IN THE SUPREME COURT OF NEW ZEALAND SC 30/2015

[2016] NZSC Trans 1

BETWEEN **DEREK NICHOLAS BLACKWELL**
CHARLES BASIL BLACKWELL
as Executors and Trustees of the Estate of
ROSS WINSTON BLACKWELL
Appellants

AND **LEITH ROGER CHICK**
ROSEMARY CHICK
First Respondents

AND **EDMOND JUDD**
Second Respondent

Hearing: 2 February 2016

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: C T Gudsell QC for the Appellants
M R Ring QC and J R Parker for the Second Respondents.

CIVIL APPEAL

MR GUDSELL QC:

Yes, may it please your Honours, I appear for the appellants. I am assisted by Mr Sutherland. Thank you for granting that application.

ELIAS CJ:

Thank you, thank you for that, Mr Gudsell, and Mr Ring.

MR RING QC:

May it please your Honours, I appear with Mr Parker for the respondent, Edmonds Judd.

ELIAS CJ:

Thank you Mr Ring, Mr Parker. Yes Mr Gudsell.

MR RING QC:

Thank you, your Honours.

Your Honours will have before you the written submissions filed by counsel for the appellant, along with the chronology that's attached to that. I propose to address matters in the order that they have been set out in the submissions. The issue here is whether the findings in the High Court, that is the negligence findings caused no loss.

Now the negligence of the respondent, which is not in dispute, consisted of an omission to provide proper advice, so the two – in respect of three transactions, 2004, 5 and 7. What's important right at the outset really is the uncontested findings of the High Court, which were expressly endorsed by the Court of Appeal, and I set these out at paragraph 3, and they are a fundamental starting point, not pleadings but the findings of the High Court that in this instance the respondent breached that duty of care, failing to explore the objectives in respect of all three transactions and to provide him with advice, importantly and fundamentally, underlines this appeal in respect of the full implications of these transactions. So I understand what the objectives are, and I'll come to this, but in the *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA) sense of digging in, finding out what it's all about, why this particular man would have been doing what he was doing, what his objectives were, and fundamentally they are clear in this case, that he wished to retain the farm for his lifetime, and that he wished to make an affordable proposition to Mr Adam Chick in

order that he could farm the property going forward, but of a limited, limited application, ie. three years.

ELIAS CJ:

Since negligence doesn't arise unless there is loss, why is it not perfectly available to start with the loss and work out whether the advice was properly tailored to that loss? I'm just wondering about your view that it has to be looked at through this lens.

MR GUDSELL QC:

Well, one doesn't arrive, given the negligence issue, one then looks at the causative, the proposition that the negligence is causative of that loss and, in my submission, that two-stepped process in order to understand the advice that ought to have been given and whether he would have acted upon that advice before you can get to the loss aspect of the particular proceeding. So there is an issue here, fundamentally is an agreement between the parties as counsel perceived that there is this two step process –

ELIAS CJ:

Well I wouldn't want you to think that I necessarily agree with that because I don't think there is any formulaic approach and these elements can be looked at in different ways. In fact some of the seminal cases on negligence say that, that you can start with causation or you can start with loss, and I'm just wondering why, in this case, it isn't a better way to do it because otherwise you're starting really at a very hypothetical end, theoretically what advice should have been given in this situation, whereas it might be – you might be better to cut to the chase a bit more.

MR GUDSELL QC:

Well at the – the proposition I've placed before the Court is that one needs to assess that advice, one needs to determine what would have happened as a result of the hypothetical advice having been given. So there is that analytical approach that in my submission the Court of Appeal didn't follow. So in essence –

ELIAS CJ:

But it's not a required analytical approach. It's just one way of looking at it, isn't it, or do you have any authority that says you have to go about it this way?

MR GUDSELL QC:

In respect of the second part, your Honour, the – in terms of starting at loss and saying well, we've got a loss here, what's the loss? Well, the loss arises from the fact that the advice that ought to have been given, which the appellant says that he would have followed, he would have taken that advice, necessarily puts him in a position where he's compelled at the end of the day to sell this property at 1.5 million. So how did that come about?

The – in essence, as your Honours are well aware, the position that the High Court Judge found is that there was a compulsion or an incentive for the Chicks to purchase this farm at 1.5 million because that's the way that the agreement was structured. If they didn't do it, they got a current market value.

So what happens when Ross Blackwell, his estate at the time this litigation, guardians were compelled to sell. The value of this farm was double and more but he was under compulsion by virtue of a negligently advised agreement to sell. So to answer your question, the loss is that particular point. Rentals an incidental matter for 2007. The core loss arises from the difference that he was compelled to sell and the market value.

So if you come back from that and say well, that's the loss, that's what the High Court has found, how did that come about? Was that caused by reversing it up? Was that caused by Edmonds Judd's negligent advice? And what we know at trial is this, or in the pleadings at least, the negligence was not admitted. There was a suggestion it was. It wasn't. The Court found, and the findings here that are in the question that this Court's put to counsel, is that based on those findings of negligence, where to in terms of loss?

So a key issue that appears to be dividing the parties is what advice would it have been given? What is the advice and if that advice had been given, what would Ross Blackwell have done? So that's the critical – and I'm not sure I'm necessarily assisting in answering the question the Chief Justice has posed of me?

ELIAS CJ:

Well, you've identified the loss as being the fact that – that flying from the fact that he was under a compulsion to sell at an under value.

MR GUDSELL QC:

He had to. He had no option. So that -

ARNOLD J:

Well you'd have to add to that. While he was still alive, wouldn't you?

MR GUDSELL QC:

Indeed, your Honour, indeed, and the critical factor here in respect of causation in terms of the advice that would have been given is really important because it is undisputed in this case that all parties accepted that this farm was not available for sale while he was alive. There's no guessing about that. There's no speculation about that. Both parties accept, indeed as far as 2010, the Chicks saying to their lawyer they would kill him if it was purchased while he was alive. So what were they – what advice would a competent lawyer have given in a situation where they'd examined his objectives and understood what it was that he was seeking to achieve here?

And a really clean answer to this case, a very clean answer to this case, is the loss arises purely and simply because the competent lawyer did not advise him to include clause in the agreement that the farm is not for sale while he was alive. It's simple. The Chicks agree with that, so there would be no dispute going forward if, after competent legal advice had been given that this particular agreement recorded such a condition.

Now in paragraph 167 of the High Court findings, it's in volume 1 at page 145 –

ELIAS CJ:

Sorry, what volume was it?

MR GUDSELL QC:

Volume 1, your Honour, at page 145. This is a critical finding of the High Court, in my submission, on this particular issue.

ELIAS CJ:

Sorry, which paragraph are you –

MR GUDSELL QC:

167, your Honour.

ARNOLD J:

So are you focusing there on the reference at the end of the first sentence to, "At a time of their choosing," as opposed to, "At a time of their choosing after his death."

MR GUDSELL QC:

Yes.

GLAZEBROOK J:

I'm sorry, I think I might be on the wrong paragraph now.

MR GUDSELL QC:

I'm sorry, your Honours. At paragraph 167 –

GLAZEBROOK J:

167, yes.

MR GUDSELL QC:

Yes, in case – volume 1 at page 145.

GLAZEBROOK J:

Sorry, got it, yes.

MR GUDSELL QC:

Sorry, your Honour.

ARNOLD J:

Is that the point that you –

MR GUDSELL QC:

That's correct and, indeed, the Court was, in my respectful submission, so perceptive to add following that sentence that it's conceivable in 2004 the parties may not have been able to come to an agreement that represented an acceptable outcome, because that's got to be seen against the background where the original lease simply provided for a right of – the first right of refusal in essence. That's what it was, and

when it was renewed, to be renewed in 2004 initially, that's all it was, and then it changed to this option.

So the lifetime issue, I repeat, is a very clean answer to this case because it's not as if the parties are competing in – and a party coming to this Court and saying, "If I'd been properly advised, this is what I would have done," and the Court's commented on many occasions that that's all very convenient, to come along in hindsight. But what we know here is that both parties agreed he was to have a lifetime interest in this property and, to come to the Chief Justice's point, he was alive in 2010 when they exercised this option that was at the time of their choosing.

GLAZEBROOK J:
Although there had been an extension of the option hadn't there and there were negotiations at the time for an extension. It was just the fact that, at that stage, he clearly was not competent to manage his affairs?

MR GUDSELL QC:
That's correct, your Honour, in the sense that, interestingly, the Chick's evidence was that when they spoke to him in March 2010 and agreed these terms, to go through to 2016 at 1.5, that he'd agreed to that. Now that was the Chick's evidence that he was actually capable at that time.

GLAZEBROOK J:
Yes I understand that.

MR GUDSELL QC:
Yes, so it's extraordinary, although that you'll have seen the evidence of Dr Newburn and others in relation to his abilities and, indeed, the Court's findings from at least as early as 2008 that this man's affairs had been taken over by his brothers because of his state of health at that time. So, yes, there was said to be negotiations at that point but, again, so far as –

GLAZEBROOK J:
But if he had been competent –

MR GUDSELL QC:
Yes.

GLAZEBROOK J:

– there may have been – and able to still live on the farm, one can assume there would have been some negotiation, maybe not at 1.5 if he'd been properly advised. But can you say that he didn't intend that to happen?

MR GUDSELL QC:

The point in respect of the negligence issues, respectively your Honour, is that it doesn't relate to 2010. It simply relates to the events that occurred in 20 –

GLAZEBROOK J:

But what you have to say is if he'd been given – well, I suppose there's sort of a number of questions –

MR GUDSELL QC:

There are.

GLAZEBROOK J:

– tied up with this which I did want to explore with you, which relates to the pleading issue that's made by Mr Ring which I presume you'll come to.

MR GUDSELL QC:

Yes I will.

GLAZEBROOK J:

But this particular question is just that can you assume that there is a loss because there wouldn't – on this assumption that there wouldn't have been a renegotiation assuming that he'd been competent at that stage, and is that relevant?

MR GUDSELL QC:

Well, my submission, it's not because of the 2005, 4 and 5, effectively as the Court of Appeal commented, I think, at paragraph 92 of their judgment, the die was cast in 2004. So the die was cast that he had a situation where all the shots were being called by the Chicks from that point on. He had no control over the sale of this farm from 2004 once that incompetent advice had been provided. And that's what the High Court, whose findings were examining states, and the critical real paragraphs

are 164 through to 167 of the High Court judgment, and they deal with each particular year, and I'll come to the issues around 1.5 because 1.5 isn't really the issue, nor is a current market value for the reasons that the Judge set out in paragraph 164.

The advice issue is the critical issue that is the starting point to determine loss and the real starting point, in my submission, is not the pleadings, which I'll come to, but the findings made by the High Court Judge. So the High Court Judge has made very clear findings and one would respectfully would say he was mindful of what he'd already found in relation to the Chick claim when he came to deal with these aspects which he carefully recorded in those paragraphs that I've mentioned, 164 to 167.

So I come back to this point, and that is that, taking the Chief Justice's point about the two step process but I do promote that as a means of arriving at a reasoned decision in relation of both findings of negligence which are not in dispute, and the causative effect of that negligent advice. What the position is here is what advice should have been given? And the parties agree that the point is the proven negligence, and I've set that out in the submissions at paragraph 5. a. and the appellants in this case rely upon a series, those series of expressed findings that I've set out, and I'll just refer to those to you for the record, and they're paragraphs 17 and 18 of my submissions. In essence, they're the points I've just made from 164 to 167 of the High Court judgment.

In my submission, this is the key, and one point that Justice Glazebrook, you've just raised now and that is, in my respectful submission, the respondent ignores those High Court findings, instead refers to the appellants' pleadings and, in my submission, that's where the matter starts to split between the propositions being advanced by the appellant and those by the respondent.

Now my starting point here is that it is entirely unnecessary and inappropriate to go back to pleadings issues when you've got express High Court findings on the negligence issue. Those findings, which are endorsed by the Court of Appeal, and I'll take you to that, it's at page 93 of volume 1 at paragraph 105. So what we have is a situation as a starting point that we have these High Court findings, failing to explore the full implications which involves, in my submission, an assessment of the objectives and Justice Arnold discussed on both of those matters that the objectives are very clear, I've pointed out in my submissions, they are to lifetime, and secondly

in relation to affordability, fixed term limited application. A really important point here, that the appellant wishes to make, is that the respondent has repeatedly said that the, Mr Ross Blackwell wanted the Chicks to have this farm at 1.5 million. That is not the case.

GLAZEBROOK J:
Why was it limited application do you say?

MR GUDSELL QC:
I beg your pardon?

GLAZEBROOK J:
Why was the second one limited application?

MR GUDSELL QC:
The three year term?

GLAZEBROOK J:
Yes.

MR GUDSELL QC:
Yes, that's, there was actual evidence on that from Mandy Rasmussen as to Mr Blackwell stating that expressly your Honour in his instructions and is that the point, you're enquiring as to why he would make it three years, it certainly was three years.

GLAZEBROOK J:
Well it's really, you have the two objectives and you have one that's for three years only, and why is that the case? I mean possibly because he assumed he'd be dead within three years, because I understand that he lived a lot longer than had been indicated might be the case.

MR GUDSELL QC:
Yes he did live, in fact lived until 2014, but the –

GLAZEBROOK J:

So if he expected to be dead then he would have expected that they got on with, after his death, with doing that, and if not it would laps and they bought at market value?

MR GUDSELL QC:

Well the expectation, on that point, the expectation of death was immediately after his diagnosis with a major tumour, as you've read, and that was in 2000. So by 2004, so when he got that advice, and he put in place various matters, including the original lease, there was no suggestion he was offering anything other than a right of renewal after a three year term, and the lease started in April 2001. So when it came to the point you're raising about what happened in 2004, why did he put in three years, well by that time he'd already lived for four years, after the event that was said to take possibly he might die within three to six months, so it's not a suggestion that the three year term, in my submission, was necessarily linked to imminent death. Indeed medically speaking people have remissions and –

GLAZEBROOK J:

Well what is the evidence on that, I'm sure we probably have been told that –

MR GUDSELL QC:

Yes.

GLAZEBROOK J:

– but I can't remember.

MR GUDSELL QC:

That's all right, your Honour, I'll take you to that. It's, if you have a look at paragraph 13. b. –

ELIAS CJ:

Of what volume?

MR GUDSELL QC:

Of my submissions.

ELIAS CJ:

Oh sorry.

MR GUDSELL QC:

Sorry your Honour, and I'll take you to the notes of evidence. The passage there is quoted and the footnote is footnote 31, it's in volume 3.

GLAZEBROOK J:

So what page? Volume 3, page what sorry?

MR GUDSELL QC:

Page 599, over to 600. It's the top of 600. And in fact it runs over to 601 so it starts at 599. Because, indeed, the question was the very question your Honour raised at 599, line 26, "So what was the magic about 2007?" And that was put to her by counsel during cross-examination.

GLAZEBROOK J:

So she didn't have a clue basically.

ELIAS CJ:

I haven't gone to the exhibits, presumably she's being questioned about some of her file notes and things, is she? Do we have, are there file notes for each of these –

MR GUDSELL QC:

There are, your Honour.

ELIAS CJ:

Could you just point me just very quickly at them? Sorry this is the 2004 transaction is it?

MR GUDSELL QC:

Yes. I can take you to volume 4 at page 675.

ARNOLD J:

And the clause that goes in the agreement is quite an elaborate provision, isn't it?

MR GUDSELL QC:

Yes.

ARNOLD J:

The alternative to the 115, whatever it was.

MR GUDSELL QC:

Yes it's, I can take you to the 2004 agreement. In fact if I could –

ELIAS CJ:

So it's 687 is it?

MR GUDSELL QC:

It is there your Honour. There's a signed copy of the 2004 agreement in volume 5, at 797. But your Honour, Justice Arnold, the same agreement, it's just that that one is –

ELIAS CJ:

This one seems to be signed too.

MR GUDSELL QC:

Oh you have it signed on 6 –

ELIAS CJ:

At 684.

ARNOLD J:

Yes, 684 has got a signed on it.

MR GUDSELL QC:

Yes, there were two files, my apologies. So to answer your question, yes, it is very elaborate because one of the issues here around this is that it suggested that Ross had an out and out desire that the Chicks, namely in particular Adam, he's not mentioned in any contractual documents, would have the farm for 1.5 million and that was completely non-commercial. But as you can see, that's not the case. It was for a limited period and it reverted to current market value, or a mechanism post-early April if it wasn't exercised, and that gives rise to the argument that's advanced in the submissions about the incompetent advice and whether he would have followed it,

followed proper advice on the issue of that limited term of 1.5 for three years, and what it would have been.

GLAZEBROOK J:
Well what do you say would have happened in 2004?

MR GUDSELL QC:
With competent advice your Honour?

GLAZEBROOK J:
Yes.

MR GUDSELL QC:
Well the real, if I may put it, the *lay down misere* as it would have had the first objective and a lifetime interest, and the second it would have accommodated the evidence in relation to affordability but it would have controlled the process for Mr Blackwell going forward, given that the agreement was for a three year term in relation to a farm that, the evidence is quite clear, prices were moving in an upward direction.

GLAZEBROOK J:
In 2004, because hadn't they, at that stage, had an evaluation that was only about 300,000 below?

MR GUDSELL QC:
Well the valuation was in 2000 and there were two issues around the valuation, and I've set these out in the submissions, how they arrived at the 1.5 million, the initial position was that, I'll just take you to this carefully, I have set it out in here. It's at paragraph 13. d. It was arrived at by reference to an estimated market value of 1.8 that Ross had said had been obtained from a John Darragh who had provided the rental. So the timing of that, around 2004, but as to the, the High Court found the discounted by 300 to make it affordable, consideration was given, as you'll see there, to current Government valuation of 1.165 and Ross had a view at the time, which much comment was made about, about 900,000. So the 1.5 was exactly half way between the Government valuation and the estimated valuation.

So what we come back to really is the situation where, leaving aside for a moment the lifetime point, which I'll say, is really a key issue in any event, but leaving it to the side, and come back to what advice would have been provided, competent advice, given there was none, would have been provided by a solicitor in relation to that issue. Bearing in mind the very clear evidence given by Mandy Rasmussen as to instructions by Ross Blackwell that this was of a limited application ie I'm not giving you this start up to Adam Chick or the Chicks forever. I'm giving it to you for three years and if you don't exercise it within three years –

GLAZEBROOK J:
But all I'm saying, in 2004 there would have been a lifetime, you say that had been a lifetime thing in there –

MR GUDSELL QC:
Correct.

GLAZEBROOK J:
– which is actually irrelevant because he didn't die in that period.

MR GUDSELL QC:
Yes, that's right.

GLAZEBROOK J:
But what would there have been in relation to three year?

MR GUDSELL QC:
In my submission –

GLAZEBROOK J:
Because if she'd said, look, you realise that the value is already going up, but it's already at an undervalue and that I think even in three years it could be really moving and you should have some sort of ratchet clause in there.

MR GUDSELL QC:
Yes.

GLAZEBROOK J:

And that would have been at the least the advice and the reason I came back to the pleadings is I can imagine situations where you're acting for both parties that you say this is a mad arrangement generally and you can think of a whole lot of other arrangements that would have been much better for Ross, but that wasn't pleaded and not met in any of the – that was the pleading point, because I can imagine a whole lot of other things that one might have done instead of this.

MR GUDSELL QC:

Well –

GLAZEBROOK J:

And advice being given and a whole lot of alternatives and then Mr Blackwell choosing, and the Chicks between them choosing the best one, but advised separately.

MR GUDSELL QC:

I do want to take on because your Honour's mentioned on a few occasions the pleadings point, and this is where it really comes down to the critical issue between the parties, because my friend suggests that the pleading point was all about just settling the current, advising him on the current market value, and that's not the pleading at all. The pleading, and it's been carefully set out in the submissions, the pleading went further than that, and the pleading went, and I'll take you to this particular point, as we're on it, if one comes to volume 1 at page 29. Now this isn't – at paragraph 29 you'll see that my friend has made much of the E, roman numeral ii –

O'REGAN J:

Hang on, what paragraph, did you say paragraph 29?

MR GUDSELL QC:

On page 29 –

O'REGAN J:

So it's paragraph 53?

MR GUDSELL QC:

Paragraph 53, thank you your Honour, it's paragraph, my apologies, 53E, roman numerals i and ii. So what's important about that particular issue is that –

WILLIAM YOUNG J:

Well I think you'd say the pleading encompasses the implications of failure to address the valuation issues. That is do you understand that it's going to be worth more than 1.5 million in all likelihood and there are issues associated with that which you may want to address?

MR GUDSELL QC:

Yes, and it's actually expressly pleaded, and it's avoided by both my friend and, with respect, the Court of Appeal doesn't record the submissions in respect of 2004 accurately in its decision because this pleading says, "Fail to properly advise in respect of the first purported variation 2004," and (i) is central to the advice that's pleaded. "Not only if seven would have occurred before '07 was likely to be well below market and the reasonable anticipated market value in April 2007." Now that's completely ignored, with respect, in my friend's submission. That's a key element of the point that Justice Glazebrook is referring to which I'll cantilever in on if required.

So what's important about that is that it wasn't simply a matter of advising in relation to the current market value because if it was you'd just say, "Ross, I think you should get a valuation." Well, even then, as Justice Glazebrook just mentioned, sorry, Justice Young mentioned, is that if you're going to fulfil your obligations as a solicitor, even on getting a valuation you'd have to say, well, why are you doing this? What's the purpose? What's the effect? And you only need to look at some of the words that were also used in the *Benton* decision which I think are apt here, and I've set these out in the bundle of authorities, but when you come to it, it's – just for the record, it's at paragraph 20 of that decision, but in that decision I'd appreciate that two of your Honours are very familiar with that matter, at least two, that Miller Poulgrain conceded that Mr Poulgrain had not met the standard of reasonable competent solicitor. This is because he had not enquired sufficiently deeply into the background of the two transactions and, accordingly, had not given proper – given appropriate matrimonial property advice. And what's happened here, certainly on (e)(i) expressly pleaded it's the future position and that activates the life interest issue.

GLAZEBROOK J:

So just so I'm clear, would you say that, because I'd taken on board the point that they should have advised on market value and then on the implications for that, do you say that this would encompass saying that the transaction should be structured in a totally different way or would you merely say what I said before about the ratchet clause.

MR GUDSELL QC:

Well, there's two parts to it, yes. There's certainly the ratchet clause issue but it's not simply, in 2004, as my friend's put it in his submissions repeatedly, all about current market value. It's this go forward position, the reasonably anticipated position.

O'REGAN J:

But how do you get from there to the ratchet clause? Who suggested the ratchet clause? Was there any evidence from anyone suggesting that that's what would have happened?

MR GUDSELL QC:

No, no –

O'REGAN J:

Well, then where did the Judge get it from?

MR GUDSELL QC:

The Judge got it, in my submission, from his analysis of what the appropriate advice would have been.

GLAZEBROOK J:

So the advice would have been because market value's likely to increase, at the very least you should have a ratchet clause in there or some kind of adjustment mechanism over the three year period. Is that the submission? And that he would have accepted that advice presumably.

MR GUDSELL QC:

Well, he would have accepted that advice. The question is –

GLAZEBROOK J:

Well, why would he have accepted that advice when the idea was to give an affordable thing for the three years?

MR GUDSELL QC:

All right –

GLAZEBROOK J:

A limited period.

MR GUDSELL QC:

Yes. The affordable, as I've said in paragraph 13. d. of the submission, how the original 1.5 was arrived at. The original 1.5 was arrived at by reference to market related factors.

ARNOLD J:

Wasn't there – didn't – wasn't the original position that Mr Blackwell suggested 900,000 as a purchase price and then Mr Chick said, "No, that's too low," and they agreed on 1.5?

MR GUDSELL QC:

They did.

ARNOLD J:

That does indicate that, at least in the interaction with Mr Chick, Mr Blackwell was susceptible to taking advice and to changing his mind about what an appropriate level of the value was. It may not have happened if he'd had legal advice to that effect. I mean, to the extent that there's any evidence about whether he responded to advice about appropriate value, the evidence is that he did when Mr Chick gave him that advice.

MR GUDSELL QC:

Well, it even goes back beyond that because he said to Adam Chick before Leith Chick while they were away, the evidence, that they could buy his farm, and then he said subsequently they can have his farm, and there was the suggestion, "We can't do that," because Margaret, his wife, who's here today, is, "Well, she's your wife. You can't give your farm away," and then there was some discussion about a

900,000 figure. Then it went to 1.5 and so this was a moving feast for Mr Blackwell and, really, tied into the arguments around his state of mind at the time, that are really not live issues here so far as his capacity or his ability to understand because the Courts found he understood the general nature.

ARNOLD J:
Just showing, though, that he did respond to advice, he did change his mind.

MR GUDSELL QC:
Yes he did, and one of the important matters here in relation to Mr Blackwell is set out actually in the Court of Appeal judgment, and it's important, your Honour, based on what we're just discussing, if we could have a look at that, and I'll just find that passage for you if I may? If I may just have a moment your Honour? Yes, the passage I'm referring to is at paragraph 66 of the Court of Appeal judgment which can be found at page 78 of volume 1, and that passage I've set out for the record at paragraph 16 of my submissions. So in this -

GLAZEBROOK J:
Sorry, sorry, what are you –

MR GUDSELL QC:
I'm saying, your Honour, I actually got waylaid from your point –

GLAZEBROOK J:
No, no, I just wondered what point you were making, which – sorry, I'm just lost on the paragraph you're referring to.

MR GUDSELL QC:
I'm referring to paragraph 16 of my submissions and I'm referring to paragraph 66 at page 78 of volume 1 of the case on appeal.

GLAZEBROOK J:
And to what – what's the point you're making, sorry?

MR GUDSELL QC:
I'm really developing the point that Justice Arnold raised in terms of his, Ross's response to advice of the type of person you are dealing with here, diminished and

impaired mental condition when he entered into all three transactions, and why I raise that is just to give some context to the point that Justice Arnold raised, well he went from 900 to 1.5, he was responding to advice, and I take you to paragraph 16, because this is all contextual.

GLAZEBROOK J:
Is the point that he should have received much more careful advice, given that he was obviously not a well man, is that –

MR GUDSELL QC:
Well it's the law. It's unsophisticated. And importantly, in this particular situation, it's striking that one of the few questions that the High Court Judge asked of the experts who gave evidence in this case, on this particular point, was a question that his Honour asked Mr Haynes, and you'll see that at volume 3 at page 419. And what, at 419 of volume 3, these were the few questions that his Honour asked, and in particular line, well it goes from four through to 25.

ELIAS CJ:
Was there any finding relating to an enhanced duty of care because of Mr Blackwell's disability, which was not sufficient to make his actions incompetent or to raise – well to make the bargain unconscionable, but was there any finding relating to Ms Rasmussen's duty?

MR GUDSELL QC:
No, your Honour, there wasn't, and –

GLAZEBROOK J:
Mind you probably because the advice was so non-existent and incompetent that it was incompetent no matter how sophisticated he was.

MR GUDSELL QC:
There was no perception, it has to be one of the, so a leading example of a serious, serious omission to look after someone who I've just described here in paragraph 16, and who his Honour asked Mr Haynes about. This – so no, to answer your Honour the Chief Justice's question, no there wasn't, and I adopt, respectfully, Justice Glazebrook's remark about that, that this, there was just none, zip, didn't occur. It's poorly let down.

ELIAS CJ:

It seems to me that what might be said, stepping back and looking at all of these transactions, it might be said that in the 2004 agreement there was a ratchet clause because it was to go to market after three years, and that after all the price had been set by some reference to market, albeit it at a discount, as at 2004. But the real harm may well have been in the 2005 variation, for which there's almost no evidence. You took us to the cross-examination that there was, oh no that was in relation to 2004, the 2007, but what was there in relation to, I just looked at the file note, which is at page 704, which is totally unilluminating as to why there was that extension, and we know it was at around the time that Mr Blackwell was presenting with delusional symptoms. What evidence was there relating to that 2005 extension?

MR GUDSELL QC:

There was evidence that you've referred to in relation to the, if you like, the medical position as it related to the first claim. As far as the claim we're concerned with in the High Court findings it was really testing what, if any, advice Ms Rasmussen gave about that particular issue, and again it was nil. So –

ELIAS CJ:

Can you just refer me, or is there a finding on that 2005 –

MR GUDSELL QC:

Yes, there is a finding on that your Honour. The finding is at 165, paragraph 165, at page 144 of volume 1.

ELIAS CJ:

Yes, yes, I remember that.

MR GUDSELL QC:

But if I may come back, your Honour, just so that –

ELIAS CJ:

And what was the finding in relation to that about the advice that Ms Rasmussen gave, is that any finding on that? Well I suppose that's it, really, isn't it.

MR GUDSELL QC:

It is.

ELIAS CJ:

Most unlikely that it would have occurred.

MR GUDSELL QC:

Yes.

ELIAS CJ:

If there had been competent advice.

MR GUDSELL QC:

And again in respect of 2005 –

GLAZEBROOK J:

Especially if the Judge said because he could have just, he could have done the same thing but seeing how it was going in 2007, and then decided whether to grant an extension –

MR GUDSELL QC:

He could have.

GLAZEBROOK J:

– at that stage. Had he not passed away in the meantime.

MR GUDSELL QC:

Yes, and an important was that there was a suggestion, remove the incentive for them to buy the farm, and for him to continue to be able to access the farm, if you like –

ELIAS CJ:

Sorry, explain that?

MR GUDSELL QC:

That if they had, if they'd had a deadline, a true deadline, of 2007, and there was none, but if you had a true one, then they would have been compelled to buy the farm at 1.5 or they'd go to market, and the suggestion –

ARNOLD J:

But how could they have done that in the face of the understanding?

MR GUDSELL QC:

Well this is where this, elephant in the room perhaps, that the understanding so-called side agreement which came up during the course of cross-examination, not mentioned in any brief, not mentioned to any legal adviser, either adviser, Mr Gray or Ms Rasmussen, was that they would see the opportunity going and in fact symptomatic of their actions that's what they did in 2010. They still had a side agreement in 2010 but they just rode over that and bought the property because if they didn't it went to market, double the value. So the side agreement had, this is where this man who was so poorly, poorly let down, giving rise to the loss, is that fundamental point about life interest, consumes the matter.

WILLIAM YOUNG J:

Well if the side agreement had been in writing then there wouldn't have been an option to exercise.

ELIAS CJ:

No.

WILLIAM YOUNG J:

Or the option would not have been exercised.

MR GUDSELL QC:

It couldn't have been exercised. What, and I come back to the point I probably made at quarter past 10, is that if, in some instances you'll get, and *Tauranga law v Appleton* [2015] NZSC 3, [2015] 1 NZLR 814 is a case you've just dealt with I'm aware of, and some are coming along saying conveniently, look, I would have done this. And you say, mmm, maybe, but maybe not, and what would happen as a result of that, or take *Benton* or any of the cases that we've got before us, you will have a conflict situation of saying, well hold on, would you really have, and would the other party have done something. In this instance it's so apparent that both parties agree, so why wouldn't it have been competently, and accepted competently, into the form of an agreement ie acted on competent advice, and it's in. It's locked in. Can't move. And he has the fortune to live for, as it was then, 10 years, after been given a lifetime sentence of about six months, for 10 years, and accessing the farm,

reasonably regularly but more irregularly in the latter years, is clearly impaired, but it was his life and the Chicks go so far as to say it would kill him if we bought it. What did they do? They bought it, had no protection. So where does the, and I don't mean to be blunt about it, but where does the buck stop? The buck stops with incompetent –

ELIAS CJ:

The extension brought Mr Blackwell more time on that argument and stopped matters coming to a head.

MR GUDSELL QC:

It did. Well, that was what was suggested was a reason and because he couldn't give evidence and was incapable of instructing counsel in 2010, it was a decision by Justice Faire on the litigation guardian point. That was the suggestion that, as quite appropriately in my submission, the trial Judge commented, look, this is really quite a logical, gratuitous act which can further valuable advantage to the Chicks for no apparent reason. It was unnecessary.

ELIAS CJ:

It gave him an advantage, however, given the terms of the agreement he entered into in 2004.

MR GUDSELL QC:

And the point about your Honour saying earlier, the Chief Justice, my apologies, saying earlier that effectively there's a ratchet clause but what happened is there's no advice in '04, there's no advice in '05 and even if there'd been advice in '05 about oh, the horse has bolted here, you've got no control, you want to keep involved, you've got no control. The no control situation arose in '04 because it wasn't put in. From '04 on, from the date of signing that agreement, Mr Blackwell was at the whim of the Chicks. He could have no control as to whether or not they exercised that option and he could have no control about price.

ARNOLD J:

So does that mean his motivation in 2005 in giving the extension to 2010 was to further protect his position and to get an advantage, as the Chief Justice suggested, it was necessary for him to do that really only because his lifetime interest was not

properly protected in the original – when the option was originally granted, and he wouldn't have had to do it if that –

MR GUDSELL QC:
Correct, nothing. He wouldn't have to do anything.

ELIAS CJ:
Although that is entirely speculative and, of course, if it's accepted that there was a side undertaking, he had no need.

MR GUDSELL QC:
Well, this is an issue that the Court of Appeal touched on and I mention it in my submissions. The Court of Appeal remark, and I'll find that for you –

GLAZEBROOK J:
Well it doesn't seem to have been accepted, presumably by the Chicks, that it was a binding side undertaking because otherwise, as Justice Young said, they couldn't have exercised the option. So it was a gentlemen's agreement, if you like, that they wouldn't do that.

MR GUDSELL QC:
That's all if, and we've got to accept as I stand here –

GLAZEBROOK J:
Well, we accept it existed because there have been findings, haven't there, but it can't have been a binding agreement, so it must have been different from what would have happened if it had been contained in the agreement itself.

MR GUDSELL QC:
Absolutely, and this is where one of the errors in the Court of Appeal, if I may respectfully say, I pointed it out in 35. d. of my submissions, and it's a remark at paragraph 114 of the judgment, and what the Court of Appeal – I apologise, I didn't give you a page.

ARNOLD J:
96.

MR GUDSELL QC:

Thank you your Honour. 114 of the judgment the, and I – you know, my submission is this. You see that the Judge was apparently influenced by the fact that the formal terms did not protect Ross against the contingency. However once the Judge accepted the side agreement, that reservation must disappear. Now –

ELIAS CJ:

Sorry, where is that? I can't see it.

MR GUDSELL QC:

I've got my – 114 of the Court of Appeal judgment at page 96 of volume 1.

ELIAS CJ:

Sorry, what are you looking at?

MR GUDSELL QC:

I'm looking at the point about the –

ELIAS CJ:

Sorry, it's just you said, "Side agreement." I can't see anything in that paragraph about a side agreement.

O'REGAN J:

The second sentence.

GLAZEBROOK J:

I don't think you're on the right paragraph. It's the Court of Appeal judgment.

ELIAS CJ:

Oh, sorry. Page of the –

MR GUDSELL QC:

96, your Honour. My apologies if I haven't made that clear.

ELIAS CJ:

No, my fault, thank you. Sorry -

MR GUDSELL QC:

My point in my submissions at 35. d. for the record is that the Court of Appeal held that it would have been preferable if the term had been included. Now it's submitted the Court of Appeal should have instead asked itself this. Firstly, had the respondent provided competent, appropriate advice, would it have advised the inclusion of a term precluding the Chicks from exercising the option during Ross's lifetime. That's the advice. And secondly, had such advice been provided, the hypothetical, would Ross have accepted it. Now having regard, as I say in my submissions, to his objectives, and the full implications of the transaction, the answer to both questions must be, yes, and I'd go further than that. There'd be no reason why he wouldn't agree to the inclusion of such a term, specifically designed to protect his prime consideration. And this is the absolute point, nor would the Chicks objects.

So what the Court of Appeal says is that his Honour was influenced by that issue around being alive and they say once he accepted the side agreement that reservation must disappear. Now that is not, in my submission, the principal why of determining issues relating to causation and then kicking on into questions of loss, and how I put it, in my respectful submission, is the way that the Court should have addressed to, and to underlying that I look at different words, but those used by Justice Young and Glazebook in the *Benton* decision which is language that is also commonly used, and I'm not attempting to be too refined here, but the, at tab 1 of the bundle of authorities at paragraph 47 of the decision in *Benton v Miller & Poulgrain*, the Court respectfully said in the second sentence, "so if the plaintiff shows that it's more likely than not that he or she would have acted in a particular way, the court acts on the assumption that this is the way the plaintiff would have acted," and the Court remarks about in that decision about avoiding risk and assuming benefit, both of which, in my submission, equally apply using that language here, it's more likely than not that Ross would have accepted that advice, that the Chicks would have accepted that advice, because they have a side agreement saying that's what they will do anyway, they say, and that prevents a sale at half its value in 2010 when Ross cannot control the process.

I wanted to come to that point the Chief Justice that you raised a moment ago, because that's the life interest point, really, perhaps in a nutshell. But the, your Honour remarked about whether there was some ratchet clause in the agreement, that it reverted to market after that three year term. The point about the floor in the agreement really in essence is this, that there was, in terms of that

pleading I took you to at paragraph 53EE1, there was no protection going forward over a three year period in terms of the ratcheting, and what's clear is we have here, and it's a remark made in some of the cases, about expert solicitors, *Hansen v Young* [2003] 1 NZLR 83 (HC) is a decision that I've mentioned in my submissions, where they hold themselves out as legal expert or specialist in a field of practice, may be subject to a stricter standard of care. Well the Court's already found negligence but terms of standard of performance. Here we've got a firm practicing in Morrinsville in the rural heartland of New Zealand, we've got Mr Gray, who acts for the Chicks, saying it was evident that the prices were on the move in 2004. So to meet both affordability and a limited opportunity to get a leg up for Adam Chick, to have advised and for him to have accepted consistent with what he was saying and doing, something tied, or to a mechanism or process, would clearly accord with his objectives, in my submission, and indeed the objectives of the Chicks, because they were simply getting a modest reduction on the, it was actually 16.67% reduction, on the true market value in 2004

O'REGAN J:
Was it the true market value, because wasn't that valuation quite old by then?

MR GUDSELL QC:
Well there was one valuation in 2000, which the rental was set and other things. The position in relation to the 1.8, the evidence quite – the evidence is that Ross said that he had taken advice from John Darragh and that the market value at the time was 1.8. So that was in an around that 2004 discussion. And that's where – so that 16.67 is an actually is percent reduction, wasn't a gifting, it was tied to a link between the Government value price of 1.165 and the market value, so-called given to Ross, which is what the evidence is, he's not here to give it, at 1.8, strike the difference in between, it's a leg up but it's not a gift, it's 300,000. So a solicitor properly exploring all of that, as in my submission they ought to have, would say, well, look you're giving him a benefit. It's like saying in simple terms, here's a 20% discount on the sale price when you buy it.

O'REGAN J:
Wouldn't the expert evidence have been to that effect, if that was so?

MR GUDSELL QC:
The expert evidence?

O'REGAN J:

Well wouldn't the evidence of the lawyer who gave evidence for your clients, as an expert, wouldn't he have said that's what should have happened if that was the case?

MR GUDSELL QC:

Well he did say, Mr Eades did say in his evidence that, around the reasons and trying to get a comprehension or understanding of the process needed to have been explored with him. At the time, of course, nothing was. So had it have been, and because we've got to deal with this hypothetical, no advice was given, what would have been, would he have acted. You tie, you join the dots. In my respectful submission you join those dots, that's the inevitable outcome of that.

GLAZEBROOK J:

Sorry, what's the inevitable outcome because I can postulate a situation where you'd say, well if the three years, because think the median, there was a 30%, I can't remember, I looked at it just before, there was something like a 30% chance of people surviving more than two years in 2000 when he was given the diagnosis. I don't know whether his prognosis was improved, it didn't sound like it frankly, it just seemed a miracle that he'd lasted, that he was in that 30% and that he not only lasted more than three years, but much longer. So in 2004 he can't have had an expectation of a long period of life.

WILLIAM YOUNG J:

Well maybe. It maybe that everyone that within the 30% that survive two years, then have a –

GLAZEBROOK J:

Well it may be, we don't know the answer to that, but he certainly wasn't necessarily expecting to make old bones, must be the conclusion, given you have a condition of that type. And I suppose my question is, that if I was giving advice there you might say, well tie it to your death, give the option to your death with some kind of ratchet clause. And then the question is, would he have accepted that, and perhaps with conditions of access put into the agreement.

MR GUDSELL QC:

Well given the starting point in terms of where he struck the first in 2004, a 16.67% reduction, it's not a major. What would have done going forward. That's what he was intending to do. They're consistent with the advice that allows for his consideration to affordability for Adam.

GLAZEBROOK J:

Although as I understand it a lot of the prices were moving because of the dairy conversions rather than dry stock. And he had assumed that it was going to be run as dry stock, hadn't he?

MR GUDSELL QC:

Well farm prices were moving, even for his farm –

GLAZEBROOK J:

Oh I can understand that.

MR GUDSELL QC:

So that the value of the farm, as an entity, was moving, according to Mr Gray's evidence, and was known to people practicing in that field, so that, and equally it should have been known to Ms Rasmussen, and the difficulty we get with this is what's the nature of the advice, because it wasn't given, and would he have acted on it. In my submission the nature of the advice, which the Court has found established in paragraph 165 I think.

GLAZEBROOK J:

Which Court?

MR GUDSELL QC:

The High Court. That's at 144. What the Court's saying there is really important because it does, contrary to my friend's theme about Ross would have insisted on having the market values in the documentation, that's not the case at all, and in my submission the Court has encapsulated matters there saying I doubt the rental would have been higher in 2004. It may be the option would have been provided for at 1.5 and then the critical point, coming on the terms of the option, had some sort of mechanism to enable the option price to be adjusted to reflect changes in market value –

GLAZEBROOK J:

And if that had happened would it have been a three year option?

MR GUDSELL QC:

Well, could it have been a three year option –

GLAZEBROOK J:

Including the death because all he was interested in, wasn't it, to have it until his death, and then for it to go to Adam, that those are the findings?

MR GUDSELL QC:

At an –

GLAZEBROOK J:

At an affordable rate.

MR GUDSELL QC:

Yes, not at 1.5.

GLAZEBROOK J:

No, no, at an affordable rate, whatever that was going to be.

MR GUDSELL QC:

Yes.

GLAZEBROOK J:

Is it the more likely thing that option up until can be exercised within 12 months of my death, or something of that nature, and with a ratchet clause of some nature, but still at a discount to market?

MR GUDSELL QC:

There are, as your Honour was saying before, various scenarios and that, that could have been provided for but to meet his objective of affordability. Interestingly what he has said directly, that we know of through Ms Rasmussen, is the point I referred to earlier saying it's just limited. So your point, your Honour, as I perceive it, is what's the point of being limited –

GLAZEBROOK J:

Yes, but why –

MR GUDSELL QC:

Yes, and I take that point, what's the point of being limited. That he clearly in terms of the commercial edge, whether it was for his wife, for knowing that he was going to die, that she was going to inherit, I would be, as counsel, would be speculating on that, but that was his evidence, it was limited, so there's no control during that three year period on his part at all. And just in terms of affordability it is very clear as to how that, in my submission, how that came about, and its' tied to a commercial anchor. It's a reduction from market. Not a $900,000 gift, it's tied to market.

GLAZEBROOK J:

But is there any evidence, if you'd a sort of ratchet clause in there with the same sort of discounting, but remembering affordability because even if market value is high if you can't borrow, if your income from it is not covering your borrowings then it's not affordable, especially for somebody with no capital.

MR GUDSELL QC:

That's right and –

GLAZEBROOK J:

And you mightn't be able to borrow to even purchase that, I'm looking at Adam, of course the Chicks are slightly different, and as you say the documentation didn't refer to Adam at all.

MR GUDSELL QC:

No, the –

GLAZEBROOK J:

Which is the slight difficulty with some of this.

MR GUDSELL QC:

Yes, the – yes, I have to be careful about what's, how far I go here, but in terms of affordability the point, at the end of the day, in terms of that advice and what loss, what he was compelled to do at the end of the day was to sell the farm, as has happened, at 1.5 million. What the Judge said, in terms of the point your Honour is

raising, is that is in 167 and I mentioned it before, it's conceivable that they may not have even been able to come up to an agreement. So it's conceivable that with the competent advice, it's about the third sentence in 167 of the High Court judgment, it's conceivable to the advice that your Honour has just referred to that when it came to a point in time that the Chicks were considering exercising that option, that it was determined that it was not affordable at the new price, and the option lapses and the current market value then kicks in, if they want to buy.

GLAZEBROOK J:
All right, so –

O'REGAN J:
There's a lot of guesswork in that.

MR GUDSELL QC:
Well I – the only reason there's guesswork, with respect, is that I'm dealing with a proposition that Justice Glazebrook has put to me that it could have been that if he dies and that there's this ratchet and Adam's affordability, once we start dealing with a number of scenarios, and there are a huge number that counsel's drifted through in –

O'REGAN J:
Well you're relying on the High Court Judge saying there should have been a ratchet mechanism. The ratchet mechanism would've ended up with a value discounted from market value but what the law firm was found liable for was the difference between the actual price and market price.

MR GUDSELL QC:
Yes.

O'REGAN J:
So isn't that inconsistent?

MR GUDSELL QC:
Well, the position as his Honour has found it is, really, drives out of two points, and one is the life interest point that he's compelled to sell. Now if the Court decides that

that should have been in the agreement and he's compelled to sell, then the difference is the between 1.5 and 3.4 million.

WILLIAM YOUNG J:

So you say, the starting point is they've had to sell it, and in under value, and that was due to negligence. We don't know what else might have happened if there had been proper advice given but on that basis we simply deal with the facts we know.

MR GUDSELL QC:

And they are facts we know, and that's –

WILLIAM YOUNG J:

We know that it wouldn't – we infer that it's more likely than not that he wouldn't have done what he did, therefore, the ultimate sale that occurred was something that was a consequence of the negligence. It may well be that if proper advice had been given, something more favourable from the point of view of the defendants would have emerged but we don't know that and we've just got to deal with the case on the basis of what we understand to be the facts.

MR GUDSELL QC:

I agree, your Honour, and to add to that, it become ancillary to any issue because if the Court accepts that's the position, it doesn't visit this issue because he didn't die and they exercised it. So that it's really in a sense saying, well, if you go past that point of life and death and, interestingly, my friend's submissions, I think, in 1.13 and 1.18 actually appear to accept that the inference would be that he would be given advice to put in some clause in relation to life. So all round we have a life situation. The only reason you'd go to Justice O'Regan's point of saying well, what would be the amount, what would be the sum up from 1.5 but less than 3.4 if we use that as the figure? There's definitely a loss. How much is the loss? But you only get there if you say, well, we'll put the life issue to one side.

O'REGAN J:

No, no, I accept that you've got a different argument on the life issue.

MR GUDSELL QC:

Yes.

O'REGAN J:

I'm just trying to understand the ratchet point, why you're putting such a great deal of reliance on that because the ratchet point must logically end up with a value at less than market but let's say 16.7% less than 3.4 million, but it doesn't end up at 3.4 million does it?

MR GUDSELL QC:

No. If you accept that the only argument that can be put forward, in my submission, on that is that it was the compulsion to sell that gave rise to the loss and that's really what the High Court has said.

O'REGAN J:

So where does that come into your pleading, the failure to tell him to put a life – a don't exercise while you're alive clause? Was that – do you say that comes into that pleading in 53. e. i?

MR GUDSELL QC:

Absolutely, absolutely because it's a –

O'REGAN J:

It's pretty oblique isn't it? I mean, if that's what you were contending for why didn't you just plead it?

MR GUDSELL QC:

Well, the position in relation to the 53. e. i. is that the – it's giving failure to give proper advice. That's the fundamental starting point for the solicitor's duty, and that proper advice relates to the reasonably anticipated position going forward, and that must necessarily link into exploring with this particular person and who he is, the life-related issue, in my submission.

GLAZEBROOK J:

Well there's also the conflict pleading which I suppose is an issue as well in this because the advising both sides and not actually – therefore turning the mind properly to what should be in there to protect the client.

MR GUDSELL QC:

Well, the position really, that's right, and both Mr Haynes and Mr Eades give very clear evidence in relation to that issue and, indeed, the –

GLAZEBROOK J:

And I suppose you'd say, anyway, the whole issue of that agreement was actually canvassed, so even if it isn't explicitly in the pleadings, it was quite clearly canvassed during the evidence and findings were made on it –

MR GUDSELL QC:

They have been.

GLAZEBROOK J:

– and so we shouldn't go back to the pleading because it was actually dealt with.

MR GUDSELL QC:

It has been expressly dealt with and a matter we discussed earlier and endorsed by the Court of Appeal.

GLAZEBROOK J:

Where did the High Court Judge deal with that explicitly?

MR GUDSELL QC:

The independent advice point?

GLAZEBROOK J:

No, sorry, the death point. I mean he does deal with independent advice as well at 165.

MR GUDSELL QC:

Yes, he deals with that at 164 and 165, had to have competent independent advice, unlikely they would've entered into it. The –

O'REGAN J:

But his response to the failure to deal with the anticipated price rise is to say there should have been a ratchet isn't it?

MR GUDSELL QC:

Well –

O'REGAN J:

Which doesn't lead you to the loss figure that you're now claiming. He doesn't say if there'd been advice about not exercising during the life, then that means the property could only have been bought at market value does he? Was that argued in the High Court?

MR GUDSELL QC:

The life issue was raised throughout, both the Court of Appeal, the High Court and Court of Appeal that that term was not included and one would expect that term to be included.

O'REGAN J:

Yes, but was it argued that the consequence of that not being included was that the property could be bought at less than market value, whereas if it had been in there it couldn't have been bought at less than market value?

MR GUDSELL QC:

Because of the – in essence, yes, in the sense that but not directly on this negligence issue and the way that it's been developed more here today, but the point that was being raised in the High Court really was drawn into the first claim and the question of independent advice, unconscionability, special disability and matters of capacity, so that these matters about him being alive or dead did not, were not included in the documents and that was more addressing issues associated with had independent advice been given, one would've expected to see such a clause in the agreement. That's how it was put.

O'REGAN J:

But I mean your case really before us today is there wasn't a clause about life. If there had have been it would've been market value, therefore, that's our loss. It's a very simple case but that doesn't seem to have been your case in the High Court or the Court of Appeal.

GLAZEBROOK J:

And it isn't dealt with on a very quick flick in the causation section of the High Court judgment.

MR GUDSELL QC:

No, not in the – no it hasn't been dealt with in that manner in the High Court judgment.

GLAZEBROOK J:

Where are the findings on that because they were certainly referred to by the Court of Appeal, so –

MR GUDSELL QC:

On the life issue?

GLAZEBROOK J:

Yes.

MR GUDSELL QC:

I'm just looking for paragraph 139. I'm going to –

O'REGAN J:

This is 139 of the High Court?

MR GUDSELL QC:

Yes. I've gone to, with respect, I'm tying in the Court of Appeal remark on page 96 about the life issue.

GLAZEBROOK J:

Oh, 139, oh, page 139.

MR GUDSELL QC:

And then paragraph 139 of the High Court decision. So I'm jumping between page 96 of volume 1 and page 136 of volume 2.

GLAZEBROOK J:

Yes, I see.

ELIAS CJ:

Did Mr Gray give evidence about his knowledge in 2010 of the side agreement?

MR GUDSELL QC:

No, no, sorry. My recollection, your Honour, is that neither Mr Gray, nor Ms Rasmussen had any knowledge about the side agreement but to answer your point, was it put to him as to his knowledge? I can find that for you.

ELIAS CJ:

No, I just – I saw a reference, I suppose, in one of the judgments to Mr Gray having known about it when there was the discussion in 2010 about further –

GLAZEBROOK J:

That was – it says in page 137 that was the first time he'd heard about it in 2010. He didn't know about it before.

MR GUDSELL QC:

Yes.

ELIAS CJ:

So did he give evidence of that?

MR GUDSELL QC:

No, I'm just going to look at that point.

ELIAS CJ:

Oh, it may simply have been Mr Chick's evidence he didn't tell Mr Gray about it, the way it's put there.

MR GUDSELL QC:

Well, it didn't emerge in any briefs of evidence. It emerged during cross-examination that he had a side agreement.

GLAZEBROOK J:

Paragraph 138 it is actually said that it didn't reflect the full terms of the – and that was the Blackwell's case, of the High Court judgment, page 136.

MR GUDSELL QC:

Yes.

GLAZEBROOK J:

So it is actually explicitly he said that was the case, even though it doesn't really accord with the pleadings.

ELIAS CJ:

Yes, that presumably wasn't pleaded?

MR GUDSELL QC:

In respect of him, well, in terms of the alive issue?

ELIAS CJ:

Yes.

MR GUDSELL QC:

No, the – because the only time the question of, certainly, the issue surrounding him not wanting to sell at all were evident from his own family and there was always evidence that Ross did not want to sell while he was alive. There was no issue around that from anyone at any point. There was no dispute about it.

Does your Honour wish to carry on now at this time?

ELIAS CJ:

We'll take the adjournment now, thank you, Mr Gudsell.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.50 AM

MR GUDSELL QC:

I haven't been able to find anything in Mr Gray's evidence over the break, your Honour, in relation to his evidence on that lifetime issue that you raised, but I will look for that to see whether I can assist you with that.

ELIAS CJ:

Well there might not be anything.

MR GUDSELL QC:

No, I haven't completed a search on it, even though we've got it electronically. Really the, just reviewing the written submissions over the break, and considering the discussion that's taken place, I don't propose really, unless your Honour's wish me to, to go through anything further in relation to those written submissions, but really to address matters –

WILLIAM YOUNG J:

What were the terms of Mr Blackwell's will? Who were the beneficiaries in Mr Blackwell's will?

ELIAS CJ:

The brothers and wife.

MR GUDSELL QC:

The life interest to the wife and the, I'll just get that accurately for you Sir.

ELIAS CJ:

Do we have the will?

MR GUDSELL QC:

Yes we do your Honour.

ELIAS CJ:

So it's in volume 4, is it?

MR GUDSELL QC:

It's in volume 5.

GLAZEBROOK J:

Page 859.

MR GUDSELL QC:

Thank you your Honour. There was an earlier will as well, I believe.

ELIAS CJ:

Yes, the judgments refer to a will in 2000.

MR GUDSELL QC:

Yes and I'm going to, there is one and I believe it's in the material that's before the Court.

WILLIAM YOUNG J:

Was there any evidence about the impact of the option on Mrs Blackwell and whether that was addressed by the solicitors or anyone else involved?

MR GUDSELL QC:

No advice in relation to, from Ms Rasmussen in relation to any will related issues.

WILLIAM YOUNG J:

Because this did have the effect of diminishing the funds which would otherwise be subject to Mrs Blackwell's life interest.

MR GUDSELL QC:

That's correct and there was a, I think Mr Chick's evidence your Honour, there was reference to some consideration given that Ross wanted to give the farm 1.2 to Adam Chick, that that couldn't happen, really showed his inability to understand in my submission, but that couldn't happen because Margaret would have a claim on it. But, no, there was no advice given by the solicitor saying well if you're going to enter into an agreement that fixes a price going forward, when prices are on the move, you have to be aware that in your imminent death, as it's likely, that it won't provide adequately, or inadequately, for Margaret. So nothing. But I do, I'm sure –

GLAZEBROOK J:

Have I imagined this? Did Mrs Blackwell know about the lease and the option. Was there evidence on that, Mr Gudsell?

MR GUDSELL QC:

No there wasn't.

GLAZEBROOK J:

For some reason I thought there was something.

MR GUDSELL QC:

There's reference to Margaret's family, members of Margaret's family. One of the difficulties with preparing the case for you is that there were matters strictly under the rules that were relevant to the earlier claims. But if I may say from the Bar, there was certainly evidence around Margaret having her own difficulties of comprehension of matters and under some – I'm conscious that she's present in Court today, but having her own mental difficulties, so in terms of her intellect. So she didn't feature in this but her family members gave evidence to those Court in relation to their dealings, and their endorsement of the action taken by Derek and Basil Blackwell. So – because they had been contacted by the Chicks in 2010 and there were all sorts of issues going around that, but I'm just conscious I shouldn't go too far into that because you haven't got that evidence.

WILLIAM YOUNG J:

Well we can always get it if we have to but –

MR GUDSELL QC:

Well there is evidence surrounding what the family members, and what was happening in 2010 –

WILLIAM YOUNG J:

Okay so we can take it that Mrs Blackwell, or at least via her family, support the Blackwell's claim?

MR GUDSELL QC:

Correct. And I'm coming to that point your Honour. My apologies. I was certain that there was a 2000 will but there's certainly a 2001 will. I'll just see if Mr Sutherland can find it. My recollection, and his indeed, is that it was in the earlier material but didn't come through into this material.

GLAZEBROOK J:

Was it in different terms or is it basically the same life interest?

MR GUDSELL QC:

I'm reluctant to say it was on identical terms. My recollection –

ELIAS CJ:

It's just that the judgments don't, I don't think, refer to a 2001 will. But anyway.

GLAZEBROOK J:

I was actually trying to find the place where they do refer to the will but…

MR GUDSELL QC:

This issue would really, around the will, had a sort of unfortunate flavour to it in a sense because there were suggestions of the, in relation to Basil Blackwell gave evidence, he was one of the litigation guardians, and then ultimately became executive. The point about it is that Ross Blackwell entrusted, ultimately, and the Court found he had capacity or understood the general nature of other matters, he entrusted his brothers as the guardians of his estate when, in the event of his death, and to, despite the evidence about why Ross did as he did, and the concerns raised about how his brothers have treated Margaret, the reality is that he continued to, right through this period, his will in 2001 reflects it, to entrust his brothers with the care of his wife and the care of his estate.

Paragraph 74 of the Court of Appeal – of the High Court judgment, to be found at page 82 of volume 1, refers to the will. My apologies, at 118.

ELIAS CJ:

So 118 page or 118…

MR GUDSELL QC:

118 page, my apologies your Honour, 118 page of volume 1, that's at paragraph 74 of the High Court judgment. This appears in the part of the judgment that's dealing with the transactions and it deals with the issues around whether or not Ross understood the general nature of all three transactions, which is concluded at paragraph 98.

Sorry, you're waiting on me, I have been able to, with the assistance of Mr Sutherland, been able to find that passage about Mr Gray's evidence on the lifetime issue, and it's at volume 3 at page 548, line 33, over to page 549, line 6.

ELIAS CJ:

So there was a file note in 2010 alluding to it apparently?

MR GUDSELL QC:

Yes, and I'll find that for you your Honour. There is a file note at page 842 of volume 5, and my recollection is this is the file note, this is Mr Gray's file note, and that just refers to the, doesn't want to sell and there's reference to, do you believe if it was sold then it might kill him, but I'm not sure whether there was any other one, I'll endeavour to find that if there is one your Honour.

ELIAS CJ:

So do we know what date this file note is? 16th of the 3rd, what year? Looks like 2010 in terms of the context around it.

MR GUDSELL QC:

Yes, it's recorded in the index, your Honour, as 16 in 2010.

ELIAS CJ:

I see.

MR GUDSELL QC:

It's in a file that's been opened for – oh yes the 841 records renewal of lease R W Blackwell 2010.

ELIAS CJ:

I see, thank you. So, he, at this stage was in the home. That's what Windsor Court is, is it?

MR GUDSELL QC:

Yes, he'd been there since 2008.

ELIAS CJ:

Yes.

MR GUDSELL QC:

Yes. There was much evidence surrounding the circumstances that gave rise to all of that but it was really all relevant to all the other causes of action in the claim that the Chicks brought against the Blackwells for specific performance.

ARNOLD J:

So this is March 2010 and they exercised the option on what date?

MR GUDSELL QC:

I think it was 29 or 30 April as the expiry date. The agreement's there. The letter is from – apologies, that was me. If you go to 847 of volume 5? If you have a look at – you might be interested, your Honours, just by my background, you'll see that at 845 there's, again, a memorandum which were – the way in which the firm communicate to each other, which Messrs Haynes and Eades commented on but you'll see that Mr Gray's been advised, in the third sentence, that the Chicks advise that they've had discussions with Ross Blackwell with regard to the renewal of the lease and the option to purchase. As a result of that advice from their client, his client, that this has been agreed.

ELIAS CJ:

And the contemporary note indicating a known valuation of more than 3 million albeit –

MR GUDSELL QC:

Oh, yes, there's a – the important point that I was endeavouring to make here was that you have a situation in March, Justice Arnold raising, of Ross extending 8.6 at 1.5 is not through to 2013, which was the – what was agreed. There was a right of renewal in 2007 to 2010 with a further right of renewal to 2013. In that 2007 lease agreement, there was no amendment to the clause 8.6 regarding the option at all. So the option was going to terminate in 2013 – sorry, 2010, although the lease was renewable through to 2013, and what you've got here is the Chicks telling their advisor, Mr Gray, that Ross has agreed, in this position he's in mentally, that he's agreed to extend it through to 2016 at the same value and you'll see, "We would be pleased to take instructions and advise we have the matters agreed above between our respective clients."

Now that's where things stepped in and then, of course, the brothers had been involved in his affairs since 2008. They stepped in and then you've got a notice, as you can see, 26 March, to settle at that price. So they've –

ARNOLD J:

Yes, well, it's interesting that they did that notice on that date.

MR GUDSELL QC:
Yes.

ARNOLD J:
Having said two weeks earlier that he didn't want to sell and that they believe if it was sold it may kill him.

MR GUDSELL QC:
On the 16th of the 3rd, they're telling the advisor that he doesn't want to sell. It underlines the lifetime issue it would kill him, which is all agreed, but that's the history of it and the matter has, if I may say from the bar, has settled and the property is now with the Chicks.

I was just reflecting on the matters referring to my written submissions, and the discussion we've had over the course of the morning. There wasn't anything else that I really wish to add to what's in writing to you in relation to this matter and unless your Honours have any questions of me, I didn't propose to say anything further at this point but to address matters in reply if they arise.

ELIAS CJ:
No, thank you, Mr Gudsell. Yes Mr Ring.

MR RING QC:
Your Honours, I've reduced what I'm proposing to say into a series of, probably a series of tables and schedules is the correct way to describe it. I wonder if I can hand those up to your Honours?

ELIAS CJ:
Yes thank you.

MR RING QC:
This doesn't so much replace my written submissions. It repackages them in what I hope is a more marketable form. I'm hoping, also, that in the course of these submissions, I'll only need to take you to this hand up and also to volume 1, which contains the three documents that I'm going to be referring to. That is the statement

of claim, the current statement of claim as at time of trial, the High Court judgment and the Court of Appeal judgment.

If I can start, your Honours, by just giving you the framework of these submissions so you know what's coming and where it's coming. First, if I can just talk about the overview here. Your Honour, the Chief Justice, suggested at an early stage in my learned friend's submissions that the lens of the loss might be a good way of looking at this and, of course, with respect, that harks back to the fundamental principle of duty of care, that a duty of care doesn't exist in the abstract. It's a duty to protect the plaintiff from the particular loss that the plaintiff's suffered, and that really takes us to what are the losses that the plaintiff, and when we talk about the plaintiff here, although my learned friend has the whole Blackwell family in there as the plaintiffs, we actually see Ross Blackwell, ironically, as being on our side and it's the Blackwell brothers really that are the protagonists here.

But if you come back to the question of the losses that are relevant here, there are, in fact, two potential losses that are relevant. One is, and this is in terms of the duty to avoid those losses, one is the loss of the value when the option was exercised, that it was exercised at less than market value, and at 1.5 million, and the second is the loss for Ross potentially, that he lost the amenity of the enjoyment of the farm while he was still alive because the option was exercised.

WILLIAM YOUNG J:
Why can't it simply be that the loss was that he was contractually committed to sell the farm during his lifetime for half its value? Why can't that be treated as the end result and then – just two more propositions, that if the Court's satisfied that properly advised he wouldn't have entered into that precise legal bargain, the question, then, is what damages should be awarded and, in that circumstance, aren't uncertainties largely to be resolved against the person who's responsible for giving rise to them?

MR RING QC:
I'm not disputing that proposition but I am, with respect, not accepting some of the starting points of your Honour's proposition.

WILLIAM YOUNG J:
Well, would you dispute a conclusion that properly advised he would not have entered into a bargain that resulted in the outcome that was produced subject only to

a gentlemen's, but unenforceable, agreement that the option wouldn't be exercised in his lifetime?

MR RING QC:

No I wouldn't accept that proposition in its broad sense.

WILLIAM YOUNG J:

Sorry, do you say that properly advised that's a deal he would have done?

MR RING QC:

What I'm saying is that properly advised Ross Blackwell would always have wanted, on his death, the farm to go to the Chicks for 1.5 million.

WILLIAM YOUNG J:

It seems to me that you may be starting in the middle.

MR RING QC:

Well, no, with respect, that's because I'm separating out those two losses. If Ross Blackwell could speak from the grave now, and he was asked would you be happy, were you happy, are you happy that the Chicks would be owning your farm now, having paid $1.5 million, all of the evidence, and all of the factual findings in the High Court and the Court of Appeal, are directed towards supporting that and only that proposition. So what he's lost is not the value, if he's lost anything, what he's lost is not the value. He's lost the fact that it happened, or could have happened, but for the Court case, could have happened during his lifetime. In fact, because the Court case intervened, it didn't actually happen in his lifetime, or if it did it was right at the end of his lifetime. But he always wanted the farm to go to the Chicks for 1.5 million.

ARNOLD J:

So what is the other side of the option doing in these agreements then? Is this an elaborate process for a market, working out what a market price is, if all he ever intended was that they were going to get it for 1.5 million, why did he instruct his solicitors to put in that option? That other element of the option?

MR RING QC:

To put a time limit on it and the time limit was to run in parallel with the three year lease renewals.

ARNOLD J:

That didn't happen in 2005 though, did it?

MR RING QC:

No, in 2005 he extended the option from 2007 to 2010 and the explanation that the Judge inferred, well that he gave to Ms Rasmussen, and the Judge inferred was correct, that he wanted to give more time to the Chicks, that he didn't want to put them under pressure to exercise the option. All of those, again, are consistent with the proposition that I am putting forward. So I want to –

ELIAS CJ:

Are you saying that if it's determined that there was no lack of capacity, and no unconscionable bargain, then there is no loss because that is what was intended?

MR RING QC:

What finally has happened as a result of the Court case is what Ross always wanted to happen, and that is the chicks get the farm for 1.5 million. Now what went wrong was that at the time for the renewal in 2010 Ross was prepared to extend the option and renew the lease. The brothers intervened and wouldn't allow the lease to be extended, and the Chicks were then left with either exercising the option or letting it all go.

WILLIAM YOUNG J:

They obviously didn't regard the agreement not to exercise the option during his lifetime as binding?

MR RING QC:

Well can I put a bit of a gloss on that because I'm not sure that, there's a number of points to be made about that. First, the High Court Judge was specific in saying that he wouldn't have expected it to be in writing, but everybody accepted that there was such an arrangement.

WILLIAM YOUNG J:

Who is everyone?

MR RING QC:

The Chicks, well, the Chicks and the High Court Judge, and the Court of Appeal.

WILLIAM YOUNG J:

But there's no, it wasn't mentioned in the briefs of evidence as I understand it?

MR RING QC:

No, because they're concurrent findings in the lower Court.

WILLIAM YOUNG J:

I now –

ELIAS CJ:

Well we're not bound, in any event, by concurrent findings, but I mean there's no issue before us on that probably.

MR RING QC:

No, correct. I mean the issue that we are dealing with here, the ground of appeal, was the Court of Appeal, right or wrong, to overturn the High Court, so what I'm endeavouring to do is to compare the High Court judgment with the Court of Appeal judgment, and that's what these submissions do. I'm going to come to objectives –

GLAZEBROOK J:

Although the High Court in causation didn't explicitly deal with the point that, Mr Gudsell's point now, which is if that had been in the agreement it couldn't have been exercised before Mr Blackwell had died.

MR RING QC:

And that's because the High Court exonerated, or didn't find that that part of the arrangements between them needed to be recorded in writing and it was no criticism –

GLAZEBROOK J:

Well it had to be recorded in writing otherwise it was absolutely useless. If it wasn't enforceable, and it could be exercised at any time, what was the point in it?

MR RING QC:

Well can I take your Honour to page 119, paragraphs 79 and 80, on page 120.

WILLIAM YOUNG J:

This is presumably written, a passage that deals with the claim as between the Blackwells and the Chicks, isn't it?

MR RING QC:

Well yes it is but there was never anything in the second half of the judgment that dealt at all with this question of the side arrangement.

WILLIAM YOUNG J:

But I mean, despite the fact that they're using the same solicitors, what passes between Mr Blackwell and Ms Rasmussen is a mystery to the Chicks?

MR RING QC:

Oh, that's not the reason that I'm pointing these passages out to you your Honour.

WILLIAM YOUNG J:

Yes, yes, sorry, but if you were looking at it as a competent lawyer, and you know that the, you've made an enquiry, and you know that Mr Blackwell doesn't want the option to be exercised during his life, would you settle for a side agreement that in fact isn't enforceable because it's –

GLAZEBROOK J:

And which you didn't know about.

WILLIAM YOUNG J:

Yes, but even if, would you settle for what it appears that Mr Blackwell settled for?

MR RING QC:

Well, what you're talking about now is not part of the evidence, it wasn't part of the pleading and isn't part of the evidence and isn't part of the findings by the High Court. The High Court findings –

GLAZEBROOK J:

Although if you look at 138, that was actually part of the case as recorded by the High Court Judge.

MR RING QC:

Paragraph 138 your Honour?

GLAZEBROOK J:

Of the High Court judgment, so that was – so no it wasn't in the pleadings that that should have been recorded but paragraph 138 does record what the case was at the High Court. On page 136 sorry.

MR RING QC:

It records that submission being made but again it doesn't find any expression in the High Court judgment. Doesn't –

GLAZEBROOK J:

Well it may not but that's the case. So if you're going to take a pleading point, can you take a pleading point when it's clearly stated that's the case?

MR RING QC:

The point that I am making, your Honour, is that there are two distinct types of loss here. One is the loss because Ross Blackwell did not want the farm to ultimately go to the Chicks for 1.5 million. And the other is, that the option was exercised during his lifetime. They give rise to different types of loss and what we're saying is that the way the pleading was framed, first of all, was a difference in value type of loss, not a timing type of loss, first of all, and second, that if you turn to the timing type of loss, the loss is the loss of amenity, the loss of Ross Blackwell enjoying the ownership of the farm for a limited period.

WILLIAM YOUNG J:

But you're looking at it from one perspective, and I understand why you do, and you may be right, but if you look at 149 of the High Court judgment, he says he's satisfied that if, "Edmonds Judd ensured that the parties were independently advised, the three transactions in issue would not have been entered into on the terms then agreed." That's almost a statement of the obvious, isn't it?

MR RING QC:

Well but that's a very broad proposition and he then –

WILLIAM YOUNG J:

No but do you take issue with it?

MR RING QC:

Yes I do.

WILLIAM YOUNG J:

That competently advised the transactions would have been, Mr Blackwell would have entered into transactions exactly as he did?

MR RING QC:

Yes, yes, I'm not shying away from that, yes, and I want to, that's the –

WILLIAM YOUNG J:

Okay well that's a proposition. Say you're wrong, does that mean that one should then say, okay, as a result of negligence they entered into ill-advised transactions, the starting point for an assessment of damages is the loss of market value, that may be discounted to allow for the possibility that he might have entered into a similar transaction as properly advised?

MR RING QC:

Well, with respect, I would frame that slightly differently because, and the part I would frame differently is where you referred to the discount, because to me the logical analysis is, he would have entered into the transaction on the same terms, if the answer to that is there's no loss. He would not have entered into the transaction on the same terms, question, what were the terms he would have entered into and would that have caused a loss and so –

WILLIAM YOUNG J:

Well why go direct to a hypothetical question when you can go to – a second hypothetical question when you can go direct to the question, point, what happened as a result of the transactions.

MR RING QC:

Well because the solicitor is only liable for the loss that he or she has caused, and if the client would have entered into a different transaction, which only caused that much loss –

WILLIAM YOUNG J:

Okay but that would, the difference there is really who takes the risk of the uncertainties. What I think the Court of Appeal may have done is we don't really know for sure what would have happened but it would probably have been similar therefore there's no causation, no damages.

MR RING QC:

Well, when your Honour says who's taking the risk of the uncertainty, there is no uncertainty because the plaintiff has to prove the loss that was caused. So the plaintiff proves what it is the transaction that the client would have entered into, that the plaintiff would have entered into.

WILLIAM YOUNG J:

I wonder whether that's right. I mean that is an approach, and it may be a reasonable approach, but what's wrong with my approach? Except that it's really unfavourable from your point of view?

MR RING QC:

Well, two things your Honour. One, it's not favourable from my point of view, I entirely accept that. The second is that it's the *Miller & Poulgrain* approach but the *Miller & Poulgrain* approach was all about discounting for percentages when we have the intervention of the conduct of a third party whose conduct you don't know which way they would have jumped, and then you discount for the uncertainty. Where you have a plaintiff, then you have no uncertainty.

WILLIAM YOUNG J:

Yes, but say we say, the hypothetical question is, would they have entered, would he have entered into this transaction if properly advised, if you answer that, no, why do you have to then go on and ask another question, well what exactly would he have done, and that's not a binary question because there's a range of possibilities.

MR RING QC:

But that's where the Court then decides on the balance of probability what the plaintiff would have done –

WILLIAM YOUNG J:

But why can't, as you say, on the balance of probabilities we know the plaintiff wouldn't have done this, why isn't that enough, under *Benton v Miller & Poulgrain*.

MR RING QC:

Well that isn't *Benton v Miller & Poulgrain* because *Benton v Miller & Poulgrain* was about third party conduct giving rise to the need to determine percentages.

WILLIAM YOUNG J:

Wasn't it also on what the plaintiff would have done? I thought it was about what the plaintiff would have done as well.

MR RING QC:

Well it is but it's what the plaintiff would have done in the face of what a third party would have done. Well here we're not talking about what the plaintiff would have done in the face of what a third party would have done.

GLAZEBROOK J:

Well you might be because what you can say here in 2004 is that he didn't want to exercise during his lifetime so you can say with some certainty that he would have said, well that should be in the agreement, that despite the three year it won't be exercised during my lifetime.

MR RING QC:

Well, I'm not accepting that as –

GLAZEBROOK J:

Well, it was part of the agreement between the parties as found by the High Court Judge, wherever that was.

MR RING QC:

Yes it was, and then the High Court Judge made the findings that I've referred your Honours to at paragraphs 119 and 120, which the Court of Appeal endorsed at page 96, paragraph 114.

GLAZEBROOK J:

Well, it may not, in fact, expected it to be in writing but he would have expected it to be enforceable wouldn't he?

MR RING QC:

Well that's –

GLAZEBROOK J:

So whether it was in the agreement or not he would have expected it to be enforceable. If it had been in the agreement or otherwise enforceable, then there was no way the Chicks could have exercised the option and that's where the loss arises because it would have been exercisable – it couldn't have been exercisable during his lifetime, and that's a simple proposition you're meeting.

MR RING QC:

Well the –

GLAZEBROOK J:

And the fact that he might have entered – and I think the point that Justice Young is making, the fact that he might have entered into something similar or the their parties may have changed their view on it is actually not of any relevance.

MR RING QC:

The question of whether he would have expected it to be enforceable, with respect, I don't accept, because that, again, is not consistent with the High Court findings.

GLAZEBROOK J:

So he would have expected that the Chicks could renege on it or he was just relying on the fact that they were friends to say they wouldn't. Is that –

MR RING QC:

Well, your Honour expresses it in a slightly casual way than I would have at the end there but, essentially, yes. The whole flavour of the High Court judgment is that there was a high degree of trust, respect, honour, mutual cooperation between the Chicks and with Ross Blackwell, and so there were a number of aspects to the arrangement that the High Court found and the Court of Appeal endorsed that we're not susceptible to be recorded in writing. That whole side of it, effectively the High Court and Court of Appeal said we wouldn't have expected that to be recorded in writing, and there's no suggestion that Ross Blackwell ever expected that to be recorded in writing. So –

GLAZEBROOK J:

Although you accept that competent advice would say don't rely on gentlemen's agreements?

MR RING QC:

Well, yes, and then what would Ross Blackwell have done is the next question because just because –

WILLIAM YOUNG J:

It just seems absolutely extraordinary – well, maybe the proposition's not a fair one to use but the – sorry, maybe the question's not a fair one to you but it does seem to me to be extraordinary to suggest that a competent solicitor would have allowed Ross Blackwell to enter into this transaction exactly as written, supported only by an oral agreement not to exercise the option during his lifetime.

MR RING QC:

Well, can I take issue with the word "allow" there, because the competent solicitor gives the advice but in the end it's the client that makes the decision.

WILLIAM YOUNG J:

Of course, of course, I understand that but – well, I'll rephrase, that if competently – what I find difficult to accept is that your proposition that if competently advice had

been given, this transaction, as recorded, supported only by the oral agreement of which this solicitor didn't know anything anyway, would have been entered into in the manner that it was.

MR RING QC:
Well, the task I have, then, we come to in table 3 in due course, which is –

WILLIAM YOUNG J:
Sorry, come to – what?

MR RING QC:
In table 3 of the hand up. I'm going to go through the table, perhaps, and give you an indication of where we're going, but table 3 is all about Ross Blackwell, the man, understanding Ross Blackwell and the conclusion that I ask you to draw from that when we get to the end of it, is even if he'd been given the advice that they say he would have been given, he would have still done exactly what he did.

So if I could just give you the overview now of the table? What I've set out in table 1 is what we say this case is all about, which is value giving rise to a causation issue because he entered into contracts at less than market value which gives rise to a loss of the difference between market value and the contract price.

What we say the case is not about is this timing issue, that the firm's failure to advise Ross on the terms of the option contract to enable him to retain ownership of his farm during his lifetime. The causation that flows from that, we say, is whether it caused him to lose, for the last few years of his life, the enjoyment of owning the farm because the Chicks exercised the option, or tried to, while he was still alive. And the causation and loss, if proven from that, is the loss of enjoyment of the ownership of the farm during the lifetime, which is not the loss in value.

Next, I want to deal with the Court of Appeal's essential causation conclusion which I'll come back to as we go through these submissions in a bit more detail. Next I want to take you to the key findings in the judgments that supported the High Court's causation in number 1 and then it's causation number 2 and what I've endeavoured to do as you can see in the margins, is to give you all the High Court references and Court of Appeal references. I'm not proposing to take you to all of them but one of the reasons that I'm doing that is because I want your Honours to see that the

Court of Appeal judgment closely followed the factual findings in the High Court judgment, which is, of course, the essential issue that leave has been granted on.

The next section, table 2 on page 2, is what we say is the proper approach to causation in this case, and that requires a four step counter factual, understanding Ross Blackwell, the man, identifying the advice that it was alleged he wasn't given and that he should've been given, considering how the man, Ross Blackwell, as described, would have actually reacted to that advice and then the conclusion on the balance of probabilities whether he would have followed it and, if he had followed it, whether he would have actually implemented mechanisms to ensure that the Chicks could not have bought for 1.5 million and could not have rented for the 69,600 but at the market value from 2007.

Table 3 is really the heart of the case and this is understanding Ross Blackwell, what he actually did and why. In the first part of table 3, at 3.1, I want to talk to your Honours and take your Honours to the passages that deal with Ross's objectives because that has been a focus of the submissions on behalf of the appellant. I want to talk about Ross's concept to achieve those objectives, and then I want to talk about how Ross saw that concept working to achieve his objectives. Again, all by reference to High Court findings of fact endorsed by the Court of Appeal.

In 3.2 to 3.7, or 3.8, I would like to talk to your Honours about Ross Blackwell, the man, in a number of headings, under a number of headings. First, his understanding that he knew what he was doing. Second, his awareness of market values. Third, the fact he had no personal, financial need for more money, the fact that he fully provided for his family, the fact that these arrangements enabled him to maintain his relationship with the farm, the fact he recognised there was a cost to the Chicks in the transactions, and that's a factor that really hasn't been addressed at all to this stage. But this factor is, of course, all about having entered into the arrangement with the Chicks in 2004, in the context that Adam and Jana were buying a farm, he knew it took them out of the market and so, of course, if it took them out of the market, he realised that if they weren't able to buy at a discount or at a significant discount, ie, the fixed figure of 1.5, then they would have been disadvantaged by having entered into this arrangement and that was one thing that he definitely did not want to see happen. And, finally, that he knew it was benefitting the Chicks and wanted to benefit the Chicks at his own expense, and the essence of all of this is this was not a commercial transaction. The solicitors, yes, they could have, and would

have, or should have given commercial advice, but Ross Blackwell was not the normal sort of client, looking for commercial advice. Clients don't come in saying, I want to benefit the counterparty to my agreement, and expect the solicitors to give them advice that protects their own interests at the expense of the counterparty. Ross was on the other side of that equation. He came into the solicitors and if he'd been asked everything that is said he should have been asked, he wouldn't have said how can I protect myself in this arrangement, he would have said how can I protect the Chicks in this arrangement.

ELIAS CJ:

The agreement in 2004, as it was structured, benefited the chicks, but it didn't benefit them by the amount of benefit the was secured in the end, and that was because of the deficiencies in the structure of the agreement.

MR RING QC:

Well your Honour is talking about the increases in value in the meantime?

ELIAS CJ:

Yes.

MR RING QC:

Well of course the evidence was that when Ross went in, in 2005 for the extension, Ms Rasmussen talked to him about the fact the prices were escalating and he said, "Yes I know that and I don't care." So there you have express evidence of his understanding that the prices were going up.

ELIAS CJ:

Well it may be evidence of some lack of capacity at the time, but those findings have been made I suppose?

MR RING QC:

Well they are the High Court findings that form the basis of this appeal. So that's where I'm going with Ross Blackwell the man. Then in table 4 I'm dealing with the, what was pleaded and what the High Court found. In table 5 with the counterfactuals as found by the High Court and the Court of Appeal and the specific reasons that the Court of Appeal is right and the High Court is wrong. And then in table – and I've broken that down into the option 2004 grant, the 2005 variation and the 20007 lease

renewal. And then the second to last table, this is this other point of the option exercised during Ross's lifetime. I want to talk about that specifically and then the conclusions.

It's not my intention to take your Honour's to every one of these references in the judgments. I would just like to pick out, if I can, the ones that I think sufficiently encapsulate things, but I am relying on all of the references as stated in here. So if I can come back to 1.2, your Honours. There were two High Court conclusions. The first one, Ross wanted the Chicks to be able to ultimately exercise the option for 1.5 million and to lease the farm in the meantime from 2007 to 2010 for $69,600 per annum, knowing and intending that both amounts were well below market value. And I'll come to the findings on that in more detail but I just footnote there an important passage in the judgment, if I can take your Honours to it, at page 138. The High Court's conclusion was, "On the face of it, there is an imbalance in financial terms but that resulted from a series of deliberate, rational decisions – "

ELIAS CJ:
Sorry, I've lost you, where is it, what paragraph?

MR RING QC:
Page 138, paragraph 145. "Which seen in a wider context, sought to achieve and brought about a fair and morally defensible outcome." So what the High Court is finding at that point is that Ross knew what he was doing. He acted deliberately. What he did was rationale when seen in the wider context.

ELIAS CJ:
I'm sorry, I'm still lost, where is it?

WILLIAM YOUNG J:
Paragraph 145.

ELIAS CJ:
Sorry, thank you, yes.

MR RING QC:
He was trying to achieve an imbalance in financial terms and he did achieve that, and in the end what he did achieve brought about a fair and morally defensible outcome.

WILLIAM YOUNG J:
What about Mrs Blackwell's position, Margaret Blackwell's position?

MR RING QC:
Well, I'm coming to that but if I can just give you the advanced – I'll take you to the paragraph.

WILLIAM YOUNG J:
Yes, sure.

MR RING QC:
If you look at my submissions at page 6 – well, perhaps look at the bottom of page 5, 3.4 –

ARNOLD J:
The actual submissions?

MR RING QC:
Sorry.

ARNOLD J:
This document?

MR RING QC:
Sorry, I'll call this the hand up, and that's all hopefully we'll need to look at.

ARNOLD J:
Okay, thanks.

MR RING QC:
Look at the hand up at page 5, 3.4.

ELIAS CJ:
Where are the page references?

MR RING QC:

Paragraph down the side.

ELIAS CJ:

I see, sorry. Five?

MR RING QC:

Page 5, paragraph 3.4.

GLAZEBROOK J:

The page numbers are at the top.

ELIAS CJ:

I see, at the top, yes. Yes.

MR RING QC:

So 3.4, "Have no personal financial need for more money. No debts and close to a million dollars in cash," and if you look at 3.5, the next page it refers to the will, and there's the reference to page 118, paragraph 74 of the High Court judgment that you've been taken to which refers to the earlier will. And you can see from that reference that the earlier will is in, essentially, the same terms as the 2001 will in that it left a lifetime interest to Margaret and the balance to the brothers.

WILLIAM YOUNG J:

But Margaret might have seen this slightly differently.

MR RING QC:

Well –

WILLIAM YOUNG J:

And was this relationship property, or not, do we know?

MR RING QC:

Well, I assume it was but –

WILLIAM YOUNG J:

So if it was, he gave away $750,000 of his wife's relationship property.

MR RING QC:

Well, he may well have done but that's not the issue that we're confronting here. The issue –

WILLIAM YOUNG J:

I think it's an issue I might have confronted with him in 2004 if I'd been acting for him.

MR RING QC:

Well, yes, and his answer would have been that he'd adequately provided for Margaret.

WILLIAM YOUNG J:

Yes, maybe. Where's the evidence as to that?

MR RING QC:

There is no evidence as to that.

WILLIAM YOUNG J:

So you're assuming that that's what he would have said if asked?

MR RING QC:

Well, there was no evidence by any experts either about that.

WILLIAM YOUNG J:

No.

MR RING QC:

There is a total gap in the evidence on that proposition. No question of relationship property, as far as I'm aware, arose in the course of the trial at all between the experts or in any other way.

WILLIAM YOUNG J:

No, well, I'm not really looking at that sort of high level of specificity but it does seem that she was a person who had an interest in all of this, and it's the sort of, you know, sort of interest I would have thought a solicitor might have talked to someone who was being generous with money to recognise that there are other people who might

be affected by the generosity. I mean, it's not just look after your own interests but look at all the objects, or possible objects of bounty. I agree the brothers are not necessarily very notable objects because, presumably, they're able bodied and comfortably off. I think that was the evidence.

MR RING QC:

Well, the evidence was, in the passages that I'm referring you to at 3.4 and 3.5 that, as far as Ross was concerned, he had a million dollars in the bank, no debts. He could –

GLAZEBROOK J:

What's the evidence that's based on? Could you take us –

MR RING QC:

Findings.

GLAZEBROOK J:

I know it's findings but is there any evidence that's based on or is that all speculation?

MR RING QC:

No, no. That was based on the evidence. There's been no challenge to these findings.

GLAZEBROOK J:

No, no. I understand that, but you say, well, Ross said this, Ross said that, Ross was clear about this. I understand there are findings but I'd quite like to see where Ross said any of that.

MR RING QC:

Okay, well, perhaps my learned junior will find you the actual passage in the evidence.

GLAZEBROOK J:

Well it would be useful just to see what it's –

MR RING QC:

The position –

GLAZEBROOK J:

It will be interesting to see how much the findings are inference and how much they're based on evidence and what that is, to me anyway.

MR RING QC:

We'll have a look at that.

GLAZEBROOK J:

Yes. Which is not to say we'd necessarily go beyond the findings but it just is still interesting to know what they're actually based on.

MR RING QC:

Well while we're, we'll look at that but just if one can assume that the unchallenged factual findings are supported by the evidence, then at page 118, paragraph 74, the High Court Judge's finding at the bottom of 74, "Even on the favourable terms on which the chicks could buy the farm, the estate would be a substantial one. Ross had no debts and had achieved his ambition of accumulating close to $1m in cash investments." There were also factual findings that he bought cars, that he bought cars for family members and given them away. Also indications that he didn't regard the, that he was in any sort of financial need, and that was also reflected in the evidence in relation to whether there should be an increase in the income of the farm. Ross, the findings were, based on the evidence, that Ross didn't need any more money and said he didn't need any more money.

So in answer to your Honour's point about whether market was taken into account, there you have also in paragraph 75, at page 118, and this is talking about the 2004 position, "Mr Blackwell was concerned that the farm should be affordable for Adam, that he and Jana should not be saddled with a debt burden that would make it uneconomic. The concession would have a relatively minor effect on his asset position. His wife's position would be secure and ultimately the Blackwell family would receive a substantial capital benefit."

ARNOLD J:

That's in relation to the, what, 2000, yes, 2004.

MR RING QC:

2004, yes.

ELIAS CJ:

So the discount of 300,000.

MR RING QC:

Yes.

ARNOLD J:

Yes, so later it's simply not true to say that concession would have a relatively minor effect on his asset position. I mean on any deal that –

MR RING QC:

I would accept that.

ARNOLD J:

That's right.

MR RING QC:

I would accept that but again in terms of Margaret's needs, the same position applied, that he had no debts, $1 million in the bank and that she was well provided for. Well as far as the lifetime interest is concerned.

ARNOLD J:

Yes.

MR RING QC:

So the impact of that, the impact of that increase is really the impact on the Blackwell brothers rather than on Margaret.

ELIAS CJ:

Well I don't know because after all $2 million, depending on what view is taken of advancement of capital, doesn't actually earn a huge amount these days. So I'm not sure that that's right to say that it would make no material difference.

WILLIAM YOUNG J:

But this is also a very time bound view. This is – and as Justice Arnold said, this is $300,000 in 2004, but if he's really committing himself to a situation where he's only ever going to get $1.5 million for the property, no matter what it's worth, then there's a different lens to look at, it requires a different lens, doesn't it?

MR RING QC:

Well the other relevant passage in this context is page 129 where 111 the trial Judge is talking about best interests not necessarily equating with best financial interests. Then goes on to say in 112, "It is easy to understand why financial considerations were not paramount for Ross. I have already mentioned this. He was well-off and financially secure. He had significant cash funds. Generally, he and his wife lived frugally. The purchase of new cars was a rare indulgence. The farm rental was sufficient to meet their needs. Ross would have appreciated that on his death his wife would be well provided for." And that finding is made not in the time factor of 2004 but after a discussion of the whole progression of time, in 129, paragraph 109, of course we're referring there to the 2007 position. So the High Court Judge did not overlook the question of whether what the position is in 2004 ought to be put to one side and a different view ought to be taken in 2007.

ELIAS CJ:

The Judge does say at 116 there was no particular emotional attachment to any member of the Chick family, which slightly counters the argument that I think you're putting to us, that there were these other reasons. There is the reason, which you've indicated, that the farm was to be affordable and he wanted it to go to Adam, but there's not much beyond that, is there?

MR RING QC:

Well I think the emotional attachment is actually more to the farm and the sense that the farm is now in good hands forever. So what I understand the High Court Judge to be saying there is it wasn't that he came to the Chicks with an emotional attachment and how can I reflect it in some way, that it was the farm that was the centrepiece of it and it could have been the Chicks, it could have been the next door neighbours on the other side, it just happens to be the Chicks –

ELIAS CJ:

It's rather odd, though, that if the farm was affordable to the Chicks at 1.5 million when it was worth probably 1.8 million, that it would not have been more valuable to them when it was worth 3.5 million. And therefore affordable at an increased price.

MR RING QC:

Well that's right, but affordability was only one factor and with respect –

ELIAS CJ:

Well what were the other factors?

MR RING QC:

Well the other factor that that doesn't take into account is that by entering into this arrangement he took the Chicks out of the market at 2004.

ELIAS CJ:

Well that could have been reflected in some sort of formula for discount.

GLAZEBROOK J:

But they'd also, they'd take them out of the market, but they didn't actually have to put up the cash, so it may have taken them off the market but they could have invested that cash in something else, presumably did, and gained benefit from that point of view.

MR RING QC:

Well, no, there's no suggestion that there was cash that was invested elsewhere.

GLAZEBROOK J:

Well it's just money.

ELIAS CJ:

And it's cost.

GLAZEBROOK J:

It's money, and so they haven't incurred the cost of –

O'REGAN J:

They might have been intending to borrow.

MR RING QC:

But that's, we're talking about the way that Ross, how Ross understood this.

GLAZEBROOK J:

Again, have we actually got that, because I think that was evidence from the Chicks, not Ross.

MR RING QC:

Well again we're going to come to that in 3.7 but I'm – let's just deal with these things as they arise and it'll be quicker later on. At –

ELIAS CJ:

It's actually almost 1 o'clock so perhaps you can indicate, finish off what you're trying to deal with.

MR RING QC:

Well at 3.7 that's the place that I've dealt with this issue, as part of understanding Ross Blackwell, and if you start by looking at the High Court judgment at page 103, from paragraph 17 to 104. As you can see from that Ross's starting point was he wanted to give the farm away for nothing and that, in my submission –

ELIAS CJ:

Well leave it to him and his wife.

MR RING QC:

Well which is essentially nothing.

ELIAS CJ:

Yes but frankly if the will would have been challengeable, it's not clear, well –

MR RING QC:

I take your Honour's point and so did Ross and that comes back to what your Honour –

ELIAS CJ:

Well so did Mr Chick. More to the point.

MR RING QC:

Well, exactly, and that's the point that your Honour Justice Arnold was making. Yes, he accepted advice, but it was only advice that said, no it's going to be not wise to do what you want to do, because you might ultimately achieve it. It wasn't a question of him taking advice to deviate from a course that he wanted to achieve.

ARNOLD J:

But on some of this doesn't that go to Mr Gudsell's point, that a competent solicitor would have sought to understand what it was that Mr Blackwell was trying to achieve and would have advised them of the most effective ways of doing that?

MR RING QC:

That's right.

ARNOLD J:

And everybody accepts that, but what you're saying is that he would have rejected that advice and gone ahead with these other arrangements and actually I hadn't quite picked this up, but if you look at paragraph 18, the last sentence, "Mr Chick was to be the caretaker."

MR RING QC:

Yes.

ARNOLD J:

Now that aspect of his intention isn't protected either.

MR RING QC:

Yes. But all of this feeds into the point that, which again that the Judge found, that he never ever wavered from wanting the Chicks to have the farm for 1.5 million.

WILLIAM YOUNG J:

But he was never given advice to the contrary. So how do we know what he would have done if advice to the contrary had been given?

MR RING QC:

Well, again that comes back to understanding the man. What was his objectives, what was his concept for achieving those objectives, and how did he see it working in practice, which are the very issues that we're coming to. I really haven't finished this but I think lunch is probably more important.

ELIAS CJ:

Well, could you finish it in a few minutes or would you need a few more? No, in fact, we have to take the adjournment so we'll take the adjournment now, thank you.

COURT ADJOURNS: 1.03 PM
COURT RESUMES: 2.16 PM

ELIAS CJ:

Yes Mr Ring.

MR RING QC:

Thank you your Honour. If I can go back to the hand up and to where I was before we went on quite a long diversion. I was at 1.2. The first conclusion in the High Court I had set out to you with the quote from the judgment. The second conclusion, in the absence Edmonds Judd's negligence, Ross would have ensured that the Chicks could not have exercised the option in 2010 for 1.5 million and did not lease the farm from 2007 to 2010 for so far below the market rent. And it's the second one that we say cannot –

ELIAS CJ:

Sorry, does that make quite sense. Sorry. "Would have ensured and did not lease…

MR RING QC:

Ensured two things, one, that the Chicks couldn't exercise the option in 2010 for 1.5 million –

ELIAS CJ:

I see.

MR RING QC:

– and second that they didn't lease the farm from 2007 to 2010 for so far below the market rent.

ELIAS CJ:

Does that mean that it wasn't very far below the market rent?

MR RING QC:

No.

ELIAS CJ:

I just don't understand.

O'REGAN J:

No, it means that he might have done it below market rent but not by that much.

ELIAS CJ:

I see.

MR RING QC:

Well, it's the words, "So far," where actually what the judgment used.

ELIAS CJ:

I see, yes.

MR RING QC:

And the point that we make there at – in reference to paragraphs 166 and 167 of the High Court judgment, that's at page 145, is that neither in relation to the option, nor in relation to the rental does the High Court make the finding that in the absence of the - that had the advice, the proper advice, been given, he would have insisted on the market price for the option and he would have insisted on the market price for the rental.

WILLIAM YOUNG J:

Doesn't it – well, it just gets back to my question –

MR RING QC:
Well it does.

WILLIAM YOUNG J:
Might it not be sufficient that on the – it's more likely than not that wouldn't have been structured exactly as it was?

MR RING QC:
However it was structured, at the end of the day one thing is clear from the judgment in the High Court. It wouldn't have been a market rent if there'd been proper advice given, and it wouldn't have been market value if proper advice had been given on the option.

GLAZEBROOK J:
Well, what does 164 say of his judgment? You might say it's inconsistent with the earlier conclusion but it was a finding that it would have been different.

MR RING QC:
Well the finding was he could have adjusted the option if he'd wanted to and then the conclusion at 167 –

GLAZEBROOK J:
Well, it would've contained some sort of mechanism to enable the option price to be adjusted to reflect changes in market value and it would, at least, have given him the ability to adjust the option price.

MR RING QC:
Yes, but it doesn't say to market value. It says, "Having regard to market value."

WILLIAM YOUNG J:
No, but that's one of the uncertainties.

MR RING QC:
Yes, but then if you read that in conjunction with 167 what the Judge says, "It's impossible to predict the course of events had Ross been competently advised. It's conceivable in 2004 they might have come to an agreement. What can be said with confidence, however, is unlikely Mr Blackwell would've ended up under an obligation

to sell his farm for half the market value." There is no finding that properly advised Ross would have exercised any sort of mechanism to ensure that he got market value.

GLAZEBROOK J:

Well, that might be right but it certainly isn't a finding there that he wanted to sell it for 1.5 and would've done so no matter what the advice had been. The finding, quite clearly, which may be a reconcilable with his earlier findings, as the Court of Appeal found, but he – the High Court Judge found that there would have been a market mechanism.

MR RING QC:

I'm not saying that this is a complete answer to the case. All I'm saying is that in terms of what the loss is if the advice was negligent, the one thing it isn't is the difference between market value on the Judge's findings. That is the only thing that you can be sure of in the face of these findings.

WILLIAM YOUNG J:

Two things we can be sure of on the Judge's view. One, it wouldn't have panned out like this. Two, perhaps it would not have been market value.

MR RING QC:

Well, I don't know what, "Panned out like this," exactly means –

WILLIAM YOUNG J:

Well, okay, what I'm saying is that –

MR RING QC:

– in that context.

WILLIAM YOUNG J:

– the deal, as struck, would not have been the deal that would have been struck with proper advice.

MR RING QC:

Yes.

WILLIAM YOUNG J:
Now that is a finding.

MR RING QC:
Yes, well, that's, of course, where I have already put my stake in the ground and said that we don't accept that, but when it comes to well, if that's right what would it have been, one thing's for sure that on the High Court judgment it would not have been market value and –

WILLIAM YOUNG J:
Well, maybe. Doesn't he also say it may be that there may not have been a deal at all?

MR RING QC:
Well, he says it's conceivable but in terms of what his actual findings were that drove the result, which is not what's conceivable, what – on the balance, but is what is on the balance of probability. On the balance of probability, he says, the one thing he's saying is that it wouldn't have been market value and, with respect, I don't think that –

GLAZEBROOK J:
Where do you get that from?

MR RING QC:
Well he says in 167 he wouldn't have granted the option on those terms, impossible to predict the outcome. What can be said with confidence, however, it is unlikely he would've ended up with an obligation to sell his farm for half the value. So the balance of probabilities is it wouldn't have been 1.5.

WILLIAM YOUNG J:
Okay, so what should we do about that? How do we resolve that uncertainty?

MR RING QC:
Well –

WILLIAM YOUNG J:

You said as going to whether there's any awarded damages appropriate, I'm inclined to see it as going to what the appropriate awarded damages is.

MR RING QC:

Well, then I agree that this is a difficulty, but it's the plaintiffs', it's the appellants' difficulty, not ours.

WILLIAM YOUNG J:

Well unless we take the view the uncertainties fall on your shoulders because you're the ones that are negligent and caused them.

MR RING QC:

Well, unless you do fall that but then with the greatest of respect, I question the principal basis on which you do that when the obligation is on the plaintiff to prove its loss.

GLAZEBROOK J:

But if you've proved that the agreement wouldn't have been the one you would have entered into, then what do you do?

MR RING QC:

Well, there's still a need for the plaintiff to show, provided there's a proper evidential basis for it first, that there wouldn't have been some other agreement which also would have resulted in no loss.

GLAZEBROOK J:

But whether there's another agreement has quite a lot to do with the Chicks as well and what they would have accepted or not accepted doesn't it?

MR RING QC:

Well –

GLAZEBROOK J:

Which gets down to the *Benton* probability in terms of that action of a third party because it wouldn't have been that deal. Would it have been a deal at all? What

would have the terms been, but that is related to, not just to what Mr Blackwell would have done but also what Mr and Mrs Chick would have done?

ELIAS CJ:
Is this a claim in equity by the way?

MR RING QC:
No. There was no pleading in breach of fiduciary duty, even thought there were allegations made about conflict of interest. It was only ever pleaded in negligence.

So just to now – exploring those findings in a little bit more detailed way at 1.3 in our submissions, Ross understood the significant features of the transactions and, particularly, knew it could have done better by leasing the farm on the open market as a dairying transaction. He knew that the option price was advantageous to the Chicks and likely to become more so as time passed, and I refer there to page 129, paragraph 110.

ELIAS CJ:
You were distracted at a time when you were going to take us to Ms Rasmussen's evidence that he wasn't interested in value.

MR RING QC:
I thought I would do that –

ELIAS CJ:
All right, that's fine.

MR RING QC:
I thought I would come back here and do that –

ELIAS CJ:
Yes, yes, that's fine.

MR RING QC:
–- when it arose, if it pleases your Honour? Second, and this is page 132, paragraph 124, which is also not a paragraph you've been taken to yet. Ross fixed the option

price and the lease by reference to what he regarded as affordable for the Chicks, particularly for Adam and for a dry stock operation.

ARNOLD J:
I was a bit puzzled by that because, on his analysis, it was about 900,000 originally, wasn't it, the price, affordability?

MR RING QC:
Yes.

ARNOLD J:
But he was told oh, well, no, you shouldn't do that. So he put it in – the agreement was 1.5 million, but it's not at all clear that that was affordable or what analysis was gone through to produce that figure.

MR RING QC:
Well, except there are a number of references in the judgment to Ross's concern for affordability –

ARNOLD J:
I know. It's evident.

MR RING QC:
As he – in the way that he viewed affordability, not necessarily in an objective way either. I mean Ross had his own views on what was affordable and what wasn't, and this is the High Court Judge effectively reflecting that. I mean the reason that affordable in paragraph 124 is in inverted commas is, in my view, that the High Court recognising that it was the way Ross used the word affordable that was at issue here. And, again, each of these is reinforced by a similar finding by the Court of Appeal.

And third, and importantly, from 2004 onwards, Ross never, ever waivered from his intention the Chicks would ultimately own the farm by purchasing it for 1.5 million and in the meantime they should continue to run the farm.

WILLIAM YOUNG J:
Yes but, again, no one was suggesting that he should waiver.

MR RING QC:

I'm sorry Sir.

WILLIAM YOUNG J:

No one was suggesting that he should waiver. I mean there was no sort of push back against what he wanted to do is there?

MR RING QC:

Well that's right, and what I'm hoping to persuade you when we look at the man is that even if somebody had tried to push back, it would not have resulted in, in fact, a different exercise price being insisted on by Ross.

GLAZEBROOK J:

But that's contrary to the findings of the High Court Judge.

MR RING QC:

Yes, but consistent with Court of Appeal Judge.

GLAZEBROOK J:

Well it might be but they only came to that because they said that was an inconsistent finding with the earlier. So you're going to have to convince us that that was an inconsistent finding and that we shouldn't follow the finding that it would have been different.

MR RING QC:

Well, yes, and essentially what we say about that is that Ross had this fixed view about 1.5 million from 2004 and that nothing anybody said to him by way of objective commercial legal advice –

WILLIAM YOUNG J:

But no one said anything to him.

MR RING QC:

No, but even if somebody had –

WILLIAM YOUNG J:

So don't say, "Notwithstanding," because there wasn't any. That's why I'm slightly unpersuaded by the word 'unwavering'.

MR RING QC:

Well, yes, but the proposition that we're talking about now is the counterfactual proposition. What would have happened if he had received commercial legal advice in the context of a very uncommercial personal relationship and a couple of transactions and what we're saying is that the reason that he never wavered from 2004 onwards, they were the very reasons that even if he'd received commercial advice, then he still would not have wavered. So, yes, we are talking about a hypothetical because we're talking about the counterfactual. What if he'd got the legal advice that the appellants says he should have got. So to put it another way, what the appellant has to, perhaps I want to persuade you of, but what the, the appellants' case is that Ross never wavered from 2004 onward in wanting the Chicks to have the farm for 1.5 million, but if he'd received some commercial advice from the lawyers, he not only would have wavered from it, he would have completely backtracked from it and entered a commercial –

WILLIAM YOUNG J:

But he might have just done something a little bit different.

MR RING QC:

Well it doesn't matter how different it was, as long as the Chicks still got the farm for 1.5 million. The thing he never wavered from was when the time comes I only want the Chicks to have to pay 1.5 million for this farm.

GLAZEBROOK J:

But what is the evidence of that over that whole period, apart from the very self-serving evidence of Mr Chick?

MR RING QC:

Well –

GLAZEBROOK J:

Because you say he wanted it at 1.5 million. Is there anything that you say indicates that he, apart from evidence of Mr Chick, that the 1.5 million rather than affordability and lower than market value.

MR RING QC:

Well the –

GLAZEBROOK J:

Which is different from 1.5 million.

MR RING QC:

Well not in Ross's mind because he equated those two things.

GLAZEBROOK J:

Well that's what you say but what's the evidence of that or is it just this self-serving statement of Mr Chick, or Mrs Chick, sorry.

MR RING QC:

Mr Chick.

GLAZEBROOK J:

No, Mr Chick.

MR RING QC:

Well, it is the evidence of Mr Chick, yes. it's the evidence of Mr Chick accepted by the High Court Judge.

GLAZEBROOK J:

I'm not sure that's quite right in terms of – well it can't be because the High Court Judge actually said there would have been a market mechanism in there. So he can't have accepted that Ross was adamant it was 1.5 and he wouldn't have done anything about it.

MR RING QC:

Well the High Court Judge found that Ross never wavered from 2004 onwards from wanting the Chicks to have the farm for 1.5 million.

GLAZEBROOK J:

Well I'm not, what he says is, never wavered, it was a process that began with this, they affected together, would secure the outcome, he wanted them to continue and ultimately became yours, theirs, he never says he never wavered on the 1.5. if he had it would be quite inconsistent, presumably, with what he said, although as Justice Young said of course he'd never had any advice contrary to that.

MR RING QC:

Well if you look back at 141, at the quote from Mr Chick's evidence, which the Judge accepted.

GLAZEBROOK J:

I understand that it mentions 1.5, but it's not explicitly accepted that he always wanted to sell it at 1.5 and was unchangeable on that, because that's contrary to the findings he makes on causation.

ELIAS CJ:

It's also contradicted, isn't it, by the terms of the 2004 agreement, because the 1.5 million was limited to three years and after that it was to go to market price.

MR RING QC:

Right, but the Chicks still had the right to buy it at 1.5, that's the point.

ELIAS CJ:

Yes.

MR RING QC:

So the 1.5 –

ELIAS CJ:

Well that's part of the issue, as to what, you know, the scope of the advice.

MR RING QC:

Mmm, but coming back your Honour Justice Glazebrook's point, the passage at 141, from the judgment, which is the passage from the evidence, is, in my submission, explicit that what he never wavered from, never ever wavered from, was the right to

purchase the farm at 1.5 million. Whatever you might say about the quality of that evidence, that is the evidence and it definitely includes the 1.5 million.

GLAZEBROOK J:
I understand that, I'm just saying the Judge can't have accepted it because he couldn't have made the findings on causation and didn't explicitly accept the 1.5 in paragraph 142 where he's discussing the evidence.

MR RING QC:
But with respect that's another way of saying that the Judge must have been right and the reason we're here is because the Court of Appeal didn't accept that, and we're supporting the Court of Appeal's judgment. That's the very point. That there are two inconsistencies.

GLAZEBROOK J:
So you're saying that on the basis of the Judge's findings – on the basis of that evidence, we should say, well, Ross would not have actually continued, changed his mind had he been given competent advice?

MR RING QC:
Yes, but it's not just that little passage. It's all of the evidence I'm about to –

GLAZEBROOK J:
I'll let you carry through on that then.

MR RING QC:
So what we're saying is that in summary those findings that supported the conclusion number 1 are not consistent with the findings that supported conclusion number 2, which is if properly advised he wouldn't have granted or extended the option on terms that allowed the Chicks to exercise it in 2010 at less than market value and that he would have, he would not have renewed the lease for the farm at 2007 at so far, which is the words used by the Judge, at so far below the market value.

So dealing with the proper approach to causation, the Blackwell brothers needed to persuade the Court that the Court of Appeal was wrong to conclude that Ross would not have acted any differently if he'd received the negligently omitted advice. We say this requires counterfactual that involves four steps. First, an understanding of

Ross Blackwell the man, his objectives, his concepts, his ideas, his visions, his intentions, his hopes, his expectations and so on. What did he know and how did he see the world, and this provides the relevant context for what he actually did and why he actually did it. And then second, the identification of the advice pleaded and proven as negligently omitted and then the fitting of those two things together is a third step, to consider how the man described in paragraph 1 there would actually have reacted to the advice in paragraph 2. That is how he would have regarded the advice as fitting or not fitting into his objectives, his concepts, et cetera, and without the presumption, or without any presumption that if he'd received the omitted advice he necessarily, or even probably, would have followed it.

And then that leads to whatever conclusion on the balance of probability as to whether if the person as described had received the advice alleged to be omitted, he would have followed it, and if he'd done that, he would have ensured that the Chicks couldn't have exercised the option in 2010 at 1.5 but only at market value, and wouldn't have agreed to the rent at the 69,600 but at the market rent of 106,000.

So in table 3 the first step is to look at Ross's objectives, and I don't think there's any dispute about these, although the appellant conflates a couple of them together. First, Ross wanted to retain ownership of the farm while he was still alive. Second, he wanted the farm to then go to Adam, and third he wanted the farm to be affordable for Adam when that time came, and also in the meantime. And if I can commend to you, I've already taken you to paragraphs 17 to 19, but also page 131, paragraphs 119 to 120, are relevant in this context. All these passages cover these points, as I say, but some of them perhaps encapsulate them a little more succinctly. And of course in those Court of Appeal passages are concurrent findings and by and large there's no doubt that the Court of Appeal is accepting this evidence, or these findings, because they're footnoted accordingly.

So how did Ross see these objectives being achieved? And again it's three steps. He saw a lease that would be renewed three-yearly, as long as he was still alive. He saw a concurrent option to purchase at 1.5 million, provided that settlement occurred by expiry date of the lease, and he saw that the Chicks would not exercise the option while he was still alive. And I footnote there at footnote 7, although I've described it as Ross's concept, it was arrived at in conjunction with Leith Chick and it was Mr Chick who first suggested the option and that is, again, those passages at paragraphs 17 to 19 of the High Court judgment.

So how did Ross see that concept working to achieve his objectives? Well first he saw that he could enjoy the farm for the extent that his health permitted without the burdens of ownership or the responsibility for running, managing, maintaining the farm and knowing that it was, or would continue to be, in good hands. Second, he saw it, the lease in the option agreement being documented because those were transactions that would be operative when he was no longer alive. Third, he saw undocumented understandings with Leith Chick because these understandings were personal and based on their proven relationship of mutual trust and friendship, that while he was still alive he could come and go on the farm as he was able, and as he wished. He would keep renewing the lease and the Chicks would not exercise the option, and again those passages on page 131, from paragraphs 117 to 120, are the High Court factual findings which encapsulate that.

ARNOLD J:
This finding that he would keep renewing the lease, is that something that Mr Chick said was discussed?

MR RING QC:
No it isn't but it is implicit in effectively what happened. It harks back to that discussion that your Honour said before about –

ARNOLD J:
Well let me be clear about this though.

MR RING QC:
Yes.

ARNOLD J:
Are you saying that in trying to figure out what his objectives were when he started on this course, you can look at what, in fact, happened, and deduce backwards?

MR RING QC:
I'm sorry, no, I was very loose with my language, I apologise for that. Let me come back to that. If you go back to 2004 –

ARNOLD J:

Yes.

MR RING QC:

The position in 2004 was there'd already been a three year lease period.

ARNOLD J:

Yes.

MR RING QC:

With a right of first refusal.

ARNOLD J:

Mhm.

MR RING QC:

He's still labouring, obviously, under the medical, his medical concerns, anticipating a limited lifetime, and enters into a three year arrangement with the option also running for the three years. So at that stage I don't think there's anything in the evidence, other than whatever inference you can take from it, that he was even looking beyond that three year period.

ARNOLD J:

Well there was the right of renewal in the lease, so, yes.

MR RING QC:

Yes, yes, so one right of renewal, but nothing really beyond that.

ARNOLD J:

Yes.

MR RING QC:

And then you see that progressively moving at three year intervals, except 2005 he moves the option out three years; 2007, the renewal is for three years, and then for what it's worth again you have the discussion between Mr Chick and Ross in 2010, which never gets implemented because the brothers intervene.

ARNOLD J:
Mmm.

MR RING QC:
But in order for the option to work on a three yearly basis, it had to line up with the lease, and –

ARNOLD J:
Well that's why the 2005 one is so odd because it was 10 years and then the lease was…

MR RING QC:
Well it stretched it out another three.

ARNOLD J:
Yes, beyond the period of the lease.

MR RING QC:
Yes. So I should just make it clear in interpreting my hand up here. Where I've divided the references into columns, I've tried to correlate so that the first column will be the first box up above and so on. And again where I've tried, I've tried to encapsulate there in the last box where I've got both the High Court box and the Court of Appeal box, I have three rows of references. Each of those rows should correlate to the bullet point in number 3 at the bottom.

So the second part of how Ross saw the concept working to achieve his objectives was that Leith Chick would be the caretaker –

ELIAS CJ:
What does that mean?

MR RING QC:
Well, in 2004 Adam wasn't ready to run the farm. Adam didn't, in fact, commence to run the farm until 2005, on the evidence.

ELIAS CJ:
Right.

ARNOLD J:
But the caretaker role until then was till the date of purchase wasn't it?

MR RING QC:
Yes.

ARNOLD J:
Yes, so even though Adam was running the farm, it was still Mr Chick who held –

MR RING QC:
Well, yes, it's Mr Chick, it's Leith Chick who he looked to as the man that he had the direct relationship, as it were, with. And so in terms of – so that is objective number 2, the farm would go to Adam. How he saw that working in practise, Leith would be the caretaker until then.

The farm would be affordable. The three points in relation to that, first that the option, the rent would be at a significant discount to market. This would have a relatively minor affect on Ross's financial position. He didn't need the money and his family was already well provided for. And, again, those same paragraphs at 117 to 120 encapsulate that. The option price was fixed at 1.5 million in 2004. Ross recognised that the Chicks needed a fixed sum because first, in reliance on the arrangement, Adam was foregoing the opportunity to buy elsewhere in 2004 and so he was also foregoing the opportunity to obtain the benefit of increases in prices. And second, this also provided a hedge for Adam against increased prices, making the farm unaffordable when the time came for it to go to him.

GLAZEBROOK J:
And you said you were going to provide evidence that that wasn't from Mr Chick on that.

MR RING QC:
No, I can't provide evidence that it wasn't from Mr Chick. That is, as the reference says, paragraph 18 at page 104 of the judgment.

GLAZEBROOK J:

It's just this hedge against inflation. Doesn't that come up in cross-examination where Mr Chick was justified in the price? Was it ever suggested that that was Ross's motivation or that it was discussed between them?

MR RING QC:

Well, again, the High Court judgment found that these were Mr Chick's motivations.

GLAZEBROOK J:

Whereabouts?

MR RING QC:

If you turn to – well there was those passages in 17 and 18 and also paragraph 123 at page 132. The commitment to lease Haupouri effectively took them out of the market. A fixed price option gave them a hedge against increasing farm prices.

GLAZEBROOK J:

This was impropriety rather than that being Ross's motivation.

MR RING QC:

Well, with –

GLAZEBROOK J:

Is there any finding that Ross wanted it at 1.5 because he wanted it as a hedge against inflation?

MR RING QC:

These are the only passages that I can refer to in relation to that.

GLAZEBROOK J:

Okay, and are they all written down here?

MR RING QC:

Yes.

GLAZEBROOK J:

You're not referring us to anything?

MR RING QC:
No. They're all here.

GLAZEBROOK J:
Thank you.

MR RING QC:
And also 137, paragraph 141, Mr Chick's evidence, and the first part of that is, "We took ourselves out of the market, disqualified ourselves from buying a farm. We also missed out on any lift in the market. So where we're sitting there out of the market, sitting on this but further to that, on face of it, it looks terrible, I agree," and so on.

And so the third point at, again back at page 3 of the hand up at 3.1, the rent was fixed at what Ross regarded as affordable from farm income, having regard to Adam's eventual purchase at the option price and the debt servicing cost that would then be carried. The farm continuing to run as a dry stock operation despite higher dairy farming returns and the farm continuing to run in a manner Ross approved of which, presumably, also included the expenditure that was being made on capital improvements. And the reference to those capital improvements is, amongst other places, page 132.

ELIAS CJ:
Sorry where, what para?

MR RING QC:
No, I'm sorry, that…

ELIAS CJ:
I see, it's at 127.

MR RING QC:
Sorry, yes, 133, 127.

ELIAS CJ:
What were the races for do you know?

MR RING QC:

Not off hand, no, your Honour.

ELIAS CJ:

It seems odd on a dry stock property.

MR RING QC:

Ah, no. So that takes us to understanding Ross Blackwell as the man in terms of the way he saw things. First, at 3.2 on page 4 he understood the transactions, he knew what he was doing.

GLAZEBROOK J:

I'm sorry, oh right.

MR RING QC:

This is page 4, 3.2.

GLAZEBROOK J:

The point made against you in respect of that variation is that he actually had no choice at that stage because the Chicks otherwise would have purchased while he was still alive, because there wasn't anything in there that said that they weren't to do that, then effectively he 2004 led to that extension, and logically led to that extension but only because there wasn't the provision in there that it couldn't be exercised while he was alive.

MR RING QC:

Ah, yes, and there's a number of points to be made. First of all there's no suggestion that he went to Ms Rasmussen with any concerns of that type.

GLAZEBROOK J:

Well there's no, nothing in, as I understood it, to say that he went with any concerns at all, because there's no documentation as to what his concerns were.

MR RING QC:

Well, what the Judge found, what the Judge accepted was Ms Rasmussen's evidence that –

GLAZEBROOK J:

I think it was Mr Chick's evidence, that he wanted to give them more time –

MR RING QC:

No that's what –

GLAZEBROOK J:

– rather than Ms Rasmussen's –

MR RING QC:

That's what he –

GLAZEBROOK J:

– but I'm not sure.

MR RING QC:

Yes, we'll be coming to that, but that's what he told Ms Rasmussen as well, at the time.

GLAZEBROOK J:

So we've got, we have the evidence on that?

MR RING QC:

We've got a finding on that as well.

GLAZEBROOK J:

Well do you want to show me where that is?

MR RING QC:

Yes, if you turn –

GLAZEBROOK J:

Is there a file note setting that out?

MR RING QC:

I'm not sure of where the –

ELIAS CJ:

In any event –

MR RING QC:

I know there's a finding by the High Court.

ELIAS CJ:

In any event that might be wholly consistent with him understanding the agreement being that he had to extend to give them more time, or the option could be exercised. We only have information about the side agreement, the undertaking not to exercise it in his lifetime, from Mr Chick, don't we?

MR RING QC:

Yes.

ELIAS CJ:

So, in fact, Ross's actions may have been consistent with him understanding that they had an option which they could exercise, and wanting to extend the lease and extend the option so that he wouldn't be put in that position.

MR RING QC:

Well except that that's not the way he expressed it to Ms Rasmussen, on the contrary, the way he expressed it to her was he was wanting to benefit them, not to protect himself, and if I can take you to some of the references on that in the judgment.

ELIAS CJ:

Yes, well can you take us to the evidence on this?

MR RING QC:

Well I'll have to find it because I've been relying on the judgment since that was the starting point.

ELIAS CJ:

Well I'm not criticising you for doing that but it's just, it does seem pretty critical, this part.

MR RING QC:

Well perhaps if I give you the judgment references while hopefully somebody is finding you the evidential references?

ELIAS CJ:

Yes, thank you.

MR RING QC:

And just so you know where we are, your Honours, I'm really –

ELIAS CJ:

This is the instruction she gave her in 2005?

MR RING QC:

Correct.

ELIAS CJ:

So we've already been to the file note, have we, on that?

GLAZEBROOK J:

No that was the 2004 one, 570 is her evidence in volume 3 on the second variation. And, I haven't found the cross-examination yet.

MR RING QC:

My learned friend suggests volume 4, page 703.

ELIAS CJ:

Thank you.

MR RING QC:

Then the file note.

ELIAS CJ:

I see.

ARNOLD J:

Sorry what was the page again?

MR RING QC:
Page 703.

ARNOLD J:
Thank you.

MR RING QC:
So the context that we're talking about here is as set out at page 105, paragraph 21, that the variation came out of the blue, that Ross had not discussed it in advance with the Chicks, and the first they knew about it was when they were told that Ross had issued those instructions. Mr Chick said, recorded in the judgment, "The next time he saw Ross he asked him why he had wanted to extend the lease. Ross said that it was to give them more time." And also referred to in the judgment at page 120, paragraph 82, this is the reference to Ms Rasmussen's evidence. She said, "Mr Blackwell told her he wanted to give the Chicks more time. He appreciated but was unconcerned about the possibility that the value of the farm could go up." Now, again if he had gone in to protect himself, then you can't imagine him saying that.

And that led the Judge to infer, at page 121, paragraph 86, having said it made no sense in commercial terms the explanation given to Ms Rasmussen not much help, "I infer Ross thought it would assist the Chicks to know that their right to purchase at the fixed price would continue to 2010 and it is also conceivable that he saw an extension would remove an incentive to exercise the option before 30 April 2007."

ELIAS CJ:
Which isn't excluding. You said there's no indication that he had any self-interest in this but the Judge doesn't exclude that with that last explanation.

MR RING QC:
No, but I ask you to infer that from Ms Rasmussen's evidence accepted, that he was unconcerned that prices were going up, if he was doing it to protect himself against increased prices.

ELIAS CJ:
No, but he might have been doing it to protect himself against an early exercise of the option.

MR RING QC:
Yes, yes, but that, of course, brings me back to what this case is about and what this case is not about.

GLAZEBROOK J:
Actually it might be a slightly odd finding and she didn't even remember seeing him and didn't know where the instructions had come from if you look at 623.

MR RING QC:
But that is the finding, not challenged.

GLAZEBROOK J:
It might be but it's rather odd.

MR RING QC:
So what we're saying there at 3.2 is he understood each of the transactions. He knew what he was doing. With a note at the top of each column that Ross initiated a concept in 2004 and went to Edmonds Judd with the essential terms already agreed with Leith Chick. In 2005 he went to Edmonds Judd on his own initiative without consulting Leith and in 2007, Leith Chick initiated the increase in the rental. Ross went to Edmonds Judd with the essential terms already agreed with Leith Chick.

And the High Court's conclusion in relation to all of those transactions at page 128 at paragraph 107, Ross was not disadvantaged by virtue of his ignorance of legal matters. He well understood what the three transactions achieved in practicable terms, "Nor do I think he was under a material misapprehension as to the capital and rental values of the farm at the relevant time."

And also of significance here, that third bullet point under the summary and the reference at page 137, paragraph 140, in the middle of that paragraph, "It is to be born in mind Ross has initiated the proposal which led to the option and to its extension in 2005, both of which objectively were unfavourable to him. The agreements gave effect to intentions that he had articulated to Mr Chick in the clearest possible terms." So we say part of understanding Ross is there's no question that he knew what he was doing.

Second, 3.3, he was aware of market values. We've listed under the 2004 lease and variation, third bullet point, he initiated the discussion that led to the option in 2004. He suggested 900,000 based on productive worth. The parties agreed on 1.5 million at the suggestion of Mr Chick to avoid a later challenge. The Judge found that the $300,000 discount was readily understood and justified. Ross was aware and happy that Adam would benefit. He was clear that he didn't want another valuation, so that is, in itself, one of the answers to the pleadings that there was negligence in failing to suggest to Ross that he get a valuation. If that had been suggested it's clear that there would have been no different causative consequences.

And in 2004 Ross knew he was giving the Chicks the opportunity to buy the farm at an undervalue and he would not have acted any differently if he'd know the true value, and that's paragraph 108 at page 129 of the judgment.

WILLIAM YOUNG J:
Well that's the difference between 1.8 and 2 million, isn't it?

MR RING QC:
This is, in 2004 or 2005 –

WILLIAM YOUNG J:
Yes.

MR RING QC:
The Judge said, so that encompasses the variation – the extension as well.

WILLIAM YOUNG J:
Yes, but it's the difference between 1.8 and two, which was the valuation at the time, 2.2 or something, which was a retrospective one, is that right?

MR RING QC:
Well except that values were escalating by 2005 as well.

ELIAS CJ:
I have some difficulty with para 143 and the reliance that the Judge seems to have placed on the fact that in 2009, when they became aware of it, the brothers didn't do anything, and that he infers from that, that that reflected Ross's wishes, but I mean it

may not matter, but it seems a bit of a non sequitur because they didn't really need to do anything in the sense that until you exercise the option it's just there. And they may not have thought that they would exercise it.

MR RING QC:
Well I understand the point that your Honour is making. The only thing I can say in relation to it is that, it's at least equally tenable that given what they became aware of in 2009, and given the stance that they took that all transactions back to 2004 were done at a time when Ross didn't have contractual capacity, that if they held that belief, and they held the belief that Ross had entered into transactions that he shouldn't have, or didn't know he was entering into, there could at least, you would think that there would at least be a shot across the bows at that stage, rather than just sitting quietly and saying absolutely nothing. That's, I think that's, fairly, that as far as I can take it.

So the awareness of market values under the 2005 variation, we've talked about him being unconcerned about the possibility that the value could go up. The 2007, that includes the discussion about increased rentals obtainable by leasing to dairy farmers but Ross wanting the farm to be affordable for Adam, and him knowing that the agreed rental was well under the market. And hence the summary at the right-hand column of 3.3, which is effectively encapsulated in the Court of Appeal finding at page 82, paragraph 74 that's referred to there, referring to the High Court finding that Ross was not under any material misapprehension as to the capital and rental values of Haupouri at the relevant times. So he knew what he was doing. He knew what the values were. He had no personal or financial need for more money.

Now your Honour, Justice Glazebrook, asked us to look for some evidence to back up those factual findings in the High Court and Court of Appeal. At volume 2, there are three passages that we've managed to find over the luncheon adjournment. One is at page 172, at paragraph 82. That's obviously evidence-in-chief by Mr Chick, and there's also page 199 at about line 27.

ELIAS CJ:
Sorry, what page?

MR RING QC:
199.

ELIAS CJ:
Thank you.

MR RING QC:
And at page 200, about line 17, and it's clearly that evidence that led the Judge at page 129, paragraph 112, which is referred to under our summary at 3.4, conclude that it is easy to understand why financial considerations were not paramount for Ross. Already mention this, well off and financially secure, significant cash funds, generally he and his wife lived frugally; purchase of new cars a rare indulgence, the farm rental was sufficient to meet their needs.

And the passage that the Judge had in mind when he talks about referring to it earlier is the other one that's referred to under that heading at page 114, 61. Financially secure, a steady income stream that exceeded he and his wife's basic needs, almost $1 million dollars in the bank. This is in reference to indulging a love of cars and generosity to family members to whom he gave near new vehicles.

So that's part of the make-up of Ross Blackwell. We've referred to 3.5 already to having fully provided for his family. Of course, Margaret would have at least $2.5 million on his assessment and that led the High Court to conclude, page 130, paragraph 113, Ross would have appreciated that on his death his wife would be well provided for. The residue of his estate, likely to be well in excess of 2 million would go to his brothers. I was given no reason to think they were in need, both owned farm themselves. Ross was in a position to make concessions to the Chicks without, in any way, failing in his moral duty to his wife or his family members.

3.6, has enabled him to maintain his relationship with the farm. The Chicks were happy to accommodate his desire to have a continuing involvement in the farm and to respect his wish that he remain the owner while he was alive. The leasing arrangement had worked well for three years. The Chicks fully understood Ross's wish to retain ownership. The informal arrangements gave effect to an emotional attachment that the Chicks respected and honoured.

ARNOLD J:
Well, only up to a point. I mean personally it seems a bit odd to me that contrasted in that in March 2010 they acknowledged that it might kill him if he lost the farm and,

they, two weeks later exercised the option. So I don't know you can really push that too far. You can put claim to the show of their interest prevailed.

MR RING QC:
Well, again, I was I think about to be criticised for engaging in hindsight once before and, with respect, I think that probably does as well. What we're talking about is what was motivating Ross. And what was motivating him prior to 2010 is utterly the trust that he had that they wouldn't do this.

ARNOLD J:
Yes, that's fair, yes. I accept that.

ELIAS CJ:
Mr Ring, I am getting a little alarmed at how much more there still is to get through. How do you think you are going?

MR RING QC:
Well, I'm –

ELIAS CJ:
Because we – it does seem that on these facts, we seem to be repeating them a bit, probably because we took you, earlier, to your table number 3.

MR RING QC:
Well I'm trying to avoid repeating this by just referring you to. I am very conscious of the time and I'm trying to move through it as fast as I can. Can I suggest we have another review in 13 minutes?

ELIAS CJ:
Yes, sure.

MR RING QC:
Thank you.

ELIAS CJ:
We will be in difficulties if you don't complete today.

MR RING QC:
So will I. Not because of anything external, just because I won't have finished.

ELIAS CJ:
Yes.

MR RING QC:
Yes, well, if worse comes to the worst, it's all here, including the references. So if I can just press on then.

The key passages I've referred you to in 3.6, 120, paragraph 80 is important as reflecting the – perhaps I can just say this, your Honours. I have endeavoured to fairly, obviously fairly encapsulate in the text what is in the reference and so, perhaps, I can simply move through the text without actually going to the reference and if you can take it on trust from me at this stage that what I've said in the texts will be replicated in the judgment, if it isn't then I've got a problem when the time comes.

So that draws us to the conclusion under the summary that Ross was able to enjoy the farm to the extent his health permitted. He shared the pleasures of ownership without the burdens. There was an understanding between him and Leith Chick that the option wouldn't be exercised during his lifetime. That was complimented by an agreement for unrestricted access and created a happy, though unorthodox, working relationship within a conventional legal framework and, again, by and large those are the words used in the High Court judgment as well.

He recognised the cost to the Chicks in the transactions, and I've referred you to that evidence. He knew he was benefitting and wanted to benefit the Chicks at his own expense. And, again, this is a really important point, your Honours, because it makes this case different from the normal situation where a client goes to a solicitor expecting to get commercial advice on how to protect his or her interests which, necessarily, means benefitting him or her at the expense of the contracting counterparty. Ross did not want to protect himself from the contracting counterparty. He wanted to benefit the contracting counterparties and he knew that what he was doing was giving them a significant financial benefit which necessarily was a commensurate, was an equivalent financial detriment to himself, and he did that totally consciously and totally intentionally as the passages there refer to.

He knew, for example, under the 2004 third bullet point, he was giving the Chicks the opportunity to buy it at under value, the price would ultimately be determined by what was affordable and that price was advantageous and likely to become more so, and he knew and agreed that the net rent was well under market and that he would do better by leasing on the open market. The last bullet point, he was predisposed to act generously towards them because they made him welcome at the farm and he liked the way they ran the farm, reflected in the 2005 without any reference to the Chicks and Leith Chick initiated the rental increase because he thought the rent should be increased. Ross said he didn't want any more rent, wasn't interested in earning anymore from the farm. He just wanted the lease to be affordable for Adam.

And that leads to the summary. Ross had reasons for preferring the Chicks over his own family. He had the close and mutual supportive relationship with them, not arrangements that could exist, the Judge said, in a normal arm's length commercial relationship, or be easily documented. And the contractual documents conveyed a special relationship reflecting Ross's primary objective, to benefit the Chicks in a real financial way, and then the point that he never, ever waivered or never deviated.

So that, then, takes us to what was pleaded and what the evidence was and what the causation was that was founded. And the overview is that these were allegations of failing – or the relevant allegations were in failing to advise in respect of values, failing to ensure Ross knew the market prices and that he contracted on terms that entitled him to receive them.

So the causation and loss that flows from that is the loss of value. He contracted on terms that only entitled him to receive less than market prices and he, therefore, lost the difference between the contract price and the market price.

2004 grant him a 2005 variation that the allegations were relevant to this, he should obtain an up to date market valuation and that the exercised price of 1.5 million was below current and anticipated market values, and the Court found that Edmonds Judd failed to advise Ross on the full implications of all three transactions and the advice that the Court said should have been given, reflected in the expert evidence. And if I can just invite you to look at page 135, paragraph 133, that's the evidence that essentially flowed into the causation findings, and that is a lawyer acting for Ross should have one, ensured he was aware of market rentals and prices and if not told him how to find them. Particular advice about the option, a competent lawyer would

have explored the basis and the reasons for the option and, thirdly, would have questioned the extension of the option. And when the Court then referred to full implications, this is the passage in the evidence that they're referring to there.

And that resulted in the loss that being pleaded as the loss, as far as the option was concerned, being the difference between 1.5 million and the market value in 2007 and, as became determinative in 2010, and what was found was it was the difference between 1.5 and the market value in 2010 because 2010 was the date the option was exercised and there'd been no material change in value in the meantime.

As far as the 2007 lease renewal was concerned, the allegations were that Edmonds Judd negligently failed to advise Ross, one, that he could review the rent, second, market rental had increased and third, he should obtain an up to date rental valuation. And that was all part of advising on the full implications of the three transactions. Should have ensured that Ross was aware of the market rental, if not, advise him that a valuer should be consulted. And then that flows into a causation and loss of the difference between the market rental and the contractual rental.

So the overview of that, we say, at 5.1 on page 9 is that Ross would have – the counterfactual as far as the High Court is concerned is Ross would have followed the advice, would have contracted on the terms that entitled him to receive market prices. A counterfactual in the Court of Appeal is Ross would not have followed the advice. He would have contracted on the same terms that only entitled him to receive discount prices and we say the Court of Appeal was right and the High Court was wrong, with respect, because the High Court counterfactual, as far as Ross is concerned, he wouldn't have regarded that as achieving his objectives number 2 or 3, or as fitting into his concept for achieving them or as fitting into how he saw the concept working to achieve them because the Chicks would not have been able, eventually, to buy the farm for 1.5 million. The farm wouldn't be affordable for them when the time came to purchase or in the meantime. Adam would have been kept out of the market since 2004 in reliance on getting the farm and would have lost the opportunity to buy elsewhere.

So in relation to the 2004 grant, the counterfactual according to the High Court, is that it would have included a mechanism in the option to enable Ross to adjust the price to reflect changes in market value if he had wanted to. But the High Court did

not address whether, if the mechanism had been included, Ross would have wanted to adjust the price, and we see that as very very important.

ARNOLD J:

But doesn't that depend on exactly what happens in the market? I mean, one of the problems of this, you make submission, obviously right, that Ross was prepared to contemplate a discount but then proceed on the assumption that it really didn't matter what the size of that discount ultimately turned out to be. This is the focus on the 1.5 million figure and the way this could have unravelled, the price of the farm could have been $10 million and your argument would be exactly the same.

MR RING QC:

Yes, I mean I don't –

ARNOLD J:

It just seems to me to be, well, extraordinary really. You don't –

MR RING QC:

I'll just come back to the context, your Honour. It started off with Ross wanting to give the farm away for nothing in his will.

ARNOLD J:

Yes.

MR RING QC:

Sir, it ended up, we say, with a price being fixed at 1.5 million. So already Ross is getting, his estate is getting 1.5 million than Ross was prepared to enter into the arrangement for. So I, with respect –

GLAZEBROOK J:

Although wills can always be changed so, again, that gave no – so from both points of view. I mean he was prepared to do that at a particular point but whether he would have carried on with that if there had been this huge increase in value is another matter isn't it?

MR RING QC:

Well, two things about that. First of all there's absolutely no evidence that he changed his view between 2004 onwards and, in fact, the High Court findings never wavered. Second, in 2005 –

GLAZEBROOK J:

Well, except that that is inconsistent with what the High Court then found –

MR RING QC:

Yes but –

GLAZEBROOK J:

– and the evidence never wavered is not very strong, to be frank.

MR RING QC:

Well –

GLAZEBROOK J:

It's – I said in 2005 that he should look at market values but she can't even remember meeting him. She doesn't know where the instructions came and there's only a one line thing saying extend the option. She didn't think that it was being extended. She didn't even think of the fact it was being extended beyond the term of the lease. She just did whatever she got instructions for.

MR RING QC:

The evidence which resulted in the finding by the High Court was that Ross said he was not concerned about the fact prices could go up.

GLAZEBROOK J:

But she doesn't even remember meeting him, so she says that, but she doesn't even remember meeting them she says in cross-examination.

MR RING QC:

Well, again, the issue that is relevant on this appeal is whether the Court of Appeal was entitled to differ from the High Court. The High Court made this finding on the evidence.

GLAZEBROOK J:

Well, it might have made the finding but it was inconsistent with the later finding if that was the case because it said he would have wavered and introduced a market adjustment provision.

MR RING QC:

Well, I'm sorry, your Honour, I can't take it any further than it is but other than, again, to make the point that the reason we're here is because there's an inconsistency between the High Court judgment, internally in the High Court judgment. The reason –

GLAZEBROOK J:

But what you're saying is that we should accept, because there's an inconsistency we should accept the first statement based on very shaky evidence, as against the second finding on causation.

MR RING QC:

Well, yes, except with the added point of this, that the Blackwell brothers also appealed the findings in the first part of the judgment, failed in the Court of Appeal, applied for leave to this Court and were refused. So quite a natural – not unnaturally, we come to this Court saying that there is findings in the first part of the judgment that are really, got to be the starting point here.

GLAZEBROOK J:

Well, but if you are refused leave in respect of unconscionability but are granted leave in respect of causation, surely that doesn't mean we have to accept all of the findings, inconsistent or not, in the first part of the judgment that may be inconsistent with the findings on causation.

MR RING QC:

Well this appeal has never been presented by the Blackwells as there being findings in the High Court that you should overturn. This appeal has been presented, as it must do in light of the appeal ground that was approved, based on a comparison between the Court of Appeal findings and the High Court findings on the basis that the Court of Appeal was wrong to differ from the High Court.

GLAZEBROOK J:

But what you're saying is there are inconsistent findings in the High Court if you are right that there had been a finding specifically on this 1.5 million, which I actually don't think is the case, that we should accept that and throw out the finding that he would have accepted advice.

MR RING QC:

Yes, yes, and one of the reasons that I say that is because there have been two attempts to suggest that the High Court findings in the first part of the judgment have been wrong and they have failed both times, one before the Court of Appeal and then one on the leave to appeal to this Court. There has to be a starting point. There has to be a peg in the ground somewhere and –

WILLIAM YOUNG J:

Why should it be one set of findings over the others?

GLAZEBROOK J:

Yes, that's what I can't understand.

WILLIAM YOUNG J:

And is there really a conflict? All the Judge says, he never wavered in relation to part 1 of the case. When he says in part 2 that he would have wavered if given different advice, that's not inconsistent is it?

MR RING QC:

Well, in my submission, it is, but I just take the same meaning out of the same words that your Honour was looking at but, yes, I'd say that they are inconsistent, and the second thing that we say in relation to that is that there's no sign of the, what you would have expected, or what one might have expected, in the judgment in the High Court in which the Judge had said, "Yes I have already found that he never, ever wavered but now that I'm dealing with this part of the judgment, for some reason you shouldn't take that at face value because I'm about to make a finding that I don't regard as inconsistent with that." But it's just not mentioned in that part of the judgment at all.

ELIAS CJ:

Well, Mr Ring, I think we really do need to work out where we're going here. I have looked ahead carefully and it does seem to me that – and we have, of course, read your written submissions. It does seem to me that all the facts that you are taking us to, we have traversed and re-traversed, so –

MR RING QC:

I am satisfied, your Honour –

ELIAS CJ:

I really think that it's necessary for you to conclude within 15 minutes.

MR RING QC:

Well, on that indication, your Honour, there's no point in me giving you anymore of this.

ELIAS CJ:

Well, touch on what you – touch on the argument, and it's not entirely your fault but we are all getting a bit bogged down in the facts which, I think, we do now have really quite a good grasp of. So it's really your response to the argument that's been put up that we want to hear.

MR RING QC:

Well, what I've really encapsulated that under the – in page 9 and page 10 under the column that's headed "Specific reasons the Court of Appeal is right and the High Court is wrong". And all I'm doing there is relating back the High Court counterfactual and the Court of Appeal counterfactual to that page at table 3.0 at page 3 of the hand up where I've set out what Ross's objectives are, his concept to achieve them and how he saw that concept working. So if your Honours don't accept that formulation, then that's the foundation on which these submissions are being made.

ELIAS CJ:

Yes.

MR RING QC:

And so I can push through that. As far as page 11 is concerned, this is what I say is the irrelevant argument here in relation to the option being exercised during Ross's lifetime because that's not the loss that Ross suffered. If your Honours accept that when – that Ross always intended, at the moment of his death, that the Chicks would be entitled to pay only 1.5 million and to get the farm, whenever that was, then that's the point of this submission because if that's right, then the fact that the option was exercised during his lifetime, if it has caused a loss at all, whatever that loss is, it's not the difference between market value and the 1.5 million. It's some other loss, if at all, and that's really all that page 11 is saying.

The conclusions, they speak for themselves, your Honours.

O'REGAN J:

The point that Mr Gudsell makes against you is that not documenting the lifetime position allowed the Chicks to exercise the option and if it had been a – if there had been a provision that stopped that then they wouldn't have been able to and, therefore, not having that clause is the reason why they have been able to buy at 1.5 million instead of market value.

MR RING QC:

And the points that we make in response to that is, first of all, nobody ever denied that there was this side agreement. So if the fact that it wasn't documented doesn't mean it was unenforceable because the Chicks would have admitted it. The Chicks did admit its existence. There was no other evidence of it until the Chicks –

WILLIAM YOUNG J:

It's the sort of – the argument goes in a circle. I mean they admitted its existence but then they defied it.

MR RING QC:

Well, yes. But they admitted its existence. So in terms of the question about enforceability, there is that. The second point to be made on that is that the High Court Judge dealt with the documentation of that at paragraphs 139 to 140 and the third point that we make about that is, and I've made this at page 11 of the hand up, alongside 6.2 on the right-hand side. That in terms of the counterfactual advice that relates to the option being exercised during the lifetime, there was no evidence

of that, of what that would have been, but it's reasonable to infer from his objectives that if he'd received advice about documenting it, it would have also addressed the Chicks right to exercise the option during his life time, one, if the lease had not been renewed and second if he became physically or mentally incapacitated so he could no longer enjoy the farm.

The whole point of, "You won't exercise it during my lifetime is that I get a kick out of owning the farm," and if somebody had said to Ross well, imagine you are so incapacitated that you don't know or you can no longer enjoy the farm because you can't go there anymore, what would you have wanted to do? Well, we say the inference, if you go back again to that page about his objectives and his concepts, is he would have wanted the option to be exercised during his lifetime in that situation because that would have fulfilled the entitlement for the Chicks to buy the farm for 1.5 million and would have recognised that he kept them out of the market up until that stage.

So I trust that provides the response your Honour.

ELIAS CJ:
Yes thank you.

MR RING QC:
Thank you your Honours.

ELIAS CJ:
Yes Mr Gudsell, sorry. Do you want to be heard in reply?

MR GUDSELL QC:
If your Honour pleases, very briefly.

The position that has been raised by Justice O'Regan a moment ago that really, if competently advised, in my submission the starting point this morning is that the life issue would have been in. There's no question about that. And the fallback position that my friend suggested very belatedly now that if he was unable to really physically or mentally, if he was physically or mentally incapacitated so he could no longer enjoy it, the competent advisor would include such a provision in the lease document in 2004.

Well, what we know in 2010 when it was exercised, they were saying, themselves, that it will kill him if we buy it now, so that he was still interested in proceeding with ownership of the farm at that time that it was purchased.

The second point, I'll come to some miscellaneous ones, but the more significant one is this by way of reply, and I've set this out at paragraphs 37 and 38 of my submissions, and that is when one addresses the hypothetical question which, in my submission, the Court of Appeal did not, what advice ought to have been provided to Ross, what the Court of Appeal did, it based its assessment of causation exclusively on findings of historical fact. That is findings as to what did happen in the absence of legal advice as opposed to the hypothetical question of what would have happened had he been appropriately advised.

And really, the matters were traversed late, or before lunch and, indeed, in detail post-lunch, are all matters in relation to historical fact associated with other causes of action and, in my submission, those painting the picture of Ross and matters of that nature don't assist the Court in its final determination because that man, Ross, had two objectives and they didn't change, the life issue and the affordability issue.

It is important here to take away a foundation, in my submission, of what's been suggested to you by the respondent and that is this. That at all times Ross wanted them to have the farm at 1.5 million. In my submission that simply is not so. There was a limited, of limited application and I addressed that to you this morning.

The only other matter I wish to address, and this is really the point that I've addressed earlier, those two critical issues of fixing the price, but those High Court findings that my friend has referred you to on the affirmative defences, and they're all drawn from the affirmative defences, must be read subject to this. He had not received proper advice as to the anticipated market value issue and secondly, that whatever Ross's intentions were regarding the fixed price of 1.5, it was for a limited period. They were at no point granted an indefinite right to purchase.

You must have regard to the context of the findings on the affirmative defences. They were addressed to elements of the defences of lack of capacity, unconscionable bargain, not the negligence claim against the respondent. The findings, in my submission, on the negligence claim should have primacy. The

findings on the affirmative defence's claim should be read subject to the causation findings, not vice versa.

The High Court Judge, in my respectful submission, was clearly conscious of the earlier findings when addressing the negligence claim. And in my submission there's a misapplication of those findings in relation to the affirmative defences, and that was perpetuated by the Court of Appeal.

What, in essence, in my submission, the respondent is effectively asking this Court to do is to ignore the full implications, despite the High Court's express findings in that respect, ignore the fact that the fixed purchase price of 1.5 million was always of limited application despite not only the express terms of the documentation but the respondent's own evidence from Ms Rasmussen that the fixed price was an opportunity for a period of time, and find that properly advised he would have wanted the Chicks to not only be able to be able but, in fact, compelled, him compelled to exercise the option in March 2010, despite the evidence before the Court establishing he didn't want to sell at that date.

So they're the key matters in my submission. There are some miscellaneous matters in relation to value and I'll just touch on one of those in respect of my friend's table and certainly this summary of submissions moves the ground a little on the written submissions counsel had received and the Court had received. But I just take you to page 8 of the table. The reference is 4.2, and on the right-hand column there's a reference to the market value at 2007, and if one looks at volume 1 at page 150, it's the last page of that volume, you will see the agreed market values set out there, and in 2007, the reference is to 3.2 million, not 2.975 million as at that date, and that's also referred to in paragraph 109 of the High Court judgment.

GLAZEBROOK J:
And there was no agreement or finding, or evidence in respect of 2005?

MR GUDSELL QC:
No. The 2005 matter, because the – we had a start – no, there wasn't, your Honour. That's the simple answer. I can go in to develop that but, no, that's the simple answer.

ELIAS CJ:

There was some objection to this being included. What was that about? That's not still live is it?

MR GUDSELL QC:

I don't recall that, your Honour.

ELIAS CJ:

I might have got that wrong. I'd just picked that up in something.

MR GUDSELL QC:

There may have been. I'm not sure but there's no dispute it's being in now.

ELIAS CJ:

There's no dispute about this, yes, yes.

MR GUDSELL QC:

So, fundamentally those are the points that I wish to address by way of reply unless there are any matters the Court wishes to raise with me.

ELIAS CJ:

Thank you.

MR GUDSELL QC:

Thank you, Ma'am.

ELIAS CJ:

Thank you, counsel, for your help in this. We will reserve our decision.

COURT ADJOURNS:3.49 PM