IN THE SUPREME COURT OF NEW ZEALAND SC 10/2017

BETWEEN	**CRAIG DUTHIE AND KIRSTEN TAYLOR-RUITERMAN DRK CHARTERED ACCOUNTANTS LTD** Appellants
AND	**DENISE MICHELLE ROOSE DENISE DEVELOPMENTS LTD DMR DEVELOPMENT LTD** Respondents
AND	**ATTORNEY-GENERAL** Intervener

Hearing:	8 August 2017
Coram:	Elias CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	G D Pearson and J K Scragg and T A V McKeown for the Appellants K J Crossland and J S Langston for the Respondents H W Ebersohn and S J Osborne for the Intervener

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CIVIL APPEAL

MR PEARSON:

May it please Your Honours, my name is Pearson and I appear with Mr Scragg and Ms McKeown.

ELIAS CJ:

Thank you Mr Pearson.

MR CROSSLAND:

If it pleases the Court, Crossland appearing for the respondents together with Ms Langston.

ELIAS CJ:

Thank you Mr Crossland, Ms Langston.

MR EBERSOHN:

May it please the Court, Ebersohn and Osborne appearing for the Attorney-General.

ELIAS CJ:

Thank you Mr Ebersohn. Yes, Mr Pearson.

MR PEARSON:

Thank you. If it pleases Your Honours, materially these proceedings concern a claim in tort and which Ms Roose and the respondents allege negligent misstatement by her accountant, Mr Duthie, and the appellants as to the tax effect of a sale of land.

Now, this appeal is limited to the question of when the limitation period started to run and it has been brought on an interlocutory basis. Now, Mr Duthie says it was when the agreement became unconditional as to the agreement for the sale of land and that was on 14 April 2008. Now, Ms Roose signed for both the vendor and the purchaser companies and we say that that is significant. This was a related party transaction on non-market terms.

The agreement was an unconditional contract for the sale and purchase of property and contemporaneously the deed of acknowledgement of debt was also signed. Now, if that is correct the claim which was commenced more than six years after 14 April is time barred under the Limitation Act. Now, there are two aspects to the appeal. I should probably say two aspects to our argument. First is to identify when in time the contractual and conveyancing process has first caused Ms Roose to be financially worse off. Material adverse financial consequences potentially being either the imposition of an irrevocable tax liability on the disposition of the property and/or the need to incur professional fees to avert that income or possibly sunk costs.

Now, I'm going to deal with those issues but Mr Scragg will deal with the second part of the argument, that is, the effect of the *Thom v Davys Burton* [2008] NZSC 65, [2009] 1 NZLR 437 decision. Now, we do say that our primary point is that the *Thom v Davys Burton* decision is correct. It applies in the present case, and we say that the present case is not a different sort of case. So the preliminary part about the tax issues really are important for context, but it's very important not to lose sight of our argument being primarily that *Thom v Davys Burton* applies in this case.

ELIAS CJ:
So does that mean in terms of how you're dividing the argument that, Mr Pearson, your argument is simply going to be running through the facts or what legal argument are you addressing?

MR PEARSON:
Ma'am, I'm going to go through the facts and then I'm going to talk about the taxing provision CB 14 and a deeming provision relating to the derivation of income in a non-market transaction. So that's essentially going to deal with the facts. But it has this legal tax component, but that's really only context.

ELIAS CJ:
So what is your position on the tax legislation?

MR PEARSON:

We say that – and this is really in response to the position for the respondents. Now, the respondents say – and we say this is contrary to *Thom v Davys Burton* – that rather than the unconditional contract starting time running, they say that, well, that could have been remediated, could have been undone. Well, we say that's just exactly like Mr Thom. He may not have got married. He may not have moved into a house. His marriage may not have broken down. His wife may not have sued. The Court might have ratified.

ELIAS CJ:

Yes, that's fine. I just wanted to elucidate – and you have – that you are really developing the reply submissions in the event that we don't accept the argument to be run by Mr Scragg, is that correct?

MR PEARSON:

That is exactly right but it also gives context to the issue. It's really directly analogous to Mr Thom's position looking at what those contingencies are. We say they're not relevant. We say once you've got an unconditional contract that is the end of the matter and it's unnecessary to look at any depth at the issues beyond that because they're exactly the same, speculative cascade of consequences that needed to follow and would have directed the quantum of loss but *Thom v Davys Burton* very clearly says that once you have what is described as a flawed asset or -

GLAZEBROOK J:

You have to deal with the no transaction as against flawed asset argument.

MR PEARSON:

Mr Scragg will deal with that part of the argument.

ELIAS CJ:

Well we have read your written submission so it's up to you but you might feel that some of the material that you want to develop in reply can be left unless you haven't sufficiently developed in your written submissions.

MR PEARSON:

I'm very comfortable with that Ma'am. There's just a few points if I might –

ELIAS CJ:

Yes of course.

MR PEARSON:

– that I would like to address.

ELIAS CJ:

Sorry. I won't interrupt you further.

MR PEARSON:

Oh, no not at all because there is in fact quite a lot of unanimity as things have emerged and Mr Ebersohn for the Attorney-General has very helpfully provided quite a lot of context. There is a critical point where we disagree with what Mr Ebersohn says but to a very significant extent as matters have progressed the differences have narrowed. So if I might just emphasise one or two factual points. Now, as you have the submissions, paragraph 22 I've set out the key taxing provision here which makes it clear what the issue is about. Section CB 14(1), "An amount that a person derives from disposing of land is income if," and there are these various conditions. It's not income under another provision. A person disposed of the land within 10 years and there was a 20% or greater uplift in the value of land due to one of the particular conditions and the condition in this case was a resource consent. Now turning to what had happened. The material facts I've set out from paragraph 25 onwards but what I would emphasise is the non-market factor and I just ask you in particular in relation to paragraph 25.9 are the terms. Now that is at the case on appeal volume 2. First of all at page 174 and paragraph 15 in the further terms of the sale, that says that the purchase price is going to be left owing as at the date of settlement. But significantly paragraph 16 says the purchase price, "The said debt shall thereafter be payable by the purchaser to the vendor upon demand. Pending demand the debt is to be interest free. No demand for the repayment of debt or any part thereof shall be made at any time before the fifth anniversary of the date of settlement and possession. So the short point is that the purchase price could not be demanded for five years after the so called settlement. Now –

GLAZEBROOK J:

Well isn't it the debt couldn't be demanded? Because there's a separation between the purchase price and the debt and in gift duty terms there probably would have been a gift of interest for the five years but it wouldn't have been a reduction of the purchase price.

MR PEARSON:

Well I would say that the reduction in the value and if we're looking at section GC 1 the question would be whether it comes within -

GLAZEBROOK J:

Well the Commissioner has never taken the view that it does, taken the view that the gift is on the loan itself and in fact there's authority that if it was interest free on demand immediately there's no gift at all.

MR PEARSON:'

I agree with that proposition, absolutely. That's not an issue but in terms of the provision relating to trading stock which applies here I would say that it does come within paragraph B because if it doesn't then there's significant scope for abuse. But certainly in relation to gifts I take no issue with what you say that is. It's certainly been the Commissioner's consistent position over a long period of time, including when gift duty was an issue.

GLAZEBROOK J:

What do you say about the view that that's just quantifying the amount rather than setting the timing?

MR PEARSON:

Well, could I go through that?

GLAZEBROOK J:

The subsidiary question is why would it just be related parties at an undervalue rather than everybody if that's the case? Why would that set a different rule as to timing for related parties at an undervalue than it does for everybody else, at least according to the Commissioner? There is no distinction between cash and the taxpayers in relation to the sale of land.

MR PEARSON:

Yes. Well, dealing with the second point first, there is a Court of Appeal authority which is taking the view that the provision or an earlier version of it applies only where it is not an arm's length transaction. The Court of Appeal took the view that the section couldn't possibly have been intended to have that effect if you have an arm's length transaction and rather than –

GLAZEBROOK J:

Well, that just underlines the second point, why should it be different for related parties, non-arm's length transaction for everybody else in terms of timing?

MR PEARSON:

Because it simply won't work unless it is different from a timing point of view. Now, if I could take you to the – if I might first just deal with the question of derivation of income as a precursor to that, now, I accept what Mr Ebersohn has said regarding the derivation of income and it is essentially a commercial, practical question as to the point in time when income is derived. Now, that means that if you have a structure such as this where you say that it's five years down the track, it would seem that the answer, if you were dealing with arm's length –

GLAZEBROOK J:

Not at all. It would be on settlement. The debt's nothing to do with it.

MR PEARSON:

Well, it –

GLAZEBROOK J:

You have to split the debt because otherwise you'd be saying, well, if you've got a mortgage it's not due for 20 years. Well, settlement is settlement, isn't it?

MR PEARSON:

Settlement is settlement if –

GLAZEBROOK J:

And you have done everything that you need to do in order to have the land, the test of derivations met. The one the Commissioner says is the test of derivation has to happen when you have the legal title to the property at the very latest.

MR PEARSON:

Well, as a commercial, practical exercise it's not tied to the form in which it is structured. Now, if you had a – you could have the settlement deferred for an extended period of time.

GLAZEBROOK J:

Well, you could and on the IRD view you don't pay it until you've handed it over.

MR PEARSON:

Yes. So if we deal with that situation, then the question becomes how does section GC 1 operate in that context? So let's assume to avoid that complication that it is simply a deferred settlement between two parties.

GLAZEBROOK J:

Well, why would we assume that when we don't have that situation here?

MR PEARSON:

Because there is a question of whether that is going to be so in terms of –

GLAZEBROOK J:

No, there's not. It's handed over. The only thing they can do is demand the purchase price after – demand the loan be repaid after five years, can't they?

MR PEARSON:

And –

GLAZEBROOK J:

They can't ask for the property back.

MR PEARSON:

No, no that's correct but it's the same if you've got a deferred settlement. There is no -

GLAZEBROOK J:

Well no, you can ask for the property back if you've got a deferred settlement and that's the point. Until you've handed the property over at settlement according to the Commissioner that crystallises the tax liability.

MR PEARSON:

Yes. That's what the -

GLAZEBROOK J:

So in a deferred settlement if the purchaser fails to pay you keep the property and equitable title joins its legal title again.

MR PEARSON:

Yes, that is correct. But in the normal course of events it will settle and if you've deferred that settlement for let's say five years then you're not going to be taxed on the receipt for five years. Now if you've got non-answering parties you've got an appreciating asset you can very considerably alter the incidence of tax by paying the tax five years in arrears in depreciated currency and of course obviously depends on the extent to which property values are increasing, but it's the very sort of thing that I would respectfully say section GC 1 is intended to deal with. Now I would respectfully suggest that a deferral in making a payment can itself for that purpose constitute an undervalue because they're not market terms and that is what the provision says because nobody would enter into that transaction without increasing the price if there wasn't going to be settlement.

GLAZEBROOK J:

Well what's said against you on that is that the only thing that provision does it set the price. It doesn't set the timing. So that's what I'm asking you to, because that's the argument made against you.

MR PEARSON:

Well let's deal with the first provision that section GC 1(a) deals with, and that is where there is no consideration. Now it seems to follow from Mr Ebersohn's argument that you have to wait until no consideration is derived but no consideration will never be derived. Now the section becomes unworkable. That's the primary provision in the section GC 1(a) –

GLAZEBROOK J:

No I think what's set against you is that the consideration is set as at the date, well it might be worth letting them explain but what is set against you is that that sets the consideration –

MR PEARSON:

Yes.

GLAZEBROOK J:

– and the derivation of that consideration is under normal rules.

MR PEARSON:

But how, what are the normal rules for no consideration? I say it just can't work.

GLAZEBROOK J:

No, no, but the, what is said is that that section makes you have sold it at market value but you derive that market value under the normal rules of derivation. That's my understanding of what's said against you.

MR PEARSON:

Okay. Well what the section says is GC 1 -

GLAZEBROOK J:

Have we got that section?

MR PEARSON:

Yes it is there.

GLAZEBROOK J:

It's in your submissions, in somebody's submissions.

MR PEARSON:

Now I haven't got the introductory part of the section set out.

ELIAS CJ:

Do we have the statute in the authorities?

MR PEARSON:

Yes. It's AB A3.

GLAZEBROOK J:

What does that mean?

MR PEARSON:

Oh, sorry, that's 3. If you click on footnote 59 it should take it -

GLAZEBROOK J:

I don't have it electronically.

MR PEARSON:

Oh, okay. No, that's fine.

GLAZEBROOK J:

So what am I looking at?

MR PEARSON:

The agreed bundle 3.

O'REGAN J:

Tab 3.

GLAZEBROOK J:

I don't seem to have an agreed bundle 3.

ELLEN FRANCE J:

Agreed bundle 2.

GLAZEBROOK J:

Oh, 2 is it?

ELLEN FRANCE J:

Sorry 1, tab 3.

GLAZEBROOK J:

Oh, okay.

MR PEARSON:

Now just to make it clear, we have used the provision in the form that it was in 2008 when we say that the limitation period is starting to run. There was a 2010 amendment. Now Mr Ebersohn has referred to the 2010 amendment. It's slightly more favourable in that it talks about derivation but having said that we accept that have to go with the version in force at the time in 2008, because there wasn't that tax return filed in that time.

ELIAS CJ:

Does Mr Ebersohn set out more of the legislation than you do in his bundle? I haven't looked at it.

MR PEARSON:

He set out a later version of it.

ELIAS CJ:

I see. That's all right. Don't take time on that.

MR PEARSON:

It's on page 1343 at GC 1.

ELIAS CJ:

1343 in which bundle?

MR PEARSON:

It's the appellant's bundle of authorities, volume 1. It's tab 3 and if you go through to GC 1.

ELIAS CJ:

I've got section 88, 89 and 90.

MR PEARSON:

It goes through a number of pages.

GLAZEBROOK J:

Volume 1.

ELIAS CJ:

Yes, I've got three pages.

MR PEARSON:

You need to –

O'REGAN J:

Tab 3, the next tab.

ELIAS CJ:

Oh, it's tab 4. Here we are.

MR PEARSON:

I'm sorry, something's happened. I've got tab 3.

GLAZEBROOK J:

Yes, so have I so something's gone wrong.

MR PEARSON:

Sorry, there's been a glitch.

ELIAS CJ:

Sorry, so you wanted us to go to which?

MR PEARSON:

GC 1. It's at the foot of the page. Now, it says this section applies if a person the transfer or disposal of trading stock to another person, the transferee, for no consideration. Now, what I say is the difficulty with what Mr Ebersohn is saying is that if you have no consideration you'll wait forever for it to be derived. You just cannot apply rules intended to deal with commercial market situations into this deeming provision. It just doesn't work.

GLAZEBROOK J:

Well, why not? It's for no consideration and received by the transfer is deemed to be the amount equal to the market value.

MR PEARSON:

When Mr Ebersohn and I –

WILLIAM YOUNG J:

You say it can only be received on disposal?

MR PEARSON:

Yes, and we say it's a simple deeming provision. Once you fulfil the conditions for the deeming provision, that's it. It's deemed.

ELIAS CJ:

Where's the operative deeming?

GLAZEBROOK J:

It's subsection (2).

MR PEARSON:

It says, "For the purposes of this Act, the consideration received by the transferor and provided by the" –

GLAZEBROOK J:

You say disposal means an unconditional contract? That has to be the argument.

MR PEARSON:

That is accepted by the parties and I've referred –

ELIAS CJ:

Oh, I see, deems market value.

MR PEARSON:

Yes. Now, Mr Ebersohn I understand is saying that for this deeming provision to work, which is intended to deal with non-market situations, it only works in accordance with the timing for market provisions. Now, I say that that is just –

WILLIAM YOUNG J:

What you've got, I suppose, is the logic of the approach that income is derived only on settlement is that it's at that time that the obligation to pay a purchase price crystallises. It doesn't crystallise at disposal.

MR PEARSON:

Yes.

WILLIAM YOUNG J:

But if there is no settlement in that sense, so no purchase price is ever crystallised, then it's sensible to look at the relevant transfer date, which is disposal. That's your argument in a nutshell?

MR PEARSON:

Yes. That's right. We say that in relation to GC 1(b) an amount of consideration is less than the market value for trading stock at the time of disposal. Now, we say that that's not like the analysis for a gift. The question is market value, that would include the timing otherwise you can dispose of trading stock between related parties extending the time for settlement and considerably alter the incidence of tax. But we just say it's simply a self-contained deeming provision and as soon as you start to introduce the sort of concepts that you have in terms of the derivation of income in arm's length commercial circumstances, you're effectively neutering the deeming provision that is intended to deal with that by using what it's trying to cure as its trigger. So, and when you do look at the submissions that Mr Ebersohn has made regarding when income has been derived he in fact identifies a fairly commercial approach to that determination and I would respectfully submit that when you look at *Gasparin* which is an arm's length commercial transaction at say settlement it can’t be assumed that in every case it’s simply settlement that is going to be the issue. If you get artificial conditions such as, well you don’t have to pay for five years, would that not be taken into account if you're looking at things commercially in terms of identifying the derivation? Now I say you don’t need to determine that in this case but nonetheless if you're going to hobble GC 1 by saying well unless you’ve got this commercial triggering and it doesn’t operate and we simply say that it’s a self-contained deeming provision designed to do away with those very questions.

O’REGAN J:

So what do you say the deemed income is here?

MR PEARSON:

It’s the market value of the land under subsection –

O’REGAN J:

Wasn’t it sold at a valuation?

MR PEARSON:

Yes and –

O’REGAN J:

So isn’t it sold at market value?

MR PEARSON:

Not, it’s not sold for market value because you don't have to pay it for five years.

GLAZEBROOK J:

But she was taxed on the market value.

O’REGAN J:

So what’s the –

GLAZEBROOK J:

She was taxed on the market value wasn't she?

O'REGAN J:

Well this says you're deemed to derive the market value but they actually did derive the market value. Just that then there was a delayed payment. That's a different transaction isn't it? That's just a side agreement as to how the amount is paid.

ELIAS CJ:

It's folded back in.

MR PEARSON:

Well they obviously accepted and we're not privy to exactly what happened but they obviously accepted it would be taxed at settlement in terms of the settlement date in this case.

ELIAS CJ:

Market value at settlement date.

MR PEARSON:

That's right but if they had said we'll defer settlement for five years then they wouldn't have to pay it on that reasoning for five year unless GC 1 operates and imposes the –

O'REGAN J:

Well I'm just trying to quantify, what is the difference between what they received and the market value in this case?

MR PEARSON:

Well they didn't receive it for five years but they were taxed on –

O'REGAN J:

I know that, but they received a document requiring the person to pay it.

MR PEARSON:

Yes.

WILLIAM YOUNG J:

Wouldn't it be the time value of a promise to pay this amount of money in five year's time?

GLAZEBROOK J:

But they were taxed on the market value so it was deemed to be sold at the very price it was sold at.

O'REGAN J:

That's my concern. It just doesn't seem to me this section's engaged here.

MR PEARSON:

Well if that is the case, let's assume it's a five year –

ELIAS CJ:

That's what I'm trying to say it is.

MR PEARSON:

– deferral of settlement.

GLAZEBROOK J:

No he is trying to say that is triggered by GC 1 -

MR PEARSON:

Well I am –

GLAZEBROOK J:

– rather than, but in fact the liability was the market value it was sold at.

MR PEARSON:

Yes. And the timing. It wasn't disputed with Inland Revenue that –

GLAZEBROOK J:

Well it couldn't be disputed with Inland Revenue that they had to pay at settlement because they settled.

MR PEARSON:

Well –

GLAZEBROOK J:

So you couldn't say, "Oh, no, we weren't settling for five years," when clearly they did settle.

MR PEARSON:

Well I'm –

GLAZEBROOK J:

And actually it's not terribly useful for you if you –

WILLIAM YOUNG J:

Can I just ask something? Is it really the case, and you've probably covered this, that a promise to pay $2 million in five years' time is treated as $2 million?

MR PEARSON:

Under GC 1 it is. But if you attempted to sell that promise to pay you have in fact settled for something that's worth considerably less than the market value and I would say that you have -

WILLIAM YOUNG J:

Sorry, what, so just, I mean there's no doubt a simple answer to this but why don't you look at the sale and say well the consideration in substance is the present value of 1.95 million in five years' time?

MR PEARSON:

Yes. That's exactly what I am saying.

WILLIAM YOUNG J:

Okay. Well I understand that.

MR PEARSON:

Yes, because if you tried to sell that promise to pay in five years' time it's not worth the face value, obviously.

WILLIAM YOUNG J:

Can it make a difference that that consideration is in a – that that five year deferral is in the deed of acknowledgement of debt rather than in the actual agreement for sale and purchase of the link documents?

MR PEARSON:

That's not actually the case, Sir.

WILLIAM YOUNG J:

It's in the agreement for sale and purchase?

MR PEARSON:

It's in both. And it's clause 15 and 16 of the further terms.

ELIAS CJ:

Where do we find that?

GLAZEBROOK J:

But it has to make a difference whether it's on settlement or otherwise because you will often have sales that are made – I mean, all you have to do is to go to Noel Leeming and they're always having interest-free loans that are given on purchases.

MR PEARSON:

Yes, but then you have to – Noel Leeming have to account –

GLAZEBROOK J:

Well, no, they have to account for the full purchase price of the trading stock when it's handed over. That's what the rule says.

MR PEARSON:

Well, they account for what they sell it for.

GLAZEBROOK J:

Well, which is the market value and the fact that they've got a loan on non-market value terms or effectively a discount of the purchase price doesn't allow them to come along and say, "Oh, well, actually, we sold it for less. Please only tax me on less." They'd really get short shrift from the Commissioner on that one.

MR PEARSON:

Well, if they build that into the contract and they'll exchange it for a promissory note that is worth only that much …

GLAZEBROOK J:

Well, economically you might be right. It's not the way the tax system works.

MR PEARSON:

Well, the …

GLAZEBROOK J:

And there are rules in respect of non-market loans, I think, between related parties anyway, aren't there? So why wouldn't it be dealt with under that?

MR PEARSON:

Yes, certainly. Well, there are financial arrangement rules, obviously, that are engaged where there's a deferral of time but if you're looking at the transaction where someone –

GLAZEBROOK J:

I mean, I don't know the answer to that but if non-market loan arrangements are dealt with somewhere else, why would they be dealt with under care?

MR PEARSON:

Well, in relation to – my position under GC 1(1)(b) the test is the amount of consideration that is less than the market value of the trading stock at the time of disposal. So I would say it's the value of the consideration that is received. Now, if you receive a promissory note for less than the market value of the property then it's engaged.

O'REGAN J:

It says the amount of the consideration, not the value of the consideration.

MR PEARSON:

Well, I respectfully say that if that distinction is drawn then the provision is going to be significantly undermined.

WILLIAM YOUNG J:

Well, it's sort of a – on the face of it, it would be a great opportunity for avoidance.

GLAZEBROOK J:

Well, then that would be dealt with under the avoidance rules but I have a feeling that – perhaps somebody can answer this in terms of the non-market loan transactions. You obviously can't but somebody else might be able to.

WILLIAM YOUNG J:

Is there an authority whether you look at it in two stages? Sale for considerations stipulated, second, unrelated transaction. That consideration is treated – it only has to be paid in five years' time.

MR PEARSON:

Well, that was in the original agreement, the whole thing contemplated.

WILLIAM YOUNG J:

But is there any – we're talking about it but is there some discussion about this somewhere in the cases where you look at it in economic terms or whether you slice and dice it and say, "Well, there are two things here. One, there's a good sale for full consideration and secondly there's a generous deed that releases or defers to the liability to pay that money.

MR PEARSON:

There's very little authority on section GC 1 and as far as I'm aware none of the authorities are –

GLAZEBROOK J:

Well, it wouldn't do because your argument would actually mean that you wouldn't be receiving market value but you're always deemed to receive market value and if you're selling at market value, which they did here, you're just taxed on it anyway. Lines between related companies.

MR PEARSON:

You know I certainly accept that, that that is the point that you are taxed on the market value but my, what I am questioning is whether the point in time when you are taxed can be deferred by deferring settlement for a number of years and, because it isn't just a situation where you have a loan. It's also the situation where you simply defer settlement and you can gain all the advantages and it would seem that that would be unlikely to be tax avoidance because if you don't settle for a number of years but nonetheless you've effectively altered the incidence of tax because the vendor with the tax liability can put off paying the tax, pay it at a later date and the recipient may well be one who doesn't hold it on a basis that requires them to account for tax. So while there may be nuances around this particular case in relation to a deed or not but the deed was delivered on the 14th outside the limitation period, so that was all that was going to be delivered. So on the 14th the agreement that contemplates the deed is executed. The deed is delivered on that date and it doesn't have to be paid for five years, so everything happened on the 14th which is outside the limitation period. So it would seem that the analysis of swapping it for the loan under the deed equally puts the completion of the transaction outside the limitation period.

O'REGAN J:

Do we know she was taxed under this provision?

MR PEARSON:

We do know that she was taxed under CB 14, yes. We don't know –

O'REGAN J:

Not GC 1?

MR PEARSON:

– we don't know whether anyone turned their mind to GC 1 or not. It's, the –

O'REGAN J:

Shouldn't we just concentrate on the facts of this case?

MR PEARSON:

Well the facts of this case are that it was taxed in the tax year commencing 1 April 2008 and ending 31 March 2009 and that's all that needs to be determined for the purposes of the taxation.

O'REGAN J:

Well if the Commissioner didn't think GC 1 was engaged though -

WILLIAM YOUNG J:

Well was it disputed that it hadn't been derived?

MR PEARSON:

It was never an issue. It wasn't an issue at all. It's only relevant now because of the question that has been raised because the respondents say that while there was an unconditional contract, while there was a disposition, they accept all that occurred outside the limitation period. They say that the process is incomplete until derivation occurs and derivation, the significance for tax is only to put it into a particular tax year.

WILLIAM YOUNG J:

Well there's no issue because presumably it's in the same tax year whenever it's derived.

MR PEARSON:

Yes.

WILLIAM YOUNG J:

Because the dates are only between the 14th of August, 14th of April and the 2nd of May.

MR PEARSON:

That's right. There was never an argument with Inland Revenue over it. So it's only responsive to the argument that the disposition wasn't enough to trigger the consequences. Our primary argument of course was to say that *Thom v Davys Burton* applies and that cascade of consequences isn't important. It was enough to have the flawed asset and that was -

ELIAS CJ:

Well your case is that it's exposure to tax through the form of ownership that is the loss and the rest is quantification and when the Commissioner chooses to treat the income as derived and to assess tax is irrelevant.

MR PEARSON:

That's right, yes. But we do say that regardless this provision makes that inevitable. But it's responsive to the respondents and –

ELIAS CJ:

Yes I understand.

O'REGAN J:

Was the argument you're making now run in the lower Courts?

MR PEARSON:
Yes. You'll see a reference to it in the Court of Appeal's judgment, GC 1 is, but we've simply taken the position it's a deeming provision, it's self-contained, it doesn't need to have something else to trigger it. The argument about it being triggered by evaluation of when income would have been derived from ordinary principles wasn't an issue in the lower Court so we're really responding to that point which is new in this Court.

Now, we really just have those two issues. One is *Thom v Davys Burton* and the other is responsive to the argument. Those issues are clearly before you and it probably makes sense for Mr Scragg to deal with the issues relating to *Thom v Davys Burton*, which is our primary issue.

GLAZEBROOK J:
You might want to look at GB 21 while you're doing that, because that is the avoidance rule in relation to financial arrangements. But in any event, it's probably not worth you doing it now.

MR PEARSON:
Right, okay, sure. GB 21. We'll do that.

GLAZEBROOK J:
It's just to address your argument there's a hole, because there doesn't seem to me to be one.

MR PEARSON:
Right, thank you.

ELIAS CJ:
Yes, Mr Scragg.

MR SCRAGG:
May it please the Court, it falls to me to deal with the limitation issues in terms of this Court's decision in *Thom v Davys Burton*. In terms of our written

submissions, I pick up the mantle at paragraph 70 and through to the balance to the end of the submissions. In this case, the relevant principles of limitation and the question of when a cause of action of negligence arises are well settled and not in contention. They're set out at paragraph 70 of the written submissions that first a claim in tort must be brought within six years of the date on which the cause of action accrued and a negligence cause of action accrues from the date on which the plaintiff first sustains a loss.

The leading authority in this jurisdiction on those issues in the context of a claim of negligence against a professional is, of course, the decision of this Court in *Thom v Davys Burton*. The unanimous decision of the Court where the Chief Justice Your Honour observed that a cause of action in negligence arises not on breach but when the plaintiff first sustains loss attributable to the breach.

Justice Wilson giving the decision for himself as well as Justices Tipping and McGrath said that cause of action and negligence –

ELIAS CJ:
Sorry, on its own, though, that's probably misleading because you might have different losses and therefore different causes of action flowing from the same breach, might you not?

MR SCRAGG:
Yes you might, but for our purposes we would say that the cause of action and negligence was would start to run at the time when loss attributable to the breach first occurs, or the first loss occurs.

ELIAS CJ:
Yes, but there may be different losses.

MR SCRAGG:

Yes, and in my submission that would go to then the question of quantification, which may come later and, indeed, may be subject to contingencies.

ELIAS CJ:

Well, I think there might be entirely separate losses as well, but anyway that’s not this case because here the advice alleged – still to be demonstrated – was that there was, that there would be no exposure to tax by taking this route.

MR SCRAGG:

That's correct. Yes. So the loss is an issue in this case. We say there are two or, depending how you classify it, potentially three of them, that’s the first, the tax loss, which was unintended.

ELIAS CJ:

Yes.

MR SCRAGG:

The second being the classic loss in a negligent misstatement case against a professional which is the cost of putting it right, seeing whether the position can be remedied, and then depending how you divide it, potentially, also, the wasted costs that the person has incurred in relying on the advice and I’ll deal with each of those in turn.

ELIAS CJ:

All right, that’s fine.

MR SCRAGG:

So Justice Wilson I set out at paragraph 71.2 in terms of his formulation of when loss arises. In cases such as this of purely financial loss, a cause of action can have accrued even though the loss is not crystallised or there’s been no out-of-pocket expenditure. The general measure of loss in these cases is the cost of putting the plaintiff in the position he would have been in had the defendant fulfilled his duty. What, in my submission, these principles highlight is that it's a question of fact in each case as to whether damage has occurred. That was emphasised by Your Honour the Chief Justice in *Thom* but also by Lord Nicholls in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 when it was said that the moment at which the comparison first reveals a loss will depend on the facts of each case. Such difficulties as there may be are evidential and practical difficulties, not difficulties in principle.

Stepping back from the written submissions, what in my submission the decisions of the Courts on limitation issues reveal is that the emphasis and the focus for the Court in determining whether or not time has started to run and a cause of action accrued is that there needs to be the establishment of an immediate loss, not a contingent one. And so if you've only got contingent loss, you don't have a cause of action. You need to have an immediate loss.

Now, the immediate loss, though, doesn't have to be capable of full quantification. That's often not possible and, indeed, in these cases of reliance on professional advice it's very often the case that the full extent of loss won't become directly known for some time and may itself depend on a number of contingencies, as indeed it did in *Thom* where it wasn't known at the time that the cause of action accrued what was going to happen in terms of the relationship, whether there'd be a claim, and so forth. But nevertheless, the Court still found that that time had started to run.

Now, in terms of *Thom* itself, the facts I am sure will be well-known to the Court. I summarise them very briefly in paragraphs 75 to 77. Relevantly at paragraph 78, I say that the Court determined ultimately the position which was that on execution of the void pre-nuptial agreement Mr Thom had an immediate claim for the costs of remedying the deficiencies in that agreement. That claim would have included the costs of obtaining legal advice on the options available to him. There are a number of possible courses open to him, all of which would have entailed cost, and that was the point at which loss arose and from which the cause of action was set to commence.

Now, I set out there the need as identified in that case for it to be established when a plaintiff is first financially worse off, which is language often employed, even if quantification is difficult and its measure on a particular case may ultimately depend on further contingencies.

There's then a number of cases from various jurisdictions that analyse what that means and when loss will first occur. What I say, though, at paragraph 82 is that ultimately in *Thom* the Court concluded that the plaintiff will have suffered loss when the plaintiff through the negligence of the defendant did not obtain the rights he should have obtained or had imposed on him liabilities or obligations that should not have been imposed. In my submission, that's an important part of the decision in *Thom* that is of relevance in this case, and that's because what the Court identified in that passage is that you can have two types of situation amounting to immediate financial loss. On the one hand, you can have cases where someone doesn't get what they thought they were going to get by entering into a transaction – that was Mr Thom's case because he got a void pre-nuptial agreement which he didn't expect – or by entering into a transaction you can have imposed upon you obligations or liabilities that you didn't want, and that's this case where an unwanted tax liability has –

ELIAS CJ:
Well, I'm not so sure that – I mean, it just depends how you want to characterise it but in that case it could have been conceptualised as he had been assured that the house would not come within the relationship property regime. In this case, it could be said that the advice was that the transaction structured in this way would not come within the tax regime. So in fact they could be conceptualised quite similarly.

MR SCRAGG:
Yes, yes that's right, and in my submission you can draw a line in one sense and indeed that's what my learned friend does with the no transaction/flawed

transaction analysis which I'm going to come to. Or you can say that they're really the same kinds of loss similarly described –

ELIAS CJ:

Well the no transaction flawed transaction analysis may be helpful where you come to quantify loss but I'm not sure that it's particularly helpful in characterising whether there is loss.

MR SCRAGG:

I agree.

GLAZEBROOK J:

Although in *Thom* he had to enter into a transaction if he wanted the result he got. In this case you didn't have to enter into a transaction, in fact you wouldn't have entered into a transaction if you weren't wishing, if you had known that it was going to have a tax liability.

MR SCRAGG:

Well that's, certainly that's the pleaded position for the respondents.

GLAZEBROOK J:

Well that has to be the case doesn't it because it's not a flawed transaction because there was no way if, there is no way that she could have avoided tax having acquired, I'm not sure why that, either having sold it within 10 years or having acquired it for the purpose of sale, whatever the, or being in the business of dealing in land whatever the right analysis is in this case.

MR SCRAGG:

Yes. I accept that as far as it goes Your Honour but there's also a suggestion in both the decisions of the High Court and the Court of Appeal and ultimately it will be a matter for trial that Ms Roose had other motivations other than simply avoiding tax with this transfer, most importantly being to avoid the incidence of a relationship property claim and so a need to divest herself of the asset so that it couldn't be available for such a claim. So it is very much as yet uncertain as to whether or not it was an option for Ms Roose to do that –

GLAZEBROOK J:

Well that's a causation issue though isn't it because if that was the case then the advice didn't cause -

MR SCRAGG:

Well quite but it's also responsive to your question as to whether, well as to whether did she need to enter into a transaction and my answer is it may well be she did need to enter into one.

ELIAS CJ:

But not necessarily this transaction.

MR SCRAGG:

No that's right.

ELIAS CJ:

That's the thing. But nevertheless, and even accepting that there is a difference between the positions here I'm still struggling to see that that sounds, the consequence is in anything other than quantification.

MR SCRAGG:

The difference between a flawed transaction and a no transaction?

ELIAS CJ:

Yes.

MR SCRAGG:

Yes, yes, I agree. Yes.

ELIAS CJ:

Well I mean tell me if there is any other but I can't see myself.

MR SCRAGG:

No. In my submission what the authorities are directed at identifying when is there first loss, when is there an immediate loss and you can have an immediate loss on entry into a transaction whether it's a flawed transaction or a no transaction case, and what the authorities have identified and Lord Hoffman perhaps most keenly put his finger on it in *Sefton* when he talked about it being no substitute for, drawing inference being no substitute for actually making an assessment on the facts as to when loss first occurred. So that's the critical inquiry and that's the case if it's a flawed transaction or a no transaction case. Now in my submission the way that the case has approached this question is that the distinction that the cases are trying to draw is not between a flawed transaction and a no transaction case. The distinction the Courts are trying to draw are between cases involving a contingent loss and case involving an immediate loss. And if you're in the immediate loss category you can then further potentially on one view define that or divide that to flawed transaction and no transaction cases, but in either case the answer as to when loss arises can be the same.

Now at paragraph 83 I say that at the time the plaintiff could immediately recover the cost of putting it right and that being classic loss in these cases. Now my learned friend suggests that in this case and the Court of Appeal also suggested that some form of loss that's more than minimal is required in order to start time to run. Now in the *Thom* decision of this Court there's no suggestion that the loss has to be more than minimal. The language used is that there has to be recoverable loss. Now of course in this Court it was suggested that the cost of obtaining legal advice on the options available to Mr Thom to address the situation were enough to amount to actionable loss and we say if you draw the parallel with this case that once the –

ELIAS CJ:

Do you have paragraph references to that?

MR SCRAGG:

Yes. You said that, Your Honour, at paragraph 26 of *Thom*.

ELIAS CJ:
Do the others say that?

MR SCRAGG:
I'll need to find the reference for you, but in saying that my recollection is that that reflected the Court's position. I'll find that for you in the break, Your Honour.

Now, in any event, and as I'm going to go on to discuss, the immediate costs of putting matters right in this case and, indeed, most cases of this type will always be more than something that's minimal.

I then at paragraph 84 and following identify three errors that we say occurred in the Court of Appeal's analysis of the position and I wish to deal with each of those in turn. The first was the Court of Appeal's finding that *Thom v Davys Burton* is a different kind of case from this case. My submission is that's not correct and that properly analysed in my submission there is no material distinction between the position in *Thom* and the position in the present case. Both cases involve the provision of professional advice and clients receiving less than what they were expecting. Mr Thom received negligent advice which led to a prenuptial agreement being void and Ms Roose claims to have received negligent advice which caused her to incur the unwanted tax liability.

Now, Justice Blanchard in *Thom* in a short concurring judgment described what Mr Thom had received as a damaged asset and in my submission it's the same here, that in both cases what Mr Thom received and what Ms Roose received was a damaged asset. In Mr Thom's case, the damaged asset is the void prenuptial agreement. In Ms Roose's case, it is an agreement for sale and purchase which exposes her to an unwanted tax liability. Both are damaged assets and in both situations the claim that's put forward is on the basis of the immediate consequences to the plaintiff of the defendant not having performed its duty and not having given correct advice.

GLAZEBROOK J:

What's the damaged asset that they received?

MR SCRAGG:

In this case?

GLAZEBROOK J:

Yes.

MR SCRAGG:

The damaged asset is the agreement which provides for a tax liability, thereby effectively reducing the value of the asset in the hands of the vendor.

ELIAS CJ:

I really wonder how – I know that there is reference to that in *Thom*, damaged asset, and I think that's picking up on – is that Hoffman or Nicholls?

MR SCRAGG:

It might be Lord Nicholls.

ELIAS CJ:

It's understandable that it was used there because that was about a guarantee or a debt security.

MR SCRAGG:

Yes.

ELIAS CJ:

Something like that, but just picking you up on that, again, this emphasis on the cost of putting things right, in 25 I say that he didn't obtain the benefit he should have secured and that is the exclusion of the provisions in the Matrimonial Property Act. That's the principal reason there. I'd have to go through and see what the others say.

GLAZEBROOK J:

No, I think that's very similar to what the others say but they used damaged assets as against a contingent loss because they received – well, immediate because it was a damaged asset when it was received. So it's the same thing.

ELIAS CJ:

I'm sure they do and Blanchard expresses agreement with mine, I think, but it was more the point that you said about the costs of remedying and getting advice because that's very much an add-on in 26. That was an additional loss that he had but the real loss is the one described in paragraph 25 of not securing the benefit of keeping it out of the relationship property regime just as here the benefit expected was not keeping – was not coming within the tax regime, I would have thought.

MR SCRAGG:

Yes, I would accept that Your Honour's classification that both cases have at their heart a primary loss, if you like, and it's the inability in Mr Thom's case of the agreement to be effective and here it's the tax, but the question for the Court is, well, what happens if you have another form of loss that happens immediately and the primary loss might not crystallise for some period do you still have a cause of action, and we would say yes, because that might be what you deal with in paragraph 26.

ELIAS CJ:

Well I'm not sure that I would say yes actually in terms of that loss so you might need to expand on that.

MR SCRAGG:

Yes, thank you.

ELLEN FRANCE J:

In that respect Mr Scragg there is some discussion about that at paragraph 49 in *Davys Burton* where in that passage about the damaged asset where they talk about the asset being the prenuptial agreement and that's the idea of in this way he doesn't get the full protection he sought and then they talk about that flaw represented actual damage and the damage being quantifiable either on a straightforward basis of what it would have cost the plaintiff to obtain or attempt to obtain a valid agreement. So that's the cost of putting it right isn't it?

MR SCRAGG:
Yes, that's right.

ELLEN FRANCE J:
Or the more difficult basis of the difference in value.

MR SCRAGG:
Yes, yes, thank you Your Honour and in our submission once you're into that territory of being able to bring a claim for the cost of putting it right you've suffered an actionable loss and time has started to run.

GLAZEBROOK J:
Well I'm not sure that's what it's saying. It says you received a damaged asset and it's quantifiable that way but the Chief Justice's point is that that's when you received the damaged asset and that's on the facts of *Thom* because if you, so that's where I think there is a distinction with the no transactions case because if you wouldn't have entered into the transaction then the question is this very difficult question of timing. It's when you first enter it whether it's unconditional or not or when you definitively have that tax liability –

MR SCRAGG:
Yes. And perhaps to focus –

GLAZEBROOK J:
– because as soon as you entered into this you definitively did not have, in *Thom* you did not have the result that you wanted so definitively at that time

you didn't have the result. You might have been able to put it right but you definitively didn't have the result. The question here is whether you definitively had the tax liability at the time you entered into the agreement or at a later stage.

MR SCRAGG:
And in my submission the answer would be yes that you did definitively have the loss at the time you entered into the agreement, for two reasons. First it's Mr Pearson's argument about GC 1 that if at the moment of disposal, which everyone in this case agrees happened on the 14th of April when the parties entered into the unconditional contract, if at that moment GC 1 applies to mean that derivation's also occurred then the taxes come home and you've got that loss occurring at that moment. But even if that's not the case then in my submission because it's an unconditional contract as at the 14th of April the parties are committed to it and the process has started and it's not open to the vendor just to stop.

ELIAS CJ:
Well they're not immune from, she's not immune from tax -

MR SCRAGG:
No.

ELIAS CJ:
– as she expected to be and whether it gets assessed later on it is exactly like it seems to me the *Thom* case because whether it actually bit in those circumstances was down the track but she did not, he did not get immunity of that asset from the application of the Relationship Property Act.

MR SCRAGG:
Yes, and wouldn't it then be the same here that at that moment if Ms Roose is exposed to the tax liability which may or may not also happen at that moment, may come later, she's still incurred a loss.

ELIAS CJ:

Well that's the argument.

MR SCRAGG:

Yes, and that is our position, and on that basis we say time starts to run from that point.

O'REGAN J:

So are you relying on this loss that arises from the need to get legal advice about how to fix it? Are you - is that a head of loss you're relying on?

MR SCRAGG:

It is a head of loss. It's not the only one. We would say there are three Sir. First the tax. Secondly the cost of putting it right, the classic negligent misstatement loss and then depending how you categorise it potentially thirdly the wasted costs that Ms Roose has sunk into the transaction to get to this point. And I'll elaborate a little bit on what that is shortly. But in terms of my written submissions the next subject I deal with is the question of a no transaction and a flawed transaction distinction. I set out at paragraph 88 what that distinction is said to be. The first point to note is that the distinction itself up until now has not formed part of the law in this country, or at least it hasn't been described in those terms in New Zealand previously.

ELIAS CJ:

In which cases is it used for this limitation point, that distinction?

MR SCRAGG:

Well it is used, if you look at paragraph 89 Your Honour I set out a number of cases which refer to the distinction.

ELIAS CJ:

I know they refer to the distinction, but how are they applying it?

MR SCRAGG:

Well they are applying it in a variety of ways. *Maharaj v Johnson* [2015] UKPC 28, [2015] PNLR 27 being the most recent application of it and in my submission actually, ultimately, it is applied in a way which does not have any ultimate bearing on the critical question and that is my fundamental submission about the transaction and no transaction distinction which is that it does not help. It doesn't answer the question.

ELIAS CJ:

Well I am just trying to remember which of those cases, if any, does use it in considering this question of when the loss arises?

MR SCRAGG:

Well what the Privy Council in *Maharaj* identified is that the distinction can serve as a helpful pointer to the question of when does loss arise because the reference is to there being a different inquiry as to the type of loss that you have in a flawed transaction case and a no transaction case. But as we see in the application of the cases, and I deal with this later at paragraph 91 where I look at four very different cases very briefly, some of which have been characterised as a flawed transaction case and some of which have been characterised as a no-transaction case, but in all those cases in fact the Court found that loss arose immediately or virtually immediately on entry into the questionable transaction.

ELIAS CJ:

You probably need to take us to *Maharaj* because it is your best case and it purports to re-calibrate some of the earlier cases that do not make this distinction.

ELLEN FRANCE J:

Yes I was going to ask about *Maharaj* because the issue there does seem to be limitation and when time runs so I was interested in how it is you say that that does not, that distinction does not really help me in terms of the Court's reasoning.

MR SCRAGG:

In *Maharaj*, perhaps if we go to that decision, it is found at tab 17 in volume 2 of the bundle of authorities. It is a decision of the Privy Council on appeal from Trinidad and Tobago and it is a limitation case and of course it is a very stark limitation case because the difference between the parties there was over a matter of some 20 years as to when time started to run; the essence of the case being that what had happened was that the claimant solicitors had attended to a conveyance of a property but had done so negligently such that the conveyance was ineffective in transferring legal title. It only transferred beneficial title and that mistake was not discovered for something approaching 20 years and at that point, steps were taken to remedy the position and indeed the position was remedied. The original vendor from all those years ago was found and the position was put right. But the question was, in that case, well when did time start to run. Was it at the time the transaction was entered into 20 years ago or was it at some later point when people realised there was a problem and ultimately the Court found that it was, at that early point of entry into the transaction and the case itself has been described or Their Lordships in the Privy Council described the case as a flawed transaction case rather than a no-transaction case.

And probably for a helpful discussion of that part of the law, one could look at paragraph 19 of Their Lordships' decision and it is from the judgment of Lord Wilson and following from paragraph 19 where he talks about the decision of the Court of Appeal, the English and Welsh Court of Appeal in *Pegasus Management Holdings SCA v Ernest and Young* [2010] EWCA Civ 181, [2010] 3 All ER 297 and then *Axa Insurance Ltd v Akther and Darby* [2009] EWCA Civ 1166, [2010] 1 WLR 1662 and so forth and there's discussion about the distinction and if you look at paragraph 19 as it appears on page 8, so it is the second part of the paragraph, the top half of page 8. If you look half-way through the paragraph, line 9 I think it is, Lord Wilson says, "The difference in concept dictates a difference in the inquiry as to whether and if so when the claimant suffered actual or measurable damage." In the flawed transaction case, the inquiry is whether the value to the claimant of the flawed transaction was measurably less than what would have been the value to him of the flawless transaction. If the no-transaction case, the inquiry is whether and if so at what point the transaction into which the claimant entered caused his financial position to be measurably worse than if he had not entered into it.

So that scene is the classic juxtaposition of the two types of case and the different inquiry as to loss. But relevantly and for my purposes what I say about that is that in either situation – flawed transaction or no transaction – the inquiry is still fundamentally the same, which is when did, in fact, the party receive, when was the party, in fact, measurably worse off? And in my submission, in flawed transaction cases and in no transaction cases that can be at the same point in time. It can be when the parties enter into the agreement, as is the case, in my submission here. That's because here on entry into the unconditional agreement Ms Roose is committed to a transaction which is going to mean she has to pay tax, which she didn't intend to pay.

Now, in my submissions I develop a range of arguments as to why we say that the flawed transaction/no transaction distinction is of limited utility and its usefulness should not be overstated. At paragraph 90.1 I have the first of those reasons, which is to say that that distinction can represent a helpful signpost to the relevant principles but it's not an end in and of itself to determine when loss arises.

ELIAS CJ:
Sorry, I'm just thinking about the market collapse cases and things like that.

MR SCRAGG:
Like *Nykredit*, which is often regarded as the classic no transaction case.

GLAZEBROOK J:
And proved, effectively, here in *Maharaj*.

MR SCRAGG:

Well, it's seen to be of that different character, yes, described in that different way as a no transaction case, yes.

ELIAS CJ:

But the transaction in *Maharaj* was that they didn't have the property, did they, because the – was it the wrong person had or nobody had signed the transfer or something.

MR SCRAGG:

It was a personal representative had signed the transfer and it needed to be the actual owner and that's why it was deficient.

ELIAS CJ:

Well, it was no transaction in a different sort of sense.

MR SCRAGG:

I see the point, and indeed that's one of the factors I raise.

GLAZEBROOK J:

No transaction is you would not have entered into the transaction but for that. The flawed one is you would have entered into the transaction but you would have entered into a valid transaction.

ELIAS CJ:

Yes, but in *Maharaj* the damage was at the time of the transaction.

MR SCRAGG:

Yes.

GLAZEBROOK J:

Well, they say a flawed transaction is which, in the absence of the defendant's breach of duty he would have entered into an analogous but flawless transaction. So he would have entered into one where the person signed themselves, not the personal representative.

MR SCRAGG:
And you'll see that, Your Honour, Their Lordships conclusion is in paragraph 27 of the decision where Lord Wilson says that in respectful agreement with the brief judgment of the Court of Appeal the Board concludes the claimant suffered actual damage upon their execution of the deed on 6 February 1986. But Your Honour the Chief Justice makes another good point which I deal with at paragraph 90.5 of my submissions, which is that one of the difficulties, we say, with the flawed transaction/no transaction distinction is that it is often quite possible to re-describe the situation so that it's either one or the other. And so in my submission that shows the lack of utility that the distinction provides.

Now, interestingly, of course, the distinction has itself had some criticism. That's referenced here in *Maharaj* as well, and you'll see at the start of page 8 – that's paragraph 19 again – there's reference to the decision of Lord Justice Lloyd from the *Axa* case where Lord Justice Lloyd describes that the focus on the distinction might be seen as an unhelpful distraction and we agree that it is an unhelpful distraction, that over-rigid classification of cases in this area doesn't help answer the essential question.

Now, interestingly, as well, and it's not in my written submissions, but the decision of the majority in the *Axa* case is also relevant on this point and I'll just give you a reference, if I might, to the decision of Lord Justice Longmore in *Axa*. It's in the bundle, volume 2 at tab 20. I'm sorry, that's not the right. I'll just find that. Sorry, it's tab 8 in volume 1. It's paragraph 73 of Lord Justice Longmore's decision which I shall find the page. In the reported decision it's page 1688 and I just draw Your Honours' attention to that paragraph. I might just read it, it's only brief. Lord Justice Longmore says at 73, "It's not however possible to say that the entering into of a flawed transaction constitutes damage when it's in one category of case but not when it's in another. The fact that the flawed transaction has been entered into will usually be damage from the claimant's point of view. The fact that the recipient of the advice might have hoped for a better transaction," that's Mr Thom's case, "or might have hoped to avoid any transaction," that's this case, "makes no difference to the fact that he has entered into a flawed transaction which he would not have done if he had been competently advised. If such a flawed transaction has come into existence that would in my view usually be the damage which the recipient of the advice has suffered and that is more than the existence of a mere contingent liability." So that's significant in my submission because that is the Court of Appeal of England and Wales identifying that both cases where you get something that you didn't want and cases where you don't get what you did want are effectively one, can be one in the same in terms of when loss first occurs.

GLAZEBROOK J:
Well I'm not sure because they refer to no transaction in 74 so I don't think you can read 73 as saying there isn't a distinction.

MR SCRAGG:
Well in my submission just from the way that Lord Justice Longmore has expressed himself he's indicating that both those types of case can give rise to a loss at the same moment on entry into the transaction.

GLAZEBROOK J:
Well they maybe can but it's whether they do might be another question.

MR SCRAGG:
Yes and that's what in –

ELIAS CJ:
So your point is it's just a question of fact when the loss arises –

MR SCRAGG:
It is.

ELIAS CJ:

– and that these characterisations and classifications really don't advance matters.

MR SCRAGG:

That's exactly my point.

GLAZEBROOK J:

Well they've, I mean there's very high authority to say that they -

ELIAS CJ:

Not really.

GLAZEBROOK J:

– can do. No, no, sorry not that they necessarily do but they can do.

ELIAS CJ:

Well they may but your point is that this case is one where the damage occurred at the same time.

MR SCRAGG:

Yes that's right, it is.

ELIAS CJ:

On the facts.

MR SCRAGG:

On the facts. That's right. I continue in paragraphs 90.3, 90.4 and 90.5 to identify some other concerns about that but I think from my last exchange with Your Honour the Chief Justice our position on the utility of this distinction is evident and clear so I won't –

ELIAS CJ:

Well you shouldn't think that my view might represent all –

GLAZEBROOK J:

Well no, we understand what you're saying –

MR SCRAGG:

You understand my position, yes.

GLAZEBROOK J:

There's no doubt that you've made yourself very clear so – and it may be that it might help the analysis but come to the same result, ie, it's when you enter into the transaction you would not have entered into -

MR SCRAGG:

Yes.

GLAZEBROOK J:

– that it actually is the same point, the entry into the transaction. That's a subsidiary point that you're making.

MR SCRAGG:

That's right, yes, yes that is a subsidiary point.

GLAZEBROOK J:

So even if you have that analysis your point is that the loss arises as soon as you enter into the transaction that you would not have entered into but for the negligent advice.

MR SCRAGG:

Yes.

ELLEN FRANCE J:

The passage from Todd that you've included in the bundle suggests that the flawed transaction no transaction cases may be a helpful signpost –

MR SCRAGG:

Yes.

ELLEN FRANCE J:

– towards the correct outcome. Do you accept that that much?

ELIAS CJ:

That's just a quote isn't it?

MR SCRAGG:

That's a quote from *Maharaj*.

ELLEN FRANCE J:

Well it's not given, it's referring to *Maharaj -*

MR SCRAGG:

Yes.

ELLEN FRANCE J:

– but that passage is not in fact in quotes but –

MR SCRAGG:

No –

ELLEN FRANCE J:

– but derived.

MR SCRAGG:

That language comes from there.

ELLEN FRANCE J:

So where is Todd in there?

MR SCRAGG:

It's, I can give you the reference in, it's volume 2, tab 29.

ELLEN FRANCE J:

Thanks.

GLAZEBROOK J:

But your main point is that it arises at the same point when you enter into the transaction that you would not have entered into but for the negligent advice?

MR SCRAGG:

In this case, yes, that is my submission.

GLAZEBROOK J:

And that’s when the loss arises?

MR SCRAGG:

Yes. That's right.

GLAZEBROOK J:

Because at that stage, at the least you’d have the costs of unwinding it so – or making it non-flawed or whatever it might be.

MR SCRAGG:

Or just actually understanding with advice what your options are. Can I get out? Do I have to continue with the transaction? Otherwise I can restructure it.

GLAZEBROOK J:

Well, if you have to continue then I suppose you have definitively incurred loss.

MR SCRAGG:

That's right. Yes.

GLAZEBROOK J:

Of some sort, even if it is the cost of getting out of the transaction.

MR SCRAGG:

And in my submission, even if it was only that, that would be sufficient.

GLAZEBROOK J:

Yes, because at that stage you have incurred loss, is your argument.

MR SCRAGG:

Yes. That's right. One way to test exactly that proposition, Your Honour, is one can ask the question rhetorically, what's the earliest point in time Ms Roose could have sought advice on her situation? In my submission, the answer to that is exactly the same point in time that Mr Thom could have done so, i.e. in both cases on them entering into the agreements, and I make that point at paragraph 96.

I'm sorry, Your Honour, just to return to your point, the helpful signpost references on page 1371, let me just refer to that again, tab 29 in volume 2.

ELLEN FRANCE J:

Yes, yes.

MR SCRAGG:

I would accept that there may be cases where it is a helpful signpost, but it's ultimately not the critical question.

Now, returning to my written submissions, I referred earlier to paragraph 91 so I won't return to that. That was where I set out how in fact when you look at the situations in *Thom*, *Maharaj*, and *Nykredit*, which are variously described as no transaction and flawed transaction cases, that in fact in all those cases what was actually found was that loss arose on entry into the relevant transaction, so irrespective of that classification the critical question was undertake the factual inquiry, when does loss occur, and it was the same point in each of those cases.

At paragraph 92, I simply state that effectively until now *Thom v Davys Burton* has been regarded as the leading authority in this jurisdiction on this question and it's a case that's been applied without ambiguity and without previously needing to raise the no-transaction/flawed transaction dichotomy. In my submission, there is perhaps from a policy point of view an attraction to that and that is that the position in *Thom v Davys Burton* gives of a clear answer as to the question that one's engaged in and in my respectful submission there is a danger with the flawed transaction/no transaction distinction that it can become a source of distraction and confusion.

Now, I then turn to deal with what was the relevant loss in this case at paragraph 93? I've indicated in the submissions there are two types of loss and that's perhaps now developed into three. First, the costs of remedying the transaction or putting it right. Now, we've already looked at the reference in *Thom* to where Your Honour the Chief Justice's comments about that were found but also Justice Wilson, and you asked me for that reference before, Your Honour, and I think this might now be the answer to that. Justice Wilson in paragraph 47. This is tab 24 in volume 2 is the *Thom* decision and Justice Wilson's decision from paragraph 47 where he's giving the answer. The Judge says towards the end of paragraph 47 in the last three lines, "If Mr Thom had discovered the problem in, say, 1993, he would have incurred legal costs in obtaining a valid agreement if, indeed, his new wife would have co-operated." So that's one reference. And then in the second, following paragraph, at paragraph 48. Sorry 49 –

ELIAS CJ:
There was the further complication in that case wasn't there, that they later made it the matrimonial home?

MR SCRAGG:
That's right.

ELIAS CJ:
So if he had known that.

MR SCRAGG:
And indeed that was one of the points –

ELIAS CJ:

He might not have, I suppose.

MR SCRAGG:

– well that was one of the points of contest in *Thom* as I understand the case, the primary position advanced was that loss for Mr Thom arose when he entered into the agreement which is what we are arguing the position is for Ms Roose but the subsidiary argument, or the secondary alternative argument made for Mr Thom was if it was not at that point, it was when they moved into the house which was three years later. And then Wilson J, paragraph 49, half-way through the paragraph the Judge says, it is line 15, "The product which he instructed his solicitors to procure for him was created with an inherent flaw. That flaw represented actual damage or harm which was suffered by the plaintiff from the moment the defective prenuptial agreement came into existence. The damage was quantifiable on that stage, either on the straightforward basis of what it would have cost the plaintiff to obtain or attempt to obtain a valid agreement or on the more difficult basis of the difference in value." And that is the passage Your Honour that Justice France took me to earlier. So in my submission, both the Chief Justice and the decision for the three members of the Court, both identify that the costs of obtaining legal advice on options that are available, or the costs of trying to put it right can amount to actionable loss. The second category – and I am going to come to that.

O'REGAN J:

Just before you move on from that. The point that the Court of Appeal took issue on there was that in this case because the parties were not at arm's length, unwinding the transaction, was a simple matter of just basically ripping it up. What is your response to that?

MR SCRAGG:

My submission to that is we do not accept what the Court of Appeal says about that. That this was not a simple case of being able to do that for a number of reasons. The first Sir is that we say that given the situation confronting Ms Roose and the potential or we would say the inevitability but my learned friend would say the potential for tax consequences to follow, this was a case where Ms Roose really would be taking a very great risk if she simply tore up the agreement rather than sought advice on what her position was and that is the case here where everyone accepts that under the income tax provisions, a disposal has occurred on 14 April so she is then finding herself in a position where the tax process has begun and in our submission she would need to incur advice or would be well advised to take advice on what her options were. That would be one reason why it is not as simple writing "Cancelled" on the agreement. But secondary that there were other matters that were relevant for Ms Roose in this situation. One which I raised before was the question of, in fact, whether she did need to enter into some form of transaction because of her concern about relationship property claims and so she may need to consider alternative options that might assist her in that regard and then in addition to that the record shows that there are actually two sale transactions that happened at the same time in this case. Everyone is focussed on the first of them but the second one which happened at the same time and all the paper work was signed up for that on 14 April as well, was to then give effect to a boundary adjustment and to sort of hive off part of the land. So that agreement was also in place. So for Ms Roose, she would have to take advice of our submission, well if I drop the first agreement what happens to the second. Am I in a pickle from a tax point of view and am I actually going to achieve my ultimate aim if I just let the agreement go because I have got concern about relationship property claims. So in that situation we say that it was more complicated than the Court of Appeal perhaps suggested. So that's one head of loss.

The second one is the one which Mr Pearson has dealt with in terms of the adverse tax consequences and the third is the concept of wasted costs of entering into the transaction and I am grateful to my learned friend Mr Crossland for his reference to a case of *Green v Eadie* [2012] Ch 363 which is a decision from the Courts in England and Wales that recognises wasted costs as themselves, potentially actionable loss. And in this case there are a range of wasted costs that Ms Roose had incurred; I have identified at least six of them and they are. First the wasted costs of the appellant's allegedly negligent tax advice which had been obtained as early as early 2008. Then there were the costs that she would have incurred obtaining the valuation which formed the basis of the price for the property. Thirdly she went to the trouble of incorporating a particular company for the purposes of this transaction, to be the purchaser of the property then there was the establishment of a trust as well which needed to be attended to. The legal costs of drafting and entering into the principal agreement for sale and purchase, the one that is in contention and then the same costs attendant on entering into the second transaction. So if it was the position that Ms Roose would never have entered into one of these transactions, they are all wasted costs that she has incurred to get to this point and we would say that that is all actionable. I think I have just about finished but if convenient I would not mind having the adjournment just to confirm with Mr Pearson as to whether there is anything else we might usefully address the Court on.

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.48 AM

ELIAS CJ:
Yes, Mr Scragg.

MR SCRAGG:
Thank you, Your Honour. I will only be five minutes or so. Just to pick up on the last point of wasted costs of the transaction being potentially ahead of loss, I had talked about in this case what we say some of those wasted costs that Ms Roose would have sustained. Because it's not in the written submissions I just wanted to give you a reference to where in the pleaded case those matters can be found, and it's in the – and I don't need to take you to it but just a reference for your note, in the case on appeal volume 1 at tab 3 you'll find the amended statement of claim and at paragraph 39 of the amended statement of claim you'll see pleaded the various steps that Ms Roose took or some of the steps that she took in reliance upon the advice, and so that's the source for that.

Secondly, I refer to the decision that my learned friend Mr Crossland refers the Court to of *Green v Eadie*. That case appears in the respondents' additional authorities at tab 3, and I don't particularly propose to take you to that either, but again to give you the reference for your note, if you look at paragraph 56 of the decision in that case, admittedly just a decision of the Chancery division of first instance, there is an acknowledgement that the claimant would, if nothing else, have the wasted cost of the transaction which would be more than trivial.

GLAZEBROOK J:
Is that a limitation case? I'm sorry, I haven't looked at that one

MR SCRAGG:
Yes, it is a limitation case and in fact it's relevant because it's about whether or not time started to run when the agreement was unconditional or when it settled. This case is helpful to the appellants because it says that time starts to run at the point that the contract is entered into. Same result as in the other case that my learned friend refers to in his bundle at tab 1, *Byrne v Hall Pain & Foster (a firm)* [1999] 1 WLR 1849. That's a decision of the English and Welsh Court of Appeal where the same decision was found that loss occurred on entry into the contract, not on settlement of the contract. So I just wanted to give you those references. Unless Your Honours have any further questions, those are the principal submissions for the appellants.

ELIAS CJ:
No thank you Mr Scragg. Yes thank you Mr Crossland.

MR CROSSLAND:
Now what I have done is taking all of the submissions and tried to distil everything down to a one page document which I can either hand up now or at a later point.

ELIAS CJ:

Hand it up now, that would be helpful thank you.

MR CROSSLAND:

So I plan to speak to this document because I am assuming the Court has read my primary submissions and obviously in this type of situation, the mind gets focussed when one reflects on each other's submissions. If I can crystallise what I say the appellants must do to overturn the decision is to convince you that bare entry into this sale and purchase agreement on 14 April, immediately caused measurable loss to DDL. If this Court prefers the approach taken in *Maharaj* which the Court of Appeal adopted, over that in *Pegasus* and like cases, then the answer is no and the appeal should be declined and in that one page document, I have set out six points why I submit that we should reach that answer.

But before I do that, I just want to address the last point of my learned friend 's submission because he has introduced something new, something that was not put before the Court of Appeal. There is no particular criticism of that because people think of things later and he has identified some antecedent transaction costs. So he has talked about the actual cost of getting the advice, the costs of incorporating the advice, the costs of incorporating DMR, the trustee company, the costs associated with setting up the trust. There is no way that I can dispute that inevitably those types of costs would have been incurred. But as a matter of logic, if those type of antecedent costs are sufficient, then all of the analysis and navel gazing that occurs by appellate Courts in Australia, here and England would be of no moment because every case where a professional is sued, there will have been some antecedent costs. So the case that my friend cited from *Green v Eadie* and also *Byrne*, those were cases –

ELIAS CJ:

So this is the wasted cost damage?

MR CROSSLAND:

Yes, so in addition to what he had submitted in his written material, he added a third category so I am wanting to address that first because there is no denial that those costs wouldn't have been incurred and paid at some point but my response to that, well if that is so, then as a matter of logic, one would never need to go into this type of evaluation analysis because every professional negligent suit, would face that same road block. There were always costs incurred setting up the transaction. So to demonstrate that, if we go to *Mahara*j and this is a case that I submit is probably the most important to resolving this. And that is under tab 17 in volume 2. I am going to direct the Court's attention to paragraph 24 in *Maharaj.* If the Court can read that, then I will make a comment.

Now it is the last sentence in that paragraph that I base my submission upon. There the Court refers to the earlier decision of *Knapp v Ecclesiastical Insurance Group Plc* [1998] PNLR 172 noting that the Judge in that case had said, "It was possible to visualise other situations in which the fault could so easily be remedied that the damage would be no more than nominal." You wouldn't make that statement about whether remediality was with or without cost if you were trumped by the earlier situation of antecedent transaction costs. There would be no point in having that type of analysis.

WILLIAM YOUNG J:

What would the antecedent transaction costs have been in that?

MR CROSSLAND:

In *Knapp* that would have been paying the insurance brokers to arrange defective cover.

WILLIAM YOUNG J:

Yes I think the antecedent costs here are slightly different. They are costs of setting up the structure, perhaps the cost of obtaining the valuation.

MR CROSSLAND:

Yes I agree with that but in *Mahara*j for example there were the underlying conveyancing costs and yet those were not seen by the Privy Council as being relevant costs to start the clock running.

WILLIAM YOUNG J:

So that someone has charged a fee for the negligent advice does not trigger the time?

MR CROSSLAND:

Correct.

WILLIAM YOUNG J:

Well I do not have too much to do with that.

GLAZEBROOK J:

Well that would be quite odd would it not because you might as well not bother, if it starts running immediately.

MR CROSSLAND:

Well that’s right but I had to address that.

GLAZEBROOK J:

Oh yes I understand that but I can understand that in terms of the negligent advice but actually the conveyancing costs for the flawed transactions was another head of cost, even leaving aside the setting up costs of the company.

MR CROSSLAND:

Yes.

GLAZEBROOK J:

And the trust.

MR CROSSLAND:

I suppose it depends on, whether once you get to that point, do you start subdividing or turning your result depending on how many antecedent costs or what quality or category they were. I would have to say to you Your Honour, my friend introducing this new point, pointing to these new transaction costs, if you are with him on that, then the appeal succeeds. I have to be absolutely candid.

ELIAS CJ:

Sorry, where do you say? Is that in his written submissions.

MR CROSSLAND:

No it is not. It was pretty much his last point.

O'REGAN J:

He made it today, he made it in his oral submissions.

GLAZEBROOK J:

Is there a difference between the costs of setting up the flawed transaction itself? I take your antecedent but just concentrate just on the conveyancing costs that must have been incurred just in terms of the agreement and the registration et cetera.

MR CROSSLAND:

Well in my submission, all of those costs fall within the same category and they should not count as relevant costs that start the limitation clock going but if Your Honour disagrees with me, then I would accept that the appeal should be granted.

GLAZEBROOK J:

Well all that would mean probably is, a back-up to your friend's submission that its entry into the transaction that does it, because at the very least at that point there will be wasted costs and probably slightly more than nominal in most cases unless they do it all themselves.

MR CROSSLAND:

Absolutely. Realistically I am unaware of professionals that work for free in this type of situation so what I am saying is that my friend is setting up an argument that with respect is not realistic to the analysis that has gone on in these types of cases.

GLAZEBROOK J:

Well you are saying the loss really in this case is the tax liability that arises from the transaction, not the entry into the transaction and that those costs of setting it up should therefore not count for limitation.

MR CROSSLAND:

Correct.

GLAZEBROOK J:

Is that –

MR CROSSLAND:

But if you are not with me, then I accept that the –

O'REGAN J:

Are you claiming these costs? Is your client claiming these costs?

WILLIAM YOUNG J:

Some of them.

MR CROSSLAND:

I would need to check the statement of claim.

O'REGAN J:

Mr Scragg took us to – well he just referred us to 39 I think it was of the statement of claim.

MR SCRAGG:

Yes. I'll just check the prayer for relief.

O'REGAN J:

Yes. So he was just taking us to the breaches but not the –

GLAZEBROOK J:

What tab is it?

MR CROSSLAND:

That's tab 3 in the case on appeal volume 1.

GLAZEBROOK J:

Paragraph 39 he took us to.

O'REGAN J:

It might be different plaintiffs have different loses too.

MR CROSSLAND:

So if we look at paragraph 69 on page 21. The losses claimed relating to the tax consequence as opposed to the antecedent costs aren't sought. At 71 the cost that DMR incurred to get representation in dealing with IRD are claimed but those are obviously later in time. That's after the tax audit has begun. So in answer to Your Honour's question those antecedent set up costs are not sought as damages.

ELIAS CJ:

But in, if the, if you have a case where the transaction is the loss it's just a question of how you quantify the loss. In some cases if you claim as here the tax that has had to be paid that will obliterate a lot of the setting up things, but in some cases it may be that you would be simply seeking to recover your out of pocket expenses for negligently undertaking a transaction. I mean it's just quantification isn't it?

MR CROSSLAND:
That's possible. It's just that the way the case has been articulated to date the focus has been on the tax consequence –

ELIAS CJ:
Yes.

MR CROSSLAND:
– with a little bit said about the remediation costs to which the High Court agreed with my learned friends but the Court of Appeal disagreed. Now can I perhaps move to that second category that my friend referred to? That's the fixing up costs. Now in my respectful submission he's overstating the position. The pleaded position is that the plaintiff's only entered into this arrangement safe in the knowledge that there would not be income tax payable. Now what I want you to imagine is let us suppose that Mr Duthie on the 25th of April telephoned Ms Roose and says, "Look hold up Denise. I got it wrong. What I told you before was in error." Now she's not going to realistically run off to the District Court or the High Court and sue Mr Duthie in summary judgment. She'd be laughed out of Court. They'd be saying, "Look the remedy's in your own hands. You were on both sides of the transaction. All you need to do is not proceed."

Now the appellants filed some supplementary submissions in answer to the Attorney-General's submissions and he gave an example there that as at 30 April, and this is at paragraph 17.1 of his supplementary submissions, he gave as an example there that everything was done and the position was irrevocable. Now my understanding is that the fact that a transaction is lodged with LINZ that typically conveyancers in New Zealand will a few days or up to a couple of weeks have their instruments certified on the LINZ system and then on settlement they click a button to release it and the solicitor on the other side of the transaction does the same and that then gets what's called submitted to LINZ and then you have registration. Now I'm telling you this because the remedy is simply that once Ms Roose got that call from Mr Duthie in my hypothetical example, "Whoops, I've made, got it wrong. There will be tax payable." All she needed to do was to ring Mr Blackwood the lawyer and say, "The transaction's off. It turns out I'll have to pay income tax." Now all Mr Blackwood, Mr Blackwood had to do nothing. All he had to do was to refrain from pressing "release" on settlement date to allow the transaction to proceed and for title to be registered.

O'REGAN J:
Was this done at a time when the Landonline system was operating?

MR CROSSLAND:
I don't know but I'll find out the answer in the break. I have spoken to conveyancing people but I didn't ask that important question.

WILLIAM YOUNG J:
Just pause there. At paragraph 4 –

GLAZEBROOK J:
I think it's relatively recent that –

WILLIAM YOUNG J:
– that you say that on 30 April 2008. Is that a hypothesis or is that a statement of fact?

MR CROSSLAND:
Well it's not in the evidence but I'm, the inquiries I've made as to how the LINZ system works. I mean it would be the equivalent where in the, previously where there was a swapping of cheque for a transfer instrument. So Mr Duthie under the previous system where it was a physical settlement simply would not hand over the transfer and not receive the –

WILLIAM YOUNG J:
Just pause there. Look, I mean if all the documents were to hand by the 30th of April that would suggest that the transfer had been signed.

MR CROSSLAND:

That’s right. But it’s –

WILLIAM YOUNG J:

And wouldn’t that then be settlement?

MR CROSSLAND:

No.

WILLIAM YOUNG J:

I mean just go back a million years. Didn’t settlement happen in the solicitor’s office where the transfer is handed over and the money is handed back?

MR CROSSLAND:

That’s right, but that’s on settlement date. It wasn't for the lawyer to say, “Well actually I’m ready on the 30th of April. I may as well get on and do it.”

WILLIAM YOUNG J:

No. Pause there. Doesn't – isn't, just leaving aside that, isn’t that usually what is meant by settlement? When documents are exchanged for money?

MR CROSSLAND:

Correct.

WILLIAM YOUNG J:

And settlement isn't when the transfer’s registered?

O’REGAN J:

I think it is now under the Landonline system. I think it’s all contemporaneous.

ELIAS CJ:

Is that legislative? I just, I wondered about that because there’s also a rather odd submission that I didn't quite understand but I wondered whether it’s because my knowledge of the legislation is now out of date that ownership didn’t pass until the documents were registered.

MR CROSSLAND:

That's my understanding Your Honour, but I can perhaps assist -

ELIAS CJ:

Well under the old system it was simply that you didn't get an indefeasible title but has the legislation now changed to say that you don't get ownership? Legal ownership?

GLAZEBROOK J:

The legislation wouldn't have changed but practice would have changed in that it -

O'REGAN J:

Settlement's now always in the register because the register's a computerised register. Whereas in the past there was a huge delay between submitting documents and actually getting them registered.

ELIAS CJ:

No, no I understand that but I'm just wondering whether the legal effect has changed and that the register is now not simply conclusive evidence of ownership but is ownership. So you don't have ownership until there's –

O'REGAN J:

Well I think it's both –

ELIAS CJ:

Is it?

O'REGAN J:

– because it happens at the same time.

ELIAS CJ:

Okay. What's the legislation? I'll look it up.

MR CROSSLAND:

I can't assist Your Honour on that but it's a very good question. I'll –

GLAZEBROOK J:

I'm not sure they needed to change the legislation did they? They might have done in terms of what documents were accepted and who certified so they probably did change that.and how the certification worked.

MR CROSSLAND:

What I understand is this, that each solicitor on each side of the transaction has what, has e-dealings and has control of those e-dealings and the first step is to certify them so that they're sitting there ready and once each side is satisfied that settlement's appropriate to proceed each lawyer will push "release," there's a release button, and that then brings the transfer instrument and the mortgage all together in one place and LINZ then registers that to record settlement having been completed but what I can do is just to turn to the sale and purchase agreement for a moment because there is something that may assist examination of this question.

ELIAS CJ:

Is that in volume 1?

MR CROSSLAND:

That is in volume 1.

WILLIAM YOUNG J:

Volume 2 isn't it?

MR CROSSLAND:

Oh sorry, volume 2, tab 16. Now if we just go to the first page. You will note that the purchase price is $1.95 million and then plus GST. And if we go to the back of the agreements at page 174 and I am going to direct the Court's attention to clause 18 and half-way through that, the last sentence starting "The parties. The parties acknowledge that the within land is sold as a going concern and is zero-rated for GST purposes. Both parties are registered for GST purposes as at the date hereof." Now for this settlement to proceed so that it was zero rated, so that no one was actually handing GST or collecting GST, Mr Blackmore, the lawyer in question. I am sorry, Mr Duthie, had to register the Development Trust for GST. Now under tab 19 is the application for an IRD number which you need to have before you can register for GST and if you turn to the second page at 184, you will see there that the date that Mr Duthie has done this is on 1 May 2008 and then it appears that he has completed the next document, the GST registration and at page 186 again you will see the date is 1 May 2008. Now the reason for drawing that to your attention really is to respond to my friend's suggestion in his reply to the intervener, that somehow 30 April is a relevant date. Now I say that is not the case because under this agreement, for there to be a settlement occurring you needed to have both parties and particularly here the purchaser which was a new entity registered for GST, so without doing that you couldn't have had a zero-rated transaction with the consequence that settlement could not have proceeded.

WILLIAM YOUNG J:
I thought time of supply was an unconditional agreement for GST.

MR CROSSLAND:
I am sorry?

WILLIAM YOUNG J:
I may be wrong about this. I just thought that when it comes to the sale of land, the time of supply is when the agreement is unconditional.

MR CROSSLAND:
That may well be correct but the question, the relevant question here is in terms of where does loss first occur in. My submission is, it is when income is derived and income is derived when the earning process is complete. So that is why I have said in that first point, in my one page summary that it is not until 2 May when settlement occurs that the earning process is complete.

So whether there is a supply at a different date, I am not sure if that is so germane to –

WILLIAM YOUNG J:

No but these documents here are material to GST.

MR CROSSLAND:

Yes.

WILLIAM YOUNG J:

If the GST issue, I mean if GST considerations turn on time of supply, then this time has already occurred.

O'REGAN J:

The GST registration document, paragraph 13 says, "From what date do you want to register the GST." And the answer is "14." So maybe that confirms what you have just said.

ELIAS CJ:

Sorry, what document is that?

O'REGAN J:

The GST registration document page 186. It is dated 1 May but asked for registration to be backdated to 14 April, sorry not backdated but take effect from.

MR CROSSLAND:

But until you have a GST registered entity, until both parties to this transaction were in actual fact registered for GST, it couldn't be settled, because it couldn't be settled on an ongoing concern basis. So the point of drawing that to the Court's attention is that this is one of the steps that had to be completed for the earning process to finish before income was derived.

ELIAS CJ:
What reason would there have been for an earlier date of registration?

MR CROSSLAND:
I can only speculate that there were other expenses incurred pre-dating 1 May for which the applicant wanted to be able to recover.

GLAZEBROOK J:
But the reason he probably does not care because the earlier you registered, the earlier you start paying GST.

ELIAS CJ:
Yes.

GLAZEBROOK J:
And if you have not gone past dates.

WILLIAM YOUNG J:
But it is probably the date of the agreement, that is presumably the reason it is there. Not that I suspect it matters much because the agreement is dated 14 April isn’t it?

MR CROSSLAND:
Correct.

WILLIAM YOUNG J:
The reason I asked about settlement is at the point when this transfer had been signed, the vendor had done all that was required to complete settlement from the vendor’s point of view?

MR CROSSLAND:
Yes.

ELLEN FRANCE J:

Although there has to be a settlement statement doesn't there, in terms of the agreement for sale and purchase?

MR CROSSLAND:

Yes that is right.

WILLIAM YOUNG J:

So was there an apportionment of rates.

O'REGAN J:

There probably would have been, yes.

MR CROSSLAND:

Because the parties were related, I haven't seen such a document but I am speaking from the bar here.

WILLIAM YOUNG J:

What did the vendor have to do to complete, sign a transfer?

O'REGAN J:

Hand over.

WILLIAM YOUNG J:

Hand over a transfer?

O'REGAN J:

Yes.

MR CROSSLAND:

Yes.

WILLIAM YOUNG J:

So at that point, might it not be said that everything the vendor had to do, to earn the purchase price, had been done?

MR CROSSLAND:

Quite possibly but the consideration has not come home.

WILLIAM YOUNG J:

Consideration, on the face of the deed the money was payable from 21 April.

MR CROSSLAND:

No with respect that is not correct, Your Honour. The deed, the money –

WILLIAM YOUNG J:

Was payable from the date of settlement which was specified as 21 April.

MR CROSSLAND:

– but the settlement date was amended to 2 May.

WILLIAM YOUNG J:

We have never seen – I mean this is just a statement, we have never seen the file have we, the conveyancing file?

MR CROSSLAND:

Well it is not in evidence. What you have in evidence is the affidavit from Ms Roose saying that is what happened.

ELIAS CJ:

There was an indication that you were going to bring along a history, wasn't there. Didn't I read that? Or somebody was going to bring along a history.

O'REGAN J:

The historic search.

ELIAS CJ:

The historic search, sorry, of the register.

MR CROSSLAND:

I don't think that was me but we can organise that.

WILLIAM YOUNG J:

I think it has been done.

ELIAS CJ:

Perhaps you might show that.

GLAZEBROOK J:

But it doesn't help if there was a delay in registration after settlement. I mean there was a standard about how long ago certain things came in but I had the impression that the LINZ online had been relatively recent, whether it was 2008 or not.

ELIAS CJ:

At least eight years I think.

ELLEN FRANCE J:

The agreement for sale and purchase does envisage ED.

GLAZEBROOK J:

So it must have come in then.

ELLEN FRANCE J:

At 3.9, 3.10

GLAZEBROOK J:

So you say under that system, settlement and transfer are simultaneous?

MR CROSSLAND:

And the settlement date did say a certain date or such other date as the parties occur, so it is some such word so it is open for it to be postponed which in fact happened because I guess people, things take longer than what people anticipate and as we have seen, the registration for GST did not occur until 1 May so Mr Duthie could not have settled this transaction on 30 April because there was still something left to do. Now it may be that from one side everything was done in terms of a transfer being available but sometimes settlements do not proceed on time and IRD – if for no fault of the vendor, the vendor doesn't receive the purchase price, IRD won't be taxing the vendor on money that the vendor was meant to receive but in fact did not receive because the money hasn't come home.

ELIAS CJ:

I am sorry, you were going to take us to the affidavit were you?

MR CROSSLAND:

Oh yes. So is that tab 7?

MR CROSSLAND:

Yes tab 7 in volume 1. And it is at page 64, paragraph 3.6.

WILLIAM YOUNG J:

So there is no instrument of variation. Presumably does she just mean settlements occurs at the same time as registration and we didn't register and therefore didn't settle until 2 May?

MR CROSSLAND:

Well I don't know, that is going to be really a matter of evidence. The evidence we have got there is her statement that it was varied. Obviously with her on both sides of the transaction, I anticipate that there was a lower degree of formality than one would have had if you had unrelated parties dealing through two different lawyers.

ELIAS CJ:

When you say, "It is going to be a matter of evidence." That could only be relevant to the limitation question couldn't it? And if so, does that mean that this is not really a suitable case for a pre-hearing determination. This point cannot be resolved, is that right?.

GLAZEBROOK J:

Well it hasn't been tested. There is evidence that it was varied and that is when settlement occurred but it hasn't been tested I suppose.

ELIAS CJ:

But it remains. It is not a matter that is agreed between the parties so it just seems a lengthy shortcut the parties may have taken in this case.

MR CROSSLAND:

That is with the benefit of hindsight. It seemed a good idea at the time Your Honour.

WILLIAM YOUNG J:

But there was no evidence – what I actually struggle with is why the parties didn't give evidence on this point because the facts, the account of the facts we have on both sides is extraordinarily skinny. There is one paragraph in her evidence, of affidavit, and there isn't any evidence from Mr Duthie but there are a few bits and pieces from the discovery, but not many.

MR CROSSLAND:

Well it was open for that evidence to be challenged because Mr Duthie was intimately involved in the transaction. He has also provided disclosure of his time records and if one traces through that, it is clear that things are still being done after 21 April.

WILLIAM YOUNG J:

Yes it is just that we have got these little bits and pieces but we do not have a narrative that ties them altogether. I mean the Judge treated it as a sort of strike out.

MR CROSSLAND:

That's right.

WILLIAM YOUNG J:

And one of the questions was stated in odd terms, "If it is arguable that, or is it arguable that." Which is a funny strike out question. Sorry which is a strike out question, not a preliminary question.

MR CROSSLAND:

The thing behind making the application was that if Ms Roose was defeated on this point, she did not want to, herself incur the cost of a trial and likewise for the defendant, so that is why we went down that path. And I take the point and I apologise to the Court for the evidence being sparse. If it is of assistance to the Court, the time records of Mr Duthie are in the case of appeal, volume 2 under tab 22. And so for example on page 203, one-third of the way down there's an entry at 29 April 2008 to a Louise Genders and the description is application for GST and IRD. So we only, as Your Honour says only have pockets of forensic information but I think it's fair to say that there were still things to be done to bring this transaction to completion. Other than that I can't take that point any further I regret Your Honour.

WILLIAM YOUNG J:

Is there any, I mean the legal implications of settlement online are a mystery to me. Is there a, do we, is there a sort of a summary anywhere? There may be in Hinde, McMorland and Sim I guess.

MR CROSSLAND:

When I inquired into that one of the conveyancers, they have a special bible or guide that explains things and I did have reference to that. I can -

GLAZEBROOK J:

It is, there's stuff online on it from LINZ which I've just looked at, I've got rid of it now. Sorry, not got rid of it. I got off it again but, because I was trying to find out when it was brought in which wasn't helpful for -

ELLEN FRANCE J:

Well you do also have to look at it in light of the agreement for sale and purchase which defines settlement date, possession, et cetera.

GLAZEBROOK J:

Where was the agreement again?

ELLEN FRANCE J:

Tab 16, volume 2.

MR CROSSLAND:

Clause 3.10 in the agreement at page 153, explains electronic transfer. It's, I'm struggling to read it but my junior has directed me to clause 3.10(4)(a).

WILLIAM YOUNG J:

Yes, 3.9(4)(a) as well. They both contemplate Landonline transactions.

MR CROSSLAND:

Yes. So I'm obliged to Your Honour for directing our attention to that.

WILLIAM YOUNG J:

Do I take it that there was a 3.10(4)(b) was satisfied before the 1st of May?

MR CROSSLAND:

3.10(4)?

WILLIAM YOUNG J:

(b). 3.10(4)(a).

MR CROSSLAND:

Yes. That's the certification that my friend referred to in his reply submissions as occurring on the 30th of April. So I presume that he had seized upon 30 April because it would still take his client outside of the limitation period.

WILLIAM YOUNG J:

It does include releasing the same on settlement.

MR CROSSLAND:

But my point was it's, settlement is on settlement date and it occurred on the 2nd of May and whatever way you slice it the fact that a solicitor may be organised, you know, three or four days or a week ahead is neither here nor there. It's not for him or her to bring forward settlement just because they're ready. That would require an instruction from both clients effectively varying the settlement agreement to bring it forward, sorry, bring it back from that 2nd of May date. Now I'm sorry, I've jumped around a little bit because I've picked pieces out of my six points but I will go back to those six points. The first point really is focused on the income tax loss, that's the first species of loss where the sides are apart. I simply submit and I am supported in this by the Attorney-General's counsel, is that the income is derived when the earning process was complete and the earning process was complete on 2 May and I am supported in that both by *Gasparin v Commissioner of Taxation* (1994) 50 FCR 73 which whilst Australian, relies originally on *Ruddenklau v Charlesworth* [1925] NZLR 161 Court of Appeal decision of some age but very, very sound and I have just identified there where you can find the submissions from the Attorney-General and myself.

I turn now to address the GC 1 argument. As members of the Court have already identified, the reality of the situation is that the first plaintiff was not taxed under GC 1. The first plaintiff was targeted firstly under CB 6 and then ultimately they settled under CB 14. GC 1 was never even talked about so we need to look at what the reality is. The property, of course, was not sold at an under value. The fact that a vendor may decide to leave 100% vendor finance in does not postpone the earning process. That was a valid payment. It wasn't for Ms Roose to say through DDL to inland Revenue, oh I'm not liable to pay this tax for five years because the money hasn't come home. The Commissioner is not interested in that. Income law is derived at settlement. The fact that a separate arrangement as to finance doesn't alter that.

So for that first subpoint my friend both in his written reply and then also orally gave the example of a five-year deferred settlement date. That is not analogous to this situation, because it is settlement that completes the earning process. It may be that if you have an unrealistically long settlement date that you fall within the general anti-avoidance provision, but this transaction was not that type of transaction. I would submit that the acknowledgement of debt is analogous to those two examples in the Intervener's submissions, the case of *Fincon (Construction) Ltd v Commissioner of Inland Revenue* [1970] NZLR 462 (CA) that is where the buildings were finished but the builder agreed to take payment for some period afterwards, but because the earning process, ie the building of the buildings, had finished, there was nothing left for the company to have done to be entitled to that income. The fact that they agreed to receive it later didn't postpone their tax liability, and likewise with the goods bought on tick, there's the *Commissioner of Inland Revenue v Farmers Trading Company Ltd* (1982) 5 NZTC 61,200 (CA) case, and Your Honour Justice Glazebrook referred to the Noel Leeming meaning that thing happens every day. But these taxpayers can't say, "Well, we've given away the goods, we've done everything, but because we haven't got the money we shouldn't be paying our tax now." So the key question is the earning process is complete when a debt has been created, and that's where this side of the table and this side differ.

The third point really is to state something I said a little bit earlier, and that is about being realistic. If Ms Roose had received a call from Mr Duthie saying, "Look, I'm sorry, I set you wrong, actually income tax would be payable," all she needed to do, and we're dealing with everyday New Zealanders, they don't go running off to lawyers at the drop of a hat, we're far too expensive. She would have said, "Look, we can't go ahead with it, put a halt on it."

Mr Blackmore needed to do nothing. Perhaps out of a counsel of perfection, I’m again told from the conveyancers that you could either leave the e-dealing unreleased or press a delete button. Now if you're going to get charged for that my submission, well, that's a nominal cost and that's not relevant measurable loss. Really at the end of the day it’s going to be an exercise in evaluation as to what is reasonable on this. In the Court of Appeal you’ve seen the answer given there, that was just to write a line “cancelled” through it, but you may be persuaded by my friend that Ms Roose did need to run off to accountants and lawyers and incur expense but with respect my submission is that’s unrealistic. This is a kitchen table transaction between a couple of people that have known each other probably 15 years, it’s that type of relationship and in my submission we should not be suggesting that putting the brakes onto something that hadn’t completed would create anything more than nominal cost. I’ve dealt with point 4. Now point 5, happily my opponents and I are broadly in agreement. I don’t know why so much time was spent on, you know, what the Court of Appeal had done with employing the no transaction flawed transaction. The Court of Appeal, if you read the decision itself, like in *Maharaj* they say this is just a tool of analysis, it’s not the be-all and end-all, ultimately you need to look at the particular facts.

Now why I say our situation is different and special and unique, because this isn’t going to open flood gates, is all the other cases involve unrelated parties. Now what that means is the potentially injured plaintiff needs to pay somebody to fix up the consequences of the breach or the plaintiff is susceptible to the whims of the other side. So if we take *Davys Burton* as an example, let us suppose that Mr Thom realised before moving into the house or, sorry, realised after moving into the house that there’d been a slip-up he’d have to say, “Look, honey, I’m really sorry, we’ve got married but the relationship property agreement we signed is no good. If it stays like this you stand to receive half, which is not what I wanted. Do you mind if we unwind it all?” Now she could quite easily say no. Now that's different from our situation here because Ms Roose, it’s only Ms Roose who’s got to make that decision. And if you look at all of the other limitation –

ELIAS CJ:
Why should that matter as a matter of principle here? If we're looking for the principle on which the cause of action accrues, why does it matter that this is a related party transaction? It may, in terms of quantification down the track, but why does it affect the issue that you brought for preliminary determination?

MR CROSSLAND:
Because when one picks up a particular case and recognises this question is factual specific, the ease in which one can extricate oneself is a relevant consideration and support for that is in the *Maharaj* case, and I'd ask the Court to go to that, it's tab 17…

ELIAS CJ:
This is that she signed promptly, so it can be assumed that if it had been discovered at the outset she also would have signed promptly, is that the point?

MR CROSSLAND:
Well, that could be a point. If you could go to paragraph 25, so that's tab 17 paragraph 25 page 10, and counsel there for the defendants, the parties arguing for limitation, had been tapping into a line of English Court of Appeal authority that said at least two other decisions of the Court of Appeal, "Which seems to suggest that professional defendants who have breached their duty of case will always be able to establish that the claimant suffered actual loss at the time of entry on their advice into the flawed transaction," and then the Court refers to two of those, and in particular if you look at (b) down the bottom, because again I had put this to the Court of Appeal that you've got a choice between *Pegasus* or what's been done in *Maharaj*, and if we go over the page at 26, after the Privy Council has considered those, the first sentence there is that the observations go too far, and noting there down the bottom of that paragraph there is no substitute for attending the particular facts et cetera and drawing inferences, and in 27 what the Court did in this particular case in evaluating it it set three factors, and the third factor there is

item (c) where it said, “It was not even in the power of the claimants or of the defendants to remedy the flaw by themselves. For it was necessary to procure the participation of Mrs Lambert,” that was the vendor, “had in 2008 it so happened that she was quickly located,” and they did a deed of rectification and so forth, “Even in those circumstances costs, for which in the first instance the claimants were liable, must have been incurred in procuring its execution and registering it.” But then what the Court does is they say that really these people got lucky in this particular instance, you know, because this is 22 years later, maybe they couldn't find her, maybe she would have died, or maybe she would have been uncooperative. Now my point there is that the plaintiff there was reliant on the whims of somebody else. Now the contrast I make with our current case in terms of –

ELIAS CJ:
But that's being referred to, isn’t it, because it’s an indication of the sort of cost that you might have incurred if those complications had existed?

MR CROSSLAND:
Yes, and ultimately the Privy Council in that case heard that the damage had occurred too early.

GLAZEBROOK J:
Well, (c) might be an indication that if you could fix it up reasonably quickly and without too much cost it would have not started the limitation running. Because they’re contrasting a position which says every time you enter into a transaction you have immediate, and they’re saying but there might be factual situations where that's not the case, so it could be taken as an indication that if you can unwind with minimal cost then that would be one of the exceptions that they’re positing.

ELIAS CJ:
Yes, and that's probably supported by the next paragraph where they say that those risks were such as to generate an immediate quantifiable reduction.

But that really just goes to whether the harm is, there is a quantifiable harm at the time of entry, yes.

GLAZEBROOK J:
Yes.

MR CROSSLAND:
Your Honour Justice Glazebook, you've eloquently expressed the nub of our case, because what we're saying here is we are one of those exceptions, it is an exceptional case, and the reason it's exception is, two things: firstly, both parties to the side, both sides of the transaction, are effectively the same human being and, two, the ease by which it could have been remedied. And that's why I had said earlier, you know, what would the Court's reaction have been – let's say settlement was a little bit later, let's say it was 1 December and Ms Roose had found out, say, in May, that there's been this mistake made. She's not going to – well, if she'd gone to the High Court seeking summary judgment for this possible tax loss she would have been laughed out of Court, the Court would have said to her, "Look, the remedy's in your own hands, you're on both side of the transaction, you can simply not go ahead and you won't incur that tax," and I would add that this is not tax evasion and I understand that the submissions from the Attorney-General supports me in that.

So, just as the Privy Council in paragraph (c) there have looked at, you know, what might or might not have happened, I'm saying then when we assess whether there has been real measurable loss we've got to be realistic and say, well, how would a District Court Judge or an Associate Judge react to a summary judgment claim where Ms Roose belligerently turns up and says, "This accountant's given me dud advice and I want a judgment," what is the loss if the case is heard, you know, say, in October, and settlement's not due till 1 December, the Court's going to say, "You haven't suffered a loss yet, plus you can sort this out yourself. Don't come wasting Court time with silly claims like this." Having said that, I'll just come back to the third category of loss that my friend –

ELIAS CJ:

Sorry, but in all the cases there is a reference to it not being trifling or that it's not, that it's got to be material, so that's the same sort of concept is it?

MR CROSSLAND:

That's exactly what I'm saying.

ELIAS CJ:

Or even measurability. But, you know, it's a bit, it's not clear how far you can stretch that, even if something can be readily fixed up, you say that you fall within that category here do you, that it would have been non-material?

MR CROSSLAND:

Yes, in my submission a couple of phone calls and Mr Blackmore not proceeding to press release on his e-dealing. And that's what, the Court of Appeal agreed with that and I commend that evaluation to this Court, with respect.

O'REGAN J:

Mr Scragg said there was some complexity relating to the second transfer and how that would have been resolved?

MR CROSSLAND:

Well, again, I don't agree with that. What was being proposed was the DMR, which was taking this bare land, then had essentially a back-to-back agreement with Ms Roose's family trust to expand the piece of land that her family home sat on. Now dollars to doughnuts if you're told it's going to cost you $300,000 to go ahead are you still going to want to deal with, you know, making your land a little bit more aesthetic? I submit not so. So he is –

O'REGAN J:

So you're saying they would have just abandoned everything?

MR CROSSLAND:

Exactly.

O'REGAN J:

Including the second transfer?

MR CROSSLAND:

Exactly. Once you look at what the facts are. So where I do – I think I was saying in item 5, where the parties are probably at one is that the no transaction/flawed transaction model is not a rigid model, I mean, that's elementary stuff, but I say that the Court of Appeal did not slavishly produce a result through blinkered application of that. Just as in *Maharaj,* the Court of Appeal said, "This is a helpful guide, we'll use it, but ultimately it is a question of fact," and that's what they did, and essentially what they said was that the relevant loss is the income tax. And I should add just in response to something the Chief Justice raised about assessment, there's a difference between when the tax comes to be assessed and when it is derived. So, just to be clear, in my submission the tax is derived on 2 May but it's within that following year that it's assessed. So Ms Roose's accountant, Ms Duthie at the time, would have looked at her overall position and then assessed it. So the fact that the assessment doesn't create a contingency, it's the lack of settlement occurring that creates a contingency, in my submission on entry into the sale and purchase agreement whilst the income coming home is highly likely, it still is contingent.

I'm just going to check my notes and see if there's any points on reply. Just out of an abundance of caution, my friend expanded his paragraph 25.9 where he was talking about the borrowing being interest free and this somehow turning it into an uncommercial transaction, I'd simply make the point that there's a separation between the purchase price and the debt, and Your Honour Justice Glazebrook picked up that point. There's no compromise to the tax base, it's possible that the gift, the interest-free component that DMR receives is taxable in that situation, so there's a symmetry between DDL being taxed as at settlement date, because as at settlement date if it's, even if DDL does not have cash in the hand the Commission says, "Well, that's your problem, not mine, you still need to pay tax," so there's no disadvantage to the tax base. So I really struggled to see where GC 1 had an appropriate place in the argument, the section's not engaged.

Just a small point, the deed of acknowledgement of debt under tab 17, that's in the case on appeal volume 2, the agreement to leave the purchase price outstanding, that activates, that came into force as at the date of settlement. Now it says in brackets there, "ie 21 April 2008," but that's just an example. Settlement actually occurred on 2 May, so my friend had made reference to that document saying that it seemed to be suggesting that the earning process had occurred earlier.

GLAZEBROOK J:
So you say that you, that it's actually the date of settlement, to leave the purchase price open and you just substitute 2 May or whatever the date of settlement was in that deed?

MR CROSSLAND:
Correct. My junior's just asked me to emphasise, because I may not have made the point clear enough, but clause 3.10(4)(a) in the sale and purchase agreement, which is case on appeal 153, contemplates the releasing, in terms of e-dealings, on settlement. So that, the point of that is simply to say that the solicitor or the conveyancer handling this does actually have to push the button and that is how you know that settlement occurs, and if we work on the basis that registration and settlement under the e-dealing system is instantaneous, that may assist Your Honour.

WILLIAM YOUNG J:
It does, thank you.

MR CROSSLAND:

So those are the submissions for the respondents unless there are any further questions of me.

ELIAS CJ:

No, thank you very much Mr Crossland. Now Mr Eborsohn we have read your submissions but I think you have heard what's been exchange and you might have some comment on that, and there might be some questions from members of the Court. But I don't anticipate we need to detain you for very long. So it would be good if we could just hear briefly from you.

MR EBERSOHN:

Should I commence now?

ELIAS CJ:

Yes. I mean if you're going to be some time we might take the adjournment but I had thought that probably, given that we've read your submissions, if you could just confine yourself to anything that's cropped up that you wish to respond to.

MR EBERSOHN:

Yes, and there are a number of issues which have arisen which I can comment on. I won't talk to the submissions unless the Court wishes me to do so.

Perhaps, because I think it's going to be more than just a few minutes, but I don't suspect it will be long, what I suggest is that I just deal with two housekeeping matters very quickly at this stage. The first one is the correct version of section GC 1 and my learned friend is correct that the Intervener's additional bundle of authorities contains a version of GC 1 after the 2010 amendment, but that amendment was made retrospective to the commencement of the 2007 Act. The reason for that was that provision, as I put in the written submissions, the original version, brought in, introduced a requirment for a recipient and the, Parliament wanted to remove that from the beginning, from the commencement of the 2007 Act. So that was the first housekeeping matter.

GLAZEBROOK J:

So you're saying your version is the right version, is that what you're saying?

MR EBERSOHN:

That's what I'm suggesting. I don't think anything hangs on it, in terms of this dispute, it's really just a matter of housekeeping. The second issue which is again just a matter of housekeeping is more really answering a question of Justice Young, and again I don't think it's necessarily relevant and the Court can cut me short, it won't take me a second, that is that His Honour is correct, that for GST the time of supply is an unconditional contract. The reason for that is an unconditional contract is an invoice, as invoice is defined in section 2 of the Goods and Services Tax Act 1985, something which notifies of obligation to make a payment and section 9 says that the time of supply is the earlier of invoice or payment. There is an associated person provision but that deals with a delay in the time of supply, doesn't apply when the time of supply is right up front and so it's of no application.

Those are the two housekeeping matters. I can continue or I can wait until…

ELIAS CJ:

Just tell us the scope of what you want to say, what points do you want to respond to. We will then take the adjournment.

MR EBERSOHN:

The first point that I was going to respond to is that my learned friend's point of the ordinary principles of derivation would not apply in circumstances where there's no consideration of the cases. I was doing to deal with that very briefly. I was going to deal with very briefly on the mischief, for want of a better word, of reading GC 1 as determining derivation in terms of – and this is not in the written submissions – the potential negative consequences, I was going to deal with that very briefly.

ELIAS CJ:

Yes.

MR EBERSOHN:

Then I was going to cover the time value of money, I was just going to talk very briefly on that, and there was some discussion in Court as to when that is taken into effect in tax cases, in tax law. It is occasionally taken into effect but mostly not, and I was just going to cover that very briefly. And that was really it, there was nothing else I was going to…

ELIAS CJ:

Yes, that's fine, and it might help if – are there any questions you want to flag?

WILLIAM YOUNG J:

The question I want to ask is this, or proposition a question, the view that income is derived on settlement relates, I suppose, primarily to the contingency that settlement might not occur even though there's an unconditional contract. So until settlement occurs you've got a claim for specific performance but you don't have a claim for the purchase price, that's basically the rationale isn't it?

MR EBERSOHN:

That's the part of the rationale in *Gasparin.* We would – the Attorney I think would take it further and suggest that the earning process is not complete until settlement. Now I think there's an issue –

ELIAS CJ:

You might want to elaborate a little bit on that, so perhaps we should take the adjournment.

MR EBERSOHN:

All right.

ELIAS CJ:

Was there any other question to be flagged?

GLAZEBROOK J:

Possibly just some of the anti-avoidance provisions and also deferred settlements under the accrual rules, I think there's probably some deeming of interest on deferred settlements in any event, so the mischief that's being talked about probably doesn't arise in terms of deferred settlements as against immediate settlements with debts. It certainly used to be, but I'm not quite sure what's happened with that, but you might like to look at that over the adjournment.

MR EBERSOHN:

I'll talk about that after…

ELIAS CJ:

Think about that over…

GLAZEBROOK J:

Because that was a point that was being made, I think, by the appellants, that effectively this was like a deferred settlement and that could mean that there was an avoidance of a tax liability.

MR EBERSOHN:

Yes, I'll deal with that. I was going to deal with the two avoidance provisions, the general, and then both the GB, I think it's this 21.

GLAZEBROOK J:

But it might be there's a time value of money built into the accrual regime in any event with deferred settlements though, there certainly used to be.

MR EBERSOHN:

I don't want to contradict Your Honour on the financial accrual rules given the text book.

GLAZEBROOK J:

Well, there may no longer be but there were determinations on that.

MR EBERSOHN:

Yes, I'll have a look at that.

GLAZEBROOK J:

I mean, I've no idea whether they're still there because I haven't looked at this for a number of years.

ELIAS CJ:

All right, thank you, we'll take the adjournment now.

COURT ADJOURNS: 1.04 PM
COURT RESUMES: 2.18 PM

MR EBERSOHN:

Thank you, Ma'am. What I'll do is I'll address the issues as I had indicated and then at the same time while I'll doing that talk to the issues raised by Justice Glazebrook and by Justice Young.

The first thing I wanted to say is on dealing with the no consideration cases do the ordinary principles of derivation apply. Now I've covered that in some detail in the submissions but what I'd like to add to that is that there is a benefit to the ordinary rules of derivation applying and that is that the rules of derivation are actually looking at the business and commercial underpinnings of derivation to say whether a amount is earned, and it allows a great flexibility. It allows the Court or the Commissioner to depart from the ordinary principles if it's to give the correct reflex to the person's taxable affairs. You see that in the more extreme cases, they tend to be the more extreme cases such as *Harrison v John Cronk & Sons Limited* [1937] AC 185 (HL) or *Absalom v Talbot* [1944] AC 204 (HL), which is referred to by Justice Richardson in a number of cases, in most of the cases in the casebook, and these two cases I refer to they themselves are not in the casebook. But what these cases essentially involve is organisations trying to help first home buyers of limited means into homes and having an exceptional delay in terms of part of the consideration in those cases, in one of the cases over 20 years and there was no certainty they would actually get payment. And the Court said in those particular and peculiar circumstances of that case derivation of income only occurred at that later date or – and I think this is *Cronk's* case – you would have to return a market at current value, which is one of the rare cases where you would take into account the current value of future money. Now for the reasons I already said in the opinion, section GC 1 does not deal with derivation. But that is a further practical reason why you don't in fact want it to deal with derivation is you want to allow that flexibility to look at the circumstances of each case and make decisions on that basis.

Now I'm going to move on – there's nothing further I'm going to say on that point unless there's a question – to the no consideration cases, where my learned friend says that in the no consideration cases you have a scenario where income is simply never derived if you look under the ordinary principles. And I would simply say that all the provision says is that it deems consideration to be provided, then you simply look at whether the earning process is complete, as suggested by Justice Glazebrook, and then income would be derived in the ordinary course. Where there were exceptional circumstances such as for example on the *Cronk's* case, those could be taken into account to give the correct reflex to the person's income. But there's simply no conceptual reason why the ordinary principles of derivation would not apply in the no consideration cases.

Now as far as abuse is concerned abuses in terms of – well, you'd have to. My learned friend in his submissions says the abuse could be to defer settlement for several years, or to access an amount of payment obligation extended into the future. Simply extending out a payment obligation in terms of the ordinary accrual principles wouldn't delay derivation to start off with. Secondly, where there is some kind of associated party arrangement with a very delayed settlement, you haven't come across it is practice, but where there is such a circumstance it may very well be possible to tackle that arrangement under either of the general anti-avoidance provisions, section BG 1, or possibly section GB 21, probably not though, that's the financial arrangement avoidance provision, for reasons which I will come to later. So there are protections within the Act which deal specifically with those scenarios. If the arrangement and the delayed settlement is not motivated by tax considerations, well then the Commissioner should just tax in accordance with the ordinary commercial principles, that's, you know, what the parties have done for their own good reasons, and the Commissioner simply taxes the consequence of that unless there is, unless it falls within section BG 1. So the Attorney does not see that by itself as an issue or problem.

Now coming back to Justice Young's question to me prior to the break as to is it simply the obligation to make payment which causes the derivation – I am paraphrasing, I don't think that's quite what Justice Young said – and I responded by saying no, it was that in part but it's also that the amount has been earned, that the income earning process is complete. And that of course comes from the *Arthur Murray (NSW) Pty Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1965) 114 CLR 314 case, but it also comes from the accrual principles. The misconception with accrual accounting is that you're simply looking at the benefits which have accrued, but you're also looking at the cost of providing those benefits, and I think the quote from what's meant by accrual accounting or accrual approach in the submissions actually catches that, this is at paragraph 24 of the Intervener's submissions, the last, we have the quote there, *Statement of Concepts for General Purpose Financial Reporting*, and the last sentence of that quote is, "Financial reports prepared on the accrual basis inform users not only of past transactions involving the payment and receipt of cash, but also of obligations to pay cash in future and of resources that represent cash to be received in future." So, that's a very general statement but the point being that taking the *Arthur Murray* case, where the dancing lessons still had to be provided. Arthur Murray had received payment. It's not a question of there was an obligation to make payment, they had the money in the account, but there was still a cost attached, and that cost to those funds, was that they had to go out and provide those lessons, which had included obviously the cost of the premises, the cost of the employees et cetera, the cost of time, and so I think what derivation, what the principals have sought to do in the derivation of income, is essentially simplified that because it was simply too complicated for ordinary people in returning their tax to put in a contra entry for the obligations and simply looked at whether the earning processes has got to a point where you can say it's truly earned, when it's completed, and although most of the cases deal with whether there's a payment obligation, because mostly a payment obligation only arises once you've performed, but there are cases such as *Arthur Murray*, and you do get a hint of it in *Farmers* where Justice Richardson draws the distinction between higher purchase and he goes on to say, at the very last paragraph of *Farmers*, something along the lines of, he's not commenting on higher purchase agreements where different considerations may well apply. So there were two types of agreement there. There was budget, where ownership of the goods was passed immediately and then there was the higher purchase where farmers retained ownership until payment under the higher purchase agreement and I assume, without the facts set out in *Farmers*, or possibly a balloon payment at the end of that, before ownership was actually transferred to those goods.

So, and you see an element of this in *Gasparin* too where although it's based on a debt, they also talk towards the end of the judgment of the dispositive power of the vendor dissipating on settlement, and there isn't a case that I'm aware of, one should never be too emphatic about these things, but I'm certainly not aware of any case where there's been a derivation of income. Where there hasn't at least been transfer for goods, or provision of the services. Most of the cases, as I've indicated, do look at whether debt has actually arisen, and by debt, can be quite confusing because it can mean an immediate payment obligation that you can sue on. But in the cases there's no question, including *Gasparin*, that when they refer to debt they're referring to the payment obligation, including a payment obligation in future. And as I said, they're usually, in the ordinary commercial practice, only arises upon transfer or services being rendered, that is not necessarily the case though, as you saw in *Arthur Murray*. So I hope that's answered Justice Young's question.

One of the side issues in this case is, and I suppose this is more similar to the *Arthur Murray* in the sense that the acknowledgement of debt up front is in fact, or at least I considered it to be, a payment of the, under the agreement for sale and purchase. In other words you wouldn't sue necessarily on the agreement for sale and purchase, you'd sue on the acknowledgement of debt. Is that separation which Justice Glazebrook referred to, in fact just standing here today I can think of a similar example in the *Ben Nevis v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 case where a promissory note was used to pay, I think it was for the insurance or one or other feature of the arrangement, so that they could get a deduction up front, it's the same concept. And so I think in that sense this is closer to the *Arthur Murray* type scenario. I'm not going to say anything further on that issue unless the Court, anyone has a question.

WILLIAM YOUNG J:

Can I just ask really two questions? First, my recollection from litigation when I was in practice is that companies in the business of trading in land will for accounting purposes accrue profits when unconditional sales are made. Now would it not be appropriate on general accounting principles, sorry, on adopting general accounting principles and translating them into a tax context, for that to also apply in relation to tax income?

MR EBERSOHN:

Well, first of all, in terms of the accounting practice this was a bit of a bugbear of me coming into this case is that I didn't have the benefit of actually being able to talk to a tax accountant, which would often be the – or, sorry, a accountant, which would often be the case for that very purpose, because that is a question which I wanted to put to the person. The question I suppose is would it be put to a suspense account pending, with the property remaining as stock in trade in terms of accounts, because you'd have to remove it out of stock in trade, the property, if you were going to declare the income at that point in time, or would it just be some kind of suspense account, and I'm not certain of the practice on accounting, so I should say that up front.

But certainly in terms of – and I should add that cases like farmers make it quite clear that while accounting evidence is important and taking into account –

WILLIAM YOUNG J:
Well, it's not decisive obviously.

MR EBERSOHN:
– it's not determinative, you still have to look at the general principles. And so what I would say is that just under general principles you would still say that the person hasn't done the primary task which was required of him or her and therefore there hasn't been a derivation of income for that.

WILLIAM YOUNG J:
And secondly in this case all that was required it would seem, as of the 1st of May to complete everything, was to press a button, metaphorically.

MR EBERSOHN:
A button.

WILLIAM YOUNG J:
Now…

MR EBERSOHN:
It was still the button though which had to be pressed by the other party to the…

WILLIAM YOUNG J:
But if it's the solicitor who's acting – well, of course a button has to be pressed by both parties in an arm's length transaction.

MR EBERSOHN:
Yes.

WILLIAM YOUNG J:

Here it's one person.

MR EBERSOHN:

Well, it's one solicitor wearing two hats. In an ordinary transaction though the purchaser would still need to press – sorry, the vendor would still need to press that button.

WILLIAM YOUNG J:

Yes, I thought I might have, and I may have misrecorded, I thought at one stage you said the vendor had to tender a signed transfer?

MR EBERSOHN:

Yes, that's me being stuck in the past unfortunately. I was thinking of the old settlement where you would go and hand in the transfer papers and give the power to the other party.

WILLIAM YOUNG J:

So it may be that pressing the button is the equivalent of tendering the transfer.

MR EBERSOHN:

Yes, I would think that it is in the modern system. Because unless the vendor presses a button it doesn't happen.

WILLIAM YOUNG J:

But the question then is really is the entitlement to the proceeds of sales by this stage still sufficiently contingent that it shouldn't be recognised? If all that stands between you and a transaction that indisputably has crystallised.

MR EBERSOHN:

I don't know that the contingent necessarily determines it, because obviously the contract is unconditional. But that is a point very clearly made in *Arthur Murray* was that it didn't matter that in that case the money was not held in a separate account or in a trust account, it was merged and mingled with *Arthur Murray's* money, it was their –

WILLIAM YOUNG J:
But the dance lessons hadn't been provided.

MR EBERSOHN:
Yes.

WILLIAM YOUNG J:
So the money –

GLAZEBROOK J:
Well, here the building hasn't been provided until you press the button is the same argument, like, it hasn't been provided.

WILLIAM YOUNG J:
Well, that would have to be, that must be the same argument.

MR EBERSOHN:
That is the argument, yes.

GLAZEBROOK J:
Yes, it's actually the same argument I think.

MR EBERSOHN:
It is the same argument, and it's –

WILLIAM YOUNG J:
It's not quite so convincing to me.

MR EBERSOHN:
That's for the Court to decide.

GLAZEBROOK J:

Well, it has to be, in a non-associated person it's relatively convincing because you don't know until they do press the button that they're going to.

WILLIAM YOUNG J:

Well, I should have said not so convincing in the case of a transaction that's not at arm's length.

MR EBERSOHN:

That is the approach the attorneys adopted in – all right, I'm going to move on to the time value of money, whether it's taken into account. It's an issue which was raised by my learned friend, and quite a logical proposition in the sense that obviously putting aside tax law an amount today is worth – sorry, an amount payable in the future is worth less than the same amount payable today. In terms of the financial arrangement rules I will deal with them, but I should also note that a financial arrangement, sorry, a loan, in New Zealand dollars interest-free is an excepted financial arrangement to which the financial arrangement rules don't apply, and that's what we have in this case. So the use of those rules are limited in that sense. But what I would say is that the time value of money is not usually taken into account in tax. There are exceptions. So for example in the *Fincon (Construction) Ltd v Commissioner of Inland Revenue* [1970] NZLR 462 case where there was a construction completed, money was payable – it's referred to in my written submissions – it was payable over a period of three to six years after the construction was completed, so part of the three million out of the 10 million was payable. There was no suggestion that what was derived was a lesser amount taking into account the time value of money, and that's usually the case. There are some exceptions, for example, section BG 1, the time value of money is often taken into account in terms of whether there is a purpose for tax avoidance, you would have seen a bit of that in *Trinity*, in *Ben Nevis,* but also in cases of extreme delay, sort of 20 years plus, you do see the court in some of the older cases in particular taking that into account. In fact if I'm not mistaken I think *Farmers*, which I think is tab 3 of the Intervener's additional bundle of documents – sorry, tab 4 – has an example which is at page 38 of the bundle, tab 4, at page 38, there are two columns, on the right-hand column in the second paragraph Justice Richardson is referring to the *Cronk* case, "At this stage I should also refer in relation to the first point to the decisions of the House of Lords in *Cronk* case," then he has a long discussion.

Now this was a case, one of the cases of houses being provided to people of limited means and where there was a significant portion which deferred for an extended period of time, and the last sort of quarter of that paragraph says, "The periods over which the instalments of principal and interest were payable might extend to more than 20 years. There was considerable diversity of judicial thinking as to the proper tax treatment of the amount so secured to the builder. In the House of Lords the majority, Lord Atkin, Lord Thankerton and Lord Russell and Viscount Simon and Lord Porter dissenting held that the sums in question should be brought into account at their estimated values and not at their face values." So there are exceptions in some of the cases, particularly where there's a long period, but certainly, where there's an extremely long period, but certainly ordinarily where you're dealing with the vast majority of commercial transactions where there's a delay of perhaps a few years you don't find in any of the decisions the Court taking into account the time value of money.

WILLIAM YOUNG J:

So say, I mean it does seem a little bit odd to me, say the promise had been I will sell you this property in consideration for you providing me with a debt security which has the following characteristic, you'll pay me 1.95 million in five years' time. You would value that wouldn't you? Or I'll go back to a more obvious example: I will sell you my property on a swap basis, I'm going to give you property X, you're going to give me property Y. The Commissioner would market – if I was accountable for market value of X you would calculate the market value of the consideration I receive?

MR EBERSOHN:

Yes.

WILLIAM YOUNG J:

So if the swap property is a debt security, why wouldn't you market value assess that?

MR EBERSOHN:

I think that where you're trading, where you're effectively entering into a barter arrangement you have to value the consideration in terms of what you're receiving.

WILLIAM YOUNG J:

What’s the difference between my example and this example?

MR EBERSOHN:

Well, in this example the sale and purchase agreement, if I’m not mistaken, the sale and purchase agreement is for a set amount. It’s –

GLAZEBROOK J:

Well, what you said just before is the Commissioner would not be particularly interested in an argument that I actually sold it for two million less the time value of money therefore I should only be taxed on the lesser amount. The Commissioner would say you sold it for X, I don’t care whether it’s been paid in five years’ time or 20 years’ time, except if it’s a *Cronk* case, because I’m just taxing you on the two million –

WILLIAM YOUNG J:

It may depend on whether it’s a deduction that’s being sought or whether it’s on the other side. But just, I mean I can’t see why you can’t value the property that's being swapped, and in this case it’s effectively a, it’s a debt, it’s a debt instrument that's being swapped for land.

MR EBERSOHN:

Yes. What I was going to say is that the actual contract itself is not in fact to be paid by a debt instrument I don’t think, I don’t have it in front of me –

WILLIAM YOUNG J:

I think it’s built into the contract.

MR EBERSOHN:

Is it built into the contract?

WILLIAM YOUNG J:

From what I was told.

GLAZEBROOK J:

I think the answer just comes down to the Commissioner’s just not going to say that the profit is two million less the time value of five years’ month. The Commissioner’s going to say those are two separate transactions – on the basis of what is actually all of the authority, on the basis that the transaction it’s the face value of the debt, “I don’t care whether it’s being paid in five, 10, 20, a hundred years, unless you come within one of the exceptions like *Cronk’s* case, in which case we discount it.”

MR EBERSOHN:

Yes, and I think it’s a practice which has developed and which has been applied in a number of cases that you're simply looking at the face value.

WILLIAM YOUNG J:

Well, abuse of aspects of it have been dealt with under accrual rules and the avoidance provisions I guess.

MR EBERSOHN:

Yes, well, that would – yes. What would ordinarily happen – except this is an excepted financial arrangements – what would ordinarily happen in a case with a deferred settlement is that the property itself would be dealt with under ordinary principles and the financing element would be dealt with under the financial arrangement rules, and that would then give the correct response. Because the financial arrangement rules only really deal with the difference in consideration between the two flows of consideration either way, and so that's effectively the interest.

GLAZEBROOK J:

So if you sell it at over market value with a deferred settlement to take account of interest the property would be taxed at its market value and the interest component would be taxed on an accrual basis?

MR EBERSOHN:

It would be taxed on an accrual basis, and that would then be spread over the term of the arrangement. And the market value of the money in the part of that calculation deemed market value, a present day value, would be calculated for each period. I say "deemed" because it's worked out on a compound interest rate, it's a mathematical formula, it doesn't necessarily mean it is in fact the market value, it's a formula within the Act and the determination's a mathematical exercise rather than an exercise in the actual position.

GLAZEBROOK J:

That used to be a gap in the legislation effectively before the accrual rules were brought in because you –

MR EBERSOHN:

Yes.

GLAZEBROOK J:

– there were ability to time and defer the acceptance of interest.

MR EBERSOHN:

That was a primary consideration in bringing in the financial arrangement rules was avoidance arrangements where there was a significant delay in payment. You get the deduction up front but only incur the economic cost after many years, that was the reason for bringing that in, well, a reason.

The other was to limit the capital revenue distinction in that area. Justice Young?

WILLIAM YOUNG J:
I'm done.

GLAZEBROOK J:
I think the point is that economically that's true that tax hasn't worked on an economic income basis, because on an economic income basis you would actually bring in the change in value over the period in any event including the benefit to you of using your washing machine or whatever it happens to be that you have as a capital asset.

MR EBERSOHN:
Yes, I think…

GLAZEBROOK J:
And somebody does suggest that at one stage in one of the, but it didn't go down overly well given that we're not even that keen on capital gains taxes let alone taxing economic income.

MR EBERSOHN:
Look, I think that there is an economic underpinning to a lot of the tax system, and I'm not saying all of it, a lot of it, this obviously is a example of where there isn't. But there's also a practical underpinning to the tax system and this I think is a case where that becomes evident in the sense that there are a lot of things which are simply unworkable if you expect ordinary people to start working out present-day values and the like, it makes the tax system extremely complex, and we see that in the financial arrangement rules which are affectionately referred to by practitioners often as "cruel rules" because they used to be the accruals, they are notoriously difficult and hard to work through. And so I think – and you see a bit of this in the derivation of income with the way the Courts have applied it in the sense that if you were to follow the accrual accounting to its purist form what you would say, taking the

Arthur Murray, is that you'd returned the income but that you'd also return all the costs associated to providing those services and you'd have to break them down and work it all out, and it just becomes a completely impossible in terms of a practical administration for ordinary businesses. So it's been simplified down to something which keeps the spirit, if you like, but is workable by ordinary people. And so it's an element, it's not always economic, but it's a balancing act.

I don't know that there's anything else I really need to say. I can talk on present value calculations on the financial arrangement rules but I just don't think it's relevant and it gives people a headache.

ELIAS CJ:
Please don't do that then. Thank you, that's been very helpful, Mr Ebersohn. Mr Crossland, is there anything that emerged from that that you wanted to comment on?

MR CROSSLAND:
No, Your Honour.

ELIAS CJ:
Yes, Mr Pearson.

MR PEARSON:
Yes, Your Honour, I'll ask Mr Scragg to reply, Ma'am, because our central feature is the limitation point. But if Your Honours did have any specific issues relating to those taxation matters I'd be more than happy to address them of course.

ELIAS CJ:
The historical material…

MR PEARSON:
Yes, we have got that, yes.

ELIAS CJ:

Have you shown that to Mr Crossland? Just pass over a copy perhaps.

MR SCRAGG:

And indeed, Ma'am, this was the only point in reply that I wished to address was essentially to provide this material to the Court. And so the context for it comes first from our reply submissions at paragraph 20.3 where His Honour Justice Young identified the reference to the date of 30 April 2008, and so these materials explain why that date appears.

So the first document you have before you is the copy of the historical search, and if you look down – they're not numbered, but line 13 – you'll see a dealing number 7723846.1, .2 and .3, those are the relevant transactions, the middle one being transfer to DMR Development Limited. So those are the three relevant transactions being first of all discharge of the mortgage that the vendor held and then, secondly, transfer of the property, and then, thirdly, new mortgage for the purchaser, and then that reflects the second document you have in front of you, which is three pages, and these are the instruments that sit behind each of those dealings. The first page is the release of the old mortgage for the vendor, the second page is the transfer by vendor and the receipt of that transfer by purchaser, and then the third page is the purchaser's mortgage. And what's relevant about it in terms of timing is you'll see that each of those documents is dated at the bottom 30 April 2008 in sequence: the first one 1.16 pm, then 1.17 pm, 1.18 pm and 1.19 pm. So that is the basis for what we say at paragraph 20.3 of the reply submission.

GLAZEBROOK J:

That would be in accordance – if this was an arm's length transaction those documents would be loaded before settlement wouldn't they? Because if you don't load them before, if you were trying to scrabble round loading everything at the time of settlement you couldn't just press a button?

MR SCRAGG:

That's my understanding, yes, that they need to be loaded so that people can then push the button, that's right.

GLAZEBROOK J:

Just push the button, so you would always be loading them in advance.

MR SCRAGG:

Yes, and I think that's contemplated by the fine print terms of the agreement for sale and purchase.

GLAZEBROOK J:

Yes.

MR SCRAGG:

I suppose our point here would be it's one solicitor who holds all of those card and he's just doing it all in sequence. And of course the very nature of the certifications, you'll see the first line in each of the certifications is that that lawyer irrevocable – well, it doesn't actually say irrevocable – but it has to be irrevocable or the system doesn't work – authority to do the act that's then said. So as at the 30th of April the lawyer's got everything he needs and he's got permission to do it.

ELIAS CJ:

But so what, do you say?

MR SCRAGG:

Well, it's really just to explain the point we make on the 30th of April.

ELIAS CJ:

I see, where you've got –

GLAZEBROOK J:

As they're doing it to themselves the argument is that effectively they've done everything to earn it as at the 30th of April, that's the argument?

MR SCRAGG:

That's correct, yes, that's the argument. Unless there are any other questions, Your Honour, those were the reply submissions.

ELIAS CJ:

Thank you, counsel. We'll reserve our decision.

COURT ADJOURNS: 2.53 PM