicks would still have exercised the option in 2010 when the lease was not renewed. As indicated above, the price still represented a substantial discount from the then market value. The market value at 2010 was $3,222,500.[109] We consider it more likely than not that a midpoint (20 per cent) of the 15 to 25 per cent discount range would have been agreed as the percentage discount in 2004 for the period post 30 April 2007. This gives, with rounding, an option exercise price of $2,500,000, which is $1,000,000 higher than the price actually paid by the Chicks, meaning a proved loss of $1,000,000.

Result and costs

[86] The appeal is allowed. Judgment for the appellants in the sum of $1,000,000 is ordered.

[87] The appellants, in their statement of claim, sought interest on the judgment sum pursuant to the Judicature Act 1908. We consider it appropriate to award interest at five per cent (the prescribed rate pursuant to s 87(3) of the Judicature Act) on the judgment sum from the date of settlement by the Chicks of the purchase of the farm.

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[109] On the basis of the figure agreed for the purpose of the High Court hearing which was not challenged before us.

[88] The appellants, having largely succeeded in the appeal, are entitled to costs. The respondent is to pay costs of $25,000 to the appellants plus all reasonable disbursements,[110] to be fixed if necessary by the Registrar.

[89] The costs order in the Court of Appeal (CA476/2013) is set aside. Costs in that Court and in the High Court should be set by those Courts in light of this judgment.

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[110] For the avoidance of doubt, this includes disbursements incurred with regard to Mr Gudsell's assistant at the hearing.