

Blanchard J Yes Mr Galbraith. Mr Ring.

Ring Thank you Sir.

Blanchard J Now you got a message last week sent in request to indicate what we were interested in.

Ring Yes I'm grateful for that Your Honours. I would like the opportunity to develop three points. First the focus of the issue that was signalled by Your Honours that you were particularly in whether the rule change in February 2007 meant that a judgment on a duty of care owed by NZX to the clients of Access, and Access itself would have no precedent value, but I'd also like the opportunity to develop a second point and that is a very short point, whether the BNZ's claim was clearly based on an untenable but for causation approach which is contrary to *Price Waterhouse and Kwan*, and I would also like to develop a third point, whether Access's claim is clearly untenable because of its necessary reliance on Access's own wrongful conduct. I have for Your Honours a summary of the submissions that I would like to make. Perhaps I can just say from the outset Your Honours for the sake of hopefully some economy of language that I appreciate in making these submissions that first this is an application for leave to appeal and not the appeal itself

Blanchard J Yes.

Ring And so I'm making the submissions under the general proposition that we seek the opportunity to fully argue these grounds of appeal and second that I appreciate that this is in the context of a strike-out application and so I'm making them under the general proposition that we seek the opportunity to argue that the Court of Appeal was wrong to find the causes of action tenable. If I can deal first with the point that Your Honours indicated particular interest in. First of all I accept Your Honours that the rule change effects the precedent value in relation to claims falling to be considered under the current regulatory regime, but my submission is first of all that there's still precedent value in the decision of this Court on the issue of whether the fact that this is being carried out by a commercial regulator rather than a traditional regulator is relevant to the existence or otherwise of a private duty of care. My submission is that this is part of the wider interest in the commercial and regulatory roles, and if I can just indicate to Your Honours that the public interest and significance of this is perhaps highlighted by – this was an article two weeks ago in the *Weekend Herald* – 'the Securities Commission is concerned that the sharemarket operator at New Zealand Exchange's diversification to new commercial operations may compromise its position as front-line

regulator of its own markets. Yours Honours there's presently only one registered Exchange and in my submission it's of sufficient importance and significance to warrant an appeal for anyone applying for registration to know where they stand as far as these principles are concerned. In this respect it would be my submission that the Court of Appeal was plainly wrong in its understanding of the market and of NZX's place in it, and if I can invite Your Honours to have a look at paragraph.75 of the Court of Appeal judgment, you can see that the Court of Appeal referred there to the conflict between commercial success and public interest in common good and suggested what if there were five registered exchanges, could it be said that they were all regulators in the common good. In my submission Your Honours, that, with the greatest respect to the Court of Appeal displays a misunderstanding of the position. While you can have more than one exchange, you can only have one regulator for each exchange, and if the Court of Appeal approach, or the Court of Appeal's attitude is correct, what they were contemplating or must have been contemplating is two exchanges side by side potentially with completely different duties, and if I can just expand on that, imagine Dow Jones Limited and the NASDAQ Commissioner - two Exchanges side by side, contemplate they're both operating under the same conduct rules; Dow Jones Limited is a commercial entity; the NASDAQ is run as a traditional regulator. With these identical conduct rules side by side Dow Jones Limited on the Court of Appeal's analysis could potentially owe a private duty of care to the individual brokers and to the clients of the brokers – the commercial regulator would not. That just with the greatest respect cannot be the legal position. Similarly Your Honours with the finding at paragraph.79 of the judgment that the Securities Commission was the primary regulator of the New Zealand Stock Exchange with NZX having some regulatory functions. That was what was said at paragraph.74, and having no quasi-judicial activity, that was what was said at paragraph.84. I dealt with this in my submissions between paragraphs.4.3 to 4.13. NZX is the statutory operator. That's what the legislation requires it to do to operate the Exchange. It's required to operate the Exchange in accordance with the regime, which is in accordance with the conduct rules. Under those conduct rules it licenses, it monitors and it disciplines, including by way of hearings and by imposing penalties on brokers, and there's a comparable regime in relation to listed companies. The Security Commission monitors NZX, but as the article that I referred Your Honours to shows, NZX is generally regarded, and under the rules and under the legislation must be the market regulator – must be the primary regulator. So my submission on that first point is that it's of significant public interest, commercial interest, to have a definitive ruling on the question of whether you operate under a commercial regime or potentially private duties of care whereas if you're a

traditional regulator you do not. The second aspect of the submissions on this point Your Honour is that in my submission there is still precedent value in potential claims under the previous rules.

Wilson Mr Ring have any other claims been made or notified under the previous rule?

Ring No they haven't.

Wilson No.

Ring This claim was brought in September 2005 and relates back to inspections as far ago as March 2000. The claim against NZX is that if it had acted non-negligently, it would have closed Access down and members of the public would not have been become clients of Access. That is they were the last people standing when the music stopped.

Tipping J So the proposition Mr Ring is it against you that the Exchange can owe a duty in tort to clients of brokers for not shutting the broker down sooner?

Ring It's worse than that Your Honour. The duty is owed to members of the public to prevent them from becoming clients of the brokers.

Tipping J Right, right.

Ring It doesn't even get to that, and if you have a look at tab

Tipping J Well they won't have a loss will they, or very unlikely to have a loss unless they do become a client. Theoretically it could be owed for the public at large but in practical terms it's owed to those who become clients of a broker; the argument being that the broker should no longer have been allowed to exist so as to take on the client who has suffered the loss.

Ring Your Honour it's the classic indeterminate liability. It's a duty that is owed to all the world to prevent them from becoming into a position where they might incur a loss – an indeterminate loss and an indeterminate liability.

Blanchard J If they're only going to incur a loss if a broker becomes insolvent because they will have a claim against the broker.

Ring Indeed, but at the time the duty is owed they're not clients yet.

Blanchard J But we don't have any other insolvent brokers do we?

Ring Not yet, but the point is

Blanchard J When was the rule changed?

Ring The rule changed in February 2007 but

Blanchard J So we've got 18 months almost has gone by.

Ring Yes but the limitation period for claims by clients would expire six years after the loss, six years after they incurred the loss, and losses may not yet have occurred in relation to inspections before February 2007.

Blanchard J But if we don't have an insolvency of a broker having intervened, the likelihood of that isn't very great.

Ring I absolutely agree Your Honour, it is contingent on there being a default by a broker.

Blanchard J Yes, which is extremely unlikely to occur in the future in circumstances which will give rise to a claim pre-February 2007.

Ring Well

Blanchard J Give me a scenario.

Ring The scenario would be simply that a broker fails now and the claim is by clients of that broker who became clients of the broker before February 2007, they would say that broker owed me a duty of care

Blanchard J But if the transaction giving rise to the loss occurred after the rule change they wouldn't be able to bring the claim would they?

Ring Well they would be able to

Blanchard J I don't think you want to say they can.

Ring Well I can't quite see the suicidal point at the moment so maybe I'm walking into a hail of fire, but

Blanchard J No, the fire mightn't be coming from the bench, it might be coming from behind you.

Ring Well it might. Can I just point Your Honours to the statement of claim because this might help to explain what I'm saying.

- Blanchard J Well no, no, no, please go back to the scenario and develop it so that I can see that there is a realistic possibility that a new claim might arise because at the moment I haven't seen it.
- Ring The scenario is that a broker fails tomorrow. The clients of that broker have their funds unavailable to them. They
- Blanchard J In respect of a transaction occurring before February 2007 or afterwards?
- Ring Well in that they became clients of the broker before February 2007.
- Blanchard J Yes, but isn't the critical point, and I haven't read the rule carefully. Indeed I don't have the full text of it, but wouldn't the critical point be when they did a transaction rather than when they first became clients?
- Ring Well that might be the second point that I want to develop which is the *Price Waterhouse v Kwan* point, but on the current pleading, the current pleading Your Honours is that the duty was owed to members of the public to shut Access down at an earlier stage as a result of which they wouldn't have become clients and/or wouldn't have invested.
- Blanchard J It seems to me somewhat fanciful to be suggesting that 18 months after the rule comes in you'd still be looking at a claim of that kind in relation to something that occurred before the rule change.
- Ring Well this claim came five years after the inspections that are being impugned. The inspections that are being impugned here start from March 2000 under the Deloitte's part of the claim for which we are also being held responsible and then follow through to our own involvement as the inspectors. So we're talking about a five year run on this one.
- Wilson J Was there any transitional provision in the new rules that could be relevant?
- Ring No.
- Tipping J I feel my brother's concern about the likelihood of this being a useful precedent Mr Ring but I don't quite at the moment grasp – well I grasp it in outline – but are you able to develop your point 1 under your – in other words why is this still going to be a useful precedent anyway if I can put it as crudely as that? Never mind the rule change.

- Ring Why is it going to be a useful precedent?
- Tipping J I can understand that it will be a precedent in relation to the general relationship between regulators and non-regulators, or people who act in a commercial way as well as being regulators, is that essentially it?
- Ring That's the point Your Honour. I mean here we have a regulator who operates under a commercial structure as opposed to a traditional regulator which is Government appointed or an SOE or some sort of Crown Entity, and the proposition that was accepted by the Court of Appeal is that because it was under a commercial structure, the auditor cases are the correct analogy, whereas if it had been a traditional regulator then the regulator cases would have been the proper authorities. If the regulator cases had been the proper authorities then there would be no questions and no duty of care, and our basic proposition is that this is a trying for form over substance.
- Tipping J In other words they haven't carefully isolated which hat the Body was relevantly wearing, or that is said to have caused the loss if you like. What it was actually doing or should have done
- Ring It wasn't a question of not properly isolating the hat. They ignored the hat. The Court of Appeal said the fact that you are regulating is not the controlling factor here, it's the fact that you are a commercial entity, so all those cases like *Davis* and, well *Davis* is the
- Tipping J Were you in that *Carter* case Mr Ring?
- Ring Yes I was indeed Your Honour.
- Tipping J Yes. In that case there was a pure regulator wasn't there? The Court of Appeal is saying that if you happen to be a commercial enterprise as well as being a pure regulator that takes you out of the regulator-type jurisprudence. Is it as short as that?
- Ring It's as simple as that Your Honour and what we would like to be submitting to Your Honours on a full appeal is that the reasons that a statutory or a traditional regulator doesn't owe a duty are the questions of the chilling effect and if you close them down early somebody suffers, if you close them down later somebody else suffers. It's those fine balances as to whether you let people carry on in their enterprise; see if they can solve it or you shut them down early. The cases have consistently said that a regulator who operates in that area and has to make those fine balances in judgments shouldn't be looking over their shoulder defensively to see whose going to sue them if they

jump one way as compared with whose going to sue them if they jump the other. Now what we want to say Your Honour is those same factors apply to every regulator, whether that regulator is in a direct line from the Government or it's operating under a commercial environment.

Blanchard J Alright, well I think we've probably

Wilson J Can I just ask one further question on that that Mr Ring do you accept that apart from that general question whether there's a duty here turns largely on the relevant rules?

Ring Yes it does.

Wilson J Yes.

Ring The second point that I wanted to develop Your Honours is this question of the 'but for approach' which really refers to the same part of the statement of claim that I was taking Your Honours to before. It's in tab 16 – it's the last tab in the book – and it's paragraph.187 sub paragraph (d). It's got a big number 60 at the bottom. And this is an amplification of the submissions at paragraph 4.32. I've got four basic propositions for Your Honours, which are actually three propositions plus a conclusion which is driven by logic. The four propositions are these. First of all there's a crucial difference between the opportunity to cause a loss and actually causing that loss. The opportunity is a 'but for' approach to causation which is not appropriate to tortious negligent claims, and Your Honours will immediately recognise that as the test in *Price Waterhouse v Kwan* of Your Honour Justice Tipping's judgment which is at tab3 of the booklet at paragraph 28, and that was the lead into and then the part of what is now the Bible on causation in New Zealand

Tipping J What, this case is now the Bible did you say?

Ring Well it is the Bible on causation in New Zealand Your Honour. The second proposition is it is a utilisation of the 'but for' causation approach to if the defendant had taken appropriate care before the plaintiff client invested, the Trust account would have been closed down and the plaintiff would not have suffered the loss because there would have been no opportunity for the defaults to occur, and that's the proposition in the immediately preceding paragraph in *Price Waterhouse v Kwan* – paragraph 27. The third proposition is back to 187(d) of the statement of claim, the BNZ's claim is that if NZX had taken appropriate care with its inspections before the Access clients had invested, Access would have been closed down and the clients

would not have suffered loss because there would be no opportunity for the defaults to occur. And the fourth proposition or conclusion from that is this claim must be clearly untenable.

Tipping J Because unusually for strike-out there is simply no basis on the pleaded facts for a finding of causation in tort. That has to be

Ring Well that's the effect of that pleading in 187(d). It's being smack in the same as paragraph 27. The BNZ's answers to that in its submissions filed in opposition to the leave to appeal are two-fold. First it says that because it was foreseeable or inevitable that the client suffered loss because of NZX's, or would have suffered loss because of NZX's negligence that's not the 'but for' approach, but in my submission that confuses duty and causation and that's the very thing Your Honour warned about in *Price Waterhouse v Kwan* at paragraph 30, that it's desirable to keep the question of the existence of a duty of care and its content conceptually separate from issues of causation. The second reason it says is that the Court of Appeal in *Price Waterhouse v Kwan* refused to strike out the claim on causation grounds, but as Your Honours will see at paragraph 29 of the judgment, that was only because *Price Waterhouse* accepted that the allegations equivalent to Access's were untenable and it filed an amended pleading deleting them.

Tipping J In strike-out cases there can be amendments but are you saying it would be impossible for this claim to be amended to plead a causation line or causation thesis that passes muster.

Ring There's been no suggestion from the other side that they could fix it.

Tipping J Yes.

Ring And as Your Honour said in I think was *Johnson and Watson*, 'it behoves a plaintiff to come along with its biggest, best and brightest cause of action in its statement of claim when it's facing this sort of challenge.

Tipping J As a general proposition I agree with that.

Ring So I'm simply saying Your Honour that patently on the pleading it's untenable. The Court of Appeal

Tipping J Might not they want to ask the Supreme Court to revisit the whole question of causation in tort?

Ring Well there's been no suggestion that *Price Waterhouse v Kwan* is correct

Tipping J Is incorrect.

Ring I'm sorry, is incorrect.

Tipping J Well that's a relief.

Ring Thank you for correcting me Your Honour. It is one of those judgments that is a bit too well entrenched now to be undone.

Tipping J And your clients like it Mr Ring.

Ring That's not correct Sir, our clients love it. So that's the second point that I would want to develop on the appeal. The third point is this question of whether Access's claim is clearly untenable because of its necessary reliance on Access's own wrongful conduct. The proposition is that we seek to argue that the Court of Appeal was plainly wrong in rejecting NZX's submissions that Access's cause of action was untenable for duty of care and/or causation reasons because it relies on Access showing that through Mr Marshall it acted dishonestly in breaching regime and in concealing this from NZX, and again that's what's pleaded at paragraph 106 of the statement of claim.

Tipping J This is the claim made by Access itself?

Ring Yes it is.

Tipping J Yes. This doesn't apply to client claim?

Ring No it doesn't.

Tipping J No.

Ring But the way these things would hang together Your Honours is that if granted leave on the first ground that would potentially deal with all claims. If granted leave on the second and third ground, collectively they would deal with all claims as well.

Tipping J But if leave was granted do you want it to extend beyond just pure duty of care issues or do you want it to extend to causation issues and *ex turpi causa* issues?

Ring Yes Sir.

Tipping J So that you want at best three permitted grounds?

Ring Yes Sir.

Tipping J Yes.

Ring You will see in paragraph 106 that what is expressly pleaded is Access's own breach of its obligations under the rules, including in (b), financial obligations to clients were met in debts of Access and dividends were paid by unauthorised use of client funds – so in other words Access used client money to benefit itself and to benefit its shareholders, and for example (e) reference to Mr Marshall

Tipping J Now is Access claiming against the Exchange for failing to stop it from breaching the Exchange's own rules?

Ring Precisely Your Honour.

Tipping J And what did the Court of Appeal say about that?

Ring That it was fine.

Tipping J That it wasn't so off the wall as to be strikeable out?

Ring Precisely. They held first of all that the duty of care was tenable for the same reasons as the duty of care was tenable as owed to the clients. Now I have some issues with that and that's one of the things I would like to develop

Tipping J It's a wholly different question as to whether you owe a duty of care to a member of public qua a client as against a duty to a broker.

Ring Well as one of the English cases said Your Honour this is akin to the Yorkshire Ripper claiming against the Police for failing to stop him from committing his crimes.

Blanchard J How much difference will it make to the result if Access is taken out of the case on this ground that you are raising and if BNZ is allowed to proceed and succeeds at trial?

Ring The quantum of the Access claim includes the BNZ amount. Access is claiming everything it owes to the clients plus other losses that it says it incurred from a trading point of view.

Blanchard J Is that extra bit substantial?

Ring I think it's about \$400,000/\$500,000.

Blanchard J Well some of us might think it's

Ring Well compared with what we're facing on the first claim

Tipping J How much are you facing?

Ring I think it's \$4.8 million.

Tipping J Well it's not a trivial amount.

Ring No, it would hurt.

Blanchard J But given that refusal of leave isn't going to prevent the point being argued before this Court at a later time, the question is whether it's better on this point anyway to allow it to go to trial if the amount at stake on this point isn't a large part of the claim.

Ring Well Your Honour first of all if you grant me leave on the second point, which is that 'but for causation *Price Waterhouse*', and leave on this point

Blanchard J You're saying we might as well allow it, yes, I accept that argument, but I was just looking at this in isolation.

Ring In isolation, no, except that it require a completely different consideration of duty of care and causation so effectively we're running two separate cases

Blanchard J Yes.

Ring And if it's never going to make it at the end of the day, patently never going to make it at the end of the day, then obviously we'd like to see it disposed of now. And we say it isn't going to make it

Tipping J And there would be some quantum issues of some difficulty I would have thought downstream if there was liability and you'd want to get rid of those from the trial too I presume Mr Ring?

Ring Well yes we would

Tipping J The client claims are pretty straightforward quantum-wise one would think

- Ring On the BNZ's case yes it is because they just go to the records at the end of the day and say this is the list of what we've lost.
- Tipping J But what you may have, sorry, what they may be suing for in relation to their own trading position I would have thought was potentially more complicated.
- Ring Very much more Sir, yes Your Honour. So as far as the Court of Appeal was concerned they held on this Access side of things the duty of care again was analogous to the situation with auditors. That was at paragraph 115 of the judgment. On causation they held that the chain of causation was not broken by the very act of the defendant in that it was obliged to protect the plaintiff from this sort of loss - that was at paragraph 117 - and in doing so they effectively rejected as the controlling principle the public policy principle *ex turpi causa* which we say must apply which obviously involves access relying on its own dishonesty. Although this was argued in both the High Court and the Court of Appeal, this public policy point, it didn't get mentioned in the Court of Appeal judgment at all. To be fair, it wasn't put together with the very thing argument, it was put as an argument as an alternative and additional argument which stood alone as a reason why the claim was untenable.
- Wilson J Mr Ring didn't the Court of Appeal say that the question of whether Mr Marshall's conduct was attributable to Access was at least in part a question of fact at the trial?
- Ring Yes it did Your Honour, but in my submission that's clearly not right and
- Blanchard J But isn't it a factual question for exploration at trial? Doesn't that need to be done before you can determine appropriately whether Marshall's conduct should be attributable to Access?
- Ring With the greatest of respect Your Honour, no. It's a matter that can be determined now on the undisputed position, and the undisputed position is broadly twofold. First Mr Marshall was the CEO, the Managing Director, and the only Executive Director of Access, and second the regime imposed requirements amongst other things to designate one person who was described in the rules as the Managing Principal to take responsibility for Access's compliance with the rules and in dealing with NZX. And it also imposed specific duties on the Managing Principal to ensure that Access maintained accurate and honest accounting records. It also required that the constitution of Access contain an express agreement that Access would be bound by the regime, and it also imposed express requirements on all

shareholders and directors of Access to ensure that Access complied with the regulatory regime.

Tipping J Doesn't the very claim suggest that the defaults of Marshall - it can't reasonably be disputed, that's what you're saying is it, that whatever he did is the conduct of Access?

Ring If you take the three attribution approach, or three attribution-type approach in Meridian, the constitution, you look at the constitution – it specifically says, and has to say that Access will comply with the regime. If you take the second attribution rule which is general agency; you look at Mr Marshall's position at Access – only Executive Director, CEO, Managing Director – you get attribution in that way. If you take the third approach which is in the absence of attribution by the first two you look at the particular statutory regime and you ask the question whether that regime would be defeated if attribution wasn't found to the particular person you're looking for, then again it's Mr Marshall. For NZX purposes Mr Marshall was Access.

Tipping J What was that paragraph in the statement of claim that you referred to a few minutes ago which

Ring 106

Tipping J 106 was it?

Ring 106.

Tipping J These are the allegations of the plaintiffs?

Ring Yes.

Tipping J So they are in effect saying that you had agreed to protect them from their own breaches.

Ring It's a game of hide and seek. If you get away with it you're fine, but if we fail to catch you then we pay. That's the nature of the claim that is being alleged.

Tipping J And the Court of Appeal said that was arguable?

Ring That's fine, and I would like to approach it in two ways. First of all in relation to the duty of care point, and the proposition there Your Honours is that there is clear authority that a defendant has no duty to protect a plaintiff from economic harm caused by the plaintiff's own negligence, and even more so caused by the plaintiff's own

dishonesty, and cases like *Wellington District Law Society v Price Waterhouse* which is in the bundle, tab 13, is authority for that proposition. It cites two other cases in New Zealand. One is *Harris*, decision of Justice Somers, the other is *Morton v Douglas Homes*, a decision of Justice Hardie Boys. Both were authorities for that proposition and it doesn't matter whether you look at it from a foreseeability point of view or a policy point of view or both, you end up with the same conclusion on that. So the only other question that could arise is whether Mr Marshall was Access for these purposes, and for the reasons that I just outlined Your Honours, it doesn't depend on the facts, it depends on the way the regime is set up, and on the way the regime is set up there can be no question as a matter of law and/or undisputed fact that Mr Marshall was Access for these purposes. Neither is there any question that he was dishonest in discharging his compliance duty as Managing Principal, including concealing breaches of the regime by false accounting in returns to NZX and he's been convicted of that. So we say on the duty of care basis this is clearly not comparable to auditors, which is what the Court of Appeal said, no this is analogous to the auditor situation. In an auditor situation amongst other things the person being audited and its personnel owe no duty of compliance to the auditor. It's a fundamental difference. So that's the duty

Tipping J Well the whole purpose of an audit is self-evident really.

Ring Yes, yes it is, different purpose altogether. So if you go down the duty of care line we say it's clear on that basis. If you go down the causation line we say you get to the same result because of the *ex turpi causa* point, and what you've got in this area is an apparent inconsistency between the very thing principle. This was the very thing that the defendant owed a duty to protect the plaintiff from versus the *ex turpi causa* principle. It's contrary to public principle to allow the plaintiff to rely on its own dishonesty or negligence. That inconsistency was resolved in England at least by the Court of Appeal last month in the *Moore Stephens* judgment which I've given Your Honours at tab 15. A somewhat similar situation, or a sufficiently similar situation to be of considerable assistance. *Moore Stephens* Your Honours were the auditors of *Stone & Rolls*. *Stone & Rolls* was a one-man company and that is a distinction that is potentially relevant here except that we would say for the reasons I've just outlined because Mr Marshall was Access for present purposes, the principles are directly applicable. But *S&R* was a one-man company. Mr Stojevic was the man. He caused *Stone & Rolls* to defraud the banks. *Stone & Rolls* obtained the funds which are then paid out to the benefit of him and other parties to the frauds. The victims recovered from *Stone & Rolls* and then the liquidators of *Stone & Rolls* claimed

from the auditors that they negligently failed to detect Mr Stojevic's dishonesty. Again a very similar situation. The Court of Appeal held that the controlling principle was *ex turpi causa*, and in doing so they applied the House of Lords judgment in *Tinsley v Milligan*. In *Tinsley & Milligan*, although Their Honours differed in the final result for various reasons

Blanchard J Those were the lesbians who were defrauding the Social Welfare?

Ring They were indeed Your Honour.

Tipping J My brother has an amazing grasp of the facts.

Ring Well Your Honour did of course the judgment in *Duncan v Donald*, where you described the result in *Tinsley v Milligan* as uncomfortable. *Tinsley v Milligan* of course was about property interests and in particular equitable property interests.

Blanchard J The uncomfortable element was the inability that the House of Lords felt to be able to make any adjustment between the two ladies.

Ring Yes, and they said

Tipping J Tributary something or other.

Ring Well they said

Blanchard J No, no, it was the bluntness of the consequence of illegality which happily we were able to avoid in *Duncan v Donald* under the Legal Contracts Act with a lot of effort.

Ring At the end of his judgment Lord Goff referred to the New Zealand Legal Contracts Act and said if this is going to be fixed it's got to be a legislature that fixes it and look what New Zealand has done – maybe we'll follow suit. But in *Tinsley v Milligan* Their Lordships were unanimous that if it's necessary for a claimant to rely on his or her own unlawful conduct the claim is barred. There is no residual discretion. And the Court of Appeal held in *Moore Stephens* that it applied in that case because *Stone & Rolls* claim was based on or arose out of or was inextricably linked with the fraud on the banks and that Mr Stojevic 's fraud was properly attributable to *Stone & Rolls* because *Stone & Rolls* was the perpetrator, i.e. the villain and not the victim, and Lord Justice Rimmer's judgment was the leading one, paragraph 72 and 73 in particular

Tipping J You really only have to go as far as showing us a matter of general public importance and it's not

Ring Well yes.

Tipping J Yes but this is an interesting point. You're sort of semi or arguing the merits now Mr Ring.

Ring Well I'm hopefully only laying out for Your Honours what the principles are. I certainly don't want to

Tipping J It must be arguable I would have thought with great respect that the Court of Appeal has not directly applied the law to this point, and I'm not expressing firm views at all but at least argue.

Ring Well the basic proposition is that if the plaintiff is the villain and not the victim

Tipping J Well you can hardly be a victim if you're the villain and the author of your own victimhood.

Ring But if you are the victim then the very thing principle applies. If you are the villain then *turpi causa* applies. That's in a nutshell what the Court of Appeal said, and we would seek leave to argue the very same issues in this one. The point being that it overrides completely the very thing principle and I would particularly, if Your Honours are looking further at this, commend to Your Honours the very short one-page judgment of Lord Justice Mummery which is right at the end of the judgment. He says 'who was the victim. The victim was the banks. No prospect of showing the company was the victim', and here of course Access actually benefited from the frauds by having its debts paid and paying out dividends. 'Is the firm potentially liable in negligence to this fraudulent company?' He said 'no'

Tipping J Well he said that would turn the world upside down.

Ring Indeed, indeed. 'What difference does the liquidation make? None'. Prior to the liquidation could this case have been brought? Lord Justice Rimer referred to the prospect of it being laughed out of Court. 'How about "the very thing" principle' he said. 'No, not if it's the villain and not the victim'. 'What about the primary and secondary rules of attribution?' He said 'it's not a case of the company itself being an innocent victim of deception by one of its Officers, the company was a party to the fraud, not the innocent victim'. And then finally 'does common sense matter? Contrary to all common sense to uphold a claim that would confer direct or indirect benefits on the corporate

vehicle which was used to commit the fraud and was not the victim of it, and the fraudulent driver of the fraudulent vehicle’.

Wilson J Do you know whether leave’s been sought to go to the House of Lords?

Ring No I don’t. This judgment’s only a couple of weeks old.

Wilson J Yes.

Ring Normally you see it once it gets reported at the end. We haven’t quite got there yet Your Honour. So the only difference between that case and ours is the difference between a one-man company and Mr Marshall’s position here, and we would seek leave to argue that there’s no fundamental difference between those two positions for a number of reasons. He is Access for the reasons that I’ve said and also because of the independent duties owed under the rules by all the other directors and the shareholders of Access. So Your Honours those are the three points that I wish to develop and I seek leave to appeal on all three of them. If I can help Your Honours further otherwise those are my submissions.

Blanchard J Thank you Mr Ring. Yes Mr Galbraith.

Galbraith Sir we’ve got a piece of paper also if I can just hand it up. While it’s somewhat longer than my learned friend’s, really there’s two essential points. One is that this is a matter which raises no issue which is a precedent value going forward and secondly it’s premature to try and determine the issues which my learned friend very eloquently was speaking about this morning – absent knowing all the facts, which is really what we deal with in the first page. Your Honours will see that we’ve set out in 1, little c, various references in the statement of claim which rely upon the rules which have now been amended, and so in terms of precedent value in relation to the rules which obviously fairly conceded at the heart but not the totality of the issues which are relevant to the existence are not of a duty, those rules no longer exist, and if I can with respect make the submission which His Honour Justice Blanchard made as a question to my learned friend, the possibility of a claim now arising out of the pre-amended rules is extraordinarily unlikely for a whole lot of fairly obvious reasons, but one of the obvious reasons of course is there will have been another inspection - at least one or, if not two more inspection of rounds carried out, and so unless those inspections would, one would assume under the new rules, an intervention that would prevent a claim thereby arising. Just given the reference in little d to what this Court said recently in *Shell v Todd*. What we say in 2 is that there aren’t

matters raised here of general public importance that require this Court to express a view on because the Court of Appeal didn't in fact decide any issues, it simply decided that those issues were arguable. There's no substantive findings made by the Court of Appeal. They could not make substantive findings on a strike-out issue and so the whole matter is still at large until the facts are known and then ultimately a Court will make a determination which may come up before Your Honours and Your Honours will then have the advantage of knowing what the facts are. We made a similar reference in paragraph 3 to the fact this is effectively an interlocutory application, and could I just say something about this? I do think there is an issue of principle here and it's not the issue of principle my learned friend's been addressing. There's an issue of principle how far this Court should indulge appeals in relation to strike-outs. Obviously the Court should in a case where the Court of Appeal has determined that the claim be struck-out because that otherwise is the end of the matter, but where you've got a case such as this where at the moment we've got three Judges saying it's arguable and one Judge with great respect, and a fairly extreme Judge in saying that it wasn't, the question whether this Court should then indulge a further level of appeal, in my respectful submission is a matter that this Court needs to consider. Because this case could have been heard now on its facts and determined and now be on a process through the appellate system to be actually determined in the full context of what the issues are between the parties, and instead if one has a further level of appeal now then of course there's further delay, there's further cost, and quite why that is necessary to have, with great respect, five Judges debate whether something's arguable or not arguable, where they're already at an appellate level that's been determined that it is arguable is not readily apparent. So in my respectful submission that is an issue which this Court does need to, in my respectful submission, consider because strike-outs which were frowned upon when I was growing up and the law had become somewhat more prevalent

Blanchard J It was a long time ago Mr Galbraith.

Galbraith It was an awful long time ago Sir. I'm reminded of that frequently Sir and I'll leave that. In 4 Sir, your Honours to say is that these are matters which do need to be determined on the facts and if I could just said in 8 and perhaps take Your Honours to what my learned friend says in his submissions at paragraph 5.1 where he's summarising his position and he says in 5.1 'the points of law set out above involve issues of general public importance etc', then encapsulates what he's been saying above 'whether NZX is the primary regulator of the New Zealand Stock Exchange, concerning the relationship between a regulator and those whose activities it is

required to supervise. Also the public who may choose to deal with those supervised – as well as concerning the relationship between this regulator and its designated brokers, and also the public who have invested or may invest in the stock market.’ Now with great respect those are questions which can only be meaningfully determined if the Court knows the facts about those relationships. The article which was handed up by my learned friend from the *Herald* really expresses exactly that. Issues about conflict between the commercial drivers of the NZX and its alleged regulatory effects. The same with the Australian Stock Exchange. There’s controversy in the *Australian Financial Review* at the moment about the conflict role which the ASX has. There’s controversy about whether there should be more than one ASX. It’s an issue which has been reviewed at the moment. Surely those issues would be relevant given that we’ve got this idea of some sort of consistency between Australia and New Zealand in commercial dealings and given that both Exchanges obviously have companies listed on both Exchanges, and investors deal in both Exchanges, that there should be some consistency, and again advising Your Honours from the Bar there, the ASX website says it’s not a regulator. It says that quite expressly. And so the issues that my learned friend’s talking about in 5.1 can only be determined when one has a proper understanding of the facts and how these relationships work. And the argument that the NZX put up, and Your Honours would have seen from the Court of Appeal judgment, was one that the inspectorial functions and the rules which the NZX had put in place and its superintendence of those rules was simply to inform it about whether the market was working well and raised concerns, or indicated concerns about broker to broker defaults. Now if one reads with great respect the Court of Appeal judgment, it’s a very very, in my respectful submission, a very normal or usual response to that sort of argument where you have rules which specifically say that clients’ monies must be held in Trust, and you have inspectors who under the rules as they then were are obliged to apply normal professional standards to a whole range of inspectorate duties when they go into inspect. And where you have also the NZX requiring the broker access, when it sends disclosure statements to its clients, you specifically tell them about these rules and to tell its clients about the inspectorate function. Now those surely are arguable premises upon which to say that there is a duty that may exist here. I accepts it’s arguable. I’m not like my learned friend saying these things are black and white and just because therefore there isn’t a duty or there is. But these must be matters that given the totality of evidence that a Court should properly reflect on before coming to a conclusion as to whether this peculiar hybrid beast – a hybrid beast I should add which it’s pleaded that when it brought the inspectorate function in-house publicly stated in its annual report that it did that to increase its

intellectual property and to make money – make money out of its inspectorate function, or make money out of its regulatory functions. And so you haven't got with great respect to NZX's position your pure public regulator, you've got a commercial entity, out to make money out of its so-called regulatory functions, and we can argue about whether they're regulatory or monitoring as the ASX says, where you've got the Chief Executive who owns a chunk of the company, and had something else not happened, it would own the bigger chunk of the company. It's quite a different situation from the reflective position and objective positions which the Courts have been prepared to recognise in relation to public regulators – true public regulators. So all I'm saying is – I'm not arguing that one side's right or one side's wrong. All I'm simply saying is that the Court of Appeal with great respect were entitled to come to the view that they did, that this is an arguable issue that will be best determined once all the facts are before the Courts. And that's in essence what we're saying in most of that second page. Can I just take you to the point we make in 10, because it links into this trust account issue? As I say a significant aspect of NZX's case is that the inspectorial role and this trust account basis was to make sure there was no broker to broker defaults and so the market wouldn't be disturbed. Now in our respectful submission, when the evidence is before the Court it will be clear that the chance of broker to broker default is very remote because of the daily clearing house basis, so if you're robbing Peter to pay Paul, in fact you're very likely to be able to settle broker to broker. The trouble is Peter, who's been robbed, who's the client, is going to lose its money, or his or her money, and so the primary loss, and the first loss which will be suffered will be that suffered by the broker's clients, not by another broker at all. Now again that's me asserting that from the bar, but those are the sort of issues again which the Court is entitled to know factually what I'm asserting from the bar is correct or not. Just taking you to 12 and my learned friend touched on this a little when he talked about *Davis* and the other cases. With the public regulator cases the Courts have recognised that there are policy issues and delicate balances too to be struck, but as we said in that first bullet point on a factual basis it would be interesting to identify what delicate balances there would be if NZX had properly performed its inspection function and identified the client's funds were missing. I mean what possible delicate balance could there then be as to what NZX should do, and is it really suggested there would be no duty then, and if one looks – I don't want Your Honours to dwell on this, but if one just looks at the pleadings in paragraph 179, 181 and 182, you will see that in effect what's been pleaded is that NZX should have known from what they'd already found out, because NZX inspectorate – the inspectorate recognised that Access was unable to tell it and to calculate what the client balances were at any given time and so NZX

inspectors in reporting back, reported that this was high risk. Of course it was high risk if Access didn't know and couldn't calculate what it owed its clients, how on earth could it be maintaining their funds in trust, and so that's one of the principal allegations of default, and that's as close as you can get to them actually knowing that there were clients' funds that were no longer being held in trust. They couldn't satisfy themselves one way or the other, Access or the inspectors. Just to take up another, it's a small point but again it stands out like a sore thumb, in the Access accounts, accounts payable were listed as an asset. Now Your Honour's entitled to laugh at that, it's non-sensical.

Tipping J I'm sorry I shouldn't have.

Galbraith That's how blatant these errors were under the inspection regime.

Tipping J Gosh you could run a wonderful company on that.

Galbraith Gosh yes, I'd look a lot better than I do at the moment in any case. But that's an allegation in the statement of claim and it's got to be factually established but that's my understanding of what the accounts show. And so again those are matters which a Court shouldn't be determining in an assumed way, or in a vacuum way, yes duty or no duty, because the nature, as we've gone on to just indicate in the next couple of bullet points, the nature of the regime and the defaults can be relevant to the existence or otherwise of the duty and Your Honours recognised that in *Couch* recently. I'm going to say something briefly about duty in contract. We've got another sub-heading there. As Your Honours are aware there's BNZ suing on behalf of the clients who lost money; there's Access's liquidators also suing on behalf of Access, but of course they're suing on behalf of Access effectively for the same thing, for the clients' money which was lost and there is a claim, an additional claim for about \$400,000, which is largely expenses incurred by Access but there may have been some trading loss I think, but I think it's minuscule whatever the trading loss was. Now it's accepted below, at least I believe it was and certainly the Court of Appeal refers to this in paragraph 102, that if there was a contractual liability arising out of the rules, and the rules actually expressly said that the inspectors would carry out their duty according to normal professional standards, and we pleaded that as a contractual term, if there was a contractual obligation then there would be equally a tortious obligation if the two went hand in hand, and that's the basis on which the Court of Appeal dealt or it started its discussion about the issue of contract. Now what happened in the Court below, in the High Court, was that His Honour managed to reinterpret the contract, absent any evidence of factual context, to

interpret contractual obligation out of existence, so that duty wasn't owed for the benefit of Access, it was a duty owed for the benefit of NZX somehow or other. Now the Court of Appeal

Tipping J Was there an actual contract or is there just

Galbraith It's the rules Sir, it's the rules

Tipping J When signing up to the rules you come into contractual

Galbraith Yes, yes.

Tipping J And these rules put this duty on inspectors?

Galbraith There's a lot in the rules Sir about

Tipping J Yes, I don't think you need to go into detail

Galbraith No, but I'm just going to tell you. It heading says inspector to exercise due care and skill. Inspector not an auditor. In carrying out his or her duties the inspector should exercise normal professional care and skill. The functions of the inspector are not to be regarded for any purposes as an audit and so the pleading was that they had to exercise normal professional care and skill because that's what the rules said, which then leaves one

Tipping J That was a duty owed to the company?

Galbraith To Access

Tipping J For Access.

Galbraith Who paid for this inspection - \$20,000 dollars.

Tipping J But there's no suggestion of a contractual duty to clients.

Galbraith No Sir, no.

Tipping J No.

Galbraith That probably takes me on to perhaps just to say that what the Court of Appeal went on to say of course, and Your Honours' have already said this to my learned friend that, what the Court of Appeal goes on to say having started from the point which I understood to be common between the parties is that if there was a contractual obligation and there was somewhere tortious obligation, that these

issues of causation that then arise are all factual issues to be determined at trial, so the *ex turpi causa* wasn't ignored by the Court of Appeal with great respect, and you will see in paragraph 117 they say 'we consider that the extent to which Access was at fault and so broke the causative link will be a relevant at trial, and go on to refer to

Tipping J Well it's not as simple as that. *Ex turpi causa* I have always understood frankly to be a scope of duty point not

Galbraith Well it can arise in contract or tort of course

Tipping J Yes.

Galbraith And so one could say in relation to contractual duty I suppose, but it can arise in both.

Tipping J You've caused it in one sense but you have no duty to prevent it.

Galbraith Yes that would be right.

Tipping J But this is the one area of the case that I feel a bit of anxiety about Mr Galbraith

Galbraith Well I think it's a very interesting area.

Tipping J Yes, because how can you possibly claim that they should have stopped you from messing it up?

Galbraith Well in the same way Sir in *Dairy Containers*, three executives there who ran the company, they were the guiding minds of the company, *Dairy Containers* succeeded in suing the auditors there. And there are other cases. *Marshall Futures* was one that Your Honour decided where you contemplated the possibility also that that might be possible. It depends on the facts, and the facts may be such that if you take the case which my learned friend referred to, *Moore Stephens*, I mean there's a case where you've got sole shareholder, sole director, ripping the banks off, hardly surprising that the Court has said well the company can't bring a claim.

Tipping J But this man Marshall was the company wasn't he?

Galbraith Well he wasn't. He wasn't a shareholder; didn't own a share in the company

- Tipping J He didn't have any shares. He was simply the director. When I say simply, sorry, I shouldn't say that but
- Blanchard J But he was the man to whom the directors effectively left the operation of the company and whom they nominated to represent the company in dealings with NZX.
- Galbraith Yes and those are facts which will have to be considered in due course.
- Tipping J Well they can be considered but they can't be disputed.
- Galbraith Well the first one I wouldn't want to actually concede. I mean in a general sense His Honour Justice Blanchard's quite right as the Managing Director or whatever he was in the company, I mean the shareholders did leave the company to be run by him as Managing Director. Quite what the inter-dealings were I don't know factually at the moment and it may end up being relevant and it may not, but it's certainly correct that in respect to NZX he was nominated as the person who was the principal for dealing with NZX. But every broking business will have somebody nominated in that role, so does it mean that if it's that person who does something wrong, then there's no claim *ex turpi causa*, but if it was somebody else within the broking company that does something wrong, rips the clients' money off, *ex turpi causa* doesn't apply. I mean I think it's an interesting issue but my respectful submission is it's an issue which should properly be dealt with once we know all the facts and this Court may in due course have to consider whether the absolute test applied by the House of Lords, which is if you've got *ex turpi causa* then it doesn't matter, there's no discretion, is the test or what I've generally understood the New Zealand law to be that it's an important factor but there is a discretion which can be exercised and that again if there is such a discretion of course will depend upon the facts. But deciding whether it is an *ex turpi causa* situation whether it's victim or villain must itself depend upon the facts and I would have with great respect thought that while it's perhaps a little superficial to say that Access is the villain here, when the claim brought by the liquidator is of course brought to recover funds which will be paid to the true victims, the clients of Access, which goes to creditors. Now victim and villain becomes a little bit I would have thought blurred in that circumstance. So there are some interesting issues this case throws up. I'm not for a moment arguing against that, but they are issues which first in my respectful submission are only issues between these two parties because of their historical origin and the changes which have been made to the rules. And secondly if this Court is going to give authoritative direction or guidance in respect to for example to what extent does the

commerciality of NZX mean that it's at some other place in the spectrum or continuum from the day this type public regulator situation that that will be a more meaningful and better informed decision once all the facts are before the Court and the Court can point specifically to what the particular facts are which put this entity left or right of those public regulator situations, and the same in respect to duty in relation to the specific rules which existed; the specific public statements made by NZX; and the requirements had of Access to advise its clients of the inspectorate function etc. They are all matters which until a Court is fully informed on the facts in my respectful submission shouldn't be determined on the basis either of assumptions or with great respect what either I or my learned friend Mr Ring tells you from the bar, because there was an awful lot of that in both the High Court and the Court of Appeal and it just reflects the absence of full evidence before the Court.

Blanchard J What do you have to say about Mr Ring's second ground relating to the so-called 'but for approach'?

Galbraith Well Sir I was unfortunately responsible for *Sue Hoy*. I've always regretted that ever since. But *Sue Hoy* was a case where we went to Court saying that the plaintiff's claim 'but for' and therefore should be struck-out. We ended up with three completely unreconcilable judgments, because I always remember when we tried to appeal it to the Privy Council, and Sir Ivor saying he wasn't going to let this go to the Privy Council

Tipping J Too big a mess was it?

Galbraith Yes indeed, that's exactly what happened, and he succeeded in preventing us and we never got to the Privy Council on it. There were three completely different judgments in that Justice MacKay, Justice Henry and Justice Thomas, and I can still remember standing up and Justice Thomas and Justice MacKay climbing all over me about what a nonsense – well they didn't quite put it as brutally as that, but it came down to that, that experience teaches you that you can't decide causation without knowing the facts and yes, common sense may say but for something, then something else wouldn't happen but you've got to look at what the facts are and see whether that can truly be made out. So with great respect, and I know my friend has a huge affection for *Price Waterhouse v Kwan*, and I'm not saying it's wrong at all in what it says but again it depends on the facts and you've only got to look at *Boyd Knight v Purdue* which is a decision of His Honour Justice Blanchard's about a prospectus, and exactly that point's made there about reliance, and one has to look and see what the reliance

was to see whether there is in effect a 'but for' consequence which follows. But the Courts

Tipping J But if it's pleaded on a basis that has to rely on something, and I'm not saying that's my view, but if it were you're not suggesting there could be an amendment to cure it?

Galbraith Well there could be an amendment. I mean there's nothing wrong with a pleading which says in my respectful submission that if you had done your job properly – take *Couch* – if the Parole Board had done their job properly then Bell mightn't have been released or had been better supervised and wouldn't have gone and did the dreadful things he did at the RSA. And it's the point I made a moment ago about if the facts do establish that the inspectors so close as effectively knew that there was a default here then all these issues about but for, fall away because the connection is so direct then, which is really what Justice Blanchard said in *Boyd Knight v Purdue*. So that's again an interesting issue but one which should be determined on the facts. A lot of these clients I understand who were there at the end of the day were the same clients who were there in 2003 when the allegations were made about the breaches by the inspectors, and causation as this Court and other Courts have said many of times is essentially an issue of fact

Wilson J Mr Galbraith that's undoubtedly normally the case, but as I understand Mr Ring's argument it is that even if all the allegations in your statement of claim are established, that would not establish causation to the necessary legal standard.

Galbraith Well that's certainly Mr Ring's proposition.

Wilson J Yes, now if that proposition is correct, should the claim be struck-out?

Galbraith If that proposition were correct, but because my argument is until you know the facts you don't know whether it's correct or not, so

Wilson J I understand that, yes.

Galbraith So it really goes around in a circle.

Tipping J Well does it go around in a circle though? Presumably the plaintiffs have put up their best case in all respects and if their pleaded causation chain if you like just can't succeed in law, and I'm not saying it's the case,

Galbraith Oh yes, if it can't.

Tipping J Then surely you'd strike it out.

Galbraith I accept that.

Tipping J So it's not quite as simple as saying oh well you've always got to go and look at the facts in more detail. You start and end with the statement of claim don't you?

Galbraith Yes

Tipping J For present purposes.

Galbraith Well for present purposes, subject to the possibility of amendment, yes, yes you do.

Tipping J Well possible amendments yes.

Galbraith No, look I accept that

Tipping J But if the chain is simply not recognisable in law then you'd strike it out surely.

Galbraith Yes, though what I would say is that it would be a very unusual situation, it's not impossible, but very unusual situation a Court's able to make that decision without knowing what the facts truly are and that's really what the Courts have said hundreds of times.

Tipping J But they truly are for present purposes what they have pleaded to be.

Galbraith Yes but this sort of spectra 'but for'. 'But for' is a label which the Court puts on a set of facts which it says is not good enough, you need more than that. But 'but for', most causation things are 'but for'. I mean in general terms that's what causation's about. At the end of the day you've got to make a judgment is this – put it this way – a bad 'but for' or a good 'but for'.

Tipping J A qualifying 'but for'?

Galbraith Yes, yes, and you can only do it on the facts. But I don't think just standing up and saying 'but for' solves anything. That just raises the question.

Wilson J Apart from the role of Mr Marshall, what's an example of what you say is a factual issue that has to be determined here before causation can be decided?

- Galbraith On the causation side. Well I mean one of the issues is going to be I would expect whether you've got clients for clients – whether there are in fact clients who were clients at the time of the original inspection and whose clients whose funds then were not being held in trust and whether if the inspectors had acted then those clients, right there and then back in the early days, whether they would have got their money back or not got their money back. Now there is then another category of client who comes along afterwards. The ones that Mr Ring categorises as being members of the public, but of course ultimately became Access clients and there would be issues about whether there's a different causation test in relation to them; in fact there may be an issue to a different duty in respect of those. So
- Tipping J I thought Mr Ring's argument was focused solely on those who came along after the place should have been shut down.
- Galbraith Well this is one of the facts which isn't before the Court at the moment as to who they are
- Tipping J Who they are
- Galbraith No sorry, it isn't before the Court as to who comes before and who comes after, so that's
- Tipping J Well that would be a practical difficulty in having any strike-out differentiating between plaintiffs if the fulcrum is the notional closing down.
- Galbraith Yes, yes, there are all of those issues and we've always recognised that there may be issues about the quantum of the claim if the deficit grew, which I believe it did between those dates, we'd claim for the full deficit. It may be that a Court would ultimately say you can only claim as Your Honour is saying up to the time of when they're closing down or when the inspector's breach occurred for whatever the deficit is there, but at the moment we've claimed the full deficit. But those are all
- Tipping J The breach essentially is failing to shut it down isn't it? That's the crunch, so the only person who could suffer loss presumably is someone who is damaged by the failure to shut it down.
- Galbraith Well we've pleaded two things. One we've pleaded they didn't do certain things that they could have done. In other words they should have taken some active steps to investigate the issues which they'd identified to liaise with Access and I mean the result of that might have

been that the shareholders I suppose recapitalising the business if they'd been alerted at the right time, but ultimately the allegation is that in the circumstances the alternative allegation is that it should have been shut down because of the default, and that's what happened ultimately. Because what happened was Mr Garlick, who was the principal shareholder, put his accountants in because he was looking I think to sell an interest in it and within less than 48 hours the accountants had recognised that there was a significant deficiency and Mr Garlick went to the Stock Exchange and by the next trading day it was shut down, bang, that was that, which is exactly what you would expect would happen. But those are all matters of facts which aren't before the Court and I'm telling you from the bar.

Blanchard J Thank you Mr Galbraith. Mr Ring

Ring Your Honours on the first point the precedent value, my learned friend said there could be no realistic further claims because their inspection since February 2007, but that doesn't necessarily follow - on the contrary. Anybody who brought an action would be wanting to focus on the inspections prior to February 2007 when the duty or the alleged duty would still exist, so in my submission that doesn't take the no precedent value argument any further. In relation to the *Price*

Blanchard J One would have to assume though that the subsequent inspections have been shonky as well.

Ring Yes.

Blanchard J How likely is it?

Ring Oh Sir you can't ask me to answer that question.

Blanchard J It was a rhetorical question.

Ring It's a no-win question for me.

Tipping J What's your second point Mr Ring?

Ring Can I move on to the next point, yes thank you Sir. *Price Waterhouse v Kwan* 'but for' is an exclusionary test. If you can't meet 'but for' you never get into causation regardless of what the proper causation test is. 'But for' is the be all and end all if you are in the fiduciary duty area. If you're in the common-law area after you've passed through the 'but for' gate you still have to meet the *Price Waterhouse v Kwan* test. No facts are required as far as this issue is concerned. We have the pleaded duty. Sorry, we have the pleaded causation. We have

Price Waterhouse v Kwan in which an identically pleaded causation was held to be inadequate to meet the test of causation.

Blanchard J What were the facts of *Price Waterhouse v Kwan*?

Ring *Price Waterhouse* was the auditor of the trust account. It was seeking to cross-claim that there was a duty owed by others. The argument was that

Tipping J Wasn't it whether the auditors owed duties to clients, of the solicitor, and if so whether breach of that duty had caused the relevant loss?

Ring Yes it is, sorry Your Honour, yes. And there were two types of allegations that were being made and those are the ones that are referred to first at paragraph 27 and then at paragraph 29. 'The main particulars of negligence were the ones that are identical to what Access is claiming'. And then there were two particulars of negligence which directly focused in on the particular clients. They're the ones that survived, and the ones that are equivalent to Access's are the ones that didn't. And in my submission Your Honour it's just simply a question of comparing the allegations in paragraph 27 with the allegations in the statement of claim at 187(d). On the third point my submission is it doesn't require the facts to be heard. The pleading and/or the causation point relies necessarily on Access's dishonesty. That raises the *ex turpi causa* point. The only other question is the status of Mr Marshall and that is a matter of undisputed fact

Tipping J Are you saying that his conduct must in the circumstances be regarded as that of Access.

Ring Yes I do, and I don't think you need to go too much further than the fact that he was the managing principal under the rules. For Access purposes he was given and assumed the role of interfacing with NZX. To say that then

Tipping J I'm not quite persuaded as that Mr Ring. I felt some force in Mr Galbraith's response to that but isn't the point better put from your point of view that he really was the hand and mind of the company for all relevant purposes.

Ring That is the point that I'm making. I'm sorry I'm probably not expressing it clearly enough. That is the very point I'm making.

Tipping J And that can't be a matter of national dispute.

Ring He is Access for NZX purposes. It's that simple proposition and whether you go down the route of CEO, Managing Director, Executive Director, you go down the route of the constitution itself which had to and did contain an express agreement that Access would be bound by the regime, or you look at it in the third area of under this particular legislative structure, who was intended to be the mind and body of the company for NZX purposes? You reach the same result whichever way you go and cumulatively the answer is inescapable. It doesn't require any facts. It just requires an analysis of the regime in that respect and the accepted facts of his actual status. Those are my submissions in reply Your Honour.

Blanchard J Thank you Mr Ring. We'll take time to consider our decision in this matter and we are now adjourned.

11.33am Court Adjourned