

Tipping J Yes thank you Mr Gilbert. You're on your own are you?

Gilbert No, I'm actually appearing with Mr Till although those appearances are no doubt very deceptive to Your Honours.

Tipping J Of course, yes this was pointed out to me and I'm sorry it's all getting a little bit difficult to follow. Now can you see everybody and hear everybody Mr Gilbert, I mean can you see sufficiently.

Gilbert Yes I can thank you.

Tipping J And Mr Wylie similarly?

Wylie Yes Sir I'm in the same position Sir, thank you.

Tipping J And Mr Till?

Till Yes, thank you Your Honour.

Tipping J Well we'll start with you Mr Gilbert thank you, if you'd like to proceed?

Gilbert Yes thank you Sir.

Tipping J Would you just give me a moment Mr Gilbert please? I just want to see whether we have it actually up on our own individual screens. I can see you on a big screen but I'm just not sure whether we're supposed to have it on our individual screens in front of us on the bench. Yes you're here now Mr Gilbert thank you.

Gilbert Yes thank you. Well as Your Honours will know the second respondent, Mr Todd, a partner in the first respondent law firm was a trustee of the Walker Family Trust which carried on business as a property developer. In April 1994 it purchased property at Towne Place in Queenstown with the intention of constructing seven residential units to be registered under the Unit Titles Act. In October 1994 it purchased vacant property at Lake Hayes with the intention of erecting a residential dwelling on the site and in November 1994 the Trust purchased two vacant lots at Frankton Road Queenstown. Now the Towne Place units which were the first I mentioned were completed and sold with settlements in April/May 1995. The net proceeds of sale after sales commission, legal and surveying costs and some disbursements were credited by the law firm to the Trust's account with the BNZ in reduction of the monies owing by the Trust pursuant to the mortgage given by the Trust to the bank. Now the position is I think accepted that the law firm had no option but to do that. The BNZ as first mortgagee was entitled to the money, it had provided the mortgage to facilitate settlement against the firm's undertaking to take the proceeds of sale to the Bank and if Your

Honours would like me to I can take you to the reference to that. It's in the case on appeal at 158.

Tipping J I don't think so for the moment Mr Gilbert, that sounds like a perfectly normal arrangement.

Gilbert Yes, yes it was. And indeed that position was confirmed by the law firm in a letter which it subsequently sent on the 14 November 2000 to the Inland Revenue Department and that's in the case at 221 and they explain the debt position of the Trust is such that the money realised from sale transactions was paid to secure creditors to reduce the indebtedness. The Trustees were required to do this as a condition imposed by the first mortgagee to release their securities. The Trustees considered at all material times there would be sufficient equity but in the result there wasn't following sale of the properties. Now again the fact that the Trustees had simply no option but to pay this money to the BNZ was later confirmed again by the law firm in a letter it wrote to Mr Everard who was counsel then acting for AMP. That letter is 12 January 2001 and it's in the case at 225. They say the long and the short of it was that the BNZ had mortgages against a number of properties cross-secured and it was a condition of the discharge and release of the mortgage that all of the proceeds were paid to the BNZ. So the result of this was that of course the GST on the sale transaction was not provided for and paid. Now the Court of Appeal accepted that the Trustees were personally liable for the BNZ borrowing and that it had no right to withhold payment from the BNZ and I'm referring there to the judgment paras.26, 32, 38(a) and (b). Now the Trustees were also of course personally liable to pay Income Tax, GST, PAYE and ACC levies relating to the affairs of the Trust and a break-down of these tax liabilities is in the case at page 132 and Your Honours will see if you look at that the most significant liability was in fact for Income Tax not GST because there was a transfer which credited most of the GST obligation reducing it to some \$20,000 only.

Tipping J What document are you referring to Mr Gilbert?

Gilbert It's page 132 of the case. These are numbered at the bottom

Tipping J What are you referring to as the case.

Gilbert Oh this is the case on appeal in the Court of Appeal.

Tipping J Well I don't think we have that so we'll just take it from you at the moment and if necessary we'll have to call for that.

Gilbert Right well, yes I thought it had been provided but perhaps not, yes as I say 132 of that. What it shows is that there was Income Tax in the 1995/96 and 97 years, GST, PAYE and some ACC levies. Ultimately a settlement was achieved with the IRD whereby the base tax was paid and the settlement was \$72,000 which gave rise to the claim now

pursued or which has given rise to these proceedings. There was also a payment of

Tipping J Mr Gilbert I think although this is helpful I think you can take it that we are pretty familiar with all the background. What we'd like you to do fairly soon, but not skimping anything you think is essential, is just take us to what you say are the important point for leave purposes.

Gilbert Yes, I have almost finished this background and that's exactly what I was going to turn to. In fact that is the last factual matter that I wish to refer to. The law firm and Mr Todd sued AMP under the firm's Professional Indemnity Policy, the essence of the claim being that Mr Todd had failed to provide for or set aside the GST payable in respect of the Towne Place units. So that even though there was no option in that regard the complaint, or the foundation for the claim against AMP was that the negligent failure on the part of Mr Todd and the law firm was to provide for and set aside the GST on the sale of the Towne Place units.

Tipping J Are you using pretty well the exact words of the pleading there?

Gilbert I am, it's para.19 of the amended Statement of Claim which is in the case at 23.

Tipping J Yes thank you that's fine. And that's the sole aspect of what Todd is said to have been negligent in respect of, failing to set aside or provide for?

Gilbert Yes the Statement of Claim is relatively discursive and there are also criticisms of the failure to monitor a person who was carrying out the property development work, but as I understand it and I'm sure my learned friend Mr Wylie will correct me if I'm wrong, I wasn't involved at any earlier stage in this proceeding, but my understanding is that the relevant causative negligence was the alleged failure to pay following the sale of the Towne Place units in response to which AMP has always said there was an absolute obligation on you to do that, indeed the firm had given an undertaking to the Bank to do so, it had no option. Now AMP resisted the claim inter alia on the following bases: First a claim by Mr Todd against himself and his firm was not a claim by a third party as required to trigger response under the Professional Indemnity Policy. That was in the Statement of Defence. The second relevant defence was that the claim was in any event excluded by Exclusion Clause 8 which provides that the policy does not provide indemnity against claims arising from a trading liability incurred by a business managed by or carried on by the insured, here the insured includes in its definition of Mr Todd – 'Mr Todd was a Trustee of a Trust. He was managing a business, namely Property Development'. The liability to pay tax was a liability incurred by that business and it was a trading liability'. So AMP said it's excluded by Exclusion Clause 8. And then thirdly AMP defended the claim on the

basis that there was no causation of loss because the money had to be paid to the BNZ, the Trustees were personally liable to the BNZ and in relation to the GST, having given the undertaking they had no choice but to pay it to the BNK and accordingly the loss was not caused by any failure to set it aside at that time but rather by the insolvency of the Trust, because the assets were all subsequently realised but there were insufficient funds available following the dissolution of the Trust assets or the realisation of them to meet this liability.

Tipping J There was no suggestion I take it that there was any negligence in giving the undertaking because that would have been a ridiculous proposition because they had to give it to secure the discharge.

Gilbert Correct, there was no such suggestion and in practical terms that of course must be right, the Bank would not have agreed

McGrath J I'm sorry Mr Gilbert but this is not a case where the GST might take priority over the mortgage funds.

Gilbert No it's not.

McGrath J It's not one of those cases?

Gilbert No it's well settled I think that the BNZ had priority over the revenue in relation to the money and it had insisted on payment of the money and indeed secured an undertaking from the firm that those monies would be paid.

McGrath J So it could be distinguished for example, I think it's the Edgewater case, but the circumstances are not the same?

Gilbert Yes that's correct. Your Honour's referring to the

McGrath J That's enough Mr Gilbert there's no need to go into the subtleties of it I can keep that in my mind.

Gilbert Thank you. Now the defences were all rejected by Justice Chisholm in the High Court, he found that causation was established and that the Exclusion Clause did not apply and he found also that Mr Todd was able to sue himself. The Court of Appeal expressly found, and I'm quoting from the judgment "there is no evidence as to the financial position of the Trust so that the respondents, that's the firm and Mr Todd, have failed to discharge the onus, their onus, as plaintiff to show that it was solvent. In other words that it would have made some difference if advice had been given at the relevant time that something needed to be done about GST". But the Court of Appeal nonetheless felt able to dismiss this appeal stating in relation to the causation point, and this is para.41 of the judgment 'that the case has proceeded on the basis that the Trust was solvent at the relevant time'. Now the appellant contends that there is no foundation for that statement,

question of causation had always been put in issue by AMP. Now the Court of Appeal did not deal with the question as to whether Mr Todd could claim against himself and his partners, thereby triggering an entitlement to professional indemnity cover under the policy and the Court of Appeal did not address the question as to whether the claim was excluded by Exclusion Clause 8. It noted that that point had been raised but did not thereafter make any reference to it or give any conclusion in relation to it other than by implication and certainly didn't express any reasons for rejecting that defence. So as we say in our submissions in support of this application for leave to appeal AMP is left in what we would respectively submit is the unsatisfactory position of not knowing whether its arguments were considered by the Court, whether they were rejected and if they were why they were rejected. So we say that leave ought to be given in this case by this Court on the grounds that there has here been a miscarriage of justice and on the other grounds which have been advanced in support of the application for leave, so we pick those up at paragraph.

Tipping J I suppose you contend Mr Gilbert that the first two points at least without prejudice to the third, the causation point, are points of general commercial significance anyway.

Gilbert Yes.

Tipping J That's part of your argument. Are you able to say as much for the third point, the specific point of causation, apart from the fact that you challenge the Court of Appeal's reasoning, how they got to their ultimate conclusion. Are you able to say that that causation point in itself is a matter of general public or commercial importance?

Gilbert It's very unsatisfactory because the Court did agree with AMP that the respondents have failed to discharge the onus on them as plaintiffs to establish this essential causation issue, but nonetheless are seen to reverse the onus in some way and find that the case had been run on a particular basis, even though there was no foundation for that, with the result that AMP lost on that ground without there being any satisfactory explanation as to how that occurred.

Tipping J Are you suggesting perhaps that there is a point of some general importance because of the lack of clarity about onus?

Gilbert Lack of clarity about onus and lack of sufficiency or lack of reasons for the decision, so it's really a question of justice that AMP feel and it is submitted that it is entitled to feel that it has not had justice because it appealed on a ground and hasn't received any reasons as to how it lost other than I suppose a suggestion from the Court of Appeal that the case had always been run on the basis that the Trust was solvent, but that can't be so because the assets of the Trust did not change, they were all disposed of and they were not sufficient to meet the obligation so it's difficult to see how the Court of Appeal can be right about that.

Tipping J Yes well you see we're not here as you know doubt are fully aware which is sort of just correct error, we have to identify on any particular ground a wider basis and you're really saying that there is a public importance element in the onus question and you've suffered a sufficiently grave miscarriage to justify leave, that's the essence of it on your third aspect the causation, but the other two stand on their own feet as to public importance.

Gilbert Yes.

Tipping J Thank you, that's how I understood it, thank you.

Gilbert I don't think I can take it any further Your Honour.

Tipping J No well that's very helpful, I'll see if other members of the Court have got any, no that's helpful, thank you very much Mr Gilbert. Now I take it Mr Till you have nothing you wish to add?

Till No thank you Your Honour I'm content to abide by the submissions of Mr Gilbert. Thank you Sir.

Tipping J Mr Wylie.

Wylie Thank you Sir. My starting point is of course s.13 of the Supreme Court Act which are the elements my friend has to establish if he is to get leave to appeal. I deal with each of the three grounds raised by him. Firstly the argument that Mr Todd couldn't sue himself, secondly exclusion clause 8 and thirdly causation. The issue as to whether or not Mr Todd could sue himself Sir is dealt with in my submissions, paras. 13 through to 15 on page 7. My friend in his submissions suggested that the Court of Appeal didn't address that issue at all and in my submission Sir it's quite understandable why it didn't directly deal with it and that's because it wasn't advanced before the Court of Appeal by my friend Mr Till who then had the carriage of the case. I've set out in para.14 of my submissions the fact that the issue as to whether or not Mr Todd could sue himself was raised as a ground of appeal. When AMP initially appealed His Honour Justice Chisholm's decision there five grounds of appeal, one of them was I read it "any claim which a second respondent personally had himself, against the solicitor or the first respondent was not one covered by the policy as it was not a claim by a third person but one by an insured against an insured constituting an uninsured loss and I've simply recorded that that ground was abandoned by AMP as appellant, it didn't form part of AMP's submissions filed with the Court of Appeal. Your Honours now have a copy of those. They are in the bundle of materials which accompanied the joint memorandum of the parties dated the 27 April under tab 5, Your Honours if you refer to that document will see that my friend Mr Till in his written submissions to the Court of Appeal summarised the grounds which he was advancing before the Court of

Appeal and the claim that Mr Todd couldn't sue himself was abandoned and the Court of Appeal itself recorded that in para.18 of its judgment. In my submission it's simply too late to criticise the Court of Appeal in that regard. The point was comprehensively considered by the High Court and it was not argued in the Court of Appeal and in that regard Your Honour

Tipping J What paragraph Mr Wylie in the Court of Appeal's judgment did you mention, I'm sorry I just missed it?

Wylie Paragraph 18 Sir.

Tipping J 18, thank you.

Wylie The Court of Appeal judgment, the copy that I've got Sir the pages are not numbered nor was there challenge by the existence of a duty owed by Mr Todd as solicitor to himself as Trustee. We therefore heard no argument on that topic.

Tipping J It doesn't absolutely preclude us from giving leave Mr Wylie. I hear the force of your point but we'll have to see what Mr Gilbert says about this seeking to withdraw that concession.

Wylie Yes Sir and that of course places the parties I represent in an impossible position. I also Sir rely upon the decision of the Supreme Court itself in the *Otago Stations* case where a similar point or a similar attempt was made by parties in that case to raise a point which hadn't been taken in an earlier point of time and the Court of Appeal firmly rejected it. The case is under tab 1 in the bundle of authorities I submitted to the Court

McGrath J Mr Wylie in this case the point was raised of course in the High Court, I don't think that was the case in the *Otago Stations* was it?

Wylie I think that may be correct Your Honour, yes.

McGrath J In those circumstances given that you had to deal with it in the High Court you got a judgment on the point from Justice Chisholm, I'm just not quite sure why it's an impossible situation for you. I mean presumably if it was raised in the High Court all of the necessary evidence in relation to the matter was dealt with in the High Court.

Wylie Yes but if one of the grounds of criticism is the fact that the High Court, sorry the Court of Appeal failed to give reasons for that aspect of its decision in my submission it did deal with it.

Tipping J Well that can't run but I think we're looking at the point more on its own merits rather than the lack of reasons aspect. If they abandon it they can hardly complain the Court of Appeal didn't deal with it but we're more interested in whether it's something that perhaps

exceptionally we should allow to be run because there's no evidentiary aspect of it, it's a point of law really whether the policy responded to these events.

Wylie In my submission Sir it has been dealt with comprehensively by the High Court Judge and it's inappropriate for it to come direct from the High Court to the Supreme Court without any intermediate ruling on it by the Court of Appeal.

McGrath J It's certainly unsatisfactory Mr Wylie and I understand your point but what I suppose I'm interested to know is whether in some way you've been prejudiced by that. I mean the argument you've just advanced is an argument that carries some force but you did say that this was an impossible situation or something of that kind and I just really want to tease out whether it's just the unsatisfactory nature of it or whether you're prejudiced in some way.

Wylie Sir I suppose the prejudice arises from the fact that this is now a case of just over \$50,000 it would be dubious whether you'd run it in the District Court let alone the High Court, the Court of Appeal and then the Supreme Court. In my submission AMP had its opportunity to raise the point and get a ruling on it, it failed to do so or elected not to do so, so now force respondents over a case for \$50,000 into the Supreme Court is in my submission prejudice to the respondents.

McGrath J I certainly understand and that's the full element of the prejudice is it? I mean I do understand that it's a bit rough on the solicitors but as to how prejudicial it is I'm not so sure.

Wylie The second aspect relates to exclusion clause 8 in the policy. I deal with this matter in paras.10 through to 12 of my written submissions and I make the point, perhaps if I can interpolate an additional point that it wasn't a case where the Court of Appeal gave no reasons and what my friend puts in issue was the adequacy of the reasons given by the Court of Appeal, I simply say that the Court of Appeal was clearly aware of the operative clause and exclusion clause 8. It refers to them in its judgment on a number of occasions, it cites what His Honour Justice Chisholm decided about the matters and it then went on to record that it agreed with the Judges' finding that in breach of duty Mr Todd had overlooked the GST liability and given no advice to the Trustees of the liability and it held that that would give rise to a civil liability for which the firm and Mr Todd would be entitled to an indemnity and it concluded that the respondents had established that they had committed a breach of professional duty which caused actual loss and triggered Trustees liability under the policy. That's at paras.39 and 40 of the decision. And in my submission those various findings can only be made by reference to the operative clause in the policy. Now I accept of course that the Court didn't deal expressly in its final conclusions with exclusion clause 8 but in my submission the conclusions which it did reach, in particular in para.38© and para.39

and in para.40 deal with the issue of exclusion clause 8. Exclusion clause couldn't arise on the findings made by the Court of Appeal because the failure by Mr Todd and the firm was a failure to act properly in their capacity of solicitors. That cannot be a trading loss or liability falling within the ambit of exclusion clause 8.

Tipping J I'm having some difficulty Mr Wylie, would you mind if I just asked you something at this point?

Wylie Certainly Sir.

Tipping J I'm having some difficulty separating out, although I can see the distinction conceptually between Mr Gilbert's point 1 and point 2. If we were to give leave on point 2, and it's a big if, I just wonder whether we would be making life awkward all round if we didn't also give leave on point 1, because it's all sort of interwoven in a sense.

Wylie Yes Sir I can appreciate that point and that I suppose is an additional prejudice to answer His Honour Justice McGrath's point put to me before in that the focus is on exclusion clause 8, the operative clause in the policy that point having been abandoned by AMP before the Court of Appeal.

Tipping J Yes, thank you.

Wylie Sir perhaps just dealing with this alleged failure by the Court of Appeal to give reasons, I simply make the point that this case has never been about the duty to give reasons and were the Supreme Court to deal with it on that basis as my friend suggests in my submission it would effectively be sitting as a Court of first instance. In my submission that would be unusual. In my submission the appellants had the option when the Court of Appeal issued its judgment of asking it to recall its judgment and to deal expressly with the exclusion clause 8 point. They didn't do so and even if they were successful on the exclusion clause 8 point before the Supreme Court in a sense that they could persuade the Court that the Court of Appeal should have dealt with it and didn't the likely result would be that the Supreme Court would remit it to the Court of Appeal and in my submission that's inappropriate given it's being at least implicitly dealt with by the Court of Appeal in the findings its made.

Tipping J Just before you move on what about exclusion 8 on its own merits. Your answer to that I understand Mr Wylie is that it's just not arguable, or fairly arguable that this situation even if otherwise covered is excluded by condition 8.

Wylie Not arguable Your Honour over the High Court or the Court of Appeal's findings as to Mr Todd's negligence Sir, no.

Tipping J Yes understood, thank you.

Wylie Now turning to my friend's third point which he's summarised as being no causation of loss and solvency, Your Honours will appreciate from having read the papers that there were a number of Trust assets. My friend listed various blocks of land purchased by the Trustees, there was also clearly trusted indebtedness at various times which varied from time to time. Eventually the last of the Trust assets was realised in April 2000 and at that point of time the assets proved insufficient to meet the various liabilities of the Trust including the GST and other taxes payable to the revenue. An issue which was debated before the Court of Appeal was whether or not the Trust was solvent at the time of the transaction, that is when the GST was incurred which was in April and May 1995, and that issue, or that point was simply put in issue by AMP. The issue of the solvency of the Trust at the end of the day was pleaded by the respondents. They said that the Trustees had to pay personally because the Trust at the end of the day in April 2000 proved to be insolvent and that was admitted by AMP but the issue as to solvency at the time the GST was incurred which was the issue which the Court of Appeal had to deal with was simply not argued before the High Court and a litigation was conducted throughout by both parties on the basis the Trust was solvent at that time and the Court of Appeal expressly discussed that with Counsel in the course of its hearing and it has noted that in its judgment at para.17 and in the final two sentences in para.41. Further Your Honours will have seen from the individual memorandum which was filed on behalf of the respondents that Mr Todd gave evidence in relation to the issue. It was his evidence that the Trustees believed throughout that there were more than sufficient assets in the Trust to meet such liabilities as it was under, that's in his evidence in chief at para.23, also clear from the agreed statement of facts that the Trustees obtained various valuations of Trust assets and the problem was at the end of the day the main remaining asset, the property at Lake Hayes, didn't sell for the amount of the registered valuations nor indeed for its government valuation or capital valuation. But the Trustees certainly thought that they had more than sufficient assets to meet the liabilities throughout and they held valuations to that effect and the Trust's financial position only crystallised in April 2000.

Tipping J I'm not sure that I understand why it matters what was in the Trustees minds if the allegation is that he'd failed to set aside or provide for GST on the occurrence of the relevant transaction.

Wylie I was going to come to that in a moment Sir. The allegation goes a little bit beyond that and I'll turn to that in a moment but my point for present purposes Your Honour is simply that AMP at no stage put in issue the solvency of the Trust at the time the firm and Mr Todd failed to give the necessary advice in relation to the GST and in my submission were the appellant now to be entitled to put that issue it effectively would be recasting its case and in my submission that once again would be unfair to the respondents. Turning to the

Tipping J But didn't you have to prove causation?

Wylie Yes Sir we did but in my submission there's evidence in the papers which I presented to the Court, various passages which I've cited, indicating that there was a surplus of assets over liabilities.

Tipping J At the time

Wylie At the relevant time.

Tipping J At the 1995 date?

Wylie As at April/May 1995 when the GST liability was incurred Sir. Now I suppose my additional submission Sir would be that in any event, even if I'm wrong in that regard, it's not a point which gets over the hurdles in s.13 of the Act.

Tipping J Yes.

Wylie The next point Sir is to simply deal with one or two points that my friend Mr Gilbert suggests. He suggests that

Tipping J You're disappearing from us Mr Wylie, could you just repeat what you were saying?

Wylie Certainly Sir. My friend Mr Gilbert suggested that the pleading was limited to the failure to provide for or set aside the GST. If I can just refer Your Honours to para.19 in the Statement of Claim, I'll read it "that the first plaintiff through the second plaintiff failed to require the second plaintiff an LP Walker as Trustee of the Walker Trust, to account to the IRD or to provide for or set aside the GST payable in respect of the sale of the Towne Place Units or to advise them of the consequences of failing to do so or of their duties owed to the beneficiaries of the Walker Family Trust which are detailed in another paragraph, that the pleading wasn't confined to a duty to provide for or set aside. Now those Sir are my submissions and unless I can further assist the Court?

Tipping J No thank you very much Mr Wylie.

Wylie Thank you Sir.

Tipping J Mr Gilbert in reply.

Gilbert On the suing himself point the point was clearly raised in the pleadings in the High Court. It was also raised in the Notice of Appeal filed by AMP in the Court of Appeal it was ground 4 which reads "any claim which the second respondent personally had against himself as solicitor and/or the first respondent was not one covered by the policy as it was

not a claim by a third person but one by an insured against an insured constituting an uninsured loss” so the point was raised in the High Court when the evidence was called by the parties to resolve the issue it was raised in the Notice of Appeal. I can’t take the matter any further than that because I wasn’t present in the Court of Appeal and perhaps Mr Till can tell us whether it was formally abandoned.

Tipping J Well I think we can take it on the fact of the judgment Mr Gilbert. On the face of the Court of Appeal’s judgment it clearly wasn’t pursued in the Court of Appeal.

Gilbert Yes the Court of Appeal doesn’t note the point as having been abandoned. What the Judges’ say in the judgment is that they heard no argument about it.

Tipping J Well yes but looking at it in a substantive way it seems pretty obvious that your client now wishes to resurrect a point that it didn’t think it should pursue in the Court of Appeal which doesn’t incline one very strongly in their favour.

Gilbert Yes I can’t dispute that Your Honour I simply make the point that it was raised at the time when any prejudice might have otherwise arisen had it not been raised, namely in the High Court and it was formally raised in the Court of Appeal although I accept of course that the matter as appears from the judgment was not pressed in argument before Their Honours.

Tipping J Thank you.

Gilbert On exclusion clause 8 in my submission this is a matter which has not been dealt with at all in the Court of Appeal’s judgment and it is an important issue. There are conflicting High Court judgments on it and it is one in its own right in my submission in respect of which leave to appeal could be granted and should be granted.

Tipping J Could you just indicate as simply as you can how the trading liability exclusion would bite here?

Gilbert Yes, I should find the precise words. It’s in the Court of Appeal’s judgment at para.14, so there’s no indemnity against any claim or loss arising from, those words are quite broad, their trading loss or trading liability incurred by a business, managed by or on behalf of the insured. The insured is defined to mean ‘the firm and all of the partners in the firm and various others’. Mr Todd is an insured for the purposes of this policy. The liability that gives rise to the claim is a liability arising out of trading, namely the purchase and sale of these units at Towne Place in Queenstown and the liabilities for PAYE, ACC levies and other GST income tax components are similarly trading liabilities. Those liabilities have been incurred by the Trust which was a business, a property development business, which was managed by or

carried on by Mr Todd and his fellow Trustees as the Trustees of the Trust, so AMP would say this is the type of liability excluded from the scope of a solicitor's professional indemnity policy.

Tipping J But it's not the trading loss or liability per se that sued for is it, it's the negligence of the solicitor in relation to his failing to advise the business?

Gilbert Well yes, the allegation is as my learned friend Mr Wylie has just said, to provide for or set aside the GST payable in respect of the sale of the Towne Place units or to advise of the consequences of failing to do so. So this is a claim arising from, it arises from that trading liability.

McGrath J So the meaning of the words 'arising from' would be crucial if you were to argue this point before us?

Gilbert Yes, yes that's right.

McGrath J As opposed to 'caused by' or something like that?

Gilbert Yes, exactly.

Tipping J But isn't it designed to eliminate a claim for a trading loss per se rather than a claim for professional negligence? It's hard to keep the other dimension out of one's mind when one's looking at this but trying to do so, doesn't this simply say you don't get covered if you make a trading loss? It's got nothing to do with professional negligence has it this exclusion? If there's professional negligence contributing to if you like the trading loss, you're saying that excluded necessarily too?

Gilbert Yes I do because it's a trading loss or liability of a business carried on by or managed by the insured. So it's focusing on that sort of a liability. If it was a trading loss or a liability arising out of a business carried on by a client then it wouldn't be excluded but here it's excluded because this is the business that's being managed and carried on by the insured itself and accordingly excluded by that provision. It arises from it.

Tipping J And the insured is defined so as to be joint and several is it?

Gilbert Yes that's correct. But Mr Todd is himself an insured for the purposes of this policy.

McGrath J Your saying really aren't you that it's a business carried on by the insured rather than one managed by the insured.

Gilbert Correct. Well as Trustee he's managing the business as well I would have thought. I think it's both. For example similarly if it was a liability that a director had for managing a business of which he or she was a director then similarly claims arising out of trading losses or

liabilities in that connection would not be covered by the firm's Professional Indemnity Policy.

Anderson J As things stand at present every time a solicitor Trustee makes a bad business call they can say 'whoops, I should have advised myself differently'.

Gilbert Exactly.

Anderson J So every loss that the policy is intended to exclude is brought in by a fiction or a device, that's your proposition is it?

Gilbert That's our proposition.

Tipping J And is it also your proposition Mr Gilbert that because it's an exclusion it necessarily proceeds on the premise that what would otherwise be liability for professional services, is excluded if it is of this character.

Gilbert Yes, I accept that.

Tipping J There has to be some force in your client's argument that it is a carving out from something that would otherwise be covered.

Gilbert Yes.

Tipping J And therefore to be otherwise covered it has to have answered to the policy but for this exclusion?

Gilbert Yes. Now my learned friend says that AMP failed to put in issue the question of solvency of the Trust. In my submission that's unfair to AMP. The position is that as the Court of Appeal correctly observed the onus was always on the firm and Mr Todd to establish causation and the Court of Appeal included that the Trustees had failed to discharge that onus on them, which is 38©, sorry it's 41(e), the respondents have failed to, I beg your pardon, 41© there is no evidence as to the financial position of the Trust so that the respondents have failed to discharge their onus as plaintiffs to show it was solvent and with respect that must be right but how the Court was able to proceed from that proposition to dismissing AMP's appeal is not revealed in its reasoning and in my submission a miscarriage of justice has occurred.

Tipping J Why, and I know you probably can't answer this Mr Gilbert, but I'll just give you the opportunity. It does seem odd to say that the plaintiffs have failed to establish causation and then as a rider to that 'in summary' paragraph, but they didn't have to because it was conceded. In effect that's what they're saying isn't it? The Court of Appeal could be read as saying they failed to do it but that's no problem because in effect it wasn't an issue.

- Gilbert Yes, which is, and I'm not sure, I don't believe there's any material that can be pointed to, to show this. The Trustees gave evidence that they thought that there were sufficient assets. We know what the assets were and they thought that they had a value that ultimately they didn't have so the fact that they may have thought that there was equity here sufficient to discharge this liability is completely irrelevant in my submission. What they had to show to the requisite standard was that if advice had been given the position would have been different. That they would have been able to meet this somehow or another from the Trust assets but the facts are that within a very short time of the disposal of those units within months the Trustees became aware of the tax liabilities, they set about realising the assets and there was a shortfall. It's hard to see what else they could have done. And as to the allegation that they should have set aside the money, there could never be anything in that. They had no entitlement to do that. They would be in breach of undertaking had they done that. That's all I wish to say in reply unless Your Honours have any questions of me.
- McGrath J I would like to hear from Mr Till rather than you I think Mr Gilbert on the suing yourself point just as to what did happen in the Court of Appeal.
- Tipping J Are you able to help us there Mr Till?
- Till Yes indeed Your Honours. The position is that that point was not pursued and as I think my learned friend Mr Wylie has put out in his written submissions in opposition, I did advise him before that hearing that that point would not be pursued and indeed I addressed no argument to the Court on that point.
- Tipping J Either in writing or orally? No argument either in writing or orally?
- Till No, so the point was before the Court only in the grounds on appeal, no written nor oral submissions were addressed to the Court and the basis in which I made that decision, or my client did, was that the judgment being appealed from was one of liability as Trustee so that the claim made was one as Trustee, the sole foundation of it being that the money which was paid to the Bank should not have been paid to the Bank but should have been paid to the revenue and indeed the basis of liability then found by the Court of Appeal is an entirely basis of liability, namely that if advice had been given to the Trustees at the time they could in some way have done something to alter the position so that personally the liability would not have ended on the Trustee personally. So for the purposes of meeting, the judgment being appealed from, the High Court judgment, it was not necessary to look at that point and so that was the basis of my making that election.
- McGrath J When you say they could have done something, what did you have in mind?

Till Well that must fundamentally be the basis of the decision Your Honour in the Court of Appeal, namely that having established the money had to be paid to the Bank and not to the revenue, which was the foundation of liability in the High Court, the Court of Appeal's judgment must necessarily be that if the Trustees were aware in April that the money had to be accounted for, that there was some action that could have been taken and indeed that basis of liability had not been previously argued, so that it ends up with the position of requiring firstly proof of some difference of position being able to be achieved by the Trustees between the time of sale and the time of their becoming aware of the liability which as Mr Gilbert said a moment ago was a matter of months and secondly the liability is one personally because there is no loss to the Trust Fund but merely an inability of the Trustee to discharge the personal liability by having recourse to the right to indemnity, and so this was a wholly new case which didn't even develop during the course of arguments to any extent but simply pops out of the Court of Appeal's judgment at the end of the day.

McGrath J Thank you.

Till But my point was in order to meet the basis of liability found in the High Court it was not necessary to pursue that point. The basis of liability in the High Court was answered by the point on which the appellant was successful in the Court of Appeal, namely the obligation was to pay the money not the revenue but to the Bank as indeed was done.

McGrath J Thank you Mr Till.

Till Thank you Your Honours.

Tipping J Mr Wylie in the light of that submission that's just been made is there anything further you wish to say, particularly in relation to the proposition that the foundation for the liability shifted if you like as between the High Court and the Court of Appeal?

Wylie Yes Sir, in my submission that's not the case. It was always the case or the respondents' that they had failed to properly advise themselves, also Mr Todd and his co-Trustee Mr Walker, as to the correct position regarding GST. That was argued before His Honour Justice Chisholm, was accepted by His Honour Justice Chisholm, and was accepted by the Court of Appeal. In my submission there was no change of position by the respondents in that regard at all. In the High Court the authorities relied on by the Court of Appeal, the revenue authorities weren't advanced to the High Court by AMP, they were raised for the first time in the Court of Appeal.

Tipping J But did Justice Chisholm proceed on the premise that the error if you like of Mr Todd's ways was not making sure the revenue got paid before the Bank, because that's the impression I got from what Mr Till

has just observed? We can look this up for ourselves but as we have you helpfully with us

Wylie I'm just turning to His Honour Justice Chisholm's decision Sir. It's para.43, page 13 of the case. It follows through Sir, his analysis of the position starts at para.34 and relevantly it follows through. It probably starts about para.41 "His Honour of course he was satisfied on the evidence of the conveyancing role which gave rise to the GST problems undertaken by Mr Todd in his capacity as a solicitor". In para.42 "In his capacity as a solicitor Mr Todd failed to exercise proper care and skill when acting on the sale of the units" then goes through to talk in para.43 about "Failure to pay GST"

Tipping J Just pause, just pause Mr Wylie would you. At 42, you read the first sentence but then the Judge says "Failure to make provision for GST speaks for itself".

Wylie Yes Sir.

Tipping J That with respect may be a little cryptic mightn't it in the context of this case? In the sense he could either be read as saying they that they should have paid the revenue straight away or he could be read as saying they should have set aside something to pay the revenue later.

Wylie Yes Sir, I accept that with the benefit of hindsight the passage is cryptic.

Anderson J Mr Wylie something that Mr Till mentioned suggests I should ask you this? Do you say that Mr Todd's liability for tax which he paid was a personal liability or a Trustee liability?

Wylie It started as a Trustee liability, well I suppose it was a personal liability from the outset, it was a potential personal liability from the outset.

Anderson J So how can he sue himself personally at the suit of himself personally.

Wylie He was able to sue himself as a solicitor for advice he failed to give as his solicitor.

Anderson J But it was a personal liability that he met not a Trustee liability.

Wylie Sir the proposition is based upon the assumption that Mr Todd should properly have advised himself as to the GST liability, the consequence of not paying it, which included becoming personally liable to reimburse the IRD for the GST.

Anderson J It's obvious of course that one can sue oneself as a Trustee at the suit of oneself personally and vice versa. But one can one sue oneself personally at the suit of oneself personally.

Wylie In my submission Sir, yes that was dealt with by His Honour Justice Chisholm and not advanced by AMP before the Court of Appeal.

Anderson J I think it's a very novel proposition.

Wylie Sir with respect supported by the Trustee Act I think at s.33(a) which His Honour Justice Chisholm referred to and relied on.

Anderson J But it depends on different capacities doesn't it?

Wylie Yes Sir, it does.

Anderson J Well if the capacity is the same here he's incurred a personal liability and he wants to sue himself personally for it.

Wylie But it's only potential personal liability which only comes home to roost when the principal heir to the Trust isn't able to meet the obligation at the end of the day.

Anderson J So what's the Trust lost.

Wylie I'm sorry Sir I didn't catch that point.

Anderson J What has the Trust lost?

Wylie Well the Trust has lost the opportunity to repay at a time when it could have done so.

Tipping J Well thank you Mr Wylie, you probably went a little wider than you were anticipating but is that all you want to say in response to Mr Till's contribution?

Wylie It is Sir, thank you.

Tipping J Thank you. Well thank you Gentlemen, we will take time to consider our decision here. We won't give judgment immediately because there are some quite significant issues.

Court adjourned 11am