IN THE SUPREME COURT OF NEW ZEALAND

SC 108/2013
[2015] NZSC 3

BETWEEN	TAURANGA LAW Appellant
AND	JOHN APPLETON AND NATALIE MARIE RYAN AS TRUSTEES OF THE APPLETON FAMILY TRUST First Respondent
	JOHN APPLETON Second Respondent

Hearing:	1 July 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	M G Ring QC and P J Napier for Appellant D W Grove for First and Second Respondents
Judgment:	19 February 2015

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The respondents are to pay the appellant costs of $25,000 plus reasonable disbursements (to be set by the Registrar if necessary).**

C **The costs order made in the Court of Appeal is set aside and any costs order in the High Court is reinstated. If costs cannot be agreed for the Court of Appeal, costs should be set by that Court in the light of this judgment.**

REASONS

(Given by Elias CJ)

[1] It has been held in the High Court and the Court of Appeal that Tauranga Law, a firm of solicitors, breached duties of care owed to Mr Appleton and his family trust for whom it acted in the purchase of a residential investment property still to be developed from a company in the Blue Chip group. When the Blue Chip group collapsed, the deposit of $90,468.75 paid to Blue Chip was lost.

[2] Despite finding that Tauranga Law was in breach of duties of care to advise Mr Appleton about the risks in the transaction, Allan J in the High Court found that the negligence was not causative of loss of the deposit because Mr Appleton would have proceeded with the transaction irrespective of proper advice. Important in that finding was the fact that Mr Appleton was content to proceed and for the deposit to be paid notwithstanding the advice he had received from Tauranga Law. Although the Judge held the advice given to be inadequate and in breach of duty, he considered that, despite its inadequacies, it "would have given most investors reason to pause".[1]

[3] In the Court of Appeal the determination that the negligence had not caused loss of the deposit was overturned.[2] The Court of Appeal thought that the errors in the advice given were more serious than they had been treated in the High Court. Reassessing the evidence bearing on causation in that light, the Court considered that the High Court had been wrong to dismiss Mr Appleton's evidence that, had he understood that his deposit was not secured in a trust account, he would have done his best to extricate himself from the agreement.[3] The evidence suggested he could readily have obtained release from the agreement without payment of the deposit or penalty either through exercising a statutory right to withdraw available for two weeks after the agreement was entered into or by refusing to pay the deposit, a course Blue Chip was likely to have accepted. In the Court of Appeal, therefore, judgment was entered for the Appleton parties against Tauranga Law for the deposit together with interest.

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1 *Appleton v Tauranga Law* HC Tauranga CIV-2010-070-385, 12 December 2011 (Allan J) at [62].
2 *Appleton v Tauranga Law* [2013] NZCA 420, [2013] 3 NZLR 777 (O'Regan P, French and Winkelmann JJ).
3 At [54].

[4] Tauranga Law sought and was granted leave to appeal to this Court. Although the basis on which leave was sought raised "the proper approach to the issue of causation in a transaction case", in the end no matter of general principle was raised by the appeal. Its outcome depends essentially on evaluation of generally uncontested findings of primary fact.

Background

[5] The unconditional agreement for sale and purchase was entered into by Mr Appleton on 23 April 2004. He intended the purchase to be completed by his family trust. The agreement was concluded without Mr Appleton having obtained legal advice. The agreement for sale and purchase was in the standard form then current as approved by the Real Estate Institute of New Zealand and the Auckland District Law Society, with exclusions and amendments initialled by the parties. A Blue Chip broker, through whom Mr Appleton had earlier entered into a similar Blue Chip purchase (after attending a Blue Chip seminar), conducted the dealings with Mr Appleton and arranged the financing of the deposit.

[6] As appears by the front page of the agreement, the vendor was "Rockfort Limited", although Mr Appleton in his evidence said he thought all along that the vendor was Blue Chip. The address of the property was given as "Unit 506 of the Fifth Floor of the Vendor's property at 18 – 20 Turner Street Auckland". The purchase price was $356,896 with a deposit of $101,910.00 (later reduced) payable on execution of the agreement with the notation "refer clause 2".

[7] The standard clause 2.4 of the standard printed agreement, providing that the deposit is to be held by the payee as "stakeholder" pending completion, was excluded under the agreement. Instead, under the "Special Conditions of Sale" substituted, the purchaser under clause 14 "agrees to the immediate release of the deposit to the Vendor ("Release")" and, in return, was to receive interest:

> 14. The Purchaser agrees to the immediate release of the deposit to the Vendor ("Release"). In consideration for the Release, the Vendor shall pay the Purchaser interest on the amount of the deposit at the rate of 8.5% per annum ("Interest Rate") from the date of Release of the deposit up to the settlement date. Interest shall be paid to the Purchaser fortnightly in advance up to the settlement date and on the settlement date. If the New Zealand

> Official Cash Rate increases by more than 0.5% in the period between the date of Release and the settlement date then the Interest Rate shall be increased from the date of its increase by more than 0.5% by the amount of such increase over and above 0.5%.

Under the agreement, the balance of the purchase price was to be paid "[i]n cash in one lump sum on the possession date" and possession date was defined as "5 working days after the issue of new unit title or after practical completion whichever is the later", with interest for late settlement set at 14%.

[8] Rockfort Ltd was a company with capital of $100 which was member of the Blue Chip group. The land in Turner Street was owned not by it but by another company. The financing for the large deposit (30% of the purchase price) was arranged by Blue Chip. The interest paid under the agreement of 8.5% exceeded the interest of 6.9% Mr Appleton was paying to the Bank of New Zealand (BNZ) for the borrowing to raise the deposit sum. The arrangement between the parties was that the apartment, after settlement, would be subject to a lease between the purchaser and another Blue Chip company, Auckland Residential Tenancies Ltd, whose obligations were to be guaranteed by another Blue Chip Company.

[9] The Blue Chip broker recommended that Mr Appleton engage Mr Olivier of Tauranga Law to act for him in the transaction, because of Mr Olivier's familiarity with the Blue Chip products. With Mr Appleton's acquiescence, the documents about the transaction were arranged for forwarding by Blue Chip to Tauranga Law by letter of 28 April. The agreement itself had already been stamped by the broker with Mr Olivier's name as solicitor for the purchaser, with a stamp provided to Blue Chip by Tauranga Law.

[10] The documents were received by Tauranga Law on 29 April, before expiry on 7 May 2004 of a two week period provided by s 225 of the Resource Management Act 1991 within which a purchaser of property for which no subdivision plan has been deposited can withdraw from an agreement without penalty. Neither Mr Appleton nor Mr Olivier made contact with the other, however, until Mr Olivier telephoned Mr Appleton on 24 May, after receiving loan documentation for money to be advanced to the Appleton Family Trust by BNZ. At that point he obtained confirmation that he was to act for Mr Appleton and the trust and that the loan

documentation could be executed in Auckland (where Mr Appleton lived) before Mr Kelly, the solicitor for Mr Appleton's co-trustee of the family trust.

[11] On 31 May Tauranga Law sent two letters to Mr Appleton together with a copy of the letter Mr Olivier had sent to Mr Kelly about execution of the loan and associated securities documents and a draft "Statement/Tax Invoice". The first letter of 31 May from Tauranga Law to Mr Appleton was a covering letter for the other letter of the same date and the other documents. The letter to Mr Kelly, copied under cover of the letter of 31 May to Mr Appleton, referred to the loan documents enclosed with the original to Mr Kelly and requested return of the completed documents by 3 June, if possible. The "Statement/Tax Invoice" included with the letter indicated that, from the funds received from BNZ, there was available after payment of the bank fees and legal fees an amount of $90,468.75 "to pay deposit for Unit 506, 18-20 Turner Street" (a reduction in the amount stipulated in the contract, to which Blue Chip had agreed when the Bank declined to advance the higher amount).

[12] The second letter of 31 May, included under cover of the first, was a letter of advice on the transaction. It comprised the only advice given by Tauranga Law to Mr Appleton and the trust in connection with the agreement for sale and purchase before the deposit was to be paid on draw down of the loan after completion of the loan documentation. The three-page letter was in a standard form used by Tauranga Law in connection with Blue Chip transactions, adapted for each purchaser client. Portions of the letter were highlighted by bolding or by the use of larger font size. The letter advised of risks in the transaction, including the risks that the vendor would fail or the developer fail to complete and the deposit paid would be lost.

[13] The letter in its entirety is as follows:

> **RE: Purchase by you from Rockfort Limited of Unit 506, 18-20 Turner Street, Auckland**
> **Bank of New Zealand loan to The Appleton Family Trust**
> **Trustees: John Appleton and Andrew Paul Clark**
> **Guarantor: John Appleton**
>
> We confirm having received from Walters Law instructions to attend to the above transaction on your behalf and take this opportunity of thanking you for the instruction.

We confirm that the agreement of sale was signed by J Appleton without legal advice from ourselves and that you may nominate a LAQC to take title.

We note that settlement of Unit 506, 18-20 Turner Street, Auckland has provisionally been set down for 31 August 2005 and that you have contracted to pay the deposit of $101,910.00 immediately. In condition 16 the vendor states that 31 August 2005 is an estimated date and that the vendor will <u>not</u> be liable for any delays beyond that date whatsoever.

The usual deposit for a transaction of this nature is ten per centum (10%) or $35,689.60 and you have contracted to pay a deposit of $101,910.00.

The major risk in this transaction <u>prior to settlement</u> (31 August 2005 or later if there are delays) is

- **if the vendor, Rockfort Limited, is liquidated or**
- **the developer is unable to complete the building and Rockfort Limited is unable to take title.**

You / the LAQC would be a concurrent creditor and may then lose the entire deposit.

We note that in terms of clause 14 of the agreement for sale and purchase the vendor is to pay to you interest for immediate release of the deposit at 8.5% per annum fortnightly in advance.

We note further that you are obtaining funds to pay the deposit from a loan to The Appleton Family Trust by Bank of New Zealand which loan is secured by an existing mortgage over 5 Tolben Place, Howick, Auckland.

We confirm that once the purchase of Unit 506, 18-20 Turner Street, Auckland has been settled **(31 August 2005 or later if there are delays)** Bribanc Property Management Limited, a company within the Auckland Residential Property Trust group will manage the property for you. Auckland Residential Tenancies Limited, a company within the Auckland Residential Property Trust group, is the Lessee of Unit 506, 18-20 Turner Street, Auckland for four years.

In terms of clause three of the lease the tenant may by notice in writing to the lessor (you) at least three months before the termination date give written notice of the Lessee's wish to renew the lease for a further period of four years, provided the Lessee has complied with all its obligations under the lease. There are **four renewal periods of four years each** and if they are all exercised then the **total lease will be for a period of twenty years.**

In terms of the fourth schedule of the lease the **lessee has a right of first refusal** to purchase the property. The lessee's right of first refusal to purchase the property is **also extended to the further terms of the lease.**

If the lessee does <u>not</u> exercise its right of first refusal you will then be able to sell the property but such **sale will be subject to the lease** which then has a potential total term of 20 years if all the renewals are exercised by the lessee.

The rental from the property being acquired will be utilised to service the loan and mortgage that you / the LAQC obtain to finance the balance of the

purchase price in addition to the existing loan by Bank of New Zealand for the deposit and any shortfall at any time will be made up by you.

We confirm our advice that

- you should inspect the property once it has been constructed **(31 August 2005 or later if there are delays)** to confirm that the purchase price represents current market value.
- Auckland Residential Property Trust advise that an exclusive insurance policy which protects you from tenant default and tenant malicious damage will be arranged. Please ensure that you obtain a copy of this policy from Auckland Residential Property Trust. Your managing agent, Bribanc Property Management Limited, will hold the original. **The major risk in this transaction after settlement (31 August 2005 or later if there are delays)** and once the title is registered in the LAQC's name is if the policy is not in place and Auckland Residential Tenancies Limited (the tenant) is liquidated resulting in you personally having to make the mortgage repayments without the benefit of rental income.

We confirm that we have not advised you regarding your decision to invest in the Auckland property market and that you understand that the projected profit from the investment will only materialise if Auckland Property prices increase as projected.

After settlement **(31 August 2005 or later if there are delays)** and once we receive the original documentation from Walters Law, the solicitors for the vendor, we will instruct our land agents to register Unit 506, 18-20 Turner Street, Auckland in the LAQC's name and mortgage in favour of the financial institution that you obtain a loan for the balance of the purchase price from in the North Auckland Registry.

After registration we shall provide you with a copy of the Certificate of Title. The original mortgage and a search copy of the title will be forwarded to the financial institution that you obtain a loan for the balance of the purchase price from to be retained by them in safe custody.

We shall keep you advised.

Yours faithfully,
Tauranga Law

Kevin Olivier
Principal

(Original emphasis)

[14] Mr Appleton did not take much notice of the letter when he received it. In his evidence he said that he "would have read it" but that he "felt confident with what I had". He said he read the letter but "obviously didn't understand what the implication [was]", saying:

> I didn't feel that it was pertinent. I felt that my deposit was in the solicitor's trust account and that I was secure.

[15] When asked about the warning that there was a risk he would lose the entire deposit, Mr Appleton responded:

> I was convinced that my deposit was secure and in the solicitor's trust account, I had no fears.

When asked again about the major risk identified in the letter, the risk of loss of the deposit, he said:

> As I had said, I didn't feel unduly concerned because I felt my deposit was safe but also um, I considered it to be a done deal, I'd signed the document and there was no further action I could take.

[16] Mr Appleton explained in evidence that he had bought properties in the past and his deposit had always been held in trust. When pressed that the letter should have disabused him of the view that that course applied in this transaction, he said:

> I can only repeat, I felt quite confident that it was in a trust and also I, I thought that this, it was a done deal anyway, so I felt quite sure that everything would be okay.

[17] At trial there was a dispute about whether the letter of 31 May had reached Mr Appleton before he signed the loan documents at Mr Kelly's office. The Judge found that Mr Appleton's evidence was incorrect in this respect, and it was no longer in dispute in the Court of Appeal that it had been received by him before the agreements were executed and the loan from BNZ was drawn down, allowing the deposit to be released. Allan J considered that Mr Appleton received the letter of 31 May in time to consider his position before paying the deposit. He thought it was then open to Mr Appleton to take further advice in the light of the contents of the letter if he wished to do so, accepting the evidence of the expert witnesses for Tauranga Law that "it was for Mr Appleton, and not Mr Olivier, to follow up the letter if he chose".[4] Instead, Mr Appleton "chose to proceed anyway, without asking Mr Olivier to elaborate on the advice in the letter".[5]

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4 *Appleton v Tauranga Law* HC Tauranga CIV-2010-070-385, 12 December 2011 at [49].
5 At [65].

[18] After execution of the loan documents at Mr Kelly's office on 4 June, the funds were drawn down and the deposit of $90,468.75 was paid into Blue Chip's bank account on June 11 by Tauranga Law without further reference to Mr Appleton. On the same day Mr Olivier wrote to Mr Appleton as follows:

> We confirm that the Bank of New Zealand loan to The Appleton Family Trust was drawn down on 11 June 2004.
>
> From the proceeds we have paid to Blue Chip New Zealand Limited the sum of $90,468.75 for the deposit for Unit 506, 18-20 Turner Street, Auckland as set out in the Statement / Tax Invoice forwarded to you.
>
> We shall keep you advised.

The letter enclosed the "Statement/Tax Invoice" to Mr Appleton which disclosed payment of the deposit to "Blue Chip".

[19] Mr Appleton did not contact Tauranga Law about the advice received in the letter of 31 May. Nor did he query the statement indicating payment of the deposit to "Blue Chip". No progress was made on the development. Interest on the deposit continued to be paid by Blue Chip until 24 December 2007. Before then, Mr Appleton attempted to obtain return of his deposit but was ultimately unsuccessful. The Blue Chip parties eventually cancelled the contract and some time afterwards the Group was placed in liquidation. The present claim was brought in 2010 and sought damages for loss of the deposit, together with interest and general damages.

The litigation in the High Court and Court of Appeal

[20] There were two bases on which Tauranga Law was claimed and was held in the High Court and Court of Appeal to have been in breach of duties of care owed to Mr Appleton and the trust. They were pleaded as two causes of action.

[21] The first arose out of failure to advise Mr Appleton of the risks in the contract and his right to withdraw from the contract before 7 May, after Tauranga Law was alerted to the fact that it was likely it would be acting for Mr Appleton by receipt of the contractual documents, on 29 April. Such duty of care was held by the High Court to have arisen in the circumstances before the contract of retainer was entered

into (which the Judge held to have been on Mr Appleton's confirmation on 24 May that Tauranga Law was to act for him and the trust).[6]

[22] Mr Olivier, the principal in Tauranga Law accepted in his evidence that the transaction was risky and the documents were "shoddy". Expert evidence by experienced property lawyers was relied upon by the High Court Judge to conclude that a competent solicitor would have contacted Mr Appleton prior to the expiry of the 14 day statutory right of cancellation, after receiving details of the transaction from Blue Chip's broker. Tauranga Law's advice was necessary to advise Mr Appleton of the risks in the transaction and to enable him to consider cancelling within the statutory cooling off period. In the circumstances of the delivery of the documentation and the contact details for Mr Appleton and against the background that "in all likelihood" Mr Appleton would instruct him, the Judge considered that a duty of care to look after Mr Appleton's interests arose that was "independent of the contractual duties associated with the later contract of retainer".[7] The Judge found that Mr Olivier was in breach of a duty of care owed to Mr Appleton in not contacting him before the statutory right to cancel expired "in order to provide advice as to the risks inherent in the transaction, in time to enable him to consider whether or not to cancel within the 14 day cooling off period".[8] The conclusions in the High Court as to duty of care and breach were upheld in the Court of Appeal.

[23] The second basis on which it was claimed Tauranga Law was liable was for inadequate advice to the respondents on the risks in the transaction after it was instructed to act by Mr Appleton and the contract of retainer had arisen. Although the opportunity to cancel under the statutory cancellation provision had by then passed, it was accepted in the High Court and Court of Appeal that as a matter of practicality there would have been no difficulty in extricating Mr Appleton from the contract. Mr Olivier in his evidence accepted as much from his own knowledge of Blue Chip and there was additional evidence to the same effect. Replacement of Mr Appleton would not at the time have been a problem since there were many investors willing to put money into Blue Chip investments such as this.

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6 At [37].
7 At [37].
8 At [42].

[24] Under the first cause of action, once it was found that Mr Olivier was under duty of care to Mr Appleton even though a contract of retainer had not yet come into existence, the conclusion of breach was largely inevitable since all experts who gave evidence agreed that Mr Appleton should have been advised of his statutory right to withdraw from the transaction and as to its risks and there was no question but that Tauranga Law had failed to do so.

[25] Under the second cause of action, it was necessary to show that the advice given by Mr Olivier in the letter of 31 May (the only advice provided by Tauranga Law to the respondents) was in breach of the duty of care owed as an implied term of the contract of retainer. Both parties led expert evidence on the adequacy of the advice given.

[26] In the High Court, Allan J found for the respondents under the second cause of action too in holding that Mr Olivier was "negligent in the discharge of his professional obligations pursuant to an implied term in his contract of retainer to exercise reasonable care and skill".[9] The Judge found that Mr Appleton had received the letter of 31 May in sufficient time to consider his position before the deposit was paid to the vendor by Tauranga Law. He also accepted expert evidence that it was for Mr Appleton, and not Tauranga Law, to follow up the letter if he chose to do so. But he held that the advice given was not adequate to discharge the duty of care.

[27] Although the letter had identified and advised upon a number of risks, the Judge considered that some risks were insufficiently addressed and others were not identified at all. The Judge gave five illustrations: the failure to address the implications of the fact that the vendor was not the registered proprietor and absence of evidence of any agreement between it and the registered proprietor; the fact that the vendor was not a company of substance; the "somewhat ambiguous reference to the 'immediate release of the deposit'" which, the Judge said, "tends to obscure the reality that the vendor was to be at liberty to utilise the deposit as soon as it was paid"; the absence of plans and specifications and the inability to identify what was

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9 At [53].

being purchased; the fact that the vendor was a purchaser from the developer and that the purchaser lacked power to compel the subdivision and the development.[10]

[28] Although Allan J accepted expert evidence for the defence that "a competent solicitor would not feel it necessary to advise on each and every aspect of the contract documents", he considered that there were "fundamental problems" with the advice given in the letter:[11]

> They included major issues such as the ultimate availability of title, proper identification of the subject matter of the contract, the lack of deposit security and the absence of any apparent obligation on the vendor to actually carry the development through. In my view, these were material legal issues that ought to have been the subject of detailed advice by Mr Olivier. They were not matters going to the wisdom of the investment from a commercial point of view, which will ordinarily fall outside the purview of a solicitor's obligations.

[29] Many of the deficiencies in the advice identified by the Judge were not material to the cause of action because they did not lead to loss of the deposit. The criticisms the Judge had on the sufficiency of the advice as to the "lack of deposit security" were however relevant not only to breach of duty under the second cause of action, but also to causation of loss. That is because the Judge considered that the fact that Mr Appleton did not act on the warnings in the letter of advice supported the conclusion he came to that the breach of duty was not causative of loss of the deposit because the advice was a matter of indifference to him.[12]

[30] It was on causation of loss that the respondents' claim foundered in the High Court. Mr Appleton's evidence at trial was that he would not have proceeded with the transaction had he known that the property was not owned by the vendor and that his deposit was not being held in trust (as he said he had understood it would be). Allan J found that the assertion by Mr Appleton that he would not have carried on if he had realised that the vendor did not own the property and that the deposit was being released, rather than held in trust, was not reliable, when tested by reference to his reaction to the 31 May letter, both at the time and at trial.

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10 At [44].
11 At [52] (footnotes omitted).
12 At [66].

[31] When so tested, Allan J considered that Mr Appleton's evidence was inconsistent with the contemporary context which demonstrated his confidence in Blue Chip and its investment vehicle, a confidence he expressed to his co-trustee even after having received Mr Olivier's letter of 31 May. He did not take legal advice before entering into the contract because of his confidence in Blue Chip, in part because of his earlier, successful, investment with the Blue Chip group.

[32] Mr Appleton said in evidence that, at the time, he thought he had no risk in relation to the deposit because he believed it was being held in a trust account. Because of that belief and because he knew the contract was unconditional, he did not feel that the advice of 31 May was "pertinent". The Judge held that it was clearly pertinent and, even though deficient in a number of respects, "drew Mr Appleton's attention in stark terms to certain fundamental problems with the transaction".[13] The Judge accepted that Mr Appleton "had clearly made up his mind to proceed with this transaction, and that he was extremely unlikely to be put off by anything Mr Olivier said or wrote": "[h]e was certainly not put off by the 31 May letter, which would have given most investors reason to pause".[14]

[33] Allan J's conclusions on causation in respect of the second cause of action (based on breach of duty of care in the advice given in the 31 May letter) were:

> [65] The deposit was lost because the Blue Chip Group collapsed. That was the very risk highlighted by Mr Olivier in his 31 May letter. But Mr Appleton chose to proceed anyway, without asking Mr Olivier to elaborate on the advice in the letter.
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> [66] In my opinion, the plaintiff has not established that the shortcomings in Mr Olivier's advice caused the loss claimed. I consider that Mr Appleton was determined to proceed with this transaction, come what may, and irrespective of his legal advice. Accordingly, his claim must fail.

[34] For the same reasons, the Judge considered that, had Mr Olivier advised Mr Appleton before 7 May of his cancellation rights (the complaint on which the first cause of action was based), "Mr Appleton would nevertheless have proceeded".[15] The plaintiffs therefore also failed to establish that the breach of duty

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13 At [61].
14 At [62].
15 At [63].

of care in respect of the advice that should have been given about the right to withdraw was causative of loss.

[35] On appeal to the Court of Appeal, the Court considered that the deficiencies in the advice given in the letter of 31 May were more serious than the Judge had appeared to believe. The "mere highlighting of the risk of loss of the deposit did not bring home to Mr Appleton the magnitude of the risk".[16] The "failure to advise on the possibility of cancelling meant Mr Appleton was not made aware of the fact that he had the right to take steps to avoid the risk".[17] In those circumstances the Court thought it "cannot be said that Mr Appleton was made aware of the very risk that came to fruition".[18]

> [38] ... The reality of the situation was that Rockfort [the vendor] was purporting to enter into a sale of an apartment in circumstances where it had, as far as Mr Olivier and Mr Appleton knew, no rights to the land on which the apartment was meant to be built, no funds available to it to purchase the land and no right to do so, no funds available to actually develop the land or purchase the apartment building from the developer and no right to do so, and no support of any kind from Blue Chip.
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> [39] The lack of any real way of describing the apartment meant that the contract was probably void for uncertainty because it did not identify in any meaningful way what the apartment being purchased by Mr Appleton would comprise. There were none of the normal protections for a purchaser off the plans, such as provisions relating to the design and engineering specifications, certification of practical completion, a maintenance period, a termination date in the event that the development did not proceed, and so on. There was no explanation of why the deposit was paid to Blue Chip rather than Rockfort, and no indication of what obligations Blue Chip assumed to Mr Appleton. Blue Chip was said to be Rockfort's agent, but it was unclear whether the credit risk being taken by Mr Appleton was a credit risk on Blue Chip or Rockfort.
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> [40] In his evidence in the High Court, Mr Olivier shrugged off all of these deficits by saying that everything depended on Blue Chip performing, and that Blue Chip was a large and reliable company. This seems to us to be inadequate. The purpose of getting legal advice is to ensure that the investor who is attracted by the superficial desirability of an investment is advised on the legal underpinning of the assumed features. The reality in the present case was that Mr Appleton was, in effect, making an unsecured advance to Blue Chip, a party with which he had no contractual relationship at all.

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16 *Appleton v Tauranga Law* [2013] NZCA 420, [2013] 3 NZLR 777 at [26].
17 At [26].
18 At [26].

[36] As a result of its view that the deficiencies in the advice given were more serious than the Judge had treated them, the Court of Appeal considered that it was necessary to "reassess the issue of causation in light of our findings".[19] It was of the view that greater weight than the Judge had given it in the High Court was due to Mr Appleton's evidence that, if aware of the deficiencies, he would not have continued with the agreement. It considered that the acknowledgement by Mr Appleton (in answer to a question in cross-examination) that he had not regarded the advice of 31 May as "pertinent" had been overemphasised by the Judge in a way unfair to Mr Appleton:[20]

> What he actually said was that he did not think that the letter was pertinent because he believed that the deposit was held on trust. This brings very much into focus the adequacy of the reference in the letter to the fact that the deposit had been released to Blue Chip.

[37] The Court of Appeal saw no reason to depart from the Judge's earlier expressed view that the reference in the letter of 31 May to the "immediate release of the deposit" tended to "obscure the reality" that Blue Chip could "do what it liked with the deposit as soon as it was paid".[21] In those circumstances, it thought the letter "would not have been particularly pertinent if the deposit had been held on trust as would be normal in a property transaction".[22]

[38] Nor did the Court of Appeal think that the Judge was right to place such weight on evidence that Mr Appleton was determined to go ahead with the transaction:[23]

> Again, we do not consider that it is right to conclude from the fact that Mr Appleton was dead set on entering into an orthodox property purchase agreement with Blue Chip that he was also dead set on entering into the unsecured deposit arrangement that he actually entered into in circumstances where he did not realise that was what he was doing.

[39] The Court of Appeal thought it immaterial that Mr Appleton had not sought legal advice before entering the transaction. He knew that the information would be sent to a lawyer and it was received within the time in which cancellation was open

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19 At [41].
20 At [48].
21 At [49].
22 At [50].
23 At [51].

to him: "[a]ll of this brings squarely into focus the fact that Mr Appleton was not given advice that he could have cancelled the agreement if he was concerned about the terms of it":[24]

> The fact that Mr Appleton entered into the agreement without legal advice does not logically support the conclusion that he would not have cancelled it if he had been properly advised as to its nature and had been told that cancellation was an option available to him.

[40] The Court of Appeal was of the view that the Judge should have considered "whether Mr Appleton would have cancelled after he had been properly apprised of the precariousness of the contractual position and advised that he had, in effect, made an unsecured deposit with Blue Chip in circumstances where he had no contractual rights against Blue Chip and where the eventual purchase of an apartment was contingent on a number of significant matters over which [the vendor] had no contractual control".[25] If this question had been addressed, the Court of Appeal thought that the Judge "would have found that Mr Appleton would not have continued with the transaction".[26]

[41] As a result of its difference of view on the nature of the inadequacies in the advice, the Court of Appeal was led to a different conclusion on causation:[27]

> Given that we see Mr Olivier's failings as much more significant than the Judge did, we must of necessity reassess the causation issue in light of our different conclusion on the nature of the breach of duty. Having done that, we conclude that on the evidence before the Court, Mr Appleton established that if he had been fully appraised of the nature of the transaction he was entering into and the legally exposed position which he faced, and if he had been told that he was able to withdraw from the transaction without penalty, he would have done so.

[42] In the result, judgment was entered for the Appleton parties in the Court of Appeal for the amount of the deposit, together with interest.

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24 At [52].
25 At [53].
26 At [53].
27 At [54].

The appeal

[43] It is not challenged on the appeal that the courts below were right to find that Tauranga Law owed duties of care to Mr Appleton and his family trust both in the period before the contract of retainer arose and under it. Nor are their findings of breach challenged either as to the failure to advise before the statutory right of withdrawal expired or in respect of the inadequacies of the letter of advice of 31 May. Instead, Tauranga Law appeals the determination of the Court of Appeal, overturning the decision in the High Court on the point, that the breach of duty caused the loss of the deposit of $90,468.75. Whether Mr Appleton's loss was caused by breaches of duties of care owed to him by Tauranga Law in failing to warn adequately of the risks in the transaction depends on whether he established on the balance of probabilities that he would not have paid the deposit and continued with the transaction if properly advised.

[44] Allan J's finding, on the basis of the expert evidence, that it was for Mr Appleton to follow up on the advice, rather than for Tauranga Law to take further steps, was not questioned by the Court of Appeal. The evidence bearing on causation therefore focussed on Mr Appleton's response to the letter of 31 May and the terms of the letter, assessed in the contemporary context and as explained in his evidence.

[45] Although breach of duty of care through inadequacy of the letter of 31 May is no longer in issue, the advice given in the letter of 31 May is inextricably linked to the question of causation in respect of both claims. The difference in the views taken in the High Court and Court of Appeal turned on whether the letter sufficiently brought home to Mr Appleton the fact that his deposit was at risk.

[46] Allan J considered that Mr Appleton's failure to react to the letter of 31 May indicated that he would not have been deflected from continuing with the transaction by advice which properly discharged the duty of care owed to him by Mr Olivier. The Judge found that Mr Appleton's evidence that he would not have continued was not reliable when measured against his reaction to the 31 May letter and the contemporary context.

[47] In reaching the opposite conclusion, the Court of Appeal was influenced by Allan J's earlier comments, when considering the question of breach of duty, that reference in the letter to the "immediate release of the deposit" was "somewhat ambiguous" and "tends to obscure the reality that the vendor was to be at liberty to utilise the deposit as soon as it was paid".[28] It took the view that the letter did not sufficiently identify that the deposit was at risk on its release and that Allan J had therefore been wrong to test and reject the reliability of Mr Appleton's evidence against his failure to take steps to avoid paying the deposit or to follow up on the advice. Mr Appleton's view that the letter was not "pertinent" on this approach was treated by the Court of Appeal as not inconsistent with his evidence that he would not have paid the deposit if properly advised of the risk, because it did not alert him to the fact that the deposit was being paid to the use of Blue Chip instead of being held in a trust account.

[48] The Court of Appeal reassessed the Judge's finding of fact on the question of causation because it thought the terms of the transaction and the deficiencies in the advice were more serious than the Judge had treated them. We do not agree that the Judge minimised the problems with the transaction. Nor do we think he failed to identify the shortcomings with the letter of 31 May. He was right however to treat the sufficiency of the advice about the security of the deposit as the only matter material to the actual loss which ensued, a view with which in substance the Court of Appeal did not disagree. The reason given by the Court of Appeal for undertaking its own reassessment of the findings on causation is not therefore we think convincing, although it was entitled to take a different view on the evidence from that taken by the Judge, without further justification. Was it right to do so?

[49] We are of the view that it was not. We consider that the terms of the letter of 31 May, the context provided by the agreement and dealings between Mr Appleton and the broker, and the absence of reaction by Mr Appleton (either to the letter or to the advice that the deposit had been paid to Blue Chip) all support the conclusion

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[28] *Appleton v Tauranga Law* HC Tauranga CIV-2010-070-385, 12 December 2011 at [44], discussed by the Court of Appeal in *Appleton v Tauranga Law* [2013] NZCA 420, [2013] 3 NZLR 777 at [49].

reached by the Judge that the legal advice he received was immaterial to Mr Appleton because of his confidence in the investment.

[50] Although the Judge did not explicitly make adverse findings of credibility in relation to Mr Appleton, he indicated that his assessment of the evidence was made to test Mr Appleton's assertions in evidence that he would have done all he could to get out of the transaction if he had appreciated his deposit was not secure in a trust account. We would be reluctant to disturb the trial Judge's rejection of the evidence of the witness. Mr Appleton had already been found wrong in the evidence that he had not received the letter of 31 May until after he had executed the loan agreements, opening the way to payment of the deposit. He did not provide any convincing explanation in his evidence as to his understanding of what "release" entailed. He had to acknowledge in evidence that his view that the vendor and the developer were the same entities was contradicted by the terms of the agreement. It was understandable that the Judge preferred to assess the probabilities for the purpose of causation on the basis of the contemporary dealings and the written record, rather than Mr Appleton's assertion, years after the events, that he would have done his best to extricate himself if disabused of the view that the deposit was not being held on trust.

[51] We are also of the view that the Judge was correct in the conclusion he came to after examining the contemporary context and documents.

[52] The terms of the agreement signed by Mr Appleton explicitly linked the immediate release of the deposit with the interest to be paid: the vendor was to "pay to you interest for immediate release of the deposit at 8.5% fortnightly in advance". Nor was it reasonable to think that such rate of interest would be paid except for money available to the use of the payee of the deposit. Deletion of the provision in the contract requiring the deposit to be held by a stakeholder also indicated that release was to someone who could not be characterised as a stakeholder.

[53] The letter of 31 May alerted the purchaser in prominent format to "[t]he major risk in this transaction". It was that if the vendor went into liquidation or the developer could not complete, the purchaser would be a creditor and "may then lose

the entire deposit". While "release" of a deposit may not convey in itself the idea of payment to the use of another and may not be inconsistent with release to a stakeholder, the context here made it clear that the payee was Blue Chip and that it was providing value for the release of the deposit to it. The payment of 8.5% interest by the vendor in exchange for release of the deposit in the agreement and the advice in the letter that the trust would be a creditor which could lose the entire deposit in the event the vendor went into liquidation or the developer did not complete made it clear to a reasonable reader that the trust was advancing the money for the use of the vendor, receiving in exchange interest from which it would cover the cost of its borrowings from the BNZ and make a gain.

[54] The Court of Appeal in effect suggested that there was inconsistency between the finding of breach of duty of care in the advice of 31 May (a finding not challenged by Tauranga Law in the Court of Appeal) and the rejection of sufficient causal link with the loss of the deposit. It based this on the Judge's reference to some ambiguity in relation to the use of the deposit. It is not easy to understand what the Judge meant by this general remark. Whether there were other ambiguities in the advice which made aspects of treatment of the deposit obscure, as the Judge suggested but which we doubt, does not however affect the central message in the letter of risk of loss of the deposit on liquidation and the reference to the purchaser then being a creditor in the liquidation. That is not able to be reconciled with a belief that the deposit was secure because it was held in a solicitor's trust account. Any ambiguity was therefore not material to the assessment of causation which depended on Mr Appleton's fixed erroneous view that the deposit was to be held in a trust account. That view was not one contributed to by Tauranga Law and, since it was contradicted both by the terms of the agreement and the letter, not a misconception that it could reasonably have thought Mr Appleton would be under.

[55] The letter of 31 May plainly advised that the deposit under the contract entered into was to be paid "immediately". Mr Appleton was advised in bold type and large font that if the vendor failed or the developer did not complete, he would "be a concurrent creditor and may then lose the entire deposit". This indeed conveyed the information that the money was being advanced for the use of the vendor and that, in the event of liquidation, Mr Appleton would simply be a creditor

who could lose the deposit. That is not information that can reasonably be reconciled with the deposit being held in a solicitor's trust account.

[56] In the letter of 11 June 2004 to Mr Appleton confirming that the BNZ loan had been drawn down, Mr Appleton was advised that Tauranga Law had "paid to Blue Chip New Zealand Limited the sum of $90,468.75 for the deposit". No question was raised at the time by Mr Appleton about the payment, which is difficult to reconcile with his evidence that he believed the deposit was being held in a solicitor's trust account.

[57] The explanation that Mr Appleton thought that he was bound and that the letter of advice was not "pertinent" for that reason (as well as because he was confident his deposit was to be paid into a trust account) does not explain why he expressed confidence in the investment to his co-trustee before the documents were signed at Mr Kelly's office which was, as the High Court found, after the letter of 31 May had been received.[29]

[58] Although in his evidence Mr Appleton suggested that he thought retention in a trust account would be usual for a real estate sale, this was not a usual agreement for the sale and purchase of realty as the terms of the agreement and the terms and form of the letter made clear. The information provided in the opinion was highly pertinent and is impossible to square with a reasonable belief that the deposit was to be held on trust until settlement. The precise risk in the transaction which eventuated and caused loss was identified in the letter.

[59] On causation, Allan J thought "the heart of the matter" was reached with Mr Appleton's evidence that he did not take much notice of the letter from Tauranga Law because he "felt confident with what I had".[30] We agree. We would not differ from the assessment of the Judge that the breach of duty was not causative of the loss suffered by Mr Appleton and his family trust. The appeal is accordingly allowed and the judgment in the Court of Appeal set aside. Judgment is entered for the appellant, with costs of $25,000 together with reasonable disbursements to be set by

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29 *Appleton v Tauranga Law* HC Tauranga CIV-2010-070-385, 12 December 2011 at [47].
30 At [59].

the Registrar if necessary to be paid by the respondents to Tauranga Law. The costs order made in the Court of Appeal is set aside and any costs order in the High Court is reinstated. If costs cannot be agreed for the Court of Appeal, costs should be set by that Court in the light of this judgment.

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