IN THE SUPREME COURT OF NEW ZEALAND SC 39/2016

BETWEEN **HAMISH McINTOSH**
Appellant

AND **JOHN HOWARD ROSS FISK**
DAVID JOHN BRIDGMAN
Respondents

Hearing: 27 July 2016

Court: William Young J
Glazebrook J
Arnold J
O'Regan J
Ellen France J

Appearances: Appellant in Person
M G Colson and L W Brazier for the Respondents

CIVIL APPEAL

MR McINTOSH:
If the Court pleases, I am the applicant.

WILLIAM YOUNG J:
Thank you, Mr McIntosh.

MR COLSON:

May it please the Court, Colson with Ms Brazier for the liquidators.

WILLIAM YOUNG J:

Thank you. Mr McIntosh.

MR McINTOSH:

Your Honours, I raised with Mr Colson some preliminary matters. First of all, I seek the Court's leave for members of counsel to take notes, in particular John Prebble QC, who is sitting in the Court today.

Second, Your Honours, when we come to the alteration of position defences I will need to be discussing in some detail some personal and normally confidential financial information, much of which has not yet been reported in any way and I would like to be free to do so. So at that point I would like to have an order that there be no reporting of those particular parts of the submission.

WILLIAM YOUNG J:

Were there orders to that effect in the High Court and Court of Appeal?

MR McINTOSH:

No, there weren't.

WILLIAM YOUNG J:

What time do you think you'll get to that material?

MR McINTOSH:

Very broadly, Sir, after the morning break.

WILLIAM YOUNG J:

Can you identify in your submissions where it starts?

MR McINTOSH:

It's the alteration of position defence, both the reliance and the detriment elements, starting from Part 4 on page 20.

GLAZEBROOK J:

Are you not seeking to have the Court cleared? You're just seeking to have no reporting of those specific details, is that right?

MR McINTOSH:

That's all, Ma'am.

O'REGAN J:

Presumably to the extent that they're not already in the judgments that are on the public record?

MR McINTOSH:

Yes, yes, in my submission, Sir, there's plenty already in the public record.

WILLIAM YOUNG J:

By reference to the paragraph numbers, can you show me where the information is referred to in the submissions that you would like to have suppressed?

MR McINTOSH:

Your Honour, I won't be following these.

WILLIAM YOUNG J:

Yes, I appreciate that but that would give us a rough idea.

MR McINTOSH:

It's really in discussion of the contemporaneous evidence from 4.3(3) onwards because a part of the defence is to interweave those communications with the other communications that I was having with the bank and with architects about the feasibility of the project in issue.

WILLIAM YOUNG J:
Okay, we'll deal with that after the morning adjournment.

MR McINTOSH:
Thanks.

The third and less troubling matter is that Mr Colson agreed that I would go first in all respects and cover the appeal and cross-appeal and alteration case and he'll go second. Those notes that I referred to, I'd be grateful, Madam Registrar, if I could hand those up.

I do wish to rely in full upon the written submissions, Your Honours, on appeal and in response. These are speaking notes.

WILLIAM YOUNG J:
Are they longer than the original? Not quite. They are a little longer than we might have anticipated, Mr McIntosh.

MR McINTOSH:
Yes. I think, Sir, once we see how we motor through them we'll find that they're manageable.

First, as I hope is evident from the written submissions, my case relies in large part upon the *Allied Concrete v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 decision of this Court. I'd like to now make some brief comments about the facts of my investment with RAM against the backdrop of that particular case.

First of all, this investment was suggested and recommended to me by my broker. It was accepted by my accountant, Curtis McLean, who's now Deloitte. These are the notes in evidence but we don't need to go through them because it's not controversial.

O'REGAN J:
Do you mind just lifting up the microphone? I'm having trouble picking up your voice.

MR McINTOSH:
Oh, yes. It was accepted by the funder of the investment for me, Westpac Private Bank. I was aware Chapman Tripp acted for RAM. The logo of that firm was on the signed management agreement. I wasn't investing in RAM itself. I wasn't investing in a new company or a new business or a new product or a marketing scheme or a pyramid scheme. Instead, it was investment with a recommended, established company offering managed share portfolio services with hundreds of other investors.

It was represented to be in shares in the marketplace and its performance, the performance of the portfolio shares, accordingly matched their performance on the market.

That's a particularly important point to my case. That's found by Justice MacKenzie at his paragraphs 10 and 12. What it meant is that any investor in my position actually looking at the quarterly reports would see identifiable shares existing in the market. If they were so minded, they could check the relevant share prices and movements. What that meant with the addition that the management fees deductions were mathematically correct for a recipient of a report was, if you like, a virtual performance, performance in every respect of what the contract envisaged other than for one critical element, the nominee company didn't actually own the shares that were listed in those reports.

There are numerous examples of the reports in the case on appeal and I don't need to go through them unless Your Honour would find it useful to see an example.

I didn't touch the investment after I made it and I say that in effect I was then reinvesting when I got every quarterly report. Not consciously in that sense

but that is the effect of what I was doing. I made the decision to leave the funds in the portfolio as opposed to moving them somewhere else.

It was reviewed annually by Curtis McLean for me for my tax returns and in turn, the tax returns were accepted by the IRD. It wasn't remarked upon by Curtis McLean or IRD at any time.

It was terminated in very normal circumstances. It was paid out in accordance with the final report as being the realised value of the stated portfolio, less fees.

The contract then ended in that way with each party going their separate ways as if the contract had been fully performed.

If we could just look at one example, please, at volume 3 part 2 tab 84, and it's page 510. The pagination is at the top. This is an email from RAM to me, the 23rd of November 2011. The final payment of 195,000 made today. Attached is a copy of the final report and over the page is that final report. Page 514, for example, you can see the sale of the – the purported sale of shares. The shares are actual but the sale is purported. But those shares exist in terms of their companies.

Back at 510, you see my email saying, "Hi Melissa, thanks very much, a very good result, kind regards." That, brief as it may be, is what I rely upon to say that there was then a conclusion or a discharge of this contract.

Perhaps to put the point another way –

GLAZEBROOK J:
Sorry, I was just going to ask, is there a significance in the date in your submission or just the conclusion of the contract?

MR McINTOSH:
Just the conclusion, Ma'am.

To put the point another way, it would be much more unusual for me to have written, “Thank you, I now regard the contract as having been discharged and concluded.”

Page 3 of my notes, Your Honours, I have listed there from Internet search companies in New Zealand offering exactly the same service. I’m sure Your Honours will recognise some of those names there. They all offer the same service that RAM offered, managing share portfolios, and I don’t know, Your Honours, but I would wager that we’re talking about billions of dollars under management in this list.

My page 4, what I’ve done here is a basic Excel spreadsheet which anyone can replicate if they’re interested. What I’ve done is I’ve annualised the return that I got on my investment. It’s not a shares return or the sharemarket. It’s simply the raw return annualised as a percentage. You see in the first one the 500,000 investment made on the 19th of April 2007 and then at the bottom of that column, 23rd of November, the email we just looked at, and 954 is the total. That’s the difference.

Now, that represents 15% per annum with that return compounding.

The next one is my net gain. I should say the purported portfolio return figure here would be 19%. The reports fluctuated between 12 and 24 or something over the period but I’ve just annualised it would be 19. The difference is the management fees deducted. But this is the raw amount that I got back.

The next box is my net gain after you deduct my own $200,000 interest cost on that investment. That would have given me then a net return of just over 9% per annum. I’ve just given an example at what it would end up with if we used a 5% annualised return compounding. My 500 would have turned into 625 over the period.

WILLIAM YOUNG J:

Or it would have been negative, wouldn't it, after interest?

MR McINTOSH:

It would have been, indeed. Mr Dent, a partner of Deloittes, gave expert evidence in the High Court. I've given the reference there to the second affidavit, but he says over that same period credit card lending rates were 18.4% and as at March 2015 interest rates for personal lending were 16.9%.

WILLIAM YOUNG J:

Interest rates for what?

MR McINTOSH:

The personal lending.

WILLIAM YOUNG J:

From whom? Who lends the 16.91%?

MR McINTOSH:

This was his market research, Sir, I'm referring to his affidavit.

GLAZEBROOK J:

His non-mortgage lending presumably.

MR McINTOSH:

Non-mortgage lending, it's unsecured lending.

GLAZEBROOK J:

Can I just check what this is going to because it's accepted that the, that your investment was made in good faith and the payment was received in good faith, which this obviously, on the basis of this material that's probably the basis of the finding, so what is the point of this?

MR McINTOSH:

I'm right on the cusp, Ma'am, of coming to that.

GLAZEBROOK J:

That's good. It's just sometimes it's better to know the point before you…

MR McINTOSH:

It's against the backdrop of the *Allied* case Ma'am and it's the next page.

GLAZEBROOK J:

Okay.

MR McINTOSH:

If I just finish here. So what I actually received was 15% per annum compounding, just as if I'd left it in the bank at that rate.

O'REGAN J:

Well you're talking, the rate above is a lending rate. What was the bank paying for in investments?

MR McINTOSH:

As I say, Sir, the bank wasn't paying 15%.

O'REGAN J:

No it was charging 15 wasn't it? When it lent money, isn't that what this is saying?

MR McINTOSH:

Ah, no. well –

O'REGAN J:

Are you saying that if you'd invested this money with a bank you would have got 16.91% interest off it? It just seems very unusual.

MR McINTOSH:

No, no, no. All I'm saying is if I had put it in the bank at that rate, that is the outcome that I would have got. That wasn't any bank rate. I'm not saying that. I'm just saying that was, I'm just showing the compounding effect –

WILLIAM YOUNG J:
If you're a bank, that's what you would have got.

MR McINTOSH:
Well, fine, if I was a bank.

WILLIAM YOUNG J:
Yes.

MR McINTOSH:
But if I was not a bank, but put it somewhere else on a compounding basis at that rate, that's what I would have got.

WILLIAM YOUNG J:
It's just the figure that strikes me as slightly untoward, the 16.91%.

MR McINTOSH:
Yes. The point I'm making is what I then got was more than I would have got leaving it in the bank at bank rates.

GLAZEBROOK J:
But quite a lot more, I would have thought, probably about three times more.

MR McINTOSH:
Yes, absolutely Ma'am, but as I also say, my investment was much riskier than that, whether it was in the global share portfolio, or as an unsecured loan of half a million dollars to this company. So you would always expect, in those terms, that you would get more of a return than simply leaving it in the bank, and the amount that I did get is less than I would have got, had I been lending at the credit card or personal lending rates. Now all I'm trying to do by this is show relativities.

Over the page, as regards *Allied Concrete*, the investment contract and its outcome was, therefore, fully at arm's length, based on the market, comparatively not exception.

GLAZEBROOK J:
Well it's difficult to say that if you don't know what the returns were for other fund managers, and I suspect, although in the long-term, shares give a much higher return, it would be unusual not to have fluctuations over this period.

MR McINTOSH:
Indeed.

GLAZEBROOK J:
And this seems to not be terribly fluctuating.

MR McINTOSH:
I haven't, in fact, I've removed the fluctuations Ma'am. I've simply annualised it to get a comparative rate.

GLAZEBROOK J:
But I mean that's more to do with good faith, we don't have that – if you are doing the comparison, the comparison usually would be with what other fund managers were doing.

MR McINTOSH:
Yes. What I'm trying to say, putting it round the other way, is I wasn't making 70% per annum, or something astronomical. It was certainly a good return, but it wasn't, as I say, exceptional. It certainly wasn't sufficiently exceptional to raise the attention of my accountant or any others, or the IRD. It was routine –

GLAZEBROOK J:
But the IRD probably isn't interested in anything apart from whether you're paying.

WILLIAM YOUNG J:

Well no regulatory interests anyway.

MR McINTOSH:

Quite. It was routine for the industry, that was the purpose for showing that list of similar companies, and it was routine for RAM, at least purportedly. In my submission the fact that RAM was secretly fraudulent doesn't change any of that for the purposes of a section 296(3) defence. But unlike *Allied* here we have a dispute about sufficiency of value. My page 6 I say, in fact in terms of a simple exchange there is no real sufficiency issue. Leaving aside that section 296(3) does not require an enquiry into sufficiency of the value, or else it couldn't be a defence to 297, which I'll come to later –

WILLIAM YOUNG J:

Do you mean sufficiency in terms of what the company was worth at the time?

MR McINTOSH:

No, what I got to what I gave.

WILLIAM YOUNG J:

And what you gave is referable to the 500,000, rather than the release, the implied release?

MR McINTOSH:

Yes, just in terms of the simple exchange, 500 in 2007, 950 in 2011. Such enquiries were doubted in *Allied* and also more emphatically by Lord Wilberforce in the *Midland Bank Trust Co Ltd v Green* [1981] AC 513 (HL) case. Leaving those matters aside, this is not a case where only meagre value has been given. I say there is no real issue with sufficiency, 954,000 in cash transferred back is sufficiently comparable to 500 in cash transferred four and a half years earlier.

ARNOLD J:

Don't you have to look at the context though? If this investment had operated as you thought it was operating, as I understand it the 500,000 that you invested would have been impressed with a trust, so RAM took it as a trustee. It undertook share dealings in your name and so those shares am I right would have been specifically identified to your investment.

MR McINTOSH:

Yes Sir.

ARNOLD J:

And any cash generated would have been kept in an account opened in your name. That's what the contract provides?

MR McINTOSH:

That's right.

ARNOLD J:

Right, so all of those funds would have been impressed with a trust.

MR McINTOSH:

Yes.

ARNOLD J:

Now on insolvency then they wouldn't be the assets of the company, would they?

MR McINTOSH:

No.

ARNOLD J:

Your trust structure would protect them.

MR McINTOSH:

That's right.

ARNOLD J:

The fact that you're in a situation of being owed a debt by the company comes about because the company misappropriated the money, stole the money, and as a trustee, or fiduciary stealing money, then you've got a claim against them, which can be characterised as a debt. Now that's easy enough to apply arguably to the 500,000, but rather more difficult to apply to the fictitious earnings, isn't it?

MR McINTOSH:

Well I was going to come to that Sir. All I was trying to show is a bare comparison of the exchange.

ARNOLD J:

Well that exchange only, didn't occur, in fact, and so one of the things that does trouble me about this, is that your case is built around what you thought was happening, but was not happening in fact, and don't we, and the – you end up being in the position of a creditor because of what happened in fact, they effectively stole your money, the company stole your money.

MR McINTOSH:

Yes.

ARNOLD J:

That's how you end up being a creditor, this has been a breach of trust and you've got a claim.

MR McINTOSH:

Yes, I am coming to address that Sir.

ARNOLD J:

All right.

MR McINTOSH:

All I wanted to do here was to – my primary case is we don't have an enquiry as to value, in a situation like this. But even if we do, in terms of the simple exchange, cash handed over, cash handed back, I say there is not an issue of sufficiency because in any circumstances, in any normal circumstances, those figures over the course of that period wouldn't be the same.

GLAZEBROOK J:

Well they may actually be less because in a risky investment you could have landed up with 200,000 back.

MR McINTOSH:

That's right, there'd certainly be no issue of the sufficiency in that situation.

GLAZEBROOK J:

Well, yes, except I'm not sure where you get the 900,000 from in a situation where you could have landed up with 200,000 back, assuming everything was conducted absolutely appropriately in terms of the contract, ie that it had been held on trust, that shares had been purchased, it's just that the shares that were purchased had not made a sufficient return.

MR McINTOSH:

I'm trying to make a point that's more simple than that before I come to that substantive issue. If it was accepted that the 500,000 given was value, the question is, is that value for the 954 given four and a half years later. It's a simple question. If it's accepted, I mean, and we'll come to the cross-appeal where it's not accepted as value at all. What I'm saying is, 500 handed over at that point in cash, is unlikely to ever come back as exactly 500. Economically and commercially that doesn't happen. For example, even in the *Re Waipawa Finance Co Ltd (in liq)* HC Wellington CIV-2010-441-465, 7 February 2011, the Court allowed inflation adjustment, just not use of money. The figures are never going to be the same. And if we go back to see what we looked at before in terms of the rates, if it was a commercial lending situation, the 500 given as value back then would come back as a lot

more in 2011. At 15% compounding it would come back at 954,000. Would we say, in that circumstance, that there was an insufficiency of value problem. In my submission we wouldn't. We wouldn't. So if we don't have an enquiry as to what actually happened, and we just look at it on that simple exchange basis, did I give value, and accept that the 500 given was value, then in my submission there is not a sufficiency question.

Now, the case against me, as Your Honours have pointed out, is that because RAM was operating fraudulently it didn't use the contractual value as intended and in fact they say it would have no value at all. But that has to be the case because if they accept that the 500 was value given, then at least there's 500 value in what came back, at least you have that, so there's no cross-appeal. So their ground for departing from *Allied* and the basis of the cross-appeal, is that the company didn't get any value at all from whatever value I gave and therefore I didn't give value under section 296(3). So I say if that argument fails, the argument that RAM had to get value from whatever I gave, and it didn't, then I say the defence is made out, as I will now go on to explain.

This is into the argument. Gave value. It says, A gave value for the property. We know from *Allied* that the section is based on 588FG(2) in Australian Corporations Law and the associated cases are to be of use. Value includes valuable consideration which has to be real and substantial. Consideration doesn't need to be full consideration. Here, the property that I gave value for is the 954 in cash. I'm A. I handed over, I gave a cheque for 500,000 to RAM that was cashed. 500 handed over by way of a cash cheque is unquestionably real and substantial value, or valuable consideration in itself. It has monetary value of 500,000. RAM took legal title to it. I was dispossessed of it. I incurred my own major interest cost on it. It then became either an asset that RAM could invest for me, as to earn its fees, or funds that RAM appropriated to its own use, but it was still $500,000 worth of value given either way. It didn't cease to have that value in itself. It wasn't gifted to RAM and it was the only reason why I later received the property back the 954.

WILLIAM YOUNG J:

But RAM simply held, should have held the money to their trustee.

MR McINTOSH:

Yes.

WILLIAM YOUNG J:

So it wasn't in that sense $500,000 worth of value, it received, except in a very technical sense.

MR McINTOSH:

Exactly Sir. Exactly. It wasn't a necessarily 500 received by RAM, but it was still value, it didn't cease to have value. Now we know that section 296(3) applies beyond the debtor and creditor relationship and voidable preferences.

WILLIAM YOUNG J:

Because it's a general provision of defences.

MR McINTOSH:

Because it's a general provision. Now, based on the *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109, (2011) 277 ALR 189 case, as approved by this Court in *Allied*, where there was the value given was a discharge of third parties debts, the value given doesn't need to be given to the insolvent company, it didn't need to be given to RAM.

ARNOLD J:

Well I can't quite remember but didn't the discharge in that case have a value to the insolvent company because of the inter-relationships between them?

MR McINTOSH:

Certainly not in the form of its actual discharge.

ARNOLD J:

So what was the factual situation in *Buzzle* again?

MR McINTOSH:

The factual situation was that the payee A, which is Apple, was owed debts by third party suppliers, and Buzzle paid those debts to Apple, and Apple gave a discharge of the debts to the third party suppliers. So the value that was given went in the discharge to the third party suppliers.

WILLIAM YOUNG J:

This is, these are the Chief Justice's reasons you're referring to?

MR McINTOSH:

Yes.

WILLIAM YOUNG J:

And she and I were a minority of this issue, weren't we? Because we looked at the, what I call the discharge hypothesis, that the value is assessed at the time the transaction occurs, rather than by reference to the antecedent transaction.

MR McINTOSH:

I think this is a bigger point though Sir. I think discharge of liability can be value given.

WILLIAM YOUNG J:

That was what I thought, but I didn't think that that was necessarily what the majority thought. I thought they were looking at the value in the antecedent transaction in this case on your approach the deposit of $500,000.

MR McINTOSH:

All I'm saying is that in *Buzzle*, which applied 588FG(2), which section 296 is acknowledged to be based upon, and uses words "for valuable consideration", our comparative is "gave value", this Court has said there's no material distinction, or at least the gave value includes valuable consideration. We have an example of that in application where the giving of the value or the for valuable consideration goes somewhere other than the payer.

Now, if that is the case, it means that the value given doesn't need to benefit the payer company, at least in the form that it's given. In my very respectful submission, that's the end of this case. It doesn't matter if RAM received that value at all, or what it did with it. It was still value that I gave and that's the end of it.

GLAZEBROOK J:

Can I just stop you there? I mean, I would see RAM having received the value provisionally in the sense that it stole it. What I do want you to deal with particularly is what it did with it as being irrelevant. I can understand your simple argument is you gave value 500,000, you got 900,000. That wasn't untoward, you say, in terms of the market, and therefore the 500,000 was value for the 900,000 in terms of the majority view in *Allied*. Not entirely sure how that fits with the minority but we don't need to worry about that because it's the majority view that we're working off.

MR McINTOSH:

Ma'am, the second argument – that was the first, if you like. The second one I've just made is that whatever value is in issue doesn't have to go to the payer company. It just has to be given and we have a live example of that.

GLAZEBROOK J:

But I think that's a totally different point, though. How do you relate it to here? You gave 500,000 and then you say that that is value for the 900,000 that came back. That's the simple argument. Then you say it doesn't matter what the company did with that money which, in this case, was actually just steal it and dissipate it, effectively, outside of the company.

MR McINTOSH:

That's right. That's what I say.

GLAZEBROOK J:

Yes, but where does that – why does that not make a difference, then?

MR McINTOSH:

Because the argument against me is that the company didn't get value from it.

GLAZEBROOK J:

Yes, but let's say the company did get value but they got value in the sense of 500,000 because I'm really concentrating on your appeal at the moment rather than mixing the two together. I mean, I understand there are two separate – there's the appeal and the cross-appeal and we'll obviously hear in respect of both of them but just in respect of the money above the 500,000, why do you say it doesn't matter what RAM did with it? Let's assume for these purposes that 500,000 has gone to the company and been dissipated but because it's been dissipated it did not get any return on it, did it?

MR McINTOSH:

Yes.

GLAZEBROOK J:

RAM itself.

MR McINTOSH:

Well, that's the next page, Ma'am, at page 8. That's the additional value I say I gave above the 500,000.

WILLIAM YOUNG J:

Before, though, just – I think one of the Australian cases did involve a theft

MR McINTOSH:

PT Garuda Indonesia Ltd v Grellman (1992) 35 FCR 515 (FCAFC) but it's a jump well down the track.

WILLIAM YOUNG J:

No, that's all right. I knew there was a case although it's probably different from this.

ARNOLD J:

There was a settlement in that case, I think, or an arrangement.

MR McINTOSH:

Yes. Just to foreshadow where I'm going to go with that, Sir, there cannot be a difference in the gave value analysis.

WILLIAM YOUNG J:

Yes, that was the took value.

MR McINTOSH:

Whether or not I knew of the fraud. If it was the same amount either way, it should in principle make no difference to whether I gave the value if I knew of Mr Grellman's fraud or not. In addition to the cheque I gave the contract. The contract was the valuable right and opportunity for RAM to use the funds to invest and earn its contract fees. That is how those companies, all of them, do business, that is their business, that must be value, in itself.

GLAZEBROOK J:

Well except all that did was lull you into a false sense of security so they could steal the money. You giving the contract just gave them the occasion to steal the money, didn't it, because if they'd said, we want your money Mr McIntosh because we're going to steal it, you wouldn't have handed it over obviously. So the contract was really part of the fraud, wasn't it?

MR McINTOSH:

I think that would be troubling to all those companies on that list Ma'am.

GLAZEBROOK J:

No, in this particular instance –

O'REGAN J:

But it's one or the other, isn't it? You either give a contract, which gives a management right, and you don't give the 500,000, or the company steals it in which case you've got the 500,000 but the contract becomes irrelevant. But they're not cumulative, are they, they're alternatives?

MR McINTOSH:

As I go on to say, Sir, at my 2, I either gave the contract, which had value, in terms of the opportunity, or the fees that the company said was deducted. Again it doesn't matter whether they did or not, they had that opportunity, and then I say the reality at 2, that the company misappropriated it. But as soon as it did that it had the use of those funds for the four and a half years.

O'REGAN J:

So you're 1 and 2 are alternatives rather than cumulative, right.

MR McINTOSH:

They are Sir, yes. I used the funds, I borrowed them, and I did something with them. RAM used them in turn. That is value. That is use of money value. And then in either case I say there was the discharge with extinguishment of all obligations.

If I could just briefly turn to the *Allied* case, which is tab 7 in the first volume, and it's paragraph 105. Over on the report page 177, first full sentence, accordingly we consider that the –

GLAZEBROOK J:

Sorry, I don't think I've…

O'REGAN J:

I think if you use the case on appeal numbers we won't get confused. It's 154.

GLAZEBROOK J:

Sorry, what were you referring to?

MR McINTOSH:

The first full sentence on paginated 154, "Accordingly, we consider that 296(3) should be interpreted consistently with the Australian provision, which is consistent with the… 'valuable consideration' requirement… On that approach, 'value' under s 296(3), while it must be real and substantial, can include value given when the debt was initially incurred or value arising from the reduction or extinguishment of a liability to the creditor incurred by the debtor company as a result." And there are various other cases confirming that the discharge of a liability is valuable consideration and hence value.

WILLIAM YOUNG J:

I didn't think the majority accepted that. I thought that was the approach that the Chief Justice and I took which is in the minority.

MR McINTOSH:

I think that was the majority I was reading – that was the majority judgment Sir.

WILLIAM YOUNG J:

But it's the –

GLAZEBROOK J:

I think they're talking about at the time it was given.

WILLIAM YOUNG J:

At the result of the earlier transaction, I think they're talking about the value that's given in the first place, rather than the value that is given in the implied discharge when the allegedly preferential payment is received. I might be wrong on that, but that was my understanding.

GLAZEBROOK J:

Well, I'm fairly sure that must be right because what it's talking about is a situation where the debtor might owe money at the time of the original transaction but it all goes back to the time of the original transaction.

MR McINTOSH:

It's as a result, extinguishment of a liability to the creditor incurred by the debtor as a result of an earlier transaction.

GLAZEBROOK J:

Well, actually, I suppose what it might actually be saying is that if you give additional value at that time then that can be taken into account as well.

MR McINTOSH:

Well, I think the *PT Garuda* case, for example, is an example where a liability that has arisen is paid and then the discharge of that liability is the valuable consideration. I don't really think that's a controversial point that discharge of a liability in itself could be giving a value in terms of –

WILLIAM YOUNG J:

Well, if that's right you don't need to look at the antecedent transaction. For every preference there will be value because the preference is associated with the discharge of the earlier liability.

MR McINTOSH:

Yes, Sir, and in my respectful submission that is the outcome of the *Allied* case.

WILLIAM YOUNG J:

Well, I must have been in the majority without realising it.

GLAZEBROOK J:

Well, except you still look back to the earlier transaction because otherwise it would have been a useless consideration because that's what the Court of Appeal decision required, new value, which was what was rejected in terms of the discharge.

ELLEN FRANCE J:

Just while we're in *Allied*, if you go to page 169 of the case on appeal, and that's the Chief Justice's description of *Buzzle*, would you mind just explaining to me again, looking at that reasoning, how you say that supports your proposition?

MR McINTOSH:

Yes, Ma'am. It's really at 165 and there the Chief Justice set out the paragraphs from Justice Young. Then 164, the appellants say that this principle only applies where it is the debt of the payer that is released while here it was the debt of a third party. No authority was proffered for that submission and I do not accept it. The consideration that moved from the promisee, Apple, was the detriment it suffered at Buzzle's request.

GLAZEBROOK J:

Who's the third party here? I think that's what we're finding puzzling.

MR McINTOSH:

All I'm saying, Ma'am, is if you can give value by discharging the liability of a third party –

GLAZEBROOK J:

But who's the third party? Because all that means is you don't have to give it to the particular person. You can give it to someone else but who's the someone else here and if there isn't a someone else, why does this help anybody?

MR McINTOSH:

Because it means that it only focuses on the giving of it. It doesn't matter who it goes to. It doesn't have to go to the company and therefore it is irrelevant what this particular company got from it.

GLAZEBROOK J:
Well, I'm not sure that's what that says but in any event in this case it did go to the company.

MR McINTOSH:
No, it didn't.

GLAZEBROOK J:
Well, you didn't mean it to go to the company. It inadvertently, on your part, went to the company.

MR McINTOSH:
Yes but that's why, Ma'am, the company can't say, "Ha ha, I didn't get any value." The answer is, it's irrelevant.

GLAZEBROOK J:
Well, I can understand that argument in terms of the 500,000. I'm still having difficulty in respect of what comes over and above the 500,000.

MR McINTOSH:
My primary point is the use of money. They've had the value of that money.

GLAZEBROOK J:
And *Buzzle* has nothing to do with that.

MR McINTOSH:
Buzzle has nothing to do with that.

GLAZEBROOK J:
Okay.

MR McINTOSH:
The first bullet, I had a contractual right to repayment of the value of the portfolio when realised. Not – it shouldn't be troubling.

GLAZEBROOK J:

And you say the actual use they made of it is irrelevant, you still gave value, is that the submission?

MR McINTOSH:

That's right. They could have made wonderful use, some use, no use at all. It must be irrelevant to me.

O'REGAN J:

Except that the returns that you were told about were a fantasy, weren't they? I mean you were entitled, if Ross Asset Management had invested your money, and the returns had actually been made, you were entitled to receive it. But in fact none of that happened.

MR McINTOSH:

No, that's right. He presented that it did.

O'REGAN J:

But it didn't so it doesn't matter what he said really does it. The fact is that your money was stolen on day 11, or whatever it was, and that was the end of the, from there on everything was a fantasy, wasn't it?

MR McINTOSH:

Right, but, well my basic case there is impossible to say, a company having misappropriated didn't get the value of its use.

O'REGAN J:

Well in a Ponzi scheme it's useless to pay somebody else, that was the end of that.

MR McINTOSH:

In a Ponzi –

O'REGAN J:

So that, so it had gone by day 11 basically.

MR McINTOSH:

Yes, but we don't know exactly where that money went anyway. The company may have actually used it to pay its rent.

GLAZEBROOK J:

Well its fungible so that's the same with everybody's funds too, everybody who lost funds, because obviously there was rent paid, there was money that went out to Mr Ross and associates, there were some shares purchased but on the whole it went round in a circle, out of, well out of, rob Peter to pay Paul, in the normal way of a Ponzi scheme.

MR McINTOSH:

Quite. But my submission Ma'am is it didn't lose value.

GLAZEBROOK J:

Well it's difficult to see how it gained value when actually nobody did anything with it.

MR McINTOSH:

But that's not my issue.

GLAZEBROOK J:

Well that's what you need to concentrate on, for me at least.

MR McINTOSH:

Okay, I will come to that. My second bullet point, I was paid the amount of what was represented to be in the portfolio, based on its values, which were the share prices on the market. Discharge by performance requires full performance but RAM represented to me that there was full performance, and I relied on those representations on each report to continue investing with RAM, and I say RAM would then be stopped from saying, oh no, I didn't perform.

O'REGAN J:

Why does that matter in a clawback case?

MR McINTOSH:

Because the contract has been discharged.

O'REGAN J:

But the Court has to do an assessment of whether value was given. The fact that Mr Ross couldn't have done this, or Ross Asset Management couldn't have done this, doesn't stop the clawback rules being applied, does it?

MR McINTOSH:

The question is, did I give value. I gave the contract. The contract had value. If the contract had been performed, I don't think it would be said that I hadn't given value by it.

O'REGAN J:

But it wasn't, so let's deal with the reality.

MR McINTOSH:

But it was, it was represented as if it had been performed.

O'REGAN J:

But so what, it wasn't?

GLAZEBROOK J:

If it had been performed though the company wouldn't have owned the money I think is being put to you right in the first place so I think we can put aside if the contract had been performed because we wouldn't even be here talking about preferences.

MR McINTOSH:

But if –

O'REGAN J:

It would have been your money all along, wouldn't it?

ARNOLD J:

What you're saying is that whatever the representation was, you were entitled to rely on it, so if the company had said, well we've had four wonderful years, 35% returns each year, from your point of view that's just what you're entitled to rely on.

MR McINTOSH:

That's right.

WILLIAM YOUNG J:

Are there cases where the Courts have decided that value was given but not enough?

MR McINTOSH:

Well that section 297 usually, Sir, is you identified in your judgment in *Allied*, if you have a simple equivalence problem, then that's what 297 is for. It's transactions that undervalue.

WILLIAM YOUNG J:

But are there any 296(3) or similar provision cases where the Courts have said, yes, the creditor gave some value but not enough to invoke the defence in full.

MR McINTOSH:

Not that I'm aware of Sir. If the contract had been performed, there wouldn't have been an issue. It's been represented to me as if it's been actually performed.

O'REGAN J:

Yes, but that was a fraud.

MR McINTOSH:

But in my submission –

O'REGAN J:

Why does the nature of the fraud determine the appropriate clawback rules. I mean what you're saying is if Mr Ross had said sorry, I lost it all, you wouldn't have had any claim. Well, I don't think you would have accepted that.

MR McINTOSH:

If the outcomes are the same, the value analysis must be the same, because it's what I gave, not what RAM received. Perhaps I can just finish this and we'll look at some examples perhaps to show what I'm saying, but the company, I say, is estopped from coming back and then saying I didn't perform, are you not entitled to that money. The respondents refer in the additional authorities to the *Re Exchange Securities & Commodities Ltd* [1988] 1 Ch 46 case, which is at tab 42, this is volume, the additional of volume 4, tab 42, 1035. This is a distribution case when the assets had been gotten, and at that point we had a fictitious profits situation as well. The claimants against the liquidator were claiming an estoppel based on what had been represented to them as to the value of their portfolios. And it was held that in that situation the liquidator is not bound by the company's representations. However, at page 59 of the judgment, which is 1048 on the pagination, the last paragraph begins, "The reason why, Mr Joffe submitted, estoppels are relevant and applicable… is that in those cases the liquidator is trying to recover money for the statutory estate, as it is called. There are no special rules that apply to getting in the assets. The rules apply to dealing with the assets after they have been got in under the statutory scheme. If an estoppel were allowed to operate or a judgment or other binding obligation allowed to operate… he would be prevented from exercising his statutory duty to consider the true liabilities of his debtor."

Right, then, “in getting in assets for the estate he is not under any different position to any assignee or person entitled,” jumping down, “who stands in the shoes of the person from whom he obtained the claim.”

WILLIAM YOUNG J:
I don’t think that’s applicable to these sort of claims, is it. Isn’t that applicable to a sort of claim on a contract by the insolvent company against a third party?

MR McINTOSH:
Exactly, which is my situation.

WILLIAM YOUNG J:
But here, aren’t you actually in the first situation?

MR McINTOSH:
No. This is not a distribution situation. Just finishing the paragraph, “In such cases estoppels can and do operate against the claimant and there is – “

WILLIAM YOUNG J:
Pause there. This distribution case really in the big scheme of things is a question as to what should be distributed to the creditors of Ross Asset Management.

MR McINTOSH:
With respect Sir, no it’s not. It’s a section 296(3) case.

WILLIAM YOUNG J:
Yes, but it’s directed to what is to be eventually, I suppose everything is, but if one looks at things in the long run, lots of strange results happen, but in the long run the issue is what is to be distributed to the creditors and this is a matter of getting in the assets of what I think the Judge here might be calling the statutory estate.

MR McINTOSH:

Quite. We're getting them in. We're not distributing them yet. At this point, estoppels can and do operate. The liquidator is bound by any estoppels that would operate against the company. That, in my respectful submission, is exactly the situation here.

WILLIAM YOUNG J:

Isn't that, for instance, when we say a company making, giving preference, where solvent that couldn't be a complete answer, could it, to a liquidator recovering preferences on the basis that the company said it was solvent, therefore the liquidators have stopped arguing them to the contrary.

MR McINTOSH:

It would depend on the nature of the estoppel in the case. It just says estoppels can and do operate. You have to establish the estoppel. What it is in this case is having represented performance, and I having accepted that, the company can't go back and then say, "I didn't." If that is the case, we have discharge of the contract by performance, discharge of the contract by performance is the giving of value. Now, if we don't accept that, we have to say, "No, there was no performance."

GLAZEBROOK J:

Well, there certainly wasn't performance in this case, so it's not that you have to say it. It's actually a fact because they didn't keep it on trust and they didn't buy any of these shares they said they'd bought.

MR McINTOSH:

Well, in my submission, though, were we in this position that would be a simple common law estoppel. It's utterly irrelevant whether the company is insolvent or not. It's represented something. It's been relied upon. It would be unconscionable for that, in the circumstances, for the company to go back on it. Simple estoppel.

O'REGAN J:

If that were so, the Companies Act wouldn't need a change of position defence, so we have to assume it's not so, don't we? Why would the provision be there?

MR McINTOSH:

Well, the point I'm making would apply outside insolvency, Sir.

GLAZEBROOK J:

Certainly nobody's suggesting anything outside of insolvency but we are in an insolvency situation.

MR McINTOSH:

Okay. Let's then say that there was not full performance on one side. There was non-performance, complete non-performance. In my submission, on the facts we nevertheless have a discharge. There is no other explanation on the facts for what happened. The parties walked away. There was a complete meeting of minds about what they intended, that this contract had been performed and discharged, and they walked away.

GLAZEBROOK J:

Wouldn't that be the case in any preference situation? From the person's preferred point of view, they think that's the end of it and presumably on the company's point of view often because they're trying to limp on they think that's the end of it, too, so what's the difference? What is the significance of a discharge, because that would have to be the case at every single preference situation.

MR McINTOSH:

Because a discharge gives value, Ma'am.

GLAZEBROOK J:

Well, then, you might as well – well, actually that isn't what *Allied* said. *Allied* said you look back at the previous transaction. It's not even what the minority said in *Allied*.

MR McINTOSH:

In my submission, the defence applies beyond voidable transactions and debtor and creditor and I don't think that can be controversial. For example, it applies to 297 which is not a voidable preference at all. It's simple transactions undervalue, not debtor and creditor.

WILLIAM YOUNG J:

It can't really apply to preferences, 297, can it? I mean, you may say in this transaction, well, it wasn't an equal exchange of value because you got $954,000 and RAM really lost for a claim that was actually worth nothing because it didn't have any money. Now, I don't think that this case could be analysed under section 297, could it, because that looks to me like the sort of situation that's dealt with under the voidable preference provisions.

MR McINTOSH:

Well, the respondents did advance a claim under 297 on the basis of an equivalent of the two figures, but it's irrelevant because the section 296(3) defence applies to section 297, and for it to be in operation anyway there's already been a determination that there was non-equivalence, there was undervalue. So you have to give meaning to section 296(3) in the context of 297 where you have a transaction undervalue, and therefore the question is, was –

WILLIAM YOUNG J:

Well it maybe, conceivably may be that section 296(3) never operates where there's been an undervalue. I mean that might be, that part of section 296(3) might, say it would leave you only with a change of position. But it may be that the basis of the liability excludes a component of a generic defence.

MR McINTOSH:

I think this Court has determined in *Allied* that it goes the other way around Sir, that 297 is a defence – 296(3) is a defence to 297.

WILLIAM YOUNG J:

Well it could be, if there's a change of position.

MR McINTOSH:

Well there's no exception for the giving of value, and the way –

WILLIAM YOUNG J:

What did the Court say, I'm sorry, I can't remember actually, don't worry about it now, I'll look at it later.

MR McINTOSH:

So in a situation where you have undervalue established, 296(3) gave value defence still applies. You just have to determine whether or not value was given.

WILLIAM YOUNG J:

Are there cases where that component of 296(3) has been upheld against the 297 claim?

MR McINTOSH:

Not that I am aware of Sir.

GLAZEBROOK J:

I thought that in *Allied* the majority did say that sort of rough equivalent effectively. So if it was an undervalue I wouldn't have thought the 296(3) claim applies except possibly to the extent of the actual value given.

MR McINTOSH:

It's a complete defence.

GLAZEBROOK J:

But it may only apply to the actual value given as against the full amount, which is the analysis in terms of…

MR McINTOSH:

Section 296(3) Ma'am applies to a wide range of Companies Act provisions. And I'll come to those –

WILLIAM YOUNG J:

But there'd be some claims that can't succeed unless the gave value component in 296(3) is negated in advance.

MR McINTOSH:

Well, if you have one section that –

WILLIAM YOUNG J:

I mean if there's a voluntary transaction, I mean, section 296(3) gave value just doesn't work, does it?

MR McINTOSH:

Well, then it doesn't work either, and so 297 does work and 296(3) doesn't work in a voluntary situation. But that's what –

WILLIAM YOUNG J:

I mean I'm just interested in whether, I mean just an area where there might have been authority as to whether some but not complete value does or doesn't engage section 296(3) as to value.

MR McINTOSH:

Well the reason is, Sir, it is the wider, it's the wider defence for all comers in all transactions in dealing with a company.

GLAZEBROOK J:

So what do you say it means?

MR McINTOSH:

So it means that if you gave real and substantial value, as in more than nominal, and you satisfy the knowledge provisions, bona fides and lack of knowledge about insolvency, then it doesn't matter if it's undervalue.

WILLIAM YOUNG J:

But can't – doesn't real and substantial perhaps have to be looked at by reference to the amount of preference? I mean if the preference is $100,000,000, and the value you've given is $100,000, well it's real and substantial but it's negligible in the context of a preference. If the preference is $105,000 and you've given $100,000 of value, well then perhaps it's just rub of the green.

MR McINTOSH:

That's where the knowledge provisions –

WILLIAM YOUNG J:

No, but will you say anything more than a peppercorn is a complete answer to any claim because it's real and substantial irrespective of the amount of money involved?

MR McINTOSH:

Yes, exactly what I say, and Parliament did not intend that there be different types of enquiry as to sufficiency in those circumstances.

GLAZEBROOK J:

Well, so in fact if you say it's not real and substantial value, it's all or nothing, you can't get part of it back?

MR McINTOSH:

That's right.

GLAZEBROOK J:

I would have thought that's slightly odd, compared to Parliament in those circumstances.

MR McINTOSH:

This Court has been through this policy argument in *Allied* and come to the view that it's to do with – it's about commercial certainty and it's the individual. The defence focuses on the individual, not on the collective.

GLAZEBROOK J:

I don't know if that's against what I'm just suggesting, is it? If you provided half of the value and that was held not to be sufficient, then you get nothing back rather than the half of the value, so you're saying in your case it's either 900,000 or nothing.

MR McINTOSH:

Correct.

GLAZEBROOK J:

Well, that's interesting. You might find you don't like the answer to that.

MR McINTOSH:

Picking up from where I was, I say there must have been an accord and satisfaction, and the relevance of that is an accord and satisfaction gives you a discharge by agreement. If you have a discharge by agreement, that is gave value under section 296(3). It can't possibly be said the contract remained on foot in any way. If I was happy with the performance of this portfolio in the terms then I would be able to claim no more as against the company, as it turns out, who was being fraudulent.

Next bullet, the compromise of claims was valuable consideration as per, for example, in *In Re Abbott* [1983] 1 Ch 45 (Ch). It might be worth just looking at that case. That's at volume 2 of the authorities. Tab 21. First reference I'd like to look at is at pagination 494 at paragraph D on the right-hand side.

The third sentence begins, “I must consider in some detail three cases relevant to the specific question whether the compromise of a claim” –

GLAZEBROOK J:
Sorry, I haven’t found the page.

MR McINTOSH:
Page 494, Ma’am.

O’REGAN J:
How far down the page is the paragraph?

MR McINTOSH:
Almost exactly half.

WILLIAM YOUNG J:
There are letters on the right.

MR McINTOSH:
There are letters on the right, half way between D and E. “I must consider in some detail three cases relevant to the specific question whether the compromise of a claim can make the claim for valuable consideration, but I think it’s sufficient to summarise the effect of the other cases as establishing so far as material three propositions. One, a purchaser means a buyer in the ordinary, commercial sense, a person providing a quid pro quo. Two, the consideration moving from the purchaser need not replace in the hands of the debtor the consideration moving from the debtor, and three, consideration given by the purchaser need not be equal in value to the consideration given by the debtor, though it must be valuable consideration in the commercial sense.”

So what this is telling us is that a compromise of a claim, an accord and satisfaction or a compromise, can constitute the payee A, the giver of valuable consideration which we know is gave value.

ARNOLD J:

But can you compromise a claim you didn't know you had.

MR McINTOSH:

Well, in my submission you can because it's vitiable if you subsequently find out – well, the *BCCI v Ali* [2001] UKHL 8, [2002] 1 AC 251 case suggests that if you didn't know you had a particular claim you're not bound by an accord or an agreement to discharge it. But that's an unrelated claim. In this situation what was being compromised or discharged was, in fact, all claims arising from that money, and in my submission has to be the case that that contract could have been discharged. Because we know it was actually discharged, so we're trying to find – if it wasn't by performance then it must have been by agreement because certainly the parties went their separate ways. If there was fraud, which there was, and it turns out that I had other claims, or greater claims, then I would not be bound by it for bringing them. But that's not the situation we're now dealing with. We're simply saying, was it discharged. If it was then that is value.

ARNOLD J:

Well what would your claim have been if you had found out that the money had effectively been stolen and dissipated, your claim would have been for the, for breach of trust and presumably for the 500,000.

MR McINTOSH:

Yes, and an equitable damages claim for what should have happened.

ARNOLD J:

How do we know that, what should have happened?

MR McINTOSH:

What should have happened is the company should have carried out the contract.

ARNOLD J:

Yes, but the result of that might have been that you lost money or made money and what amount. I mean how is that to be assessed?

MR McINTOSH:

Well it's represented what happened and that is the evidence. If that is achievable, and we know it was because those are shares that actually existed in the market –

ARNOLD J:

Just on that, by the way, these reports you've shown us just refer to particular shares and have a value assigned to them. They don't refer to the number of shares.

WILLIAM YOUNG J:

They normally refer to transaction dates, though, don't they? Aren't there transactions where shares are bought and sold?

MR McINTOSH:

Yes.

WILLIAM YOUNG J:

Which correspond to actual transactions.

MR McINTOSH:

Correspond to the market value. So my claim –

ARNOLD J:

Well they correspond to the market value, that's not the question though. You can't trace them, can you, to particular transactions that occurred?

WILLIAM YOUNG J:

Can I just ask, related to that, this $500,000 was invested about the time of the GFC?

MR McINTOSH:

Yes.

WILLIAM YOUNG J:

So what happened to that, did he report on the GFC? And its consequence to the share prices?

MR McINTOSH:

Yes, in part.

WILLIAM YOUNG J:

Are they in the reports that are in the file?

MR McINTOSH:

Yes, they're in the, he wrote reporting letters to all investors, that are in the case on appeal as well, but he didn't refer to the, I don't actually recall now I'm sorry Sir, he referred to the GFC in exactly those terms, though he might have.

WILLIAM YOUNG J:

Well it's highly likely that had these monies been invested really in the sharemarket there would have been pretty significant losses up until probably 2010.

MR McINTOSH:

Could well have been, but not necessarily.

WILLIAM YOUNG J:

Well obviously he's managed to pick a few shares that survived the maelstrom.

GLAZEBROOK J:

Which is why the type of returns by either fund managers in the market would be a very much more a comparison than the lending rates.

MR McINTOSH:

Certainly, but I would –

GLAZEBROOK J:

If you were getting damages, would probably not be the represented returns, but, well possibly could be, if you could argue that you would have taken it out if you'd had lower returns, but you'd have to show that.

MR McINTOSH:

Yes I would, but we're in the opposite situation now . I don't have a damages claim because I've discharged it.

GLAZEBROOK J:

But I'm not sure that actually helps in what we're looking at which is the preference issue.

MR McINTOSH:

But he is estopped. The company is estopped from denying that representation, which it said was possible on the reports. That would be the amount of my claim.

GLAZEBROOK J:

Well actually I'm not entirely sure the company would be estopped.

WILLIAM YOUNG J:

I'm just looking at the, I know these weren't actual shares, but I see the New Zealand NZX50 didn't regain its 2008 figure until 2012.

MR McINTOSH:

I'm not fully familiar with those reports Sir but I do remember there were significant reductions over 2008 and 2009.

ELLEN FRANCE J:

In terms of some of the investments it did say numbers, didn't it, so for example looking at 418, Canadian Equities Jaguar Mining, it does give the numbers, but not always.

GLAZEBROOK J:

And actually from memory the New Zealand Stock Exchange fared much better than stock exchanges elsewhere in the GFC which is why…

MR McINTOSH:

That's looking through the lens as if I was claiming on the company now.

O'REGAN J:

Which you're not, I accept that.

MR McINTOSH:

Which I'm not. What we have is the company would have to say to me, I was in breach of trust, sorry, I will, prepared to pay you some damages for what should have happened, but it wasn't that amount. And I say, well you've told me it is that amount, and it's obviously achievable. But it's also not just me. None of the other investors, or their accountants, or the IRD, had any difficulty with that performance. So the fact that it was post facto and may be technically impossible is irrelevant. It was possible.

O'REGAN J:

Let's move on because I don't think we need to…

MR McINTOSH:

And finally in my submission the *PT Garuda* case and *Fairfield Sentry Ltd (in liq) v Migani and Ors* [2014] UKPC 9 case, the recent Privy Council decision on the redemption of units in a fund that invested in the manner of Ponzi, both support the discharge conclusion. In *Fairfield Sentry* the redemption of units in the fund, at what turned out to be significantly inflated prices because of the fictitious profits, was upheld as being not an estoppel in terms, but the

redeeming parties were entitled to keep those amounts because it's been represented to them as being the correct amount. The company then couldn't go back and say I'm sorry, we're going to change those redemption amounts. They were intended to be relied upon. In my submission the Ross reports were intended to be relied upon.

I've listed at 10 what gave value, what 296(3) does not say. It doesn't say to the company. That it was received by the company, that's the relevance of *Buzzle*. In exchange, there was actual value to the company, that the value was used by the company, that the value was use by the company as intended. It doesn't say that value is still available to the liquidator, and wouldn't be on *Buzzle*. It doesn't say if value was established on enquiry. Doesn't say equivalent. Doesn't say reasonably equivalent such as the North American jurisprudence and statutes, for example bear a fair and reasonable relative value to the consideration. It doesn't say gave substantially equivalent as Justice MacKenzie and Justice Miller decided that it means. It doesn't say gave value where the company, except where the company was a Ponzi, or there was fraud or dishonesty, or there was a breach of a relevant contract. It doesn't say gave value as a trade creditor only. It doesn't say outside the financial services industry or gave value where the two amounts were not monetary sums. Over the page, it doesn't say excluding any interest or use of money value. Or other than in the context of a bare trust relationship, or where beneficial title was not intended to be given. It doesn't say, but excluding any discharge of liability by agreement. Or any discharge of liability by agreement that might be vitiable, at the election of payee A. It doesn't say, unless 297 applies. It doesn't say unless 348 of the Property Law Act applies.

WILLIAM YOUNG J:

We might take the adjournment Now Mr McIntosh. Are you about to get onto your – we'll see, it's a bit further on isn't it. In terms of these notes of your oral argument where does the material you'd like suppressed start?

MR McINTOSH:

It's from 22 onwards.

WILLIAM YOUNG J:

Thank you. We'll take the adjournment now.

COURT ADJOURNS: 11.30 AM

COURT RESUMES 11.46 AM

WILLIAM YOUNG J:

Mr McIntosh, we will suppress publication of the references and argument to your financial situation at the time of the transaction subsequently. We will, however, reconsider that in terms of the judgment, what we say in our judgment. The other thing is, you are going to have to get a bit of a move on.

MR McINTOSH:

Yes, Your Honour pleases.

WILLIAM YOUNG J:

We really are expecting you to finish at or around lunchtime.

MR McINTOSH:

Given the importance of the point we just left, I'd like to finish my references in the *Abbott* case. We were at page 494.

ARNOLD J:

Sorry, what tab again?

MR McINTOSH:

It was 21 in the second volume. We were at 494 and Justice Peter Gibson was considering the propositions.

GLAZEBROOK J:

I'm sorry, I …

ARNOLD J:

Tab 21.

MR McINTOSH:

At 496 paragraph E on the right-hand side of the page, he concludes, "In my judgment, therefore, Mr Shear has made good his submission that the compromise of a claim can constitute the claimant a purchaser for valuable consideration of what the claimant receives by way of – "

WILLIAM YOUNG J:

Can I just pause there? This is a one transaction case. There's a settlement by the husband on the wife which is challenged. It's not a preference case which by definition involves two transactions, the initial incurring of the debt and the later discharge.

MR McINTOSH:

I've moved on, Sir, to talk about the compromise of my claims against the company for breach. This decision, which was referred to, I believe, in *Allied* was the Abbott decision.

WILLIAM YOUNG J:

Yes, it was.

MR McINTOSH:

It confirms that the compromise of a claim, and here I have claims against RAM for breach, makes me a purchaser for valuable consideration, which means in terms of section 296(3) we know valuable consideration equates to giving value. That means that if I compromise my claims with RAM I gave value for what I received. At the bottom of the page, this is a reference that's been picked up in the Australian cases and *Allied*. Paragraph H, "A purchaser for valuable consideration must be someone who can not only be described as being a purchaser but also said to have given consideration for his purchase which has a real and substantial value, not one merely nominal or

trivial or colourable." Over the page there's a reference to the quid pro quo that Justice Peter Gibson referred to. In that phrase, I do not think that the word "quid" is confined to some material asset which can or will replace in the hands of the debtor the asset which he has disposed to the debtor. Then down at paragraph E on the right-hand side, two lines down, "In my judgment, a claimant who relinquishes the claim in return for the right to a substantial sum of money, whether £9000 or any other sum, is a purchaser of that sum for valuable considerable within the meaning of section etc whether that sum is accurate or inaccurate estimate of what the Court would award."

Now, what this means is that I have relinquished my claims against RAM for the sum that I received. I therefore gave valuable consideration. Valuable consideration is give value in terms of section 296(3) and it's irrelevant whether that's accurate or inaccurate as to what a Court would award.

My page 12 of my notes, I've set out why the defence cannot depend on what the company did with the value I gave or did what it was supposed to do. We saw this morning that the defence is for all comers in all situations. It applies beyond the debtor/creditor and voidable preferences. This Court has declared what Parliament's intentions were by the wording used, commercial certainty by those bona fide parties who hand over value. There can be no exceptions to it. It would make no sense for there to be a difference in the way the defence operated, for example, where an insolvent company had paid out a tort liability. In that situation, there'd be no monetary equivalent we'd be talking about. We'd be looking at a discharge situation. It cannot be there's a difference between those two outcomes just because one happens to be a commercial transaction as opposed to being a discharge of a tort claim.

It can't be that the same value given could give different outcomes in the defence depending on what the company did when that matter is outside the control or knowledge of the giver. Not only is that outside the words but more importantly it would mean that the knowledge provisions become, in effect,

redundant. Why does it matter whether or not the payee A knew about the company's insolvency if whether or not they gave value depends on what they wouldn't know, which is what the company did with the value?

It would make no difference if the value was simply money lent to two companies and then repaid after they became insolvent, but one had used that money well and the other hadn't, and that's in effect what's happened here, an unsecured loan for four and a half years once RAM appropriated the principal, and I just note, Your Honours, it wouldn't have mattered for the purposes of the reasoning of *Allied Concrete* if a company had never collected from warehouse the products it had purchased on trade credit and those products had disappeared. The value would still have been given.

At 13 I set out three scenarios if RAM had been insolvent but not fraudulent. I won't dwell on these because of time but the first one is if it had carried out the contract as it had been said. There'd be no question about whether I had given value. If, however, at scenario 2 RAM had banked my cheque but left it, not used it and used company funds by accident and created my portfolio then upon closure realised the error and advised me but offered me the same sum, ie the realisation of the portfolio less the fees, there'd be no performance of the contract but I wouldn't have suffered any loss because it's the same outcome. So I would have accepted that sum rather than a right to sue, which would be of no greater value and RAM would be estopped, anyway.

But what happens in scenario 3, if we have that situation but RAM hadn't told me, my net position would still be the same if RAM's made a mistake but not disclosed it. Equally, a fraud situation but not insolvent. This is like the *PT Garuda* case. If RAM had defrauded me, only me and nobody else, but made up the amount with someone else's money or its own money, it would have made no difference to the value I gave, nor would it make any difference whether it told me about the fraud or not. The fact that in *PT Garuda* and *Grellman* the fraud was explained doesn't change the value analysis in terms of the discharge given. If what I gave changes depending on what the

company actually did with it, what's the point of the knowledge provisions in the defence?

At 14, I see what happens defined that I gave no value at all would require reading in most, if not all, of the additional words from page 10 and 11. It means you ignore the focus on me as the individual and the commercial certainty for me and people like me dealing with companies and you instead focus entirely on the insolvent company. You conduct the value analysis on what happened without my knowledge and how the company actually used the value, thereby making distinctions between what would be outwardly identical, arm's length routine transactions solely on the basis of the fraud. You change the value analysis between the two, you disadvantage the defrauded payee over the non-defrauded one, and you make the knowledge provisions redundant.

You have to say the 500 handed over in cash has zero value. You have to say the use of money has no value at all for the purposes of the section, and you have to ignore the facts that the parties had obviously intended discharge by either performance or agreement and walked away and say that that doesn't work because of the unknown fraud despite that being my election only.

I say in short it requires going to some extraordinary lengths to avoid the operation of the defence when we already know the purpose of the defence.

To find that I didn't give value about 500 requires the same steps of being through plus bifurcating the sum into principal and gain when that is completely artificial on the facts and in practice. There were not two transactions by that payment. It was either payment of the portfolio or payment of all liabilities. When you get a return, the realisation of your securities, you don't look at it and say, "First I'll have my principal, then I'll have any gains or losses." It's always just one amount. It's whatever the value is.

You also get the situation where you have to say that the company's use of my 500,000 for four and a half years has no value but my use of the company's 454,000 for the same period was value. So I have to pay interest on it in the High Court. The High Court judgment is not absolutely clear on this point. It just said interest and costs come back to me if they can't be agreed, but I have to say the presumption in the judgment that there was interest awarded on the clawback.

WILLIAM YOUNG J:
Has that been clarified? No.

MR McINTOSH:
No, in the normal way but there's no reason why Judicature act interest is awarded on damages and liquidators get interest on clawbacks other than the fact that money has value. It's completely irrational and illogical to say I could have value by use of the company's money but it couldn't have value by use of mine.

At 16 I set out some consequences what this will mean. It will mean potential inquiries whenever there's fraud. If there's fraud, whether the value given was used by the company as intended and gave it value. Whether for the purposes of this defence claims under sections 292, 293, 297, 298 and 299 the value given was substantially equivalent. So I've said the knowledge provisions become, in effect, redundant, for gave value defences. The gave value defence means it's not available for a claim under 297. With respect, that cannot possibly be right. You get the asymmetry of treatment of use of money value I've just averred to. You have difficulty in defining lots of Ponzi as opposed to just an insolvent company, and if it is a Ponzi, from when. What happens to a Ponzi valid normal transaction such as payment of rent, because on the reasoning that any value given to a Ponzi only enables it to continue, then surely providing it with premises also only enables it to continue what it's doing. What do you do with investment transactions where the money was properly used. It would create real uncertainties for the financial services industries as to whether they actually give value.

Justice Miller's judgment gives a strong impression that the lending of money is not the giving of value. Real uncertainty for anyone receiving back from the company the proceeds of their securities. So if we were to go to Forsyth Barr, for example, just a well known name, ask for repayment for a realisation and repayment of some shares, there's now going to be uncertainty as to whether or not the money you get was actually yours. Uncertainty for anyone compromising a debt with an insolvent company. And as to what constitutes equivalent value in financial situations. I say it to suggest that applying 296(3) differently for Ponzis will not impair the free flow of trade for normal transactions as untenable. The whole basis of fraud is the appearance of normality. Any securities firm could actually be operating as a Ponzi. And to interpret it that way would defeat the established very purpose of the defence, commercial certainty for those dealing with companies in good faith and on a normal basis.

Page 18 is what I say are irrelevancies. The overseas Ponzi rules in cases, because they've got different wordings. The existence of secret fraud. The Property Law Act. Just on that Your Honours I say that the Property Law Act interpretation and policy submissions advanced by the respondents are irrelevant to 296(3). I don't advance any separate defence under the Property Law Act 349 because, for two reasons. The transaction to me has been set aside under the Companies Act as well as the Property Law Act, so I need to maintain the section 296(3) come what may, and in any event 296(3) is a complete defence to any Property Act recovery in any event, and I submit that what, part 6 of the respondent's submissions in response are simply wrong. It is not possible to say that where section 348 applies you have to use only 349 and not 296(3). In any event there's no material difference between the two because it's valuable consideration or value.

I say that *Re Waipawa Finance*, *Re Exchange Securities*, et cetera, the rules and authorities for distribution of pooled assets are irrelevant, just as they are to orders for payment on interest on clawbacks. And section 297. If I succeed on my defences no section 297 claim can remain, and the reason

that's here is because it was advanced by the respondents and it still seems to remain in their submissions. I say it's completely irrelevant because it's clear that 296(3) applies to 297.

WILLIAM YOUNG J:
Did the High Court judgment mention it, or just in passing?

MR McINTOSH:
If that. It's only relevance is that unlike section 296(3), 297 expressly requires the value to be received by the company, and hence valuable to the company, and unlike 296(3) the value expressly and solely deals with equivalent, albeit in its own terms, about a difference in value, indicating that 296(3), which is silent on that, does not. And I've said there it can never be, if 296(3) requires equivalence, it can never be a defence to a 297 claim, contrary to what this Court has already ruled in *Allied*.

WILLIAM YOUNG J:
What's the reference to that in *Allied*? I'm sorry to slow you up.

MR McINTOSH:
Now Your Honour's judgment dealt with that. Your Honour at 184.

WILLIAM YOUNG J:
Yes, no, I was thinking of something else though. I was thinking of a two transaction case and I thought that if the complaint was that value hadn't been given in relation to the earlier transaction, that should be addressed under section 297.

MR McINTOSH:
And also the Chief Justice at 160 where she says, "Moreover the statutory scheme provides specific provision for the setting aside of transactions at an undervalue." Meaning that that is the, if you have a simple undervalue situation, not a voidable preference, that is the one you use. The correct interpretation is section 296(3) is you just have to give real and substantial

value, not equivalent. Unless there's any particular issues troubling Your Honours I'll move on to the alteration defence.

First of all, I'll start with the irrelevancies this time. It is irrelevant what I did with the money itself. That is not a requirement of the defence. In the leading case on this, which is *Madsen-Ries & Anor v Rapid Construction Ltd* [2013] NZCA 489; [2015] NZAR 1385, the change of position had nothing to do with the use of the money itself. It was actually giving away the company's own money by way of a cheque. Now I used it to repay debt. That was indeed so, it was always going to be so. But the defence relies here on the validity of the payment and the issue is what I did, having believed that I had the money and had validly repaid the debt. It's not a simple debt repayment change of position case like *Blanchett v Mowbray* [2013] NZHC 2797 for example. It's, having received it, what did I then do. That I intended to carry out –

ARNOLD J:
The situation in *Madsen-Ries* was an exchange, wasn't it, of payments between the debtor company, the insolvent company, and the creditor, and they were in a debtor/creditor relationship to each other, and it's reasonably easy to see when they made that exchange of payments that the creditor company wouldn't have made it absent a correspondent payment –

MR McINTOSH:
No, quite so, and no issue with that. So all I'm saying is a very simple point that the defence didn't rely on what they did with the money they received. In most cases it won't be what you did with the money you received, it's what you did in reliance on its validity. That's a simple point Sir, it's not…

ARNOLD J:
Yes, okay.

MR McINTOSH:
And the other matter I say is irrelevant is that the direct construction liabilities were mainly incurred by Anne Elliot Ltd the look through company that I used

as a vehicle, and I've set out the references in the evidence to my evidence and Mr Florentine. The existence of that LTC in here made no difference to my liability for Westpac for all of the acquisition development debt. If AEL were to default on its liabilities, I would still be liable for all its existing debt. By the time of RAM's demise that was already 1.3 million. The bank certainly makes no distinction between the two. In my submission it's completely irrelevant. There's no requirement that the detriment somehow matches up or compares to the RAM payment. It appears nowhere in either the section or the authorities. I just want to say, Your Honours, I don't rely on the Property Law Act 349(2). I don't have to, I don't do so. The hardship I point to is only in terms of the detriment element of the section 296(3) defence, not the unjust element in 349(2).

It's not significant that I haven't filed a statement of position. That's not a requirement of either defence. Even if it were a requirement for unjustness I'm not relying on that defence. I say there I have, in fact, deposed as to my financial position in my two affidavits 2 and 3, the references are in the casebook, and I was not called for cross-examination on that.

There are only two issues in this case, in this particular defence. Was there a conscious action taken and was there detriment. I've set out from *Madsen-Ries* the issues there. The issue, paragraph 26, was a conscious one to act in reliance on the payment and as for detriment in the words of Justice Fisher, only to find he is not only required to pay the money but in the meantime he's lost a valuable alternative opportunity and Justice Tipping in *BJ Builders*, following receipt of the impugned payment which course of conduct he would not have undertaken but for receipt of the payment and belief in its validity.

So the first of those two issues, the action I claim is the decision to proceed with that development project as from early December 2011, thereby incurring major cost and risk. This was a week after I received the final payment from RAM and closed the portfolio. That was, and we'll come to it Your Honours, a stop/go decision which I had said would need to be made. I just note three

preliminary points there. Sorry, just explaining those references, we don't need to go to them, but at paragraph 7 in the first reference, and at paragraph 23, this is my deposition that I would not have done, I would not have taken that step and taken on that risk. So this is where I am deposing on oath that I wouldn't have done so and –

GLAZEBROOK J:
Sorry, I think I've lost you in your…

MR McINTOSH:
I beg your pardon Ma'am, page 21, first issue reliance.

GLAZEBROOK J:
Sorry, I see the bold bits at the top, that's why I was losing you. Right.

MR McINTOSH:
And the last reference there at page 516 is a statement from the bank as to my debt position at the relevant time and then what happened. And Mr Dent in his first affidavit gave evidence about the nature of development risk as opposed to something like the return of the Ross funds.

I just note the alteration of position defence is not inferior to the gave value. The standard of proof isn't higher. There's no equities test. In the circumstances the insolvent company are not a relevant factor. Secondly, a payee in my position has no reason at all to think, for at least a whole year afterwards, that my portfolio is not at all times a valuable asset and its payment out wasn't valid. I therefore can't be expected to be laying any kind of paper trail against the future possibility of clawback. No one unaware of any issue thinks like that. So independent documentary evidence of reliance will often be scanty at best. As it turns out, Your Honours, as we'll see, I did lay, in fact, quite a paper trail. Not against the future possibility of clawback, but just because of the importance of that money to me at the time. I also note in *Madsen-Ries* the affidavit evidence was unchallenged and was

accepted, and contemporaneous emails noted by the High Court as supporting that claim to reliance.

Right, we're into it. The decision to release the portfolio, realise the portfolio and repay debt was because of my high debt position and wish to reduce it, compounded by the million dollar loan that I then took on to acquire the next door property at number 33.

ARNOLD J:
Just in terms of timing, that decision was made earlier in the piece to acquire number 33.

MR McINTOSH:
The decision was made, Sir, when?

ARNOLD J:
Earlier – what was the date of the decision to acquire number 33?

MR McINTOSH:
It was a mortgagee sale situation.

ARNOLD J:
That's right, you made him three offers.

MR McINTOSH:
I made three offers, yes.

WILLIAM YOUNG J:
It was August 2011 when you acquired it.

MR McINTOSH:
When I acquired it, yes. But I was getting indications from the agent, as they do, that I had good prospect, and so I had to take into account the possibility that I might succeed, and it had to be bought on credit anyway, so it rather

brought to the fore my wish to realise that land portfolio, so I could replace one debt with another.

My starting point at that point was four million and climbing, and there's nothing particularly exciting about that, I was highly leveraged, but I submit someone in my position and age might well be in that position. But I was concerned about it. I wanted to begin selling down the portfolio to reduce it, and I was, knew, I said before, I was bidding for number 33. The proceeds would always go first to repay the 600,000 bank loan, that was the 500 plus it had capitalised for the first few years and then I'd just pay the interest as I went, so anything that I got would go to that first, it didn't absolutely have to but there was no asset otherwise backing that loan. The balance, in the event 354, would logically go to pay off some of the debt on my rental holiday home, simply for being earlier in time than anything else, it was just the next logical place where you'd put that debt. It was still debt. But it wouldn't have matter, as I deposed in my first affidavit, where it went, I was still personally liable for all the debt and the total of the proceeds would have the same effect in reducing it, and that's exactly what I told RAM on termination, "I need the money to reduce debt." So what I said to RAM in July, that I want to use it to pay for my holiday home, was neither strictly correct or relevant, but I said in my affidavit why I said that to RAM. I wanted to keep the possible purchase and then actual purchase of number 33 confidential. Nothing cloak and dagger about that, Your Honours, I just didn't want it to be known that I had purchased that house in the mortgagee sale. It was something of a plaid cottage and it was owned by Mr Serepisos. As it was it was still reported.

My position became acute in August 2011 as Justice Young noted, when I bought number 33 on credit for 986, let's call it a million, my debt went up to five million. That's actually, that change is material. With Westpac for example it transfers me from the auspices of the local Westpac credit management overview to the Australian one, simply by the amount. I was concerned about it and the bank was also concerned that it was a temporary situation and I deposed that if I, I discussed with the bank that if I did get that property, I would retire the RAM portfolio. So when I did bring it, I brought

matters to a head. Now I'm going to go through the correspondence shortly and you'll see that in hindsight Mr Ross was delaying. He didn't want me to exit. And I had to keep pushing him alone. Hindsight is a wonderful thing, I now know exactly why he didn't want me to exit, but I had to do it and so when I was, I wasn't used to someone, I wasn't used to a situation where someone would perhaps be recalcitrant or hesitant about realising your securities portfolio, so I didn't really pay too much attention at the time, other than realising that nothing was happening. So I actually met with him on the same day as I settled the purchase and he asked, or encouraged me to stay in the fund at least for some further months. I couldn't and so I wrote to him in an email on the Sunday saying look, I need to reduce debt anyway, and I'd like to give 30 days notice. I brought the matter to a head, got the money, and repaid debt. It had the effect, as we've seen, of almost directly offsetting the amount of the purchase on credit of the property. The amounts are strikingly similar, actually, although that's completely a coincidence. I've said Westpac was expecting me to repay and that's what I did. Had that not occurred, had that RAM money not been available and my debt remained at five million, I could not have serviced that debt as well as do the development for an additional three million. I couldn't even do it with the RAM money. I would still have to sell other property, and I did so. That's in my affidavits, Your Honour. I've had to sell off other properties in order just to get the debt level down in order to complete the development. Nothing wrong with that, nothing out of the way. But it just shows that with another million dollar load of debt I just couldn't have done it.

Looked at another way, a project that was always going to be marginal at a total of four million for required borrowings, which is the one million acquisition plus three million development, would suddenly become quite uneconomic. I was not a developer. The project would be wholly debt-funded. I didn't have unlimited means or credit.

This was – I hadn't done a development for it and it was a very large sum and as we'll see from the emails it was quite a daunting prospect. I discussed it with my wife and we decided to go ahead and I invited her to name the LTC

who would hold it for us. She and I had together just watched the BBC production of Jane Austen's *Persuasion* and we both admired the heroine Anne Elliot as someone who had gumption. We both thought that this would involve, among other things, quite some gumption.

Over that time, September to November, I was investigating with architects whether development was actually feasible in terms of size and shape. We'll come to an email showing exactly that. But could we just look briefly at volume 3 part 2 page 482? That's the yellow bundle. Tab 73. That's a very short email – I don't know if Your Honours have it – Monday 19 September. This is a week after settlement. I'm writing to Mr Roberts, who is a local architectural designer. "Any progress on the town planner? I don't want to hassle but if we can't get consent I will need to flick the property ASAP before it breaks me." That is an example of the initial investigations I did as to feasibility.

If it wasn't possible to get a building consent based on what's called bulk and location of the existing old dwelling, I would have sold off the property. The reason why that was an issue, Your Honours, is because it was actually technically a non-compliant building at the time. You can sometimes get consent of bulk and location because of what's called existing use.

I made the decision to proceed a week after receiving the RAM money. I engaged my architects. These were out-of-town architects to actually design the houses and obtain the consents. I say the proximity of the events and of the amounts when the whole project was debt-funded can't be ignored.

It's also, I say, Your Honours, inherently believable that someone in my position already clearly worried about a debt level of five million, would not insouciantly take on a further three million of debt for a development project irrespective of the fact that the RAM payment might be void. Indeed, to say that I was unconcerned about whether I was a million worse or better off with reference to the portfolio at that time is, with great respect, questionable as a matter of sense.

ARNOLD J:
I don't think anybody is saying that. I mean, that's …

MR McINTOSH:
I'm afraid, Sir –

ARNOLD J:
People in this situation are always concerned about the fact that you know, they've got the money paid back and the debt paid and they built it into their operations and looking back on it, obviously they've done it as a matter of routine but that's not quite the point of the change of position defence is it. The fact that you've taken the money, built it into your ordinary operations, assumed that, on the assumption that it was valid, I mean everybody's in that situation.

MR McINTOSH:
Quite, but to say that it wouldn't have made any difference to me is not right because it was particularly important.

ARNOLD J:
So you say that's the test, that if it would have made a difference, any difference to something you'd done then you'd change your position?

MR McINTOSH:
So long as what I did was to my detriment. I gave evidence on oath, I've given you the references to that effect, it was not challenged in any way, wasn't called for cross-examination or even direct examination, it was supported by the contemporaneous documentation which I'm coming to, it wasn't contradicted by any person or documentation. Justice MacKenzie however found that I proceeded without concern and did not act in reliance because I intended to carry out the project anyway and my significant borrowings demonstrated considerable, the word indicates a mistake sorry, a considerable willingness on his part to take on a large debt burden.

Although then at 121 Justice MacKenzie, he accepted that I might not well have proceeded had I known that the RAM payment was invalid which is with respect an odd thing to say because that is the very essence of an action in reliance. He said that my evidence had to be treated with caution. Why should it be treated with caution if I wasn't cross-examined or contradicted?

ELLEN FRANCE J:

Well what he said in relation to that is at 11, paragraph 116, "Without in any way doubting your credibility some caution is required because it's after the event of what you might have done if you had suspected that the payment might be clawed back." So he said the focus had to be on the contemporaneous document.

MR McINTOSH:

But, yes thank you Ma'am yes that's what he does say, but why would you say it because it must apply in every situation and there was no reference to anything like that in *Madsen-Ries.*

GLAZEBROOK J:

Well it must apply to every situation but it's really just saying hindsight's a great thing and so normally people give – now in hindsight they think I wouldn't have proceeded but whether that was the case at the time must be treated against contemporary documentation and it's a perfectly normal and reasonable way of looking at things.

MR McINTOSH:

Yes Ma'am. The Court of Appeal –

GLAZEBROOK J:

Well do you have anything to say in response to that, because you're saying no you should have believed whether you're talking in hindsight or not because it was unchallenged.

MR McINTOSH:

Well that is what I do say Ma'am. I think the authorities I've referred to are the *Austin, Nichols & Co Inc v Stitchting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 and *CIR v Trustpower Limited* [2015] NZCA 253, [2015] 3 NZLR 658 Trustpower case. If someone gives evidence, they say something and it's unchallenged in any way at all, it should be taken as accepted.

O'REGAN J:

Well except it's what the Court has to evaluate as what would have happened in circumstances where in fact it didn't happen, so you're saying, well now that I know I've lost that money, this is what I, this is how I now rationalise it. But the Court is entitled to say we're looking at a different hypothetical which is what would have been the case at the time. And so I don't, I don't think it doesn't in any way impugn the credibility of your evidence, it's just a different analysis of the fact.

MR McINTOSH:

Well the Court of Appeal Sir went further and said, "We are in no doubt that he made an informed commercial decision to proceed with the development project independently of receipt of RAM's payment." And I can't read that any other way as saying that they do not accept my evidence that I would. I say that was unavailable on the evidence and it was most unfair to me. I've been in effect called untruthful without my evidence having been tested. But in any event, let's leave me and move onto the –

GLAZEBROOK J:

But I think all that's being said, isn't it, is that what Justice MacKenzie said, without doubting the fact that that's what you now truly believe and that your credibility is intact. In fact, that's with the benefit of hindsight and therefore what you truly believe may not have been the position at the time. Isn't that all that's being said? It's not impugning your credibility in terms of what you now believe to have been the case.

MR McINTOSH:
Well, that said, I made an independent decision irrespective of the RAM payment.

WILLIAM YOUNG J:
But both Courts also focused on the timing of the decision to sign the contract for the construction. Now, I know that other stuff had happened earlier, in particular, the plans and the demolition.

MR McINTOSH:
Yes. I'll come to that, Sir.

Anyway, let's go to the contemporaneous evidence, please. The Court of Appeal declined to consider that. It said we have less regard to that. I say that was an error of law. Such material is, by its nature, not only admissible but the best evidence of a payee's subjective intention and hence of their claim to reliance. It would unquestionably be considered if it directly contradicted what I was saying.

All right. Volume 3 part 1. We start at tab 31. It's 378 to 380.

WILLIAM YOUNG J:
This is getting the money out of RAM.

MR McINTOSH:
Yes. This is where it starts. In fact, there are various points where we could start but I'd like to start here in terms of the story, if you like.

The bottom of page 379 is an email of 5 July to David Ross. "As discussed, I'd like to start selling off my RAM portfolio this year to pay for a new dwelling in Queenstown. In your hands as to how and when, but with the stockmarkets picking up now would be a good time. I prefer the proceeds to be paid out as you go but happy to discuss." Back over the page at 379, two weeks went past and I didn't get a reply so I emailed him again. He emailed back and

said, “Yes, I’ve noted. Will keep you posted as we go forward.” I thought we were going forward at that point. It turns out we weren’t.

I wrote to him a month later. “Hi David, I know everything got hammered in the last two weeks” – this is a reference to global markets – “but would be grateful for an update.” By this time, Your Honours, I’ve bought the property. On 30 August I followed him up because I still hadn’t heard. He replies and sends me an attached portfolio and says, “I’m off to Australia where I’ll crystallise my thoughts.” I reply within two minutes saying, “Thanks very much. Not as bad as I thought. I look forward to that.”

A week later, “I hope your trip was fruitful. Can we have a quick meeting on this project?” This is me bringing it to a head. Then he says –

GLAZEBROOK J:
I mean, effectively, you’d already bought the property before you knew that you were getting money. I mean, you obviously had no reason to think you weren’t getting the money but you had bought the property before you got the money.

MR McINTOSH:
That's right. There should be no issue with that.

GLAZEBROOK J:
Is there any significance in that, though?

MR McINTOSH:
It’s not my case, Ma’am, that my decision to buy the property was based on the payment.

O’REGAN J:
It’s the decision to develop it.

MR McINTOSH:

It's the decision to develop it.

GLAZEBROOK J:

What was the other purpose in buying the property, though, if it wasn't to develop it?

MR McINTOSH:

The other purpose?

GLAZEBROOK J:

The proposition I'm putting to you is that you were buying the property with the purpose of developing it, weren't you? You weren't buying it for any other purpose?

MR McINTOSH:

I was buying it to secure it because it was the neighbouring property and if I didn't do it the next person would, and I would lose control of what happened. So the desire to purchase it –

ARNOLD J:

But your plan was to develop it.

MR McINTOSH:

Well it was a derelict building, my plan was to do something with it, yes.

ARNOLD J:

Well the building was essentially worthless.

MR McINTOSH:

Okay, fine, there's no issue, that is my intention, to develop it. Initially I thought develop it and sell, and then having spoken to the bank about it they said, well why don't you just develop and hold, so in fact that's, in the end,

what I did. At 381, that's just the file note from my solicitor just recording there a very small point, that my company won't be GST registered.

WILLIAM YOUNG J:
So why was that, it's probably irrelevant.

MR McINTOSH:
Just a thought, I'm not a developer, it wasn't a developer company. It was simply just a holding company for nothing other than ring-fencing it for the tax loss. 383 is me just reporting to the bank that the second offer hasn't been successful. 385, we just looked before, Your Honours, at me talking, following up with RAM. 385 is me two days later sending that report to Westpac. This is because I've just taken on an obligation to pay within two weeks on settlement date the 986,000, or the balance less the deposit, and Mr Emmerson is the private bank who's managing my account, and I'm keeping him informed. There's no other reason why I would send that portfolio to him unless I wanted to keep informed about that, and as we'll see, it was because of my and his concern about managing that debt level.

393 is the next. Now this is slightly out of date order but just the way the bundle's gone together I'm afraid, this is the day or the weekend of the settlement. I'm writing to my lawyers, I've bought it. The word "help" is obviously jocular but only in part because it's all borrowed, "And I'll be talking to my accountant this week on the best ownership and development vehicle structure and report back as soon as possible. I'm keen to keep the project or my involvement in it as confidential as long as possible."

395, 396, a similar message to a Ms Garnham, is also, this time Ms Garnham and Mr Emmerson are, I think one's transitioning in, the other transitioning out, or stepping in when someone's away, I can't now recall. At the bottom of that page I say, "Will you please look into funding for the project. Please can we get the deposit out of another account and set up a new one. We're thinking roughly four million in total," then I break it down. "At three units sold, at 1.3 million each, that would clear me 200,000.

Hardly worth the candle but if I can get the cost down a bit and the sales up a bit it would make a difference," and she replies and says, "Congratulations. We've got approval for the initial purchase."

Over the page though Your Honour, 396, that's the rest of my email when I'm writing to her I said, "all of the above will have a stop/go decision after the feasibility investigation." And I repeat to her, "I am keen to keep the project (or at least my involvement in it) confidential for as long as possible."

Then 397 I follow up very shortly afterwards, having spoken with my accountant, paragraph 2, "As you know my primary thoughts had been only to secure the land so as to protect my properties on either side and to take advantage of that position to develop into units if possible. I hadn't really thought much further about it because I didn't have the property. However, your comment when we met a month ago about giving consideration to holding as rentals had me thinking, and I think that's the way to go if I can manage it, build and hold like Dublin Street. If I could inject some capital later to reduce the bank debt just below the rental income," et cetera, pay for themselves. "I'm familiar with that sort of process whereas I'm not at all familiar with property development in the normal sense, nor am I set up for it. Presumed the bank would be okay with that." And paragraph 3, "In light of that plan new ownership structure, LAQC," which was the predecessor to LTC obviously, Anne Elliot.

398, that's the, well that's what I said this morning. 399, this is Mr Emmerson replying to me round the same time, "Congratulations, exciting project in front of you," and I said, "Thanks for your help, it's a bit daunting actually but I guess I can just pretend it's not there." Meaning that you ignore something that's making you apprehensive. 400, a file note from Ms Puntenney, my lawyers. Paragraph 5, "Hamish will be obtaining mortgage finance through Westpac," and that we note at the bottom, "Clear no word from Hamish on funding, John." Page 403 is the deed of nomination, page 407 is the formation of the LTC. 409 is me again in touch with Westpac 22 August, this passing on our valuation information because the bank required the new

acquired property to be valued and I've said, "What do you want to do about getting a valuation?" She says, "I'll discuss with credit and get back to you. I request that they waive that requirement, once we have the others in place and Queenstown's completed they're more comfortable with the overall proposal." Now 411 is the settlement statement and then we put that volume away.

Volume 2, part 2. We start at 414, this is that management report that we, I said that it was sent to me at the end of August by Mr Ross and the opening balance is 941. The page 418 the value of the portfolio is at that date, has gone down somewhat to 911. 419 Your Honours is an example of what began to happen to me at this point as I began to gently exceed my credit limits across various accounts and Westpac were just notifying me in courtesy to say that had happened. "Good morning Hamish, I notice your personal account and Lavender Ridge account are out of order," and by those amounts, "Would you like me to move some money around?" This is because, having just acquired the property and without having the funding in place I was actually starting to burst. 420, the valuations are reporting in, that we have a valuation for the two adjacent houses, that should, I hope, give us more boost to my assets/liabilities ratio. The last paragraph, "As soon as the bank can, please could I have an account facility set up for Anne Elliot so I can draw down the deposit and take the pressure off my personal account."

421, in fact, it's actually 422, about this new account. I say in the middle of the page, just at the top of the page, "Thanks, Nick, could I access that facility from tomorrow night because I'm overdrawn in my 91 and for tax claim reasons I need to pay the deposit back from my 95 account, or are you saying it can't be set up until we've met?"

It starts to be a signal that I'm becoming quite keen to know that there will be funding available for this particular project and back over at 421 Mr Emmerson says, "I can't get back to you until Monday but I'll get straight on to it."

445, there's simply the guarantees that had to be put in place making me and my other interests as necessary guarantors for all the borrowings of Anne Elliot. That's not in issue, I don't think.

470, there's simply the settlement that took place on Friday the 9th.

471 to 72 is particularly important. At the bottom of that page is my email on the Sunday. So we've just had the settlement on the Friday. Does Your Honour see that, 471, at the bottom of the page? My email, Sunday 11 September. "Dear David, thank you for the meeting on Friday." That was the meeting I referred to before. "I'm really pleased how well you've done with the portfolio, particularly in the tough market conditions in the past few years. Having thought about the situation since and discussed the options with Westpac, later on Friday I've decided we should call it quits now and take the gains made. While we might do better by year end, we can't be sure of that. I need funds to reduce debt now, anyway. Please can I give the 30 days' notice. Thank you for your efforts. As I said, I'd be keen to create another portfolio in a year or so."

Now, given that statement it really raises the question why, if it was unconcerned about whether or not the RAM payment was valid, why I just didn't leave the portfolio there. If I was going to proceed with the development anyway, it didn't actually particularly –

GLAZEBROOK J:
Can you rely on something before you receive the money as a change in position?

MR McINTOSH:
In my submission, you can base it on the Court of Appeal decision where the Court said the value given can precede the payment.

GLAZEBROOK J:

But that's a totally different point. You're relying on a change in position and you're saying what you were relying on was what you had been told would be the case rather than actually having received the money.

MR McINTOSH:

The reliance can be contemporaneous. I think we know that, also, from the *Madsen-Ries* case.

GLAZEBROOK J:

But what you were relying on, if you were relying on it, when you purchased the property was the fact you'd been told there was money there. You weren't relying on actually having had a payment made.

MR McINTOSH:

No, there's no issue about that, Ma'am.

GLAZEBROOK J:

Well, what difference, if anything, do you say that makes?

MR McINTOSH:

Sorry, what difference?

GLAZEBROOK J:

Well, somebody tells you there's money and you rely on that and go and do something.

MR McINTOSH:

Yes.

GLAZEBROOK J:

Can you then later, when you get the money, say, "Well, I relied on getting that payment"?

MR McINTOSH:

In my submission you could but that's not what I'm saying here.

GLAZEBROOK J:

So what are you saying?

MR McINTOSH:

I'm saying that I relied upon the validity of the payment that I received.

GLAZEBROOK J:

Well, you can't have done when you actually bought the property but you hadn't received the money.

MR McINTOSH:

I don't advance, I don't say that Ma'am.

GLAZEBROOK J:

All right so what are you saying? Well then why were we looking at all that stuff beforehand?

MR McINTOSH:

Because I'm showing the importance of the money to my debt position and the decision making that I'm making, that I'm going through.

WILLIAM YOUNG J:

What you're trying to say is that it was always a marginal decision, whether or not to go ahead with the development and the background illustrates that.

MR McINTOSH:

Yes.

WILLIAM YOUNG J:

Well you are probably going to have to step on a bit though because there are other, as it were, the activities that happened before and after Ross Asset Management went into receivership.

MR McINTOSH:

Yes indeed Sir. But I will finish on time. I have set out my case at length in the written submissions and also in these hand up notes. I don't have far to go in fact in terms of these notes and I will finish. 478 is another example of me and 479, two more accounts going quite out of order because of the credit position. And then at 480 I've been asked by the bank to investigate, should investigate what my life insurance and income protection insurance position is and I did so and at the bottom of that page there I said to Nick, "I'm starting to feel a bit hassled, have I not got enough cover, is life insurance a requirement for the loan, if not let me know." Meanwhile I emailed Ross Asset Management 30 days' notice on Sunday. There's no reason to keep the bank as informed as I did of that money if it was really of very little relevance to my decision making or theirs. 482, we've already seen that one. In my submission that is a very strong piece of evidence, that the project was marginal. My financial position was reasonably acute at this point and I needed to know whether I could go ahead. I couldn't just sit, I've already, I've just paid out a million dollars with no prospect of income on that money. I'm paying interest on it, I've got not prospect of income coming back for years because whatever has, whatever's there has to be pulled down and built.

488 is example of architects investigating and looking at possibilities for what could have happened with the section. 491, 492 through to 494 I should say, this is me following up with RAM, we started at 494, I rang them for an update, then I said a week later I hadn't seen the money in account, I said, "Please keep me updated," I emailed him again 10 days later, "Can I have a statement or a report." I get an answer, I say, "Thanks, good to know what's happening." 495 and 496, top of 96 I'm emailing the bank saying, "Nick, Ross money see below." And then 495 he says, "I'll look out for the funds on Thursday and let you know when they arrive." 499, 500, two-thirds of the way down the page at

499 I email Mr Emmerson on the 4th of November when I've been told by RAM that it might have been a bit ambitious, the timing and I say, "Thanks for your call. FYI the below. It looks like I really have to keep on this critter. Can I suggest we adjourn our session to, say, next Friday? We should have all the RAM money in and can take stock and restructure properly."

GLAZEBROOK J:
Sorry, I've lost you again.

MR McINTOSH:
Page 499, Ma'am. He replies, "Yes, it would be wise on both counts."

501, again, I'm keeping Mr Emmerson informed. "Looks like the money's coming but it's slow. In the interim I need to pay some bills and balances. Can I make a transfer?" He talks about that.

More of the same follows on. Really it's just the closure and then 510 which I referred to this morning and then 516 a week later, there's a fee proposal for 150,000 for the architects.

That is my case. That is my decision taken in reliance in the validity having believed in good faith that I had retired that amount of debt. I made the decision to go ahead. My feasibility investigations had told me it was possible. I now knew what my debt and equity position was so far as I knew and I could do it.

The last one is volume 3 page 687.

GLAZEBROOK J:
So when are you saying that was accepting the – when do you say you had the decision to go ahead?

MR McINTOSH:

Once I received the RAM payment. That was the stop/go. Two things happened.

GLAZEBROOK J:

What happened? Are you coming on to that?

MR McINTOSH:

Yes.

FRANCE J:

Do you mean all of the RAM payments?

MR McINTOSH:

Yes. I wasn't making a new decision upon each payment, Ma'am. It's all contemporaneous.

GLAZEBROOK J:

Can I just put to you that if you look back at 395 it looks an incredibly marginal project but the receipt – whether it's funded by debt or equity you've still got a cost of capital there and it doesn't make it any more or less a marginal profit. In fact, some would say that it actually makes it more of a marginal profit if it's – however it's funded. I mean, it doesn't improve the profit that it's funded by debt or equity, does it?

MR McINTOSH:

No. It simply means I can't do it because I can't actually borrow that amount of money and service it.

WILLIAM YOUNG J:

But you did, though, because you don't sign the building contract until after RAM has gone into receivership.

MR McINTOSH:

Yes.

WILLIAM YOUNG J:

You may be in a situation where you thought you may as well be hanged for a sheep as a lamb.

MR McINTOSH:

Absolutely. But if we look at page 687 in volume 3 part 3 –

GLAZEBROOK J:

I didn't get the impression that the money borrowed was dependent on you getting the RAM. They seem to have accepted the loan in any event, or have we missed something in terms of asking you to pay anything down?

MR McINTOSH:

There was an initial approval to buy the property for the 986. I could clear that but I couldn't do anything more with it without getting further funding and that was the proposal that they needed. Now, is there a document which says, "We, Westpac, will only let you do this if you have retired this amount of debt"? No, there's not. But the bank isn't expecting that the money's not there, just as I'm not. So there won't be that sort of document in place. There wouldn't be. The bank doesn't particularly care, anyway, because it's fully secured.

GLAZEBROOK J:

Well actually they usually do care what other funding you've got, unlike some.

MR McINTOSH:

Well sorry, I'm not saying they don't care because they'll care in the sense they won't lend but they would still be protected. 687, if I could just have an extra minute into the lunch break, I confirm I will finish. This is a year later when I'm writing to my accountant in response to his –

GLAZEBROOK J:

Is it part 3 of volume 3?

MR McINTOSH:

Tab 117. And that's me replying to my accountant who's starting to work on my tax return and I was explaining where the monies had moved around in particular things and I gave him an overall explanation. I ran out of money mid, credit mid-year and also had to buy the property in the mortgagee sale so I ended up having to move things around. Among other things that was why I needed the Ross money. Now the detriment is in two parts. A year later I had spent on this project 320,000 of the dated liquidation. The bank account is in there, it's at page 429, you can see both the amount of debt on that project as at receivership in November '12 and then at liquidation.

GLAZEBROOK J:

Sorry what page was this?

MR McINTOSH:

Page 429.

GLAZEBROOK J:

So we're back in the other volume?

MR McINTOSH:

That will be, yes in tab 57.

WILLIAM YOUNG J:

So what's the critical date we should look at?

MR McINTOSH:

Two-thirds of the way down the page we see 5 November 2012.

WILLIAM YOUNG J:

427?

MR McINTOSH:

429. You see that's the critical date, 5 November, that's the position just before the receivership took place and then up the page at 14 December just before the liquidation took place. So it's gone from 1.239 up to 1.307.

O'REGAN J:

Sorry what's the date of the liquidation, I missed that sorry – 14th –

MR McINTOSH:

14th of December. I think the liquidation was just after that, it might have been the 17th.

WILLIAM YOUNG J:

So you've spent basically the purchase price plus another $300,000-odd?

MR McINTOSH:

Yes. Now at that point if I stop because RAM's gone into liquidation, I don't know about my portfolio and the information that's coming out is incomplete and scanty. The respondents don't know either as liquidators and they are saying some of these may be valid, some not, we don't know. But I've got no reason to think that my one wasn't. I can't just sit on the project because it's now chewing its head off in interest and there's going to be no income coming off it for years. I've got to do something. If I sell I have to immediately realise that loss of 320 because those investigations I'm never going to recoup on a resale from somebody else buying it, I haven't built anything, just got the property and incurred interest costs. So I'm already in the hole by that amount or around that amount, that is detriment if I stop. If I carry on then I take the risk of carrying on with the project and I do so and we now know that it has quite a significant unrealised loss. The detriment is not the project itself because I have it, it will be if I have to repay that money, I have to sell the thing that's in my deposed evidence and therefore I have to return not over the 954 but also realise all the loss in that. In the course of it I sold my holiday home to put into that project so had I stopped I wouldn't have had to do that, I

wouldn't have lost it and I also altered the boundaries of my own property, reducing them by one-third for the purpose.

That's all I want to say, it's set out in the notes and the submissions. I finished my note with some requests, that there be at least a statement that that Court of Appeal's finding against me is to my credibility, at least a comment that that wasn't available. I say that no interest should be payable on any amounts that are repayable by me, for the reasons that I set out earlier and I ask for my costs at every Court and I won't go through all the reasons but there are lots. Those are my submissions Your Honours.

WILLIAM YOUNG J:
Mr Colson, 2.15 to four, is that enough time?

MR COLSON:
2.15 to four should be enough time Your Honour.

COURT ADJOURNS: 1.06 PM
COURT RESUMES 2.16 PM

MR COLSON:
Thank you, Your Honour. I'll start first, as the appellant did, with the value defences before moving to the change of position defences.

I propose broadly to speak to my submissions by way of overview, although partly partway through I will have a smaller hand-up which is a table just looking at the different arguments on each of the aspects of value that are claimed by either party.

I start, though, by acknowledging that to a large extent this appeal is, of course, a test case as Your Honours will have seen in the leave affidavit filed by one of the liquidators, Mr Fisk. There are potentially claims totalling around $90 million in relation to the capital put in by investors and around 42 million of

fictitious profits that the liquidators would, of course, seek to challenge or litigate over if they were successful in this Court.

WILLIAM YOUNG J:
I read in the paper there have been some settlements.

MR COLSON:
Yes, there have, Sir. There have been settlements totalling around four and a half million dollars in recent times. Some of those, obviously, following the Court of Appeal decision, some simply because individuals have decided they want to return the profits and get on with life. So that means that the total payments as noted in a footnote to my submissions are now likely to be, as of today, around five or six cents in the dollar for investors. To put that into specific context before addressing my submissions that means, of course, that Mr McIntosh at the moment seeks to keep either 954,000 or 500,000. If that were not the case and on liquidation he would be likely to receive around $30,000. So that's the magnitude of the difference just by way of example, not with respect to the appellant but in respect of the wider issues at stake.

As the liquidators' submissions outline and as seems to be accepted there was originally intended to be a trust relationship between the parties. But the nature of the relationship fundamentally changed as a result of RAM's actions and in my submissions in order to look at whether or not value was given in the context of the two Acts, both the PLA and the CA, one needs to look to the reality of what happened and the changing nature of the relationship and each of the steps taken. I propose to do that shortly by going through the table I referred to earlier.

But first I just wanted to make some preliminary comments by way of summary of my submissions, again, in terms of the statutory background of the Act and I cover this broadly at around section 5 or page 9 of my first submissions.

The Property Law Act, if I may start with that, around paragraph 5.1 it, of course, doesn't define valuable consideration and nor is value defined in the Companies Act. There has perhaps surprisingly been little judicial analysis of what valuable consideration means –

WILLIAM YOUNG J:
Can I just ask you one question. Is section 297 in play?

MR COLSON:
Yes it is Sir. It's in play peripherally. In the High Court Justice MacKenzie touched on it. It was absolutely pleaded. It was touched on, on the basis that he did not need to address it. The notice of appeal to the Court of Appeal it was relied on as an alternate ground. The Court of Appeal didn't address it. I think technically it's still before you, and it's certainly a section which I will address you on. Albeit briefly.

The historic focus of the Property Law Act of course has been to catch dispositions made with intent to prejudice creditors by putting property beyond their reach or by otherwise hindering them in recoupment of money owing. The second point I really address in my submissions is the PLA should be interpreted liberally in order to effect its purpose, and that's been a very longstanding proposition of the Courts.

If I turn to the Companies Act, again there's no definition of "value" in section 296 of the Companies Act. There has been no detailed judicial analysis of what value means in the Companies Act. The majority in *Allied*, as Your Honours have been taken to, did indicate that value means something real and substantial but all members of the Court preferred to leave the question broadly for another day.

WILLIAM YOUNG J:
Did I not discuss it?

MR COLSON:

I'm sorry Your Honour?

WILLIAM YOUNG J:

I was the fifth member I take it. I don't think I discussed it, did I?

MR COLSON:

No, I think that's right, I don't think you did Your Honour. As has been discussed with the appellant the focus there was very much by both the majority, and in some respects the minority, on the antecedent transaction. The majority expressly so and certainly Justice William Young's judgment when referring to the two theories, did refer, in the context of the discharge hypothesis, to discharge of the underlying antecedent transaction, and in my submission it's very important, therefore, to focus on antecedent transaction and what, in fact, happened in the relationship between the parties here, that is RAM and the appellant.

The conclusion to my run through of the purpose of the statutes is to note that, therefore, that value needs to be assessed objectively, and in the context of the circumstances as a whole, and as I have said, just as in *Allied*, one needs to look at the various steps for transactions that occurred between the parties as a matter of reality.

I then wish to move to paragraph, or backwards in fact, to paragraphs around 4.8 of my submissions, and that is to examine the legal relationship as it became upon misappropriation of the property. The legal relationship as intended, of course, was that the funds were to be held on trust and applied towards the purchase of securities and shares and there was to be a contractual power of management. In fact, of course, the funds were swiftly misappropriated and at 4.8 of my submissions I set out what I, or the liquidators considered to be the differing components to the legal relationship.

The first to which I'll return is a proportionate claim in the pool of RAM assets remaining to the extent they derived from the misapplication of investor funds.

In my submission this is an important point and one I'll expand on shortly because it goes to the issue of who had the money and who had title and then official title to the money. Now I cite there *Foskett v McKeown* [2001] 1 AC 102 (HL), the starting point in any way though, and I don't consider this proposition controversial, but I just want to touch on it to ensure it's not. is that if a trustee mixes two investors', or two beneficiaries' trust assets, that mixed pool still remains held on trust for those two beneficiaries. Precisely how that may be allocated as between them has been the subject of some debate over time from a *Devaynes v Noble* (1816) 35 ER 781 (Ch) *Clayton's case*-type approach to the more modern approach as presented in cases such as *Waipawa* but in my submission it must be uncontroversial that if there has been a mixing of trust funds which remain identifiable that the beneficiaries to that pool of funds still retain an interest to them.

Now, I say the proportionate claim because that seems to be the conventional and modern approach as set out in *Foskett v McKeown*.

GLAZEBROOK J:
Was there actually ever a trust here, though?

MR COLSON:
In terms of an?

GLAZEBROOK J:
Because certainly RAM as trustee had absolutely no intention of holding the funds on trust at all, so the whole documentation purporting to say there would be a trust was actually part of the fraud.

WILLIAM YOUNG J:
Ross would have been convicted, I imagine, on charges of theft by failing to account, as we might have described it in the past, which did presuppose the money had been received for a particular purpose at the time.

MR COLSON:

Yes, I was going to say, Your Honour, I think the starting point must be the contractual arrangement that was signed up for. I think you have to start with that document. Now, it may be that Ross Asset never intended to live up to its side of the bargain but that was certainly the starting legal point between the two parties and, indeed, if one follows that through and takes the pool of trust funds to which I have referred in my submission those funds must not be available to unsecured creditors to the extent they represent funds entrusted to RAM as a result of a contractual entitlement or obligation to manage them in a trust capacity. The Court must, in my submission, respect that even if RAM had no intention of doing so.

The second aspect which I identify at 4.8B in relation to the legal relationship of the parties is that there was a cause of action for breach of trust against RAM to have the trust property restored, which I think the Court of Appeal referred to as an equitable debt. Finally there was potentially a cause of action sounding in equitable damages which I footnote again saying there's potentially a claim either for interest or to recognise the lost opportunity to profit from real investment returns, if any, presumably, of a similar asset. So those, in my submission, are the three aspects to the legal relationship that we created upon RAM's misappropriation of the appellant's funds.

Four years later, of course, a payment of 954,000 was made to the appellant which was, as the Court of Appeal said, calculated from a fabricated foundation of non-existent investments and securities. As Your Honours would have seen, Mr Ross effectively backfilled or post facto invented the quarterly reports. The shares that were not held but were said to be held were parked in an entity, a fictional broker called Bevis Marks, which had been in place since at least the year 2000, and in respect of which Mr Ross pleaded in his criminal charges to that activity since at least 2000.

So against that backdrop I'd like to turn to the various steps which followed in the relationship and which are said to create value. So what I have done in this table is, you'll quickly see, is to analyse the various steps in terms, or

summarise them in terms of the analysis undertaken in my submissions by looking at the initial contribution, the misappropriation, the repayment, the use of money, the management fees, set out the liquidator's approach, the appellant's approach in response; so I was just planning to work through each of those steps in order to give the submissions on value.

In terms of the appellant's initial contribution of half a million dollars to RAM as I have already submitted and as seems uncontroversial, the payment was intended to be held on trust and invested for the appellant. There was never value to RAM by receiving that payment as a trust deed does not itself obtain value when given trust funds.

ARNOLD J:
What about the promise to pay management fees from management of that fund?

MR COLSON:
And I'll come to that, I'm happy to address Your Honour on that now, it's the last part of my table if you'd like to –

ARNOLD J:
No, no, whenever you like.

MR COLSON:
I might come to than then Your Honour. The alternative approach which is put forward by the liquidators is largely reliant on Justice Miller's judgment in the Court of Appeal and the US authority which indicate that objectively there can be no value in a contribution to a Ponzi scheme. Now the appellant's response largely to that has been –

GLAZEBROOK J:
Well it's quite valuable to the owners of the Ponzi scheme in that without getting the money in they couldn't keep the Ponzi scheme going so there might not be, there might not be an equivalent value for the person who

provided the money, but that will often be the case in terms of an insolvent company won't it?

MR COLSON:

That's right Your Honour, the way that was addressed in the US cases, in particular *Merrill v Abbot (In re Independent Clearing House Co)* 77 BR 843 (D Utah 1987) which I'll come to, is to say objectively in the context of the Statute, what can the legislature or Parliament here have intended by value. Can it really have intended value here to have meant the use by the funds in a Ponzi scheme, the only purpose of which is to keep the Ponzi scheme going and that's how the US cases have shortly disposed of that and that was largely reflected in Justice Miller's judgment. Particularly in the context of both the Acts which I've touched on, that if one looks at, for example, the Property Law Act whose intention of course is to stop assets being put beyond the reach of creditors when the very purpose of the use of the funds in payment out here was to advance the fraud. And in my submission it cannot be right that the simple handing over of the cheque of itself is value.

GLAZEBROOK J:

What say he'd lent the money, why isn't the handing over a cheque in those circumstances value?

MR COLSON:

It potentially is if it was lent. I think there's two responses to that Your Honour. First the wider criticism remains that if that money is to be used in the Ponzi objectively, that it's not value. The objection that they are trust funds –

GLAZEBROOK J:

Well the value to who from – because I'm sure it was quite valuable to Mr McIntosh, the whole 500,000, it was also quite valuable to the Ponzi scheme in order to keep it going. I'm having difficulty in – from whose perspective is there no value or is it just a policy matter?

ARNOLD J:

Yes is it a policy matter?

MR COLSON:

I do see it as a policy matter. The wording of the Statute which the appellant relies on, of course, is gave value. My submission on that is that is largely directional, it simply means the value needs to come from him. It doesn't mean objectively one focuses on his action and his action alone. I say that having regard to the object, sorry objects of the Statutes, both the PLA and CA and the context of the Companies Act, in my submission, that's reinforced somewhat by the sections that follow. 297, of course, being a focus on ensuring that appropriate value is delivered to the company, if I use the word "appropriately" neutrally but really market value. And 298 which is concerned with dealings with those who are connected to the company, whether through relationships, blood relationships or other relationships, directors et cetera, spouses, there the words both "gave" and "received" are used, but it's clear the focus is overall on the benefit to the company. Now in my submission simply because the word "gave" in 296(3) is used, that does not mean you purely focus on value from the point of view of the creditor and nobody else. In my submission it requires a wider context, as was undertaken in *Allied*.

GLAZEBROOK J:

What say Mr McIntosh had lent the money to the company and an employee had misappropriated it?

MR COLSON:

I think a case of lending is more difficult. I think my response is two-fold to that. First, the wider, the bigger submission, if I can put it that way, that the Court needs to look beyond that and see what was done with the funds in terms of a Ponzi, is still arguably relevant, depending on the individual fraud, but in terms of simply lending the money, I accept that the other limb I rely on, that is that beneficial title was never intended to be given to the company was always a trust relationship, that clearly can't survive.

GLAZEBROOK J:

Although I have a bit of trouble with seeing if you lend money to a company and it's stolen that's, you can still avail yourself of it, but actually if the fraud is worse, so it was supposed to be held on trust and wasn't, then you're somehow in a worse position than if you lent money. I understand, leaving aside the whole Ponzi thing because I understand that that's a policy argument issue.

MR COLSON:

I accept that point. There is, in either instance, of course, ultimately you have a debt arising as a result of the actions, you end up in the same position as well, of course. Initially you –

GLAZEBROOK J:

Yes, exactly, which is why I had a difficulty, if it was always a debt as against if it was not intended to be a debt but became a debt.

MR COLSON:

Yes.

GLAZEBROOK J:

And the reason I said an employee was to distance itself from the company itself.

MR COLSON:

Yes.

GLAZEBROOK J:

Here it was clearly the company itself.

MR COLSON:

It was and it had been that way for some time, or acting in that way for some time. So the submission I was addressing you on then was broadly that as

intended there was not value to RAM because it was simply a trustee relationship, and I'll come back to the management fee et cetera.

Then we turn to the immediate misappropriation of the half million dollars by RAM, which is the second action identified in my box. The two submissions broadly I've discussed already. First, the bigger submission, that objectively, having regard to the statutory context and Parliament's intent et cetera, one cannot say that RAM's misappropriation of those funds was value. The second way in which I put the argument is on the basis of the proposition I made earlier, that if trust funds, innocent contributors' trust funds are mixed, the funds remain held on trust for the benefit for all those who contributed to it. On that basis, again, misappropriated trust funds were held on trust for the investors. They weren't part of the assets of the company available to creditors and so on liquidation again not value to the company.

GLAZEBROOK J:
Where does the preference arise from then, if they're not the company's funds?

MR COLSON:
The, well they're not –

GLAZEBROOK J:
In any event I would have thought they were mixed with the company's funds as well in this case so I would have thought that the argument that the trust survives actually disappears slightly, especially in the Ponzi situation because –

MR COLSON:
Well you're –

GLAZEBROOK J:
There really isn't a trust here.

MR COLSON:

No but you do, if you look what remains here of course there are on a number of, leaving aside the litigation, there are a number of shares that were realised and that are held by the liquidators. They represent contributions made by investors over years, and in my submission those would be held on trust by the company. They wouldn't be available to the general body of unsecured creditors, because of course –

GLAZEBROOK J:

I'm not really sure because aren't you really in a Goldcorp situation by that stage?

MR COLSON:

I'm not sure if you quite are, Your Honour, because here you're explicitly, you've got –

GLAZEBROOK J:

I mean these shares were supposed to be held for particular people.

MR COLSON:

Yes.

GLAZEBROOK J:

What these were, were a sort of pool to, even if you didn't get enough Ponzi scheme in you could actually pretend that you had shares that you could sell off, weren't they?

MR COLSON:

That's broadly right.

GLAZEBROOK J:

They were part of a sort of a float, if you like, in case you didn't at the particular time have enough unfortunate investors who were going to be putting their capital in.

MR COLSON:

I think that's broadly right, Your Honour. Those inevitably, as with many Ponzis, it may have started off with a decent intention then there are losses which are covered up and it all turns.

GLAZEBROOK J:

Well, we don't know.

MR COLSON:

No, we don't know but you can see from the liquidators' analysis, for example, that the percentage of shares that were purchased with investors' money decreased markedly over the years as one would expect. But you still have a core of shares that have been built up by individual investors' money and in my submission they would be held on trust for those investors. Now, quite how that's divided up between them, whether it's a pro rate distribution in terms of *Foskett* and *Waipawa* or whether it's a *Clayton's case*-type distribution would be an issue for another day.

GLAZEBROOK J:

Yes, except the liquidators are going under the preference which must assume that it is the company's money, doesn't it? So I can't quite understand the two submissions.

WILLIAM YOUNG J:

They're acknowledging there's a debt, aren't they?

MR COLSON:

Yes they are and I will answer your question specifically. They're also going on the Property Law Act, of course. But in terms of it being the company's money, there is case law saying for the purposes of section 296 it doesn't matter whether it's the company's money or someone else's money if it is a payment made by the company. I can get that reference to you but I think it's in the High Court decision.

GLAZEBROOK J:

Made with company's money?

MR COLSON:

That provided there is a payment by the company it does not matter whether it is the company's funds, as it were, or funds held on trust by the company. You simply need a payment by the company in terms of section 296. Of course, in 349 it just refers to payment by a debtor and there is, in the Property Law Act, no requirement that the person who is sued is the creditor or a creditor. There is just reference to a debtor.

GLAZEBROOK J:

Sorry, I'm just on the …

MR COLSON:

Sorry. Now, in terms of the first page of the hand-up I've given, I think at the bottom right I have largely addressed already what's meant by the word "gave" in section 296(3) and my submission that a wider view of that should be taken in context and also given sections 297 and 298 of the Companies Act. I also just note that where there is a reliance by the applicant on part of the Bankruptcy Code that one needs to go on and look at another section in that Bankruptcy Code 548C which contains very similar wording to 296(3) and I will come back to that briefly in the context of looking at one of the US cases.

GLAZEBROOK J:

How Ponzi does it have to be? I'm just thinking of those solicitor trust account cases which are the rob Peter to pay Paul but are all, really, at the margins. I mean, this, obviously, was the full-blown Ponzi, eventually, by the time we're looking at now.

MR COLSON:

Yes. I accept that is a tricky issue potentially, but in my submission obviously the first doesn't arise here but looking towards wider matters, as Your Honour is bound to do, of course, the first point is, in my submission, it still remains held on trust, the funds, so it's a Ponzi. You can't recognise it as value goes more to the use of the funds. It's the second argument.

WILLIAM YOUNG J:

You can have a Ponzi scheme that doesn't work ostensibly on the basis of money held in trust, can't you?

MR COLSON:

Yes, you can, you can.

WILLIAM YOUNG J:

So you can be a debtor/creditor?

MR COLSON:

Yes, they're both instances in the States and there's indeed both instances in New Zealand. Often though in those New Zealand cases although there may not be a trust relationship, almost inevitably those running the company haven't complied with the Securities Act or the Financial Markets Conduct Act so that you have a statutory trust arising anyway. Cases such as *Waipawa;* instances of that, so you often end up with the trust.

I was then coming to the position over the page on page 2 in respect of RAM's payments to the appellant. The appellant of course says that this represents a full accord and satisfaction or a discharge by performance. I start under "the liquidator's approach" by just stating some of the obvious points. The appellant of course didn't know of the claims he had against RAM. There was no agreement reached between he and RAM in order to deal with those claims. The payments were based on a complete fiction and categorising them is a discharge of an unknown claim simply in my submission perpetuates fraud. And I go onto say, again these are

summarising my submissions, that any discharge cannot be value because it's inconsistent. This is an alternative submission if the Court were to hold there was a discharge, it can't be of value, it's inconsistent with the policy of both Acts. The second bullet point is one I've touched on before, that the appellant's claims were not generated by the giving of value, so the type of analysis as in *Allied* is distinguishable here. Justice Miller almost recognises this in the High Court when he said, "*Allied* doesn't readily apply here because in terms of the antecedent at transaction, the initial giving of value, there was none really, value was taken. And second, by the time you get to the paying it back you can't say it's a discharge because the claims were unknown." He then went on, of course, to apply *Allied* in a wider sense saying, though I – to use loose language, I hear what the Supreme Court's saying and I'll do my best to apply it in these circumstances and he then says the 500,000 represented value but there was no value for the fictitious profits. But it doesn't readily sit this case, with the analysis and *Allied* is hopefully, in my submission, made clear and as obvious.

GLAZEBROOK J:

On values taken, does that make a difference? So if Mr Ross had climbed in Mr McIntosh's window and taken out a suitcase full of money and toddled off back to the company with it, and then Mr Ross had – Mr McIntosh had said well I want my money back and Mr Ross had said, okay you know I shouldn't have really climbed in your window, I was just borrowing it, here it is?

MR COLSON:

I don't place weight on the word "gave" when it was taken; I'm not running that argument. I say gave value needs to be looked at in context. The simple point is it doesn't readily fit with the type of trade credit analysis as in *Allied*.

GLAZEBROOK J:

That's certainly true.

MR COLSON:

Now I set out the appellant's approach in the next column, the manner in which he said value was given. And the response to that is in the last column, to state perhaps the obvious, "Discharge of a contract can occur by performance or accord and satisfaction." It's trite that discharge by performance requires exact performance but in fact of course there was absolutely no performance of the contractual obligation here. So then you come to the proposition, was there a discharge by accord and satisfaction, again trite propositions but accord means agreement and satisfaction is the consideration that follows that agreement. That necessarily requires agreement. There was no agreement here because the appellant was unaware the contract had not been performed and was unaware of his equitable claims. So in my submission as the Court of Appeal held, and indeed as it recorded as being conceded by the appellant's counsel in the Court of Appeal, there wasn't a discharge arising from that payment.

I have two additional bullet points which I note there, both of which I think have come up in the morning session. First, if the appellant were correct then you'd rarely if ever had a voidable transaction because completion of any transaction means it can't be re-opened. Second, a claim by a liquidator cannot be defeated by a representation by a company. Perhaps one obvious point that didn't quite come up this morning is that section 292 and section 347 are claims by the liquidator, they are not by the company. Of course if there were a cause of action against the company it may still be bound by a representation made by it prior to liquidation, but that is a claim by the liquidator, and that's the proposition for which, in my submission, *Re Exchange* stands.

Then over the page I was going to address the two other aspects which are relied on by the appellant. The use of the initial payment for four and a half years. The liquidator's submissions on that are set out again in the box, under the intended arrangements RAM was to receive no value from the use of the appellant's money. It was always going to be held on trust. That, of itself, was not going to get any benefit of the use.

ARNOLD J:
Just on that, didn't one of the letters, something I read said that if a certain level of return was achieved, then some percentage of it would go over and above some level?

MR COLSON:
Yes, that's with the management fee, Your Honour, and I'll touch on that next, but yes there are two letters that set out the management fee arrangement. The first, the combined effect of which was 1% of the total portfolio initially and then a percentage based on the profit and returns achieved.

ARNOLD J:
I see, so it was only in respect of the calculations made?

MR COLSON:
That's right Sir. Back to the liquidators' approach. Again the submission I've put to you before, and I'll come to the *Independent Clearing House* case shortly, but that case says there's clearly nothing of commercial or objective value by misappropriating the funds for use in a Ponzi because you're just using them to perpetuate the Ponzi, which will inevitably collapse. Again, as I say in the liquidators' response column, at the end around the third point, in my submissions, given the appellant's funds were not directly traceable they simply form part of a diminishing pool of assets held on trust. So a *Snell's Equity* type and *Foskett v McKeown* proposition is accepted, that is the combination of investor trust funds is still held on trust for those investors, then again it never became part of the company funds available to be used by it.

I then finally come onto management fees. The starting point is that management fees were, in fact, never paid. The quarterly reports show a deduction for them but, of course, the quarterly reports were fictitious and the affidavit evidence, quite clear in this proceeding, that there were no management fees paid by the appellant. Indeed, there were hardly any management fees paid at all. My recollection of them is that in the final year it

was around $7000. That is because, as the quarterly reports were fictitious, there was, so that calculation was fictitious, there was no actual deduction from the RAM bank account, or from payments made out to the appellant or anyone else for those management fees.

In terms of the promise to pay them, can that be a valuable consideration, in my submission that's answered in *Allied* at paragraph 159 which says, "A promise will not be value until it is actually carried out." That's, again, developed slightly, liquidators' response, final column, "Nor is it clear executed consideration is required for value or valuable consideration," comments by the Chief Justice at paragraph 159 of *Allied*. I go on to say, "In any event, management fees never deducted." And to the extent an estoppel claim is raised in relation to those by the fact a report shows the deduction the same submission is put.

Now, I was going to move from there to a couple of authorities which were touched on this morning, the first being *Buzzle*, which is at tab 13 of the authorities in the first volume. Very broadly, *Buzzle* was relied on by this Court and *Allied* to say that discharge of an antecedent debt can potentially be value. What happened in *Buzzle* was that there were seven Apple resellers who combined their business in order to make a new company called Buzzle on the basis that the whole would be greater than the sum of the parts. As part of that reorganisation, the various suppliers contributed the assets they had on hand which had been provided by Apple. Apple consented to all the arrangements and took some more security over the new company. Buzzle then paid the debts of the suppliers, that is, the individual companies which then came together and effectively formed Buzzle and the question was whether that could be value. Broadly a lot of the case was potentially focusing on whether there was any benefit to Buzzle by making that payment but the Court decided it didn't need to get into that because Apple had a defence and that's set out at page 292 of the casebook in the context of valuable consideration around line 161, because there were defences of valuable consideration or change of position. The Court notes at 162 you don't have to give full consideration, just valuable. At 163, ample authority that satisfaction

released of an antecedent debt is valuable consideration. 164, the appellants say this principle only applies where it is the debt of the payer that is released and here it was the debt of a third party. That wasn't accepted by the Court and it dismissed it quite quickly between lines 167 and 169 and it does note that around 165 the consideration that moved from the promisee, Apple, was the detriment it suffered at Buzzle's request.

Now, this was put to you this morning standing for the proposition, effectively, that the words "gave value" in section 296(3). It doesn't matter where the value went. Therefore, the focus is simply on the payer, the creditor. There can be no focus on the company itself. Of course, my first proposition to that is that you need to look at the matter contextually in light of the purpose of the statute and the surrounding provisions, including 297 and 298. Here, of course, to the extent that this is put up as authority for that proposition it doesn't quite meet that in any event because of the factual scenario here in effect. Buzzle was the new incarnation of the old creditors.

As the Court notes, Apple suffered detriment by releasing the old debts at Buzzle's request so it's not as if it went into an entirely unrelated third party. It was part of a reorganisation.

The other case which was touched on this morning – I won't take Your Honours to it – was *PT Garuda* which is at tab 27 and I think Your Honour Justice William Young mentioned that in terms of a case involving fraud. There broadly the airline realised it had been defrauded by one of its employees. He paid back 100,000 initially and then a settlement was entered into that he'd also transfer a house or 150,000 equity in a house. The case was to do with whether they were – those transfers were voidable in terms of the legislation. It was ultimately held that the $100,000 payment could be retained, but not the house transfer, because of knowledge on the part of the airline. But that case dealt, unlike here, with a, I wouldn't call it straightforward, but with a clear accord and satisfaction proposition. There, there was knowledge of the fraud. There was in effect a settlement entered into and there were issues around the voidability of the two limbs of

that, based on knowledge of the fraud et cetera. It is understandable there that the Court said, in respect of the 100,000 at least, before the knowledge arose, that that was discharge of an obligation because there had been disclosure and a settlement agreement entered into. It's quite a different situation, in my submission, from what happened here when there was no knowledge of the fraud.

Now they're my submissions largely on the cross-appeal, although elements of that obviously applies to the appeal as well. But to turn to the alternative submissions on the appeal as the Court of Appeal held, and as the High Court held, if any value was given at the time of the payment, the only quantified claim at that time, the only hard dollar figure, was the trust property which had been taken. This is around page 25 of my first submissions, around 6.1. And as the alternative to ordering all of the funds to be repaid, in my submission, the Court should follow that analysis and only an order at least the fictitious profits to be repaid because there was no value given for that.

Now one can deal with that in the Court of Appeal manner, which said that's the only quantified claim, or one can deal with it effectively as the High Court did by looking at the wider principles behind *Allied*, focusing on the antecedent transaction, and saying well the most that was given was half a million dollars. Now beyond that, of course, the appellant has not established or quantified the value of the residual claim for equitable damages. Nor, in my submission, has that claim been discharged because there has been no agreement, there's been no accord and satisfaction. And I note in the submissions that this type of outcome is also consistent with much of the US law, although the statutory regime admittedly is slightly different there.

I just wanted to take you to one decision if I may in the second volume of authorities at tab 25, *Independent Clearing House*, which is at page 549 of the bundle of authorities and perhaps just, I won't spend long on this Your Honours, but just to discuss this decision briefly. If you look at page 562 initially, and there's a footnote 21 down the bottom left.

WILLIAM YOUNG J:

Sorry, what page?

MR COLSON:

Sorry, page 562 of the casebook, you'll see at footnote 21 it sets out section 548(a) and it allows the liquidator effectively to void certain transactions, including at (2)(A), if the debtor received less than a reasonably equivalent value in exchange, so different wording from our legislation. But over the page then at page 563 you'll see at paragraph 9 of the judgment, in a position that's been upheld by numerous US Courts, "We conclude that the debtors – "

GLAZEBROOK J:

Sorry, can I just have the page?

MR COLSON:

563 at page 9. But the whole of the relevant US sections are set out at the first bundle of authorities and they're easier to read there but just to save time I'll say this if I may. So the focus is on reasonably equivalent value. Again this was a Ponzi. Paragraph 9, "We conclude that the debtors received a reasonably equivalent value in exchange for all transfers to a defendant that did not exceed the defendant's principal undertaking," and that effectively that was commitment to provide funds, "But to the extent a defendant received more than he gave the debtors, the debtors did not receive a reasonably equivalent value," and that's the position that's been adopted in numerous US cases. And if one goes on then to look at page 565. By this time the Court is coming onto another limb of 548 which is the change of position defence which simply talks about giving value so there's no reasonably equivalent, it's just giving value. And it notes that at the top left-hand of page 565, "The transfers could still have been made for value however if the debtors received property in exchange for the transfers," and then at paragraph 13. "Value must be determined by an objective standard if the use of the defendant's money was of value to the debtors it was only because it allowed them to defraud more people of more money. Judged from any but the

subjective view point of the perpetrators of the scheme, the value of using other people's money for such purpose is negative." And the Court then goes on at page 567, just the last passage I'd like to draw to Your Honours' attention, 567 the left-hand column and it's the last substantive paragraph on the left-hand column. "The extent to which a defendant, 'gave value,' for a particular transfer is essentially the flipside of the question we have already discussed under section 548A(2), namely whether the debtor received a reasonably equivalent value." So as my submission earlier urged on you, when one takes the words "gave value" in 296(3), what the Court is saying here is well the company receiving reasonably equivalent value and the credit or giving value, they're flipsides of the same coin and that supports my submission that one needs to look at value in the wider context and not just purely from the creditor's point of view in 296(3).

And the final aspects of my submission and the alternative that at least the fictitious profits should be returned, really focus on the wider statutory context and I deal with this at page 28 of my submissions, initially around paragraph 6.11 at (a) where you'll see the wording of the, our statute's very similar to the US statute under the Property Law Act. I say at 6.11, "Section 349 of the PLA supports an interpretation of valuable consideration as requiring reasonably equivalent value. (a) if the position were otherwise then the value aspect of 3461B would become meaningless. A disposition could be made at 50% of value, an application to challenge this could pass the threshold test of without receiving a reasonably equivalent value in exchange but then fail because of 3491A, that can't have been Parliament's intention." And I won't take you to the submission but the same submission can be made in respect of the Companies Act and the interaction between 297 and 296(3). That is you could have a transaction that theoretically is challengeable because market value isn't given but then there would be a full defence and a mandatory defence under the Companies Act because it's a "must" provision, section 296(3), that the person who gave something less than market value could then get off completely. And in my submission that can't have been the case.

Now the final aspect I might deal with now is on the interaction between sections 296(3) and section 349. I appreciate my learned friend has in some respects moved away from the defence in the Property Law Act, but it's covered at – my submissions on this are covered in the reply and the liquidators at section 6 around page 25, "The liquidators maintain the proposition that section 296(3) of the Companies Act should not as a matter of interpretation apply to the Property Law Act." And the broad reasons for that are set out in my section. There's about three or four of them. The first, as I say, at paragraph 6.4 of my reply submissions. The PLA defences are contained in section 9 of the PLA and the section immediately following 348 and 349 actually specifically refers to the Court's power to make orders pursuant to section 348. So there's a specific recognition of the link between the two. The key point as I note at 6.5 and reason why the liquidators are pressing this point is that there is a significant difference between 349 and 296(3). 296(3) of the Companies Act provides a mandatory defence, "The Court must not make an order for recovery if value has been given." So if a narrow view is taken of value is just some sort of value, perhaps significant but not dollar for dollar or close to it, then that's it, the Court can't order recovery, full stop. Whereas under the Property Law Act it's discretionary.

WILLIAM YOUNG J:

The opening words of section 296(3) aren't very helpful are they, from the point of view of that argument?

MR COLSON:

In terms, sorry in what way Your Honour?

WILLIAM YOUNG J:

"A Court must not order recovery of property, the company, for its equivalent value by a liquidator whether under this Act or any other enactment or in law or in equity"?

MR COLSON:

No they're not, I accept that, they're not. I accept that completely. Sorry I slightly confused myself but I'll stay with the point. This is more for the change of position defence actually than the value defence, I'm sorry about that. I've jumped on and confused myself a bit. So the discretionary aspect is for the change of position defence, not the value defence. But I'll stay with the submission on it while I'm there, which I had touched on at 6.5. The distinction between the two in terms of changed position, mandatory for Companies Act, not so for Property Law Act. I accept Your Honour's point about the wording of it, but there is the added point that section, as I say it's paragraph 6.7 of my submissions. Section 347 of the Property Law Act sets out the procedure which must be followed by a creditor or liquidator when going under the Property Law Act. It includes that a notice must be provided communicating the effect of sections 348 and 349 but there is of course no reference to the Companies Act. So the submission there is if Parliament had intended the Companies Act defence to apply, it would have required that notice to be given under the procedural mechanism in 347 as well.

WILLIAM YOUNG J:

But this property direction isn't confined to companies?

MR COLSON:

No it's not. That's the other point, you'd have two regimes if the payor was a company you'd be under the Companies Act defence, means that there's a change of position, you can't take action, it's must not.

WILLIAM YOUNG J:

No but the point I'm making and I have to look at the Insolvency Act to see how good a point it is, is that it's not necessarily odd that there would be defences in the Property Law Act but in a sense it would be rendered superfluous by the Companies Act because the Property Law Act may apply in circumstances where the Companies Act doesn't apply?

MR COLSON:

Yes that's right but it does seem odd to me that the, it could do, but the provisions are obviously not dissimilar although they serve different purposes, yet the defence is available depends on the character of the payor. So obviously the, sorry, back to my same point I suppose Your Honour, if the payor is a company, then the Companies Act means that the Court can't order recovery if there's been a change of defence. If the payor is an individual then it can. Which just seems an inconsistency that Parliament cannot have intended.

WILLIAM YOUNG J:

Well it may be dealt with by dealing with change of position in the Companies Act is one which is of substantial moment. It won't be exactly the same, it'll be pretty similar.

MR COLSON:

It could be Your Honour, it just seems a significantly different outcome, and I do query whether that would have been intended by Parliament.

GLAZEBROOK J:

What's the significantly, I think I might have got lost.

MR COLSON:

So it just comes back to, in terms of, I've slightly confused the Court because I've jumped ahead to the end of my submissions, I'm sorry for that, but in terms of the change of defence, position defence, under the Companies Act it's mandatory, if the company pays and there's a change of position, the Court cannot order relief. Under the Property Law Act it can still order relief. It may order relief. So it's quite a different outcome. If there is an individual creditor, or a partnership –

GLAZEBROOK J:

What are we supposed to do with that, is what I'm really asking?

MR COLSON:

Sorry. My submission is that the indication from that is that Parliament intended the Property Law Act defence to be represented by section 349 and only section 349, not the Companies Act.

GLAZEBROOK J:

So what does that mean though, that we ignore what's said in the Companies Act?

WILLIAM YOUNG J:

It would mean section 296(3) isn't an answer to the Property Law Act and that's the proposition.

MR COLSON:

That's right, you'd read it down, you'd say the latter statute, latter more specific statute. Effectively, not overrides, but if you're reading the statutes two together, you have to read 296(3) down so it doesn't apply to a specific statutory regime such as that in section 347, 348, 349.

O'REGAN J:

And what are you saying, if there is that discretion, what are you saying the Court should do with the discretion?

MR COLSON:

Well the appellant has abandoned reliance, I suppose, on that, but theoretically it could have said, for example, it was a Property Law Act claim, okay, I don't think there has been a sufficient change of position to – sorry. There has been some change of position but I'm going to still order some payment be made. If we look at the funds here, and I'll come to my specific submissions, but you could say there was some expenditure on the property. I'm going to take that off and I'm going to order the balance be returned, for example. It just allows the Court to do a bit more around that.

So coming to change of position properly, sorry, having started with the last submission on that. There are the two provisions we've already touched on, because I've done everything in reverse order, 349 and 296. In terms of 296(3) it's accepted, I think, by both parties that *Madsen-Ries* sets out the test for 296(3), or the elements to it, and I address this at paragraph 2 of my reply submissions at paragraph 1.10. That is that, "The alteration of position following receipt of the payment must be a conscious one." That, "The creditor must show that it would not have undertaken that course but for receipt and a belief in the payment's validity. In accessing whether there is an alteration of position the question is whether a creditor has acted to his or her detriment and that a contemporaneous alteration of position is sufficient."

I would now like, in terms of delivering the substance of my submissions, to start by taking Your Honours to some of the evidence. It's at volume 3, part 3, and it's a letter which the appellant wrote to the liquidators setting out his position shortly after – it's at page 709 tab 128 – sets out his position and it's the first letter in response, effectively, to a letter of demand. You can see it at page 709. It's to Mr John Fisk at PwC and it's from the appellant.

Now, there's a few passages I'd like to take Your Honours to that I want to work through. You'll see while there's a letter here which runs through to page 713, then there's a schedule which explains matters in more detail, and that schedule starts on page 714.

I'd first like to take you to paragraph 3A of the schedule on 714, paragraph 3. This is consistent with emails at the time which are set out in my submissions but it's just a convenient way of summarising the position. Paragraph 3, "My object of the investment" – this is the RAM investment – "was to obtain in the strong global investment market conditions prevailing at the time the benefit of the difference between the investment returns and the cost of the investment to use for a primary purpose, ie a) I'd already borrowed funds from Westpac to develop some land in Queenstown for a holiday rental sometime in the future, b) in 2007 on making the investment I advised RAM of that future building project and my hope to put returns from the debt-funded investment

into it." So it had always been his intention when making his investment in RAM to use those funds in respect of his building project at Queenstown.

"At c), as set out further below, that building project commenced in 2010 at a building cost of approximately 1.25 million and was completed in September 2011 whereupon I sought closure of the portfolio for the purpose of paying some of that cost." Now, I note – and I'll give you some page references rather than take you to it but that Queenstown property owned by Thorn Holdings was later sold in 2014 for 1.93 million. That is a profit of just over 700,000. You can see that from references at pages 133, 163, 166, and 714.

The next passage I was going to take you to is over the page at paragraph 11 where the appellant sets out that by mid-2011 the Queenstown building project was nearing completion and the monthly bills were often over 100,000 a month, which exceeded his monthly drawings. He additionally had provisional tax coming up.

Then he says at paragraph 12, "I therefore began to move towards closure of the portfolio to pay off the original investment debt and use any gains made to pay off the Queenstown building debt." Ultimately, that is, of course, what he did with the funds.

At paragraph 4 he said there was a complication. "To complicate matters, around that time the property in between my existing properties at numbers 31 and 35 – ie number 33 – came up for mortgagee sale. I was not financially in a good position to buy it because of my existing debts but I wished to acquire it if I possibly could to avoid particular development of the site by a third party to the detriment of my adjacent properties." That is put there as his primary focus.

Now, the next passage I'd like to come to is over the page at paragraph 20. He talks about the steps he subsequently took. Paragraph 20, "In particular, in October 2011 I engaged architects Kerr Ritchie of Queenstown, to

investigate possibilities for the newly acquired property at No 33 Palliser Road. It transpired that, by utilising land at the rear of my family property at No 35 Palliser, and altering the boundaries of both properties, it would in principle be possible to build two new dwellings on this site," importantly next Your Honour, "without compromising the view or value of my family property." Now the significance of that last statement "or value of my family property" is that the appellant now says that boundary charge has had a detrimental effect on me. He says correctly in his submissions that his family property, as it were, has lost approximately 30% of its, the area. As detailed in my submissions though what, in fact has happened is that the properties are effectively on a hillside, this is covered in the architect's report dealing with the development. Both properties ran up and down the hillside. The boundary has been changed from one going straight down the hillside, to one across the hillside. The benefit being, I can take Your Honours to the documents if you wish, but the benefit being as I identified by the architects, that the houses would now have their outdoor area, as it were, on the same level, and I can take Your Honours to an architect's report which identifies that would be of value to the properties. So rather than your classic Wellington walk up the back of the hill to the clothesline, you've now got property on the same level, and that's consistent with the statement he makes in this letter to PwC, that he could develop the site, change the boundaries without affecting the value of this family property.

The next aspect I'd like to take Your Honours to is page 718. He then goes, this is paragraph 30, sorry, I should start at paragraph 28. He says, "As from the weekend of 405 November 2012, I became aware from media reports that the Ross company group could be in major trouble and receivers had been appointed," et cetera. Perhaps to state the obvious the appellant would have known from Ross Asset's business that it dealt with funds held on trust so the fact it was in major trouble would, one think, have been immediate concern.

Paragraph 30, "The liquidation of RAM then occurred," he says, "However, even then I had no reason to believe that the ROF would be repayable," that's return on funds, "because I still believed that the ROF could

be legitimate; and also on investigating my legal position I realised that I had already satisfied all of the s 296(3) criteria. I therefore decided that I should continue with the project." That was entering into the building contract et cetera. The legal advice, of course, as my submissions demonstrate as oral advice from his accountant, and on notice of RAM's liquidation, et cetera, a company dealing in trust funds, he elected to make a decision to continue with the project.

Paragraph 31, he also says, "That the contract will be wholly debt funded by Westpac, and the resulting $4.5 - $5m bank borrowings necessary for the project overall are intended to be repaid over the next 10 to 20 years with rental income derived from the new houses and supplemented by any surplus personal income that I receive." So it was effectively a long-term hold Your Honours and one page I'll just take you back to, sorry, is at page 712, consistent with that at the bottom of 712 at 14.(b) he says, "At the time of the ROF, the nascent development project at 33 Palliser Road was expected to cost (land plus buildings) in the vicinity of $4.5m, and the likely market value of those two properties when completed would not exceed that sum," ie there was always an acknowledgement that in developing the property the market value of them once completed would not match up with what was spent. He goes on to say, "NO real profit was expect… Moreover, I was not a property developer for tax purposes, so I would need to hold those properties," for a while.

So if we can just bring those strands together in terms of what it was the appellant on his own evidence was seeking to achieve here, primarily to protect his view or ensure the property in the middle of the two properties he owned wasn't developed in a manner that had an impact on those properties.

Secondly, effectively it was a long-term hold, 10 to 20 years, not develop and sell. It was originally. Quickly changed to develop and hold. So market value today, tomorrow, et cetera is irrelevant. It's always a long-term hold.

And third, as was accepted by him this morning, obviously there are tax benefits to him because it was held in an LTC. So tax losses made by the company who undertook the development would be available to him. Now, they are the facts I wanted to take Your Honours to.

Then broadly looking at those facts and the change of position in a roundabout way, I've set out in quite a detailed way the facts as found by the lower Courts et cetera. In terms of my reply submissions, I'm really up to page 15. That payments from the RAM portfolio were intended to be and were used to repay debt on the Queenstown house.

Now, just to orientate the Court, the law seems to be on 349(2) change of position, you need a causal connection between the receipt of the challenged payment and the change in circumstances. Obviously under 296 there's the *Madsen-Ries* factors including reliance and detriment.

Now, the submission I outline at page 15 of my reply submissions from 4.7 is that the entire point of the original investment was to seek to make gains to pay down debt on the Queenstown house. That's exactly what did in fact happen. When the return from investment was received from RAM – the fictitious payment we now know – it was used to repay debt on his Queenstown house. The law is quite clear that repayment of a debt is not a change in position and in my simple submission that's where the Court's inquiries should stop. It's a perfect circle. It was the intent of the original investment. It was how the investment was applied. That's as far as you need to go.

If one goes further, you're moving quite a way from the reliance or causation-based approach which you need to follow, in my submission, under sections 296 or section 349. We're starting to move into, well, what's the general effect on the applicant from overall reliance in some way on this payment and of course any person who receives a payment in some general way is going to rely on it. It's always going overall to affect your asset position. In my submission, something much more specific is needed and you

do need to look where the funds were put and they were put to repayment of the debt as it was already always anticipated.

The second point I make is that the appellant had progressed developing the property before receiving the payment. There was no close causal connection between the receipt of the payments and this decision. He's already taken steps to explore it with his architect et cetera. There was reference by the appellant to the stop/go email today but there's no further analysis of that stop/go decision, nor is there analysis, for example, in terms of that stop/go decision was he better off selling the property with the architect's plans, what would he have got for it back in November 2011 if he was investigating the stop/go rather than developing it. There's simply no evidence of that, and how he might have been prejudiced.

In my submission, he's gone into this development for a range of understandable reasons, to protect his property, long-term hold for tax reasons. Unfortunately for him, some of the development hasn't come off as well as anticipated, which is often the way with developments, costs have been a bit more and the value is not as good, but they were risks he knew of when he went into the development. They were the same risks he took when he made a decision to enter into the building contract, after he knew of the possibility voidability of the payments to him, and in reality he's seeking an underwrite from the liquidators or the RAM investors because the long-term project on the basis of a valuation a year ago isn't quite as good as he thought it might be. The only impact –

WILLIAM YOUNG J:
Well where is that valuation?

MR COLSON:
The valuation is in volume 3 of the evidence. The latest valuation is at tab 141. There's two valuations. The first one was at 134. That's the September 2014 valuation. Sorry, Your Honours, that's a drawdown report. The latest one is at 141, March 2015. And you'll see on about page 815 each

of the townhouses is valued, or each of the houses is valued, one at 2.2 million, and on one, 816, one at 1.5 million, which come in total to about 3.7 million.

WILLIAM YOUNG J:
And that's about what the debt is.

MR COLSON:
Yes, the appellant makes the point he has introduced some equity into the project. I would make this point though. The sum he puts forward as the total development costs includes capitalised interest. So as Your Honours might have seen there was broadly the initial purchase of around 980,000 for the house, and the building contract was worth three million, so just those two get you to around 3.9. I can run you through all the numbers but broadly the valuation isn't too out of whack with actually the costs of building, direct costs of building, and the land. Of course once you capitalise interest that starts to have a different result on the economics.

Now there was an earlier valuation, of course, at paragraph, at tab 133. No, I've got that wrong. No, sorry, 133, 23 April 2014, this is on page 732, we've got a total valuation of around 3.9 million. Now not surprisingly valuations go up and down, who knows what it would be today with the movement in the Wellington property market. Moreover, they were always developed to be a long-term hold, so in my submission market valuations put forward, of course, not having been realised, don't affect that. In reality what the change of position is, the complaint really is that the debt equity ratio in respect of the development will be changed. There will be more debt and there will be less equity.

Now in terms of some submissions put to you around that, that the development would have to be sold if you were to order repayments et cetera, first there is, of course, no statement of position put forward by the appellant. We don't know his full financial circumstances. Second, there is no evidence from Westpac that the original lending was on the basis that the RAM portfolio

would be realised. There's no document at all indicating that. There's no offer conditional upon that in terms of the lending, nor is there any affidavit from anyone at Westpac on that, and indeed an email that you were taken to this morning at page 409, when they were talking about credit approval prior to the RAM portfolio being realised, made no mention at all of the RAM portfolio, it just talked about the need for the Queenstown property to be finished.

And a final matter, and I can hand out the affidavit if you like, but in terms of an affidavit filed in the Court of Appeal in the context of the name suppression application, a copy of which I have here, the appellant deposed he had recently borrowed $400,000 to fit out his new chambers. Again this is well after knowledge of the claim et cetera.

Now, coming to the specific matters relied on briefly, the appellant talks about engaging the architects. Of course, they'd been working on the project well before he'd received the payments, as you can see from the timeline attached to my schedule. Secondly, he refers to making an application for relevant consents. In my submission, that must be de minimis in the context of the overall sums involved. He also refers to altering the boundaries for numbers 33 and 35. Yet his own letter written to the liquidators indicated that had no impact on value.

There was the demolition of the existing dwelling which was a leaky house and indeed I've got a reference in my submission to a quantity surveyor report or an architect's report saying it was a condemned house that was inevitably going to be demolished. The entry into the building contract for $3 million which occurred well after renew of RAM's position and had taken oral advice on that from an accountant.

To the extent the Court looks at detriment under the Companies Act, in my submission he has not suffered any. The development was always intended to be a long-term hold. He knew that the market value, once completed, would be below the development cost. All that has changed is he has now put

up valuations to indicate that and if this Court orders the funds to be repaid then the debt equity mix on that would change.

I was then going to touch on the interaction between the two sections but I've done that already so unless the Court has any further questions, those are my submissions for the liquidators.

WILLIAM YOUNG J:
Thank you.

Mr McIntosh.

MR McINTOSH:
Very briefly, Your Honour, in relation to the gave value defence I just want to address some points about, first of all, the policy argument. The legislative history of the amendments, the 296(3), make it clear that the intention of that defence was to focus on the position of the individual, not the collective. That's noted, among other things, at 46 and 96 of this Court's judgment in *Allied*.

The related point from that, as Mr Colson said, the position of the creditor in relation to 296. I think the fundamental point of difference between the two cases comes down to a very simple proposition. Section 296(3) applies beyond the debtor and creditor relationship. What that means, it has to have universal application and the same principles applying in its application so that there aren't differences in treatment of people using the defence and that's why the defence is primarily focused on the knowledge of the individual who brings the defence.

Now, a position of somebody claimed against under section 297 puts this starkly in issue. That person is not a creditor. It could be but there's no reference to that in 297. It's anyone buying an asset off a company in liquidation, sorry, that's insolvent in the period, can be claimed against. So that is, somebody with no other relationship to the company enters into a

transaction and say, for example, buys the company's photocopier for 50% of market value. Now if the person –

WILLIAM YOUNG J:
But it doesn't have to be a creditor, but it can be.

MR McINTOSH:
Yes.

WILLIAM YOUNG J:
Although that's subject to the question that I had in the back of my mind, whether section 297 can really apply to what is in substance a preference, whether it sits easily beside the preference provisions.

MR McINTOSH:
Section 297 is another weapon in the armoury of a liquidator.

WILLIAM YOUNG J:
But it would completely overlap all preferences, wouldn't it? Because it's almost always the case that the person who gets preferred gets real money in exchange for a debt that isn't worth very much because the company is really broke.

MR McINTOSH:
I'm sorry Sir, I'm not following.

WILLIAM YOUNG J:
In one respect the transaction between you and RAM was a transaction at an undervalue, from the point of view of RAM, because they pay out, you $950,000-odd, and they get in exchange the release of a claim that in reality is worth next to nothing.

MR McINTOSH:
Yes.

WILLIAM YOUNG J:

Now if that's the right analysis then you don't really need preference provisions because section 297 does most of the, will almost always do the work, which makes me wonder whether it's really aimed at that. Whether it's really aimed at preferences.

MR McINTOSH:

Well I don't think it is. I think it's aimed at simple transactions where company assets are transferred away and somebody coming to that may, in fact, innocently pay less than market value. That person is entitled to invoke the section 296(3) defence say if I had no knowledge.

WILLIAM YOUNG J:

Well may be.

MR McINTOSH:

Well section, Your Honour, you refer to the words.

WILLIAM YOUNG J:

Yes I know that but it wasn't in this context. It depends on whether gave value means gives substantially equivalent value, or just means, or means more than a peppercorn, or means something in between.

MR McINTOSH:

Yes Sir, that's exactly the point, and this case, of course, just to make sure, is I'm saying it's somewhere in between. On the fact.

WILLIAM YOUNG J:

Well not really are you? I thought you were saying just a little bit more than a peppercorn, I mean that if it's $100,000, that's real and substantial. The fact that it's referable to a $100 million transaction doesn't matter. That was what I understood your contention to be. You look at real and substantial de-contextualised from what the other side of the transaction is worth.

MR McINTOSH:

The wider the apparent discrepancy, the more likely that there's going to be an issue under the knowledge provisions.

WILLIAM YOUNG J:

Well that's true I guess.

MR McINTOSH:

But in this particular case not only do we not have an issue under the knowledge provisions, but it's not a small amount. If you take into account the effluxion of time –

WILLIAM YOUNG J:

Well it might be because it might be in your case really 30 or $40,000 compared to $950,000.

MR McINTOSH:

But it isn't though. If you see what I'm saying. It's half a million, for 954, four and a half years later. But the position was did Parliament intend that outcome, that that person buying the photocopier in good faith can't use the defence because the undervalue applies. The answer is no. Parliament did not intend that section 297 would trump. They intended the other way round and that's just the purpose, and it's for all comers. And because of that it can't mean that in some cases you change what the value given test has to be. It's either real and substantial or it's not, otherwise you're ending up an enquiry in each case as to whether that value has been given in terms of the section. And it certainly can't be interpreted on the basis that it changes because the party on the other side was fraudulent or a Ponzi because that would actually defeat the whole purpose of the knowledge provision that the person doesn't know and they're coming to it as an innocent person in good faith and paying value.

Related to that, when Parliament was choosing the words for the new section 296(3) they could have used formulations from all around the Commonwealth.

That included to the debtor, received by the debtor, equivalent value, and they didn't. They chose those ones akin to the Australian ones and we know what the Australian ones have been interpreted to be.

I'd like to just note one thing. Paragraph 47 of the Court of Appeal's judgment, which is in the first volume at tab 4. I have asked Mr Smith about that and he and Mr Ross are adamant that there was no such acknowledgement that there was no accord and satisfaction of my claim.

GLAZEBROOK J:
Sorry, whereabouts are you?

MR McINTOSH:
Paragraph 47 of the Court of Appeal's judgment in this case at page 27 tab 4. It may be just semantic, but the acknowledgement that's been referred to in the last sentence, neither Mr Smith nor Mr Ross have any record of saying that that was acknowledged in relation to the accord and satisfaction element of the submissions which was put squarely in the written submissions and so I do not accept for a minute that there was an acknowledgement that there was no accord and satisfaction.

WILLIAM YOUNG J:
Well, we might have to go back to Mr Colson on that. Anyway, carry on.

GLAZEBROOK J:
Well, Mr Colson hasn't been relying on that in any event. He just says there isn't an accord and satisfaction.

MR COLSON:
That's my primary submission, Your Honour.

MR McINTOSH:
Lastly on value, the Court of Appeal's approach seems to have been you can't discharge an unquantified claim. They give no authority for that and in my

submission that cannot possibly be right. You're not bound by a compromise and a discharge of a claim that you didn't know about but, as I said this morning, what was being discharged here was all obligations in relation to this contract and you have, for example, in *Homeguard Products (NZ) Ltd v Kiwi Packaging Ltd* [1981] 2 NZLR 322 (HC) and the *James Wallace Pty Ltd v William Cable Ltd* [1980] 2 NZLR 187 (CA) cases referred to in my reply submissions examples of where there's a dispute, and so you don't have a finally-liquidated or quantified claim but nevertheless the liabilities are discharged.

Very briefly on the alteration of position, the first point that Mr Colson made was that Thorne Holdings made a profit of 725,000. That land was acquired in 2004 and held for the purposes of investment, rent or building and it was debt-funded and interest was charged upon that. At 304 to 307, you see the bank accounts for that particular LTC. When you add in the acquisition cost of 600,000 plus the building cost of, in the end, around 1.2 million, that investment made no profit at all because it sold at around about the cost of the land and building with no recouping of any of the interest, the holding costs in the intervening years.

I'm not seeking by this defence an underwrite on the unrealised losses. As I said in my submissions this morning the detriment is not the project itself. The detriment is the ability to not have done it and not have incurred the losses either then or would have to incur now if I have to repay the full amount and have to sell the property. So, yes, it was intended to be a long-term hold and therefore in itself it isn't a detriment, but that position changes if obliged to sell it, and I deposed in my affidavit that even at the current equity position it wasn't impossible that I would have to sell at least one of them, and that certainly becomes –

WILLIAM YOUNG J:
Which affidavit is that, the third affidavit?

MR McINTOSH:

Well it's the first affidavit, page 138.

GLAZEBROOK J:

Tab 138, page 138 of volume 2 is it?

MR McINTOSH:

Volume 2. Top of the page at 138, "if the properties were then to be sold at the April valuation prices, I would therefore realise a loss of around $900,000. I intend instead that they be rented out as soon as possible, for a combined rental… However, the annual interest bill on the project debt will be around $300,000, so I will have to fund the shortfall… plus principal repayments from my own income. Given those figures, it is possible I may have to sell at least one of the houses." That's the position as is and then over…

WILLIAM YOUNG J:

That is position as is with no repayment obligation at all.

MR McINTOSH:

Yes. And then in my last affidavit at page 176 I simply give the detail of where all the funds have been applied, what the total limit is, it's simply an updating position to say that there was no credit limit left and I was having to fund the money myself out of income or rentals when the properties were let. I said, "I have no other accounts, with Westpac or otherwise, of any significance."

GLAZEBROOK J:

Can you please just explain to me again, just so that I'm sure I've got it, exactly what the detriment was once the money was received, because you'd already bought the property.

MR McINTOSH:

Yes.

GLAZEBROOK J:

There wasn't really anything to do with it other than flick it on except that that wasn't an option because you couldn't flick it on and achieve the aim of not having an adverse development on it, and then what exactly the detriment is, because you said it's not the development, it's something else. So do you want to just tell me exactly what…

MR McINTOSH:

Yes, at that point –

GLAZEBROOK J:

At what point, at the point you received the money?

MR McINTOSH:

At the point I received the money. I'm now in a position financially to proceed with that project, and I know it's feasible for me to do so.

GLAZEBROOK J:

But if you hadn't received the money, what was the choice at that point?

MR McINTOSH:

Selling.

GLAZEBROOK J:

But you've just said that wasn't a choice that you were prepared to take. You'd already bought it – you'd obviously bought it with it in mind that you might have the money.

MR McINTOSH:

Yes.

GLAZEBROOK J:

But when you got the money what was the choice at that stage, to sell at a loss at that stage and to take the hit of a possibility of an adverse development?

MR McINTOSH:

Ma'am, that wasn't, at that point the choice was simply do I wish to proceed with this development and whatever risk it may come. And that is what I did because I believed that I had validly repaid that amount of debt. Had that money not been available, I could have carried on, if I thought I could, but my evidence was that I wouldn't have. I didn't think I could service it and the bank wouldn't have let me anyway.

WILLIAM YOUNG J:

But they did let you service it in 2013 by which stage it must have been apparent that there was at least a possibility that you were going to be asked to pay the money back.

MR McINTOSH:

The funding was in place before, the funding was in place from the, during the course of 2012.

WILLIAM YOUNG J:

But it's not significantly drawn down on until the following year, is it?

MR McINTOSH:

It's not significantly drawn down until the following year, that's correct.

WILLIAM YOUNG J:

And by that stage Ross Asset Management was in receivership and liquidation, that it was a Ponzi scheme was pretty well understood, and the prospect that someone was going to come knocking on your door and ask for the money back, must have been a real one?

MR McINTOSH:

That's not a matter that would concern the bank at that point though, because it's fully secured.

WILLIAM YOUNG J:

Yes, but you didn't have, it must have concerned you –

MR McINTOSH:

I did –

WILLIAM YOUNG J:

And you didn't have to, I mean I appreciate what you said to me before lunch, that you were already $300,000 in the hole and that encouraged you to go ahead, but it didn't force you to go ahead.

MR McINTOSH:

No it didn't. Thank you Your Honours, that's my points in reply.

WILLIAM YOUNG J:

Thank you Mr McIntosh, that you Mr Colson. We'll take time to consider our judgment and deliver it in due course in writing.

COURT ADJOURNS: 4.03 PM