IN THE SUPREME COURT OF NEW ZEALAND SC 46/2011

BETWEEN **NEIL TONY HICKMAN & ORS**
First Appellant

AND **DAVID JOHN LESTER & ORS**
Second Appellant

AND **ANTHONY COLLINGWOOD & ORS**
Third Appellant

AND **NORMAN AND MARIE HERRICK**
Fourth Appellant

AND **TURNER AND WAVERLY LIMITED (FORMERLY TURN AND WAVE LIMITED)**
First Respondents

AND **GREENSTONE BARCLAY TRUSTEES LIMITED**
Second Respondent

AND **GRAFTON PROJECTS LIMITED (FORMERLY ICON CENTRAL LIMITED)**
Third Respondent

Hearing:	7-9 November 2011
Court:	Elias CJ Tipping J McGrath J William Young J Anderson J
Appearances:	P J Dale, N R Campbell and D W Grove for the Appellants S H Barter for the Appellant Herrick D J Chisholm and G P Blanchard for the First Respondent

D J Neutze for the Second Respondent
B O'Callahan for the Third Respondent

CIVIL APPEAL

MR DALE:

May it please your Honours, Dale with Messrs Campbell and Grove for the appellants.

ELIAS CJ:

Thank you Mr Dale, Mr Campbell, Mr Grove.

MR BARTER:

May it please your Honours Barter for the appellant Herrick.

ELIAS CJ:

Thank you Mr Barter.

MR BLANCHARD:

May it please, Chisholm and Blanchard for the respondent Turner and Waverley.

ELIAS CJ:

Thank you Mr Chisholm, Mr Blanchard.

MR NEUTZE:

May it please the court, Neutze for the respondent Greenstone Barclay Trustees Limited.

ELIAS CJ:

Thank you Mr Neutze.

MR O'CALLAHAN:

May it please the court, O'Callahan for Grafton Projects.

ELIAS CJ:

Yes Mr O'Callahan, thank you.

Well have counsel worked out, well I suppose it's really the respondents what order they will appear in. You will go first Mr Dale?

MR DALE:

Yes Mr Campbell's going to lead the argument for the appellant.

ELIAS CJ:

Thank you. Yes Mr Campbell?

MR CAMPBELL:

Your Honour at issue is the enforceability of various sale and purchase agreements that each appellant entered into with one of the respondents. Those agreements were entered into in conjunction with investment products that Blue Chip marketed and the respondents knew that Blue Chip would be marketing the apartments and those investment products together. It's the appellant's submission that the investment products themselves were securities offered and allotted in breach of the Securities Act and moreover, that the respondents cannot have it both ways. They can't both take advantage of what their agents, the Blue Chip sales agents, have done in obtaining purchases for the apartments and yet at the same time disown what those same agents have done in going about doing the very thing that the respondents wanted them to do, namely finding and introducing purchasers.

Now I'm going to start by going through the relevant facts. I'll dwell on some that might require a bit more explanation.

TIPPING J:

Are you relying on both the definition of a debt security and the composite definition of a security or if not, which one?

MR CAMPBELL:

Just the definition of debt security your Honour.

TIPPING J:

Just debt security, thank you.

MR CAMPBELL:

And to a limited extent with the joint venture agreement, the definition of equity security.

Now the general theme of the investment products marketed by Blue Chip was that there would be an unconditional sale and purchase agreement between one of the appellants, one of the investors and a vendor for an apartment that was yet to be built. Under the sale and purchase agreement it was acknowledged that the apartment would be leased and there would be, and there was, lease documentation attached to the sale and purchase agreement. In addition to that, through various means and I will of course take you through the particular agreements between Blue Chip and the investor, the investor was to receive a return by way of various payments from Blue Chip and under the agreements there were three types that were issued in this appeal. A joint venture agreement where Blue Chip and the investor were, to some extent, simply acting as joint venture partners but they were doing much more than that because under the joint venture agreement, as I'll come to explain, Blue Chip was also, and you don't ordinarily see this in a joint venture agreement, undertaking to make payments during the course of the joint venture to the investors and those payments were –

WILLIAM YOUNG J:

This wasn't quite the one that was involved in *Bartle v GE Custodians* [2010] 1 NZLR 802, (2010) 9 NZBLC 102, 748 (HC); *Bartle v GE Custodians* [2010] NZCA 174 [2010] 3 NZLR 601; *GE Custodians v Bartle* [2010] NZSC 146 [2011] 2 NZLR 31 or was it? Was that the joint venture agreement or was it something slightly different, Mr Dale will know I think?

MR DALE:

It was a joint venture agreement, yes your Honour.

WILLIAM YOUNG J:

Okay.

MR CAMPBELL:

Yes it was in different terms, it was one of the – it was an older version of the joint venture agreement.

WILLIAM YOUNG J:

Okay so it's not the same, it's not the same as this?

MR CAMPBELL:

No there were, there were certainly similar elements but no it was different. Just to explain your Honour I wasn't involved in *Bartle* so I don't have the same understanding of that as Mr Dale and Mr Grove.

WILLIAM YOUNG J:

Right.

MR CAMPBELL:

But as I was saying under the joint venture agreement, as I'll explain in due course, it wasn't simply co-ownership and letting of a property but the Blue Chip partner was promising to make certain payments to the investor during the course of the joint venture and those payments were really in the nature of providing a return on the investment that the investor had made into the joint venture.

And under the other products that we'll look at, the PIP agreement and the PAC agreement, in both of those options were granted to Blue Chip to take over the investors' rights and obligations under the sale and purchase agreement. Now it's interesting to note the way in which Blue Chip itself regarded the products it was offering to investors and that's why I've included the quote that the Court of Appeal themselves quoted from Blue Chip's 2005 Annual Report at paragraph 6 of my submissions, which explains what Blue Chip's point of difference is. It provides a financial planning solution that utilises property rather than just providing the property itself and it concludes by saying, "Investors know upfront the returns to expect, which is more akin to a financial product than a standard property investment." Now of course I'm not suggesting that this somehow is going to be determinative of the issues in this hearing but in my submission the way in which Blue Chip has described its product at the end - there is basically a financial product rather than a standard property investment - is absolutely accurate, and that will become evident from the agreements when I take you through them. And of course the Securities Act is absolutely concerned with financial products and in securities legislation around the world these days, "financial products" is the term that tends to be used rather than securities. The change in terminology really doesn't make much difference but that's

really what the Securities Act is directed towards and as I say that's, I think, an accurate description of the products that were marketed.

The marketing methods of Blue Chip are set out by Justice Venning in *Icon Central Limited v Collingwood* HC Auckland CIV-2008-404-7424, 25 November 2009, paragraphs 111 to 118. Your Honours you'll be aware that there were three judgments from Justice Venning, they each follow much the same structure and there is a lot of reasoning and analysis that is common to and almost repeated in each judgment, so generally speaking when I've referred you to some paragraphs in one judgment unless they're just dealing with particular factual issues, it's almost certain that you'll find the same passages, sometimes the same words, in the other two judgments (*Lester v Greenstone Barclay Trustees Ltd* [2010] 3 NZLR 67 (HC); *Hickman v Turn & Wave Ltd* HC Auckland CIV 2008-404-5871, 25 November 2009).

WILLIAM YOUNG J:

This is a slightly peripheral issue, but how did this marketing method tie in with the real estate agents' legislation?

MR CAMPBELL:

Well, my understanding is that Blue Chip was not licensed, so in that sense there may have been a breach of that legislation. I confess it is not a matter that I've explored, and I'm not sure whether it was in the High Court, where I didn't appear, Sir.

WILLIAM YOUNG J:

Well, it's a peripheral issue, if it's an issue at all.

MR CAMPBELL:

Yes, I –

WILLIAM YOUNG J:

It's idle curiosity on my part.

MR CAMPBELL:

Well, yes, I confess I experienced that slight curiosity a few days ago, but didn't take it anywhere, I'm afraid.

TIPPING J:

I'm afraid I was more idle than curious, Mr Campbell, on this point.

ELIAS CJ:

But it may be relevant at some stage, if we're considering the whole scheme of protection for investors, to know what's available under what. I don't even know, does the Real Estate –

WILLIAM YOUNG J:

Real estate agents' legislation.

ELIAS CJ:

– Agents Act purport to cover all transactions?

WILLIAM YOUNG J:

I think on the whole, if you're selling property as an agent for someone else, in the way that real estate agents do, you are required to be licensed, that's the general proposition, and I just wondered how that worked here.

MR CAMPBELL:

Well, as I say, my understanding is that they were all unlicensed. As I'll explain in a few minutes, the arrangements between each of the respondents and the various Blue Chip companies contemplated that licensed –

WILLIAM YOUNG J:

Yes.

MR CAMPBELL:

– real estate agents would be used, but –

WILLIAM YOUNG J:

They weren't.

MR CAMPBELL:

– they weren't, and in each of the three judgments Justice Venning came to the conclusion that each of the respondents were aware of that and implied they

authorised it. I might give that further thought in the luncheon break and draft an amendment.

ELIAS CJ:

Not to the statement of claim.

TIPPING J:

To what? An amendment to what?

WILLIAM YOUNG J:

The statement of claim, I think he suggested.

ELIAS CJ:

But where you might, what you might want to consider is the inter-relationship of that legislation with the securities legislation.

MR CAMPBELL:

Yes, thank you, your Honour.

WILLIAM YOUNG J:

I'd have thought that the, a breach of the Real Estate Agents Act, apart from any criminal sanctions, merely has the effect of depriving the agent of the right to the commission.

MR CAMPBELL:

The legislation, both the current one and the previous Act, does tend to visit non-compliance upon the agent, from my fairly basic understanding of the Acts, rather than on the principal.

TIPPING J:

I don't think it has any effect of vitiating or otherwise the underlying contract, does it?

WILLIAM YOUNG J:

No.

MR CAMPBELL:

No.

TIPPING J:

Anyway, you'll no doubt…

MR CAMPBELL:

In any case, the sales agents would contact potential investors and obtain their financial details to see whether they qualified for a mortgage. If they did, the sales agents would get the investors to sign an authority to proceed, which would appoint Blue Chip as the agent for the investors to seek finance and to locate a property, among other things. Now, there is an example of one of these authorities in what's been called, I think, the "general bundle". Now, there are quite a number of bundles. There are three volumes for the Barclay or the Greenstone appeal, three for the Turn and Wave appeal and two for the Icon appeal, and then there's another general bundle. And the authorities at page 3 of the general bundle, I think in –

TIPPING J:

Is this the bundle of essential authorities?

MR CAMPBELL:

No, it's the general bundle of miscellaneous documentation, quite a thin one. It has a black – well, mine has black binding.

ELIAS CJ:

Sorry, and is it, which one, volume 1?

MR CAMPBELL:

Yes, it says, "Volume 1." There is however –

ELIAS CJ:

Yes.

MR CAMPBELL:

– only one volume of it.

McGRATH J:

"Miscellaneous documentation".

MR CAMPBELL:

Yes. Just by way of explanation, partly because of the speed with which this was brought on, bundles were created really as we were drafting our submissions, on the understanding that the respondents could request that further documents be put in, which is what happened.

BLANCHARD J:

This is what – we had called this the "general bundle"?

MR CAMPBELL:

Yes.

TIPPING J:

Madam Registrar, I haven't got it, I don't think, so – I beg your pardon, here it is.

ELIAS CJ:

I think you can take it that we haven't read it.

MR CAMPBELL:

Well, you may be pleased to know that there aren't too many pages in this particular bundle, or in fact in many of the others that I will be taking you to.

Page 3, and the numbering's at the top, I think of every one of these bundles. Unfortunately, there are page numbers all over the place, partly because the documents have been used at a number of levels. So on page 3, this is an example of a letter of authority from some investors to Blue Chip New Zealand Limited, and you will see that it authorises Blue Chip to carry out, firstly, a number of actions. Firstly, to make application for the raising of finance, that application to be based on the completed form attached. And then, thirdly, and more importantly, "Upon satisfaction that funding will be available to place the deposit and settle the properties, Blue Chip is to proceed immediately to prepare draft sale and purchase agreements and call agreements over residential investment properties located in the greater Auckland area ready for execution by me/us," and you'll note that what the investor is authorising Blue Chip there to do is not only prepare the draft sale and purchase agreement, but also what's there called a "call" agreement, which is essentially what the PIP, the premium income product agreement, is.

Now, once Blue Chip had located a property, the sales agent would prepare a financial analysis for the investor, setting out the investor's expected return, and there's an example of that in the same bundle at page – maybe if we start at page 118?

ELIAS CJ:

Sorry, did you wish to make any particular, any further comment about the letter of authority, before we move on to page 118?

MR CAMPBELL:

No, simple to observe, your Honour, that at the outset, at least for that letter of authority – and it's just an example, I think there's only one other in the bundle – IT contemplates that Blue Chip is not just going to be obtaining an apartment, but also getting ready, in that case, a call agreement for execution by the investor. I suspect it is more the respondents who will be wanting to make something of the letter of authority, because they make something of the fact that the investor – well, they make something of the fact that Blue Chip was acting not only as an agent for the respondents in finding purchasers, but also that Blue Chip was authorised by the investors to obtain finance and to locate an apartment. Now, to foreshadow what I will say at some point, later in my submissions, the fact that Blue Chip was acting as an agent for the investors doesn't really matter at all for the issues that are alive today, or indeed for any of the issues that I think have ever been alive in this proceeding, because it's never been suggested that Blue Chip did something on behalf of the investors for which the investors are responsible to the respondents.

So the respondents aren't making some counterclaim for misrepresentation or anything like that, they of course are not seeking to rescind any agreements on the basis of some misrepresentation made by Blue Chip on behalf of the investors. So I think that consideration can be put to one side.

So, at page 118, this is the example of the sort of documentation that Blue Chip would send to an investor.

TIPPING J:

It's interesting it's called, "The Blue Chip investment process."

MR CAMPBELL:

Indeed. I mean, the term "investment" is found everywhere, and I'll take you to some other phrases, your Honour, in this letter and the accompanying documents, that make that point.

So, this is basically a covering letter and, after saying that, "Our team has now selected the property which will form the basis of your investment," you'll see that it says, "Accompanying the letter are a financial analysis," which I'll take you to in a moment, "An agreement for sale and purchase, a property management agreement and a deed of lease and then invoices for the initial contribution."

Now this particular letter was addressed to an investor who was going to be an investor in the joint venture agreement, rather than the PIP product so just, just – I'll say a lot more about the joint venture agreement shortly but just to put that in context.

Then under the first heading "The Transaction." It says, "The way in which Blue Chip describes the transaction, it's been designed to provide you with a secure passive income stream, with the risk and responsibility of interest payments transferred to Blue Chip Joint Ventures Limited." Then there's an explanation of the transaction and I will take you through the actual document that was eventually – actual agreement that was entered into eventually between the investor and Blue Chip.

"Under the terms of the transaction, a corporate trustee will acquire title to the legal property to be held in accordance with the terms of a joint venture." Then the summary of the investor's entitlements under the joint venture are set out. "Firstly, the investor is entitled to interest on the borrowings you raise to make this investment."

Now and then, in very general terms, under the joint venture agreement, the investor raised the money and contributed that towards the joint venture, so that the joint –

WILLIAM YOUNG J:
Did that include working capital?

MR CAMPBELL:
Yes.

WILLIAM YOUNG J:

So that was retained in the meantime, if you take the joint venture, Blue Chip – the joint venture company as part of Blue Chip, was retained within Blue Chip?

MR CAMPBELL:

You mean the money was?

WILLIAM YOUNG J:

The working capital contribution.

MR CAMPBELL:

Yes, well it was retained within the joint venture which consisted simply of the investor and Blue Chip Joint Ventures Limited.

WILLIAM YOUNG J:

Yes and that money provided a source from which procurement fees could be repaid if necessary. Although, well I presume there's only one pot of money?

MR CAMPBELL:

Yes, yes.

ANDERSON J:

They put up money to get it back?

MR CAMPBELL:

To a certain extent, yes.

ANDERSON J:

That's how it seemed in the *Bartle* case.

MR CAMPBELL:

Yes. So, the point that I'm making now is however, that firstly because the investor was going to incur its own interests costs by raising the money necessary, firstly for the deposit, the working capital and on settlement the balance of the purchase price, the first thing that Blue Chip promised to do was basically to reimburse the investor for those interest payments –

TIPPING J:

So this was, in effect, an indemnity against the interests that the investors were going to have to pay to the financier?

MR CAMPBELL:

Yes, yes. So that – and that basically rules off the cost to the investor, or the ongoing financial cost to the investor of the investment and the procurement fees which is the next bullet point, is then effectively the return that the Blue Chip company provides to the investor on again, the investment that the investor has made into the joint venture.

McGRATH J:

Which is the main attraction for the investor –

MR CAMPBELL:

Indeed and we'll see that in the –

McGRATH J:

– and the whole scheme, yes.

MR CAMPBELL:

Yes and we'll see that in the financial analysis because there's no reference in the financial analysis to the interest payments because they're just balancing, or they're just simply an indemnity. The income that comes from the joint venture is basically described as the procurement fees and when the property is sold you'll get a small portion of any capital gain which is again, something that I'll come to.

ANDERSON J:

Suppose that the property had a good tenant who paid regularly, who got the rents?

MR CAMPBELL:

Ah, all the income was, as I understand it, after all the costs of the joint venture, were shared in accordance with the terms of the joint venture. They were not automatically paid to the investor.

WILLIAM YOUNG J:

There's an analysis at para 301 of the Court of Appeal judgment that shows how the funds on a particular transaction were broken down.

MR CAMPBELL:

So –

WILLIAM YOUNG J:

Was there evidence about the banking arrangements? Where did, for instance, the working capital for – who actually held that money? I mean, did each joint venture company have its own banking arrangements, or was everything just aggregated within Blue Chip?

MR CAMPBELL:

I'm told that it all went to a Blue Chip company, presumably the joint venture company, or –

WILLIAM YOUNG J:

You're not sure?

MR CAMPBELL:

There may not be –

WILLIAM YOUNG J:

Well, I mean, I'd want to have a rough interest to know how the accounts work. I mean, maybe it was just all dealt with within the Blue Chip companies themselves and journalised, or it may be that each joint venture company did set up a separate bank account and operate separately.

MR DALE:

Yes, your Honour, we're aware of it. We're not aware of standalone bank accounts for the individual companies, investor companies.

WILLIAM YOUNG J:

Okay, thank you.

MR CAMPBELL:

The third entitlement is depreciation which is, I don't think, relevant to anything here and then lastly, over the page, an agreed share of the net sale proceeds on sale of the property and I'll take you to the way in which the joint venture agreement deals with that –

WILLIAM YOUNG J:

Was there any disclosure of the underwrite thing?

MR CAMPBELL:

I very much doubt that.

WILLIAM YOUNG J:

I mean, did the Blue Chip ever disclose that it was getting 12.5% or 15% of the purchase price, as commission or underwrite fee?

MR DALE:

Not so far as we're aware your Honour, there was no investor having a direct knowledge of that. It only came out in the course of exchanges after the collapse of the group and we were looking for information, we learnt of the agreement.

WILLIAM YOUNG J:

Right, thank you.

ANDERSON J:

Because it was an arrangement between Blue Chip and the developer, it was a private aside arrangement. I might direct this to Mr Dale. I seem to recall from the *Bartle* case that there were elements of secret commission about it.

MR DALE:

Yes, well the developers' position on it was that they were paying a fee in return for the Blue Chip marketing but Blue Chip, the argument was that Blue Chip was getting quite a substantial fee but it was taking a risk because it was obliged to purchase the apartments that they didn't achieve the presales for –

ANDERSON J:

Yes, well it may not lead anywhere but it was a commission that should have been disclosed by Blue Chip to the purchasers.

MR DALE:

Yes.

ANDERSON J:

And to that extent it was a secret commission if it wasn't.

MR DALE:

It wasn't part of the (inaudible).

MR CAMPBELL:

Then over the, this is on, just the second page of that letter, the explanation of the transaction continues by saying that, "The transaction itself continues until either you choose to wind it up or the property is sold and then on termination the property is sold and the sale proceeds are applied firstly, to discharge the balance loan security against the property," so any mortgage, "then to return the amount of your initial contribution." So – and you see initial contribution is capitalised there, that's because it's defined in the joint venture agreement basically as the borrowings that the investor raises and contributes to the joint venture.

So the way in which the transaction is described to the investors is essentially that there is an investment which is on the termination of the joint venture, returned to the investor and that's just to foreshadow the point that the Court of Appeal held below that there had to be some sort of repayment for there to be a debt security and, as I'll explain later, our submission is that there doesn't have to be a repayment but even if there does have to be one, essentially that's exactly what was going on here. An initial contribution was paid by the investor. At the end, that initial contribution was returned or repaid and in the meantime, the investor received the procurement fees and was indemnified against the interest costs.

TIPPING J:

So, putting it very simply, you got your interest and some of your capital back?

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

Well look, the problem was that the – there was so much added to the purchase price on the way through, if you write on the fifth of the commission back or take that off and the working capital and the other fees, there had to be a huge inflation in property values for it to be self-funding?

MR CAMPBELL:

Indeed, yes which it – the whole scheme could only continue if the property market continued to increase at the rate that it did for some years in the early 2000s.

TIPPING J:

But is it essentially your case Mr Campbell that, although not so described, the procurement fee played the part of interest, if you like, in a simpler world and the return of the initial contribution was the return of at least part of the monies originally invested?

MR CAMPBELL:

Yes your Honour.

TIPPING J:

At the simplest possible analytical level –

MR CAMPBELL:

Yes.

TIPPING J:

That's the way you invite us to see the setup.

MR CAMPBELL:

Yes and with the other products, with the PIP agreement it's even clearer because I'll take you to some documentation where –

TIPPING J:

Well there's no need to – I just wanted to make sure I was with you, if you like, conceptually.

MR CAMPBELL:

Yes, yes, so however it might be disguised by using different terminology that's really the substance of what was put forward to the investors.

TIPPING J:

And the same, broadly speaking, the same in relation to each of the three products?

MR CAMPBELL:

Yes, yes. And the fact that they are attached to or have something to do with real estate, again to foreshadow what I'll be saying later. It doesn't mean that it's somehow outside the Securities Act, because these particular products in themselves are just financial products as between Blue Chip and the investor. They have something to do with real estate, there's an underlying property that the transaction has something to do with but the important rights and obligations are undoubtedly add-ons and just to take it, the joint venture is one example.

If this was just a simple pure joint venture with no, leaving just to one side the shares, but just a simple pure joint venture where Blue Chip wasn't promising to indemnify the interest and promising to pay the procurement fee, but instead the parties were just sharing 50/50 or 75/25 whatever it might be in purchasing, owning, and renting property, then that would simply be undoubtedly something that was exempted from the Securities Act but that's not what this product is. It involves co-ownership of property but on top of that, and most importantly, and it was marketed as the most important aspect of it, there was to be a financial return to the investors from Blue Chip undertaking to pay additional matters. The return from any possible capital gain was only about, the investors basically received 5% of any capital gain. The key driver of this product was the investment or interest return that was –

TIPPING J:

The procurement fee.

MR CAMPBELL:

– through the procurement fee, yes.

Now just staying with this letter, under the next heading, "What Next." Our investment advisor will take us through each of the documents and when you are ready to proceed you will need to sign the agreement for sale and purchase, the property management agreement and the disclosure and acknowledgement, and

their next steps, and I want to take you through this your Honours because of a point that my learned friend, Mr Chisholm, makes about the timing of some of the joint venture agreements.

Once signed, that's once the agreement for sale and purchase is signed, our investor advisor will arrange for the documents to be returned to Blue Chip, we will then send them to your solicitor, along with the agreements that formed the joint venture agreement, or joint venture arrangement you are entering into with the Blue Chip Joint Ventures Limited. And so although this was presented as one package at the outset to the investors, the sale and purchase was, the sale and purchase agreement was signed first, it was then sent to the purchaser's solicitor along with the joint venture agreement. So generally speaking with the joint venture agreement, as far as can be told from this particular letter, there was always likely to be some sort of delay between signing the sale and purchase agreement and actually signing the joint venture agreement.

TIPPING J:

So they had signed the sale and purchase agreement without legal advice, get hooked onto that and then have to go off to their solicitor for the advice on the joint venture agreement?

MR CAMPBELL:

Yes.

TIPPING J:

Is this the scenario that was envisaged?

MR CAMPBELL:

That appears to be how it worked and I just wanted to highlight that because both in Justice Venning's – in Justice Venning's judgment, which I have referred to in paragraph 7 of the submissions, His Honour said that the documentation, both the sale and purchase agreement and the Blue Chip investment product were assembled by the sales agent for execution by the investor, but looking at this letter I don't think that that is correct, at least for the joint venture agreement. It appears for the joint venture agreement that the sale and purchase agreement was signed first, always contemplating that there would be a joint venture but that joint venture agreement was actually signed subsequently.

TIPPING J:

So potentially you could get committed to the sale and purchase agreement and then when you go and see your solicitor and he says, oh I don't like the look of this, I'm speaking hypothetically, you might not have to sign the joint venture agreement but then you would be on your own, if you like, as far as the purchase was concerned?

MR CAMPBELL:

Yes, the financing of it.

TIPPING J:

Yes, yes.

MR CAMPBELL:

Yes, that's right your Honour. Now I make – I was going to take you as well to the analysis that appears on page 122. So this is one of the documents that was enclosed with the letter and you will see early on there's a heading, "Blue Chip Solution." To meet your goals we have structured an investment around the following property. Then there is a summary of your proposed investment which I confess not everything there makes sense to me, I'm not entirely sure what the percentages are, whether they are –

ANDERSON J:

It makes less sense is that a property being brought for 593,000, it's going to cost you 676,000 to buy.

MR CAMPBELL:

Yes, well I can understand that. It's more the –

ANDERSON J:

It's just so glaringly obvious, I'm astounded people went into it.

MR CAMPBELL:

The interest rates I'm not sure precisely what they refer to, it might be the lease returns, I'm not sure, and then in the table the additional annual income before tax. You will see firstly there's a reference to your fortnightly receipt from Blue Chip, this

is the procurement fee. This is the payment you will receive from Blue Chip every second week from the date you pay your contribution.

ELIAS CJ:

Sorry, where's that?

MR CAMPBELL:

That's in the table on page 122.

ELIAS CJ:

I see, yes thank you.

MR CAMPBELL:

So this is the payment you will receive from Blue Chip every second week from the date you pay your contribution until the property is sold. In addition to this payment Blue Chip will pay the interest on any associated borrowing. So those are the procurement fee and the indemnity for the interest.

And then the last row in that table says, "In addition to the return of your contribution," so this again is making the point that I made before that what is being suggested in this document is basically that the investor pays an initial contribution, gets it back at the end but in addition you are also entitled to a small portion of the net gain when the property is sold. So I may come back to those documents later once I've looked at the, taken you through the joint venture documentation itself and some of the other documents.

McGRATH J:

I don't, myself, understand, if I need to, how the, what might be payment is brought to account there which is what that little passage seems to be suggesting. This profit, if it emerges, that's going 95% to Blue Chip but then there's in some way the fortnightly payment that was not taxable is referred to?

MR CAMPBELL:

Well the – it says the payment is made to you as income without a deduction for tax but it goes on to explain that it is taxable and that the investor will have to make an allowance for that in the sense that when they get, in this case, $402 every fortnight they shouldn't –

McGRATH J:

It's taxable –

MR CAMPBELL:

– go out and spend it all.

McGRATH J:

Okay.

MR CAMPBELL:

Just put a third or whatever away safely to, to keep the revenue –

TIPPING J:

Well they tell you, you can safely spend $291 if you're on an average –

MR CAMPBELL:

Yes, yes.

TIPPING J:

– seems to be the idea.

MR CAMPBELL:

So that procurement fee was paid absolutely by Blue Chip Joint Ventures Limited to the investor.

Now if I can return to our, the written submissions. From paragraph 8 I deal with the relationship between the respondents and Blue Chip. Now each of the respondents were developing properties in – apartment properties in Auckland and in order to achieve sales of those apartments, each of them engaged a company in the Blue Chip group to introduce purchasers and I'm going to go through the ways in which each of the three respondents did that.

Firstly with Greenstone, that's Greenstone Barclay Trustees. The relationship between Greenstone and Blue Chip is set out in the Court of Appeal's judgment at paragraph 70 to 89. Just as an aside, hopefully you noticed there was some

difficulties in photocopying the Court of Appeal judgment. I think it was in the *Icon* bundle. So there should be a completely separate bundle in the Court of Appeal judgment. I'm not sure that I need to take you through it. Well, I will need to take you through it actually in just a moment.

So the relationship between Greenstone and Blue Chip started in October 2005 when Mr Bryers who was the, of course, driving force behind Blue Chip, asked Mr Abel-Pattinson of Greenstone, whether Greenstone would be interested in developing an apartment building in Albert Street, and a few months later Greenstone entered into a profit share agreement and an underwrite agreement with Lyell Limited, which was a company associated with Blue Chip and Mr Bryers, in relation to the development of that property.

Now the underwrite agreement provided that Lyell would use its best endeavours to procure a real estate firm to introduce purchasers but, as I mentioned earlier, what in fact happened was that Lyell used Blue Chip sales agents to market the apartments. Now Justice Venning found that Mr Abel-Pattinson understood that and that he understood that the sales agents would market the apartment to investors as part of the investors' investment with Blue Chip. Now I'll refer you to the passages from Justice Venning's judgment where he made that finding, and Justice Venning held, and the Court of Appeal agreed that the sales agents were acting as sub-agents for Greenstone to introduce purchasers for the apartments. Nothing turns on whether they were sub-agents as opposed to agents. So that's Greenstone.

Turn and Wave or Turner and Waverley as it's now known, had a similar relationship with Blue Chip and that's summarised by the Court of Appeal at paragraphs 90 to 110. In this case, the Blue Chip subsidiary was Monrad Limited, which owned land on the corner of Turner and Waverley Streets and in June 2006, Turn and Wave agreed to buy that land from Monrad and then entered into a profit share agreement with Monrad in relation to the development of the land. A few months later, at the end of August 2006, the parties entered into an underwrite agreement, which is the one that creates, or really underpins, the agency relationship between Turn and Wave and Monrad. This, like the Greenstone agreement, contemplated that Monrad would use its best endeavours to procure a real estate firm –

ELIAS CJ:

Sorry, is that a submission you make generally, that it's the underwriting agreements that underpin the agency relationship?

MR CAMPBELL:

I'm – it's not an important point, your Honour. It's just more to say that the profit share agreements, as I understand it, don't really impact upon that relationship. It is the, firstly the underwrite agreement, which contemplates that, in this Turn and Wave's case, that Monrad Limited will procure a real estate firm to introduce purchasers, and then secondly, the finding of fact that actually what happened to both parties knowledge is that Monrad simply engaged Blue Chip sales agents to obtain purchases. So the starting point, if you like, is the underwrite agreement but I think it is common ground now that, in fact, what happened in all three developments was that real estate agents were never used, Blue Chip sales agents were used instead, with the implied authority of the respective respondents.

Now, Mr Manning, who was Turn and Wave's sole director, was aware that the apartments were to be sold by Blue Chip sales agents in conjunction with the sale of Blue Chip products. Now, my learned friend, Mr Chisholm, is going to be submitting that Turn and Wave wasn't actually aware that the sales agents would be marketing the apartments in conjunction with the Blue Chip products and he's going to say that all Turn and Wave understood, or all that they were aware of, was that Blue Chip would be marketing them with the leases and property management agreements.

Now, that submission is contrary to the findings of fact below. What I tried to do in this part of our submissions was simply record, and sometimes use almost word for word, the findings of Justice Venning and perhaps the Court of Appeal when they were confirmed or varied and so I needed to take –

TIPPING J:

Was there concurrence of findings below on this awareness and implied authority issue?

MR CAMPBELL:

Yes. I would like to take you to the judgments. Now, so this is *Hickman v Turn and Wave Ltd* HC Auckland CIV-2008-404-5781, 25 November 2009 in volume 1. Now I've referred you to paragraph 106 of the judgment but it's probably better if we start a little bit earlier than that at –

ELIAS CJ:

Is this what I have as volume 2, sample contract documentation Turn and Wave?

MR CAMPBELL:

It should be volume 1, which is of the same series, also a pheasant blue binding.

ELIAS CJ:

I don't have a volume 1 of that but –

McGRATH J:

Case on appeal.

ELIAS CJ:

I just have the case on appeal, general bundle 1, the one we've been looking at. Is there another volume?

MR CAMPBELL:

There's a – so with the Turn and Wave appeal –

ELIAS CJ:

Yes.

MR CAMPBELL:

There are three volumes, all with blue binding. So the first volume, as usual, has the application for leave, this Court's judgment granting leave and the pleadings and Justice Venning's judgment.

ELIAS CJ:

I'm sorry, I have it, thank you.

MR CAMPBELL:

So if we start at paragraph 94 on page 233 of that volume. In this part of the judgment, Justice Venning is exploring whether there was any agency relationship between Turn and Wave and the Blue Chip sales agents. So at paragraph 94 – I might just stop and put this in context.

What my learned friend, Mr Chisholm is going to say is that Mr Manning and Turn and Wave were aware of what he describes as "Vanilla Investment products" that a number of firms in the marketplace, such as Blue Chip, and including a company that Mr Manning had previously owned, NZFI, used when marketing apartments on behalf of developers, and by "Vanilla Investment products" what my learned friend is referring to is the situation where the developer wanted apartments sold and the intermediary, such as Blue Chip, would promote the sale of those apartments by attaching a lease to the apartment. So saying to potential investors, "Not only do we have this wonderful apartment rising out of the ground in Albert Street, but we will provide you with the lease that will be in place for about two years or four years and will guarantee a certain return for the initial two years or three years, and sometimes we'll provide a property management agreement as well so you don't have to worry about anything except paying your tax at the end of the year." So my learned friend is going to say that that was all that Mr Manning understood Blue Chip was doing, and that Mr Manning didn't understand that Blue Chip was actually doing more than that and adding on joint venture agreements, PIP products and PAC deeds. So, what's important to understand is that there was never any dispute by Mr Manning that he understood that those leases and property management agreements, the vanilla types of investment products, had always been offered by companies like Blue Chip. And I say it's important because Justice Venning spends some time and makes a number of comments about Mr Manning's awareness of the Blue Chip sales agents marketing the apartments as part of, in conjunction with Blue Chip's products, or as part of an investment with Blue Chip, and there would have been no need for Justice Venning to be exploring that question or asking to what extent Mr Manning had detailed knowledge of those extra products, such as the PIP product and the joint venture agreement if, as my learned friend would have it, Mr Manning – His Honour was accepting that Mr Manning knew only about the vanilla products. So that's just to put the comments that I'm going to take you to in some context.

So, paragraph 94, although there is reference in the clause – that's in the underwrite agreement – to the use of a real estate firm, I infer from Mr Manning's evidence that he knew Blue Chip sales agents would sell the apartments to investors as part of their investment with Blue Chip, rather than Monrad using real estate agents. Now, that comment is partly, or that finding is partly, directed to knowledge that there would be Blue Chip sales agents doing the selling, rather than real estate agents, but it is also a finding that Mr Manning knew that the sales agents would sell the apartments as part of their investment with Blue Chip.

Then at paragraph 100, in the second sentence, again there is reference to this. His Honour says, "By agreeing the apartments were to be sold by Monrad and by Mr Manning's general understanding that the apartments would be sold by sales agents selling Blue Chip products, Turn and Wave implicitly agreed at the least to the appointment of the sales agents as sub-agents.

And then paragraph 105, Justice Venning in the second sentence says, "In the present case, the selling agents were primarily acting for Blue Chip and selling the Blue Chip product." Now, I just emphasise that because I want to make it clear that when Justice Venning is talking about the Blue Chip product in these passages he's talking about the joint venture agreements and the PIP products, he's not simply talking about the lease agreements and the property management agreements, because it was in relation, in relation to the leases, there was never any suggestion that –

TIPPING J:

Are you endeavouring, by this submission, to get Turn and Wave in this case implicated in the vise that you say lies under the Securities Act in these arrangements?

MR CAMPBELL:

It is one of the planks that I will be trying to find an appropriate analogy with –

TIPPING J:

Well, you'd need a bit more specificity of findings, wouldn't you, than those that we've gone through so far, to take you on that journey?

MR CAMPBELL:

Well, I might – we might find that in the next paragraph actually, your Honour.

TIPPING J:

All right, it's, you're just warming us up?

MR CAMPBELL:

Yes. So, in the next paragraph, which starts, "I find," which is a good clue as to there being some factual findings, various things, and then if we start with the second

sentence at the very end of, bottom of that page, “Although the role of the sales agents may not have been expressly referred to in the underwrite agreement, Mr Manning and Turn and Wave were aware the apartments in the Bianco were to be sold by sales agents, in conjunction with the sale of the Blue Chip, with the sale of Blue Chip product. And then he immediately says, “While he may not have been aware of the details of the Blue Chip product, Mr Manning was, I find, aware at a general level that Blue Chip employed sales agents, licensees, to market its products.

TIPPING J:

Well, that leaves us in a rather imprecise state.

MR CAMPBELL:

Well, not quite, your Honour, because what Justice Venning goes on to do later in the judgment, and it comes back to his statement, “While he may not have been aware of the details of the Blue Chip product,” is to investigate the extent to which Mr Manning actually understood the detail of the joint venture agreement and the PIP product.

TIPPING J:

Right, so we must read this with what you're going to come to refer to in a moment?

MR CAMPBELL:

Yes, well, the –

TIPPING J:

Because at the moment I have to signal, for myself at least, this doesn’t get us very far.

MR CAMPBELL:

Yes. Well, the point is that later in the judgment Justice Venning finds it necessary to explore in some detail the evidence that is relevant to what Mr Manning understood as to the detail of the product.

TIPPING J:

Right, fine. Does he actually say he may not have been aware of the details but later on he, in effect, finds that he was aware of some of the details?

MR CAMPBELL:

No, no, he finds that he was – that Mr Manning was not aware of many of the details of these products at all. But there would have been no need for Justice Venning to have asked himself that question if Justice Venning was of the view that Mr Manning had no understanding of these, of the joint venture produce or the PIP product, at all.

ELIAS CJ:

I'm finding that a little elusive, that, the distinction you're drawing there. He didn't know the detail but he had an understanding of what was happening.

WILLIAM YOUNG J:

You say he knew it was a financial product, he never really got to the bottom of what it, of the detail of the financial product?

MR CAMPBELL:

Yes. And I'll come in my submissions in a moment to the sorts of information that was shared with Mr Manning. Maybe I will just jump forward…

TIPPING J:

Well, this is relevant to the tainting issue, isn't it?

MR CAMPBELL:

Yes, yes.

WILLIAM YOUNG J:

Not necessarily critical to it.

MR CAMPBELL:

Not necessarily.

WILLIAM YOUNG J:

Because it depends if you treat the, if you simply impute the agent's knowledge –

TIPPING J:

Yes, quite.

WILLIAM YOUNG J:

– then you decide to take the issue. But your case is helped –

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

– if those who were the, in substance, the developers, knew.

MR CAMPBELL:

Maybe we can briefly jump forward to paragraph 27 of –

ELIAS CJ:

27?

MR CAMPBELL:

27, of the submissions. And here, on summarising the findings below, is .the knowledge of each respondent of the detail of the investment products. And at paragraph 27 the person responsible for sales and for liaising with Blue Chip received a letter in January 2007 from Blue Chip which enclose quite a number of sale and purchase agreements and quite a number of, I think PIP agreements, for every one of those sale and purchase agreements. Now Ms Reynolds didn't consider the PIP agreements and the nomination deeds were relevant to Turn and Wave so simply returned them to Blue Chip, and Justice Venning accepted her evidence on that.

And then, from time to time at meetings attended by Ms Reynolds and perhaps Mr Manning, that's how Justice Venning described it, references were made to PIP and joint venture agreements, but Mr Manning had no reason to take an interest in Blue Chip's investment products and was not aware of the detail of those products. And then, thirdly, as a result of a market meeting that Ms Reynolds attended in January 2007, of which she was, she took notes of that meeting, she was aware that the PIP product was to be used as part of a big push to promote sales of Turn and Wave's apartments, was aware that the PIP product was an underwrite product – well, at least, that's how it was described, I don't think that's an accurate description – and that it gave a return to professional investors and understood that Blue Chip intended to resell the apartments through the normal sales process approximately eight months out from settlement.

Now all of those – despite those findings of fact, Justice Venning came to the conclusion that Mr Manning and Turn and Wave did not have knowledge of the detail of the Blue Chip investment products, and so my point –

TIPPING J:

So you must be much stronger on the imputation than on your actual knowledge argument, on the basis of this.

MR CAMPBELL:

What I want to distinguish your Honour, is the respondents knowing that Blue Chip was going to be marketing these apartments, in conjunction with some sort of investment property. An investment product that was more than just a lease and a property agreement. I want to distinguish that which, in my submission and I'll develop this later, is of assistance to the appellants.

From another finding which would have been even better and effectively we did have this finding in relation to Icon because Mr Bryers was the sole director of Icon at the time and signed all the sale and purchase agreements. It would, of course, be even better for the appellants if there had been findings below that Greenstone and Turn and Wave also knew of the detail of the investment products that –

TIPPING J:

If you fail on imputation, you're still arguing that they knew enough are you?

MR CAMPBELL:

Yes.

TIPPING J:

Is that the essence of it?

MR CAMPBELL:

Yes and in particular, that they knew that the way in which their agents were going to go about the very thing for which their agents had been appointed, namely procuring purchasers.

TIPPING J:

Yes but procuring purchasers per se would get you nowhere.

WILLIAM YOUNG J:

Procuring purchasers with an associated financial product, with what they know is a financial product and not a simple joint venture where they're going to go the market and get a tenant and they're going to share, divvy up the proceeds.

MR CAMPBELL:

Yes, your Honour has basically completed my sentence because the point is that the agents are of course engaged by the respondents to procure purchasers but the respondents know how they're going to procure purchasers, so they know the way in which they're going to go about it, in general terms. They know that the Blue Chip sales agents are going to go out there and not just say, "Look, these apartments are fantastic, wouldn't you like to buy one," but that they're going to say, "You really should buy one because we're offering a financial product in association with it that's going to make it better for you than just an ordinary apartment."

WILLIAM YOUNG J:

All apartments were sold off the plans, weren't they?

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

So there was no– it wasn't possible for a purchaser to go and have a look?

MR CAMPBELL:

No.

WILLIAM YOUNG J:

Were there any that weren't sold off the plans, where the buildings had been completed?

MR CAMPBELL:

Not in this case, no. Apparently they were discouraged from going to look at them but I don't know that that's particularly relevant. I think they were all off the plans, I look to my left.

MR DALE:

Yes.

MR CAMPBELL:

They were.

MR DALE:

They were off the plans –

McGRATH J:

In fact, the bank wouldn't give any money until a certain percentage of them had been sold, as I understand it.

MR CAMPBELL:

Yes, of course.

WILLIAM YOUNG J:

But that wouldn't have been 100% probably?

McGRATH J:

Wouldn't give the developer any money, yes.

MR CAMPBELL:

Yes, yes, you're right Sir.

TIPPING J:

So the key to it is, if we don't have imputation, that they knew, the respondents knew that Blue Chip – there was more to it, if I can put it that way, than a simple acquisition on a simple joint venture basis. They might not have known the intricacies of it but they knew that there was more?

MR CAMPBELL:

Indeed. Well, in particular, that they knew more than this was simply being sold by Blue Chip as an apartment with a guaranteed lease in place.

TIPPING J:

Yes, that's what I meant.

MR CAMPBELL:

Yes, yes. Now, I was going to take you also to the Court of Appeal's judgment on this particular issue because, on the appeal, there was, this issue was debated to some extent and at paragraph 144 of the Court of Appeal's judgment.

ELIAS CJ:

Sorry which para?

MR CAMPBELL:

Paragraph 144.

ELIAS CJ:

Thank you.

MR CAMPBELL:

And here the court records that Justice Venning found that, "Mr Manning was not aware of the detail of the PIP and joint venture agreements but he was aware that Blue Chip sold investment products to its investors and offered investment advice to them. Turn and Wave was also obviously aware that the units were being sold subject to the leases.

So, at least the way in which the Court of Appeal understood Justice Venning's judgment, was that Justice Venning was not merely finding that Mr Manning knew about the associated leases but that he had a general awareness that Blue Chip offered something more than just leases, they offered investment products in conjunction with the apartments.

Now, what my learned friend Mr Chisholm is mostly going to rely on, is a passage in paragraph 124 of Justice Venning's judgment but all that the Judge was doing in that paragraph is recording the evidence that Mr Manning gave. The Judge wasn't making any findings and that's made absolutely clear from paragraph 123, the last part of which says, "I proposed to consider the evidence of the extent of Turn and Wave's knowledge of the Blue Chip products and marketing methods. So the Judge, in that paragraph 124, was not making any findings.

ELIAS CJ:

Was that challenged though, as evidence?

MR CAMPBELL:

Ah, yes, in the sense that there was – it was certainly an issue in the High Court and this is clear just from Justice Venning's judgment. It's not clear from any of my knowledge because I wasn't there, that there was – it was certainly alleged that Mr Manning knew much more than he said that he did, or that Ms Reynolds knew more than she said that she did. As I've said, I've taken you to paragraph 27 of our submissions, the Judge essentially found that Mr Manning and Ms Reynolds had a limited – or no detailed knowledge of those products.

As I've said, if the Judge was of the view that, as Mr Chisholm would have it, that Turn and Wave had no knowledge whatsoever of those products, then there would have been no need for him, for His Honour, to have engaged in that question in the depth that he did. He just would have come to a very quick point of saying, "Turn and Wave didn't have any knowledge whatsoever of these products, so I don't have to explore that."

ANDERSON J:

How did it get you around the finding that he made? I mean, he examines an issue, makes findings on them, so what?

MR CAMPBELL:

Well –

ANDERSON J:

What's the – you seem to be suggesting there's some underlying implication that one has to take from the fact that he looked into it?

MR CAMPBELL:

No your Honour, I'm simply saying that he also found that Turn and Wave had a general understanding that Blue Chip was offering investment products in conjunction with the marketing of the apartments and that's all that I'm resting – all that I'm saying. It's Mr Chisholm who is going to be saying that he can test that finding, that he's basically going to – it seems, from his submissions, take you through the evidence that was before the High Court, to try and persuade you that in

fact Mr Manning didn't have that understanding. Yet that's a finding that Justice Venning has already made. I –

TIPPING J:

Well he must have had some knowledge, otherwise your point is that the Judge would have held that he had no knowledge?

MR CAMPBELL:

Indeed, yes.

TIPPING J:

But that's all you're saying, as I understand it?

MR CAMPBELL:

Indeed, that is all that I'm saying and you may find that that doesn't get me anywhere at the end of the day, or it doesn't get me anywhere on a particular point –

ELIAS CJ:

Well it depends what is meant by details.

TIPPING J:

Yes.

ELIAS CJ:

It's a little slight. The Judge does go on, I see, to say that the high point for the plaintiffs was Ms Reynolds' evidence and then he does deal with that, so it doesn't look as if there's anything very firm as to the extent of knowledge at all. It doesn't seem that he goes further than what – further than to recite what Mr Manning said, suggesting that that's probably where it rests.

WILLIAM YOUNG J:

Well, he, does he – the Court of Appeal sets out Ms Reynolds' file note –

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

– which does record, perhaps inaccurately, some details of the PIP product and also records that she'd been given copies of the documents.

MR CAMPBELL:

Yes. But you are right, your Honour, that that speaks the question, what does detailed knowledge mean and how much knowledge do you have to have? I mean, we're going to perhaps dissect the agreements in some detail, I'm not suggesting that anybody, I don't think anybody every suggested that the respondents sat down and analysed the agreements in the way that they have been in the courts. But, to some extent, I mean, my submission is that a detailed knowledge isn't require in any case. It probably helps, and with Icon we have that, because of Mr Bryers' position with Icon. But I'll be submitting that the fact that the respondents knew that in general terms the way in which the agents were going to go about procuring purchasers was to market the apartments in conjunction with an investment product, is enough to implicate – it's going to be relevant not just to the tainting ground but also to the question of whether the sale and purchase agreements were part of the relevant allotment under the Securities Act.

ELIAS CJ:

Does that mean any knowledge that Blue Chip was financing the investors would be sufficient?

MR CAMPBELL:

Well, no, your Honour, because the mere fact of –

ELIAS CJ:

So how far would you have to go?

MR CAMPBELL:

Well, when you say "financing", are you talking about arranging finance from, say, GE?

ELIAS CJ:

No, because that doesn't have any relevance to the, the issues here – no, no, I accept that. I'm just trying to explore with you what detail would have been sufficient.

MR CAMPBELL:

Sufficient for what purpose?

ELIAS CJ:

For knowledge.

MR CAMPBELL:

I see, I see what you mean. Well, in this case, knowledge that under the investment products, firstly with the joint venture agreement, that the investor was going to be offered the right to hold shares in the joint venture company. So, basically, knowledge of the rights that were being offered under these various products, which constituted securities. So with the joint venture agreement the shares, the fact that Blue Chip was going to indemnify for the interest and then pay a procurement fee.

TIPPING J:

Yes, but can you show that they had actual knowledge of the indemnity for interest and the procurement fee payments?

MR CAMPBELL:

Only in the case of Icon.

TIPPING J:

Only in the case of Icon?

MR CAMPBELL:

Yes. So –

TIPPING J:

Through Mr Bryers?

MR CAMPBELL:

Yes. Because, to be clear, in Turn and Wave's case for instance, notwithstanding the evidence of Ms Reynolds receiving the agreements and being given a sales pack, we are stuck with –

TIPPING J:

I think you're right, Mr Campbell, that was my impression.

MR CAMPBELL:

Yes, we're stuck with the Judge's finding.

TIPPING J:

Yes.

WILLIAM YOUNG J:

Well, she had it, but she didn't read it.

MR CAMPBELL:

That was essentially it. That was essentially the finding, yes.

TIPPING J:

Well, one would have thought, with respect, that one would – if you're going down the actual knowledge route rather than imputing the agent's knowledge – you'd have to have knowledge of those aspects that constitute the vise, never mind knowledge that they did constitute a vise.

WILLIAM YOUNG J:

Well, how could it return 16% without some Blue Chip intervention? How could a sale of an apartment, that she's recorded that that's the return, hasn't she, in that file note she's taken?

MR CAMPBELL:

I'd have to look at the file note, which I think is probably in volume 2.

WILLIAM YOUNG J:

It's in a Court of Appeal judgment, I think, I don't know if it's in…

MR CAMPBELL:

Oh, yes, my learned friend Mr Neutze has pointed out that the 16% return, which is in relation to the PIP product, is 16% on the deposit that the investor has paid –

WILLIAM YOUNG J:

Right.

MR CAMPBELL:

– under the sale and purchase agreement, rather than 16% on the –

WILLIAM YOUNG J:

But how can it get that without some intervention? Where's the file note?

MR CAMPBELL:

Page 27 of the general bundle, I believe.

ELIAS CJ:

But what paragraph number are we –

WILLIAM YOUNG J:

148.

ELIAS CJ:

Thank you.

MR CAMPBELL:

You'll also find the minutes of the file note at pages 27 and 28 of the general bundle.

TIPPING J:

The minutes are on page 27, where is the file note, Mr…

MR CAMPBELL:

No, I think what was being referred to is simply those minutes, rather than any file note.

TIPPING J:

Ah, right.

MR CAMPBELL:

But they, the minutes were prepared by Ms Reynolds. And, just to be clear, the minutes state they were from Monday the 22nd of November, my understanding is that it's common ground that it's actually 22 January 2007.

ELIAS CJ:

Sorry, are you referring to these minutes?

MR CAMPBELL:

Yes.

ELIAS CJ:

Dated the 22nd of November? It's common ground that it's the –

MR CAMPBELL:

It's actually 22 January 2007.

TIPPING J:

It doesn't give one great confidence in the accuracy of –

ELIAS CJ:

A long holiday.

MR CAMPBELL:

No. You'll see the footer of the document refers to 22 January, so…

ELIAS CJ:

Ah, yes.

MR CAMPBELL:

That's been updated, but not the important early heading.

WILLIAM YOUNG J:

Okay, sorry, so one, point one, the 16% is on the deposit, but is that because it was envisaged that the settlement, the purchasers wouldn't have to settle?

MR CAMPBELL:

Well, the respondents are going to contest that, your Honour, I'm not hanging my hat on it, but it was because, in my submission, it was always contemplated that once Blue Chip of course exercised the option –

WILLIAM YOUNG J:

Yes.

MR CAMPBELL:

– then the effect in substance was that the investor had basically advanced the deposit –

WILLIAM YOUNG J:

And got 16%.

MR CAMPBELL:

– and got 16%. Because once Blue Chip exercises the option, Blue Chip has to reimburse or, you might say, repay, the deposit to the investor, and in the meantime they get 16% per annum.

ELIAS CJ:

What's the significant – you may not know – of the reference to professional investors? Because when I'd seen that before, I had mistaken it.

WILLIAM YOUNG J:

Well, this is perhaps a thought that it doesn't – why it's not Securities Act, is it?

ELIAS CJ:

Yes, that's what I…

MR CAMPBELL:

Well, I think Mr Chisholm is certainly going to say that although Ms Reynolds didn't understand very much about any of what she was told, she might however have understood, if she'd thought about it, that this meant that there wouldn't be a Securities Act issue.

TIPPING J:

Well, that's a long bow.

WILLIAM YOUNG J:

Well – well, yes, I mean –

TIPPING J:

I mean, I don't – this impression –

WILLIAM YOUNG J:

– it could be a bit too cute actually, couldn't it?

TIPPING J:

The impression I get here is that she didn't really know what was going on.

MR CAMPBELL:

Yes. Well, I'll leave Mr Chisholm to articulate that, and I've probably misrepresented what he's going to say –

WILLIAM YOUNG J:

Right. But, okay, well we'll have to –

MR CAMPBELL:

– only partly deliberately.

WILLIAM YOUNG J:

Well, they may have to have an explanation as to how one would get a 16% return without some Blue Chip intervention, without Blue Chip somehow or other accepting a liability. But that's not your problem, that's an issue which they will no doubt address.

MR CAMPBELL:

Yes, well –

WILLIAM YOUNG J:

Because, okay, I mean, you see, the question you're being asked is – by, I think, Justice Tipping – is, well, let us assume that what triggers the Securities Act is that Blue Chip is accepting liabilities, it has to do things as opposed to just managing. What is there in this to indicate that Blue Chip is accepting an obligation to make payments to the investors? And there's nothing explicit. It may be that it's implicit in the 16%, it may not be, I don't know. And there's also the reference, whatever might be implicit in the fact that Blue Chip had to sell the apartments twice, why –

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

– would they have to sell them twice?

MR CAMPBELL:

Yes, and why would the respondents be happy with that perhaps.

WILLIAM YOUNG J:

Right, okay.

TIPPING J:

Well, that's a pleasure yet to come.

MR CAMPBELL:

Yes, well, I think it'd perhaps help if I made clear that we're not, we're not challenging any factual findings below, we realise the limits of trying to do that.

ELIAS CJ:

Second appeal.

TIPPING J:

Well, you don't want to open it up.

MR CAMPBELL:

No. In my submission, Mr Chisholm for Turn and Wave is going to be trying to do that. So, to be clear, when it comes to tainting our submissions that it is only Icon who has actual knowledge that the products involved rights – well, involved aspects that constitute a securities under the Securities Act, and that under the tainting head for the other two respondents, which have to rely on imputed knowledge. But in terms of imputing the agent's knowledge, while we may be stuck with the factual findings that Turn and Wave and Greenstone didn't have actual knowledge of the detail, in our submission, the fact that those respondents had general knowledge that Blue Chip would be offering some sort of, some sort of investment product to entice purchasers is relevant to what knowledge of the agents should be imputed to Greenstone and Turn and Wave.

And just to draw a contrast that that is made somewhere in the submissions, this is quite different from a situation where the respondents engage a real estate agent or

even an unlicensed real estate agent, simply to find purchasers and the respondents think that all the agent is doing is advertising the property for sale, taking potential purchasers through the property, if that's possible, or taking them to the site and showing them nice brochures. We're a long way from that, even on the findings that were made by Justice Venning in relation to Turn and Wave and Greenstone.

TIPPING J:

But you're going to be dealing with imputed knowledge separately later?

MR CAMPBELL:

Yes. So that's the position with Turn and Wave which no doubt Mr Chisholm will say more about in due course. As to Icon, the position is quite different because of Mr Bryers and I don't think I need to say anything further about that. As I understand, my learned friend Mr O'Callahan's submission, although those issues were contested in the Court of Appeal I understand it's now accepted that whatever knowledge Mr Bryers had of these products is attributed to Icon.

Now finally at paragraph 16 of our submissions, it's acknowledged that although the Blue Chip sales agents were acting as agents for the respondents to introduce purchasers, they were not acting as agents for the respondents in relation to the marketing of the Blue Chip investment products. Those products the agents were marketing undoubtedly on behalf of the relevant Blue Chip entities. Now that is seized upon by the respondents as being somehow undermining any possibility of either imputing knowledge or attributing conduct to the respondents, but I repeat my point that given that the respondents knew that the sales agents would be marketing the investment products for the very purpose of procuring purchasers, I will be submitting that the respondents are not absolved of responsibility for what those sale agents did, and the, and that may mean either that the knowledge is imputed to the respondents or that, in general terms, the, any breach of the Securities Act is attributed to the respondents, probably in the sense that the sale and purchase agreements are properly regarded as part of the allotment invalidated by section 37.

TIPPING J:

Are you in effect arguing that they were there by parties to the allotment, if they weren't the issue?

MR CAMPBELL:

No that is correct and that's accepted. I will be arguing two things. Firstly in relation to the allotment question the argument is that because the sale and purchase agreement was necessary to create the rights that constituted securities, it was not only the entry into the investment product that was the allotment but also the entry into the sale and purchase agreement. And in relation to that point, there may be questions of severability, whether nonetheless the sale and purchase agreement can be severed from the investment product and our submission will be that –

TIPPING J:

You can hardly say that the sale and purchase agreements were part of the allotment, can you? Did I mishear you or –

WILLIAM YOUNG J:

That's a point that, leave has been granted to appeal on that point.

ELIAS CJ:

Yes.

TIPPING J:

Oh yes, I'm not saying you can't take the point pursuant to leave, I'm just saying it sounds a very odd proposition.

ELIAS CJ:

It's quite important for his argument.

TIPPING J:

It is.

MR CAMPBELL:

Hopefully less odd as the day progresses.

TIPPING J:

As the day goes on.

MR CAMPBELL:

Yes.

TIPPING J:

But it has to be, doesn't it, something to do with – there was some participation in the allotment by the developers?

MR CAMPBELL:

Well if the –

TIPPING J:

I mean I –

WILLIAM YOUNG J:

It was via their agent.

TIPPING J:

Via their – yes, something like that.

MR CAMPBELL:

Well the participation, your Honour, in my submission, comes from their knowledge that the way in which the apartment is to be market is in conjunction with an investment product.

TIPPING J:

I can see an argument that they participated via the agent, a fortiori via the agent in the allotment but what I can't quite understand was the proposition that the sale and purchase agreements or the underlying asset were allotted.

MR CAMPBELL:

Yes well the allotment of the security is, in essence, the entry into the agreement or agreements that give rise to the securities. In all of these cases the investment product itself was not sufficient to give rise to securities because the investment products didn't work without a sale and purchase agreement. In many cases they were conditioned on –

TIPPING J:

Well all right, you will need to give me considerable help here.

WILLIAM YOUNG J:

You needed to slot an apartment into the mix to make it work?

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

And basically –

TIPPING J:

Yes I understand that.

WILLIAM YOUNG J:

– on the face of it could be any apartment because the apartments were sort of fungibles, weren't they?

MR CAMPBELL:

Ah, almost yes. Expressly so in a couple of the agreements.

WILLIAM YOUNG J:

And they were swapped occasionally, we can't do one in reverse so we'll do one, we'll – and providing it's the same value the maths works, or the same value is attributed to it the maths works out the same.

MR CAMPBELL:

Yes and –

TIPPING J:

I think it all turns on the agency. If – but that's probably a premature observation –

MR CAMPBELL:

Ah –

TIPPING J:

This aspect I mean.

MR CAMPBELL:

Yes, yes.

ELIAS CJ:

Do you disagree with that?

MR CAMPBELL:

That it all turns on agency?

ELIAS CJ:

Yes.

TIPPING J:

I mean how are they in there other than through the Blue Chip people, leave Icon aside for the moment?

ELIAS CJ:

Yes.

MR CAMPBELL:

Yes.

TIPPING J:

How on earth are they in there?

MR CAMPBELL:

Well I agree with that in this sense. If the Blue Chip companies – if all that the respondents knew was that the Blue Chip companies were trying to find purchasers for the apartments it could have been just an ordinary real estate agent, even a licensed one and unbeknownst to the respondents the way in which the real estate agent went about obtaining purchasers was to market the apartments in conjunction with investment products, then it is difficult to see why the sale and purchase agreements would be invalidated as well. But I think, with respect, that the reason for that is not that the sale and purchase agreement is not part of the allotment, because I think it is in any case, even in that example, but that it would be appropriate to sever the sale and purchase agreement from the investment product. Severance would be appropriate because the respondents would have had no knowledge whatsoever of what the agent was doing and the agent was doing it on behalf of somebody else.

TIPPING J:

Never mind the jurisprudential basis on which one reaches the conclusion but if you haven't got some link through an agency, either imputed or actual, or knowledge – well I'm talking loosely. I wouldn't have thought you'd get anywhere?

MR CAMPBELL:

Well I agree with that. As long as we're not deciding where to hang our hat on, you know, which peg.

TIPPING J:

No, no, I'm saying this entirely without prejudice as to what the correct analysis is given that link.

MR CAMPBELL:

Yes, I don't think we'd be here.

TIPPING J:

No, all right. So this agency thing is really pretty vital? It may slot in, in more than one place?

MR CAMPBELL:

Yes, yes.

TIPPING J:

Right.

ELIAS CJ:

Is that a convenient time for us to take the adjournment?

MR CAMPBELL:

It is your Honour.

COURT ADJOURNS 11.30 AM

COURT RESUMES: 11.44 AM

ELIAS CJ:

Thank you Mr Campbell.

MR CAMPBELL:

Now I'm going to address the respective investment products in more detail starting with the joint venture product which is an issue only in relation to Turn and Wave and Greenstone, it wasn't used for the Icon development and I'm going to use the Greenstone documents as an example. They were either identical or in all relevant respects the same for Turn and Wave. So the joint venture product included a sale and purchase agreement, I don't need to take you through that, with an addendum providing that the apartment was sold subject to a lease.

TIPPING J:

Now where are you referring to now Mr Campbell?

MR CAMPBELL:

In the submissions at paragraph 17.

TIPPING J:

Oh in the submissions, I'm sorry, I thought we were going to the document.

MR CAMPBELL:

I will take you to the document.

TIPPING J:

Volume 2 of?

MR CAMPBELL:

Volume 2 of Barclay. Now the joint venture agreement starts at page 754.

ELIAS CJ:

I have assumed you're not taking us to the sale and purchase agreement. I have assumed that there is no reference in the body of the sale and purchase agreement to the lease, is that right? It's just the addendum?

MR CAMPBELL:

I think that is right, yes.

ELIAS CJ:

It may be useful to take us to a sale and purchase agreement at some stage but don't worry about it now.

MR CAMPBELL:

Right. So the joint venture agreement is between an investor, in this case John Boyd and Diane Boyd and Blue Chip Joint Ventures Limited and the – perhaps if we turn to clause 3.1, firstly, on page 759. The purpose of the joint venture is expressed to be to enable each joint venture party to engage in the business of owning and renting residential property and such other business as the joint venture may by resolution agree. But we'll see that the agreement provides for much more than just owning and renting a property because as I've explained the Blue Chip company undertakes to provide certain additional benefits to the investor.

Under the agreement a company was to be formed to hold all of the joint venture property as their trustee for the joint venturers and the investor was to be the sole shareholder and director of that company. I don't think it particularly matters but Mr Neutze has said in his submissions that the investor was obliged to incorporate the company. I don't think the joint venture agreement actually says that and my understanding is that, not surprisingly, Blue Chip looked after incorporation but I don't think it particularly matters. It's common ground, of course, that it was the investor alone who was to be a shareholder and director of the company.

ANDERSON J:

And he paid for it, I think?

MR CAMPBELL:

I'm sure they did.

ANDERSON J:

Because legal costs of several thousand are included in the budgets.

MR CAMPBELL:

Yes, I think $3500. Now under the agreement the effectively the investor provided the funds to enable the joint venture to purchase the property whilst Blue Chip Joint Ventures Limited agreed to arrange loans, provide an indemnity against any operating shortfall and manage the properties. Now that's most clearly

shown firstly on clause 6.4 on page 761. So this provides that each joint venture party must pay to the company, that's the company that's going to hold the property on trust, that joint venture party's initial contribution, in cleared funds and the company must apply that money in doing various things.

Now initial contribution is defined in, or described in schedule 2 which is on page 778 and you'll see there in schedule 2 that for party A which is the investor, party B is Blue Chip Joint Ventures Limited, for party A the initial contribution means, "The obligation and responsibility for all borrowings on the property, together with such sums as shall be necessary to pay for that part of the property, together with a contribution towards all costs and disbursements associated with the joint venture and that obligation and responsibility shall represent 75% of the joint venture units."

ELIAS CJ:

Well, what's the joint venture units, sorry?

MR CAMPBELL:

That's just a way of expressing the parties' proportionate ownership in the joint venture.

ELIAS CJ:

In the property, do you mean?

MR CAMPBELL:

Ah –

ELIAS CJ:

No, in the joint venture, yes.

MR CAMPBELL:

– in both really because the company holds the property on trust for their proportionate shares and then party B, the Blue Chip company, is to arrange –

ELIAS CJ:

I see joint venture units is defined. I see, yes, that's fine.

MR CAMPBELL:

Party B's initial contribution is arranging the loans, so the investor actually borrows the money and contributes it, Blue Chip Joint Venture actually arranges the loans, "Providing an agreement to indemnify the joint venture and Party A, the investor, against all or any liability for operating cash shortfall from the property and an agreement to assume management responsibility for the property."

So those – essentially the respective initial contributions and you'll see that, as well as the indemnity for the interest which we've talked about before and which I'm going to take you to in just a moment, there was also an obligation on the Blue Chip company to indemnify against an operating cash shortfall if, presumably for instance, the lease payments were insufficient to cover the costs of maintaining and owning the property.

The Blue Chip company also agreed to provide what is basically the return on the investment to the investor and this was in clause 6.10.

WILLIAM YOUNG J:

The 0%, what, what – is that a mistake, 6.10.2?

MR CAMPBELL:

Yes, ah, I believe so. So 6.10.1 is the interest payments that the Blue Chip company is going to reimburse or indemnify, 6.10.2 is the procurement fee and I've taken you already to the – the way in which it is explained to the investor at the outset in that letter and analysis in the general bundle and I don't need to go back to that at the moment.

Now, it's important to also look at the way in which the joint venture –

WILLIAM YOUNG J:

Can you just – I mean, my 6.10.2 is a bit hard to follow because the 0% doesn't make much sense, at least to me. What –

ELIAS CJ:

Is there another example in the bundle that we could look at?

MR CAMPBELL:

Not for Turn and Wave?

TIPPING J:

Well presumably it should be expressed in a dollar figure, per fortnight?

MR CAMPBELL:

Yes, in the example in the Turn and Wave bundle which is in volume 2 at page 518, it is expressed as a dollar amount. Quite precise, $498.06. I don't think there's any issue, as between the parties, that there's a 0% there.

ELIAS CJ:

No.

MR CAMPBELL:

Now, although I haven't done it in the written submissions, I just want to explore the way in which – well, what was going to happen if the property was sold and the starting point is clause 12.2.

So this, as I say, this is contemplating what's going to happen if the property is sold. "If the joint venture is resolved by special resolution to sell the property the company will be authorised to do so," and so on. "The joint venture will continue until completion of the sale, at which time the company must distribute to each joint venturer that joint venturer's interest in the net sale proceeds, less any deductions from that interest authorised by clause 12.3."

Now clause 12.3 is not important. I think that's just contemplating the possibility that one or other party hasn't, at that point, paid what they should have but the joint venturer's interest, or the word interest, is defined at the start of the agreement at page 757. Though, remembering clause 12.2 provides that, "The company will distribute to each party that joint venturer's interest in the net sale proceeds and interest means a joint venture party share," this is on page 757, "as tenant in common and the assets and liabilities of the joint venture, recognising their initial contribution."

So, through a combination of clause 12.2 and that definition, the investor receives back their initial contribution on the sale of the property which again was how it was described in the analysis that I took you to earlier. That's the starting point. If things go well, there will still be money left over once those initial contributions have been

repaid and clause 6.10.4 provides for that. That provides for the distribution of net proceeds of sale of property and you'll see, net proceeds of sale are capitalised there.

So if we look at the way that that is defined, that's, "The proceeds of sale of a property received by the company, less all actual costs and liabilities attributable to that property outstanding at the date of distribution to the joint venture parties." So the net proceeds are what are left over from the sale proceeds once you've repaid the initial contributions. So if there are net sale proceeds left over, you'll see that clause 6.10.4 of this agreement allows that the investor will receive 5% and the Blue Chip company 95%.

So, in general terms, that's providing that if there is capital gain on the sale the investor gets 5% of it, Blue Chip gets 95% and you'll recall in that analysis that I took you to, the way in which Blue Chip described it to the investor was that they would get a small portion of any capital gain.

So to foreshadow my submissions on the Securities Act, the key parts of the joint venture agreement that we say are securities, are firstly the offer of the right to hold the shares in the joint venture company and secondly, the promises made by the Blue Chip company in clause 6.10, to reimburse the interest payments and to pay the procurement fees and those were basically the means by which this was going to provide a return on investment for the –

TIPPING J:
And presumably the rights under 12 point – the termination rights?

MR CAMPBELL:
Yes, that –

TIPPING J:
Because that's what gives you your initial contribution back, isn't it?

MR CAMPBELL:
It does, yes, yes, though to be –

TIPPING J:

It's your case, I'm not –

MR CAMPBELL:

Indeed.

TIPPING J:

I'm not wanting you to adopt something that's not sound.

MR CAMPBELL:

Well we're not concentrating on the initial contribution coming back in the sense that I'm not sure that that is a debt security because you would be getting that back in an ordinary joint venture in any case and in many ways that's just a clause allowing for the – providing for the distribution of the sale proceeds. It's not a promise by the Blue Chip company as such.

WILLIAM YOUNG J:

I see. This is a reference to how the proceeds, if they are received and to what extent they are received, they're to be divvied up.

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

As opposed to Blue Chip saying, "We're going to pay you this."

MR CAMPBELL:

Yes.

TIPPING J:

So it's contingent? At best it's contingent on there being proceeds.

MR CAMPBELL:

On there being a sale.

TIPPING J:

It's not an unconditional promise, is that what you're saying?

MR CAMPBELL:

No, I'm really saying more than that. That's it's just the means by which the parties have agreed the sale proceeds should be distributed when the joint venture is wound up. Now the effect of it is that the investor is going to give their initial contribution back. But the thing about their clauses 6.10.1 and .2 is that, in the meantime the Blue Chip company is making quite separate promises to pay an investment return to the investor during the course of the joint venture agreement. So the way in which –

TIPPING J:

I thought you may be wanting to address an argument that it's at the essence of a debt security that you get, at least, part of what you put in back, as well as getting a return on it but if that's not what you're seeking to do that's – I just want to be absolutely clear about that.

MR CAMPBELL:

Well just to be clear, generally speaking, with the debt security, you will get back –

TIPPING J:

Yes.

MR CAMPBELL:

– generally what you have put in and that is the case here. So the way clause 12.2 operates shows that the overall arrangement is not at all unlike what we would normally see with the debt security. But at clause 12.2 it is not Blue Chip Joint Ventures Limited who is making the promise.

WILLIAM YOUNG J:

Sorry, say the thing, the apartment doesn't sell for very much, how do the investors get their initial contribution back?

MR CAMPBELL:

I imagine on pro-rata basis with the – if the sale proceeds are less than the initial contribution.

WILLIAM YOUNG J:

Well – but look at the end of 6.10.1, "Party B shall prepare the joint venture, pay into a bank account nominated by party A the sum or sums, accordingly the interest or

principal and interest payments secured by party A for the borrowings." On the face of it, that means that if party A has borrowed the money and it falls to be repaid during the term of the joint venture, it's got to be indemn – there's an indemnity there.

MR CAMPBELL:

Yes that's true your Honour. I've tended to concentrate on the repayment of the interest but there is the possibility of the investors' capital payments being reimbursed by Blue Chip Joint Ventures as well.

TIPPING J:

Well I, speaking for myself, I would have thought that that was a significant feature of the whole structure, that at least what was intended, it may not be fulfilled, it was intended that you would get a return on your money in the meantime and at the very least your initial contribution plus 5% at the end of the day. But is that too simplistic a view?

MR CAMPBELL:

No, no, no, I agree with that view entirely. I think that is right. It's just that it seems to me that the mechanism by which those things, at least the clause 12.2 mechanism perhaps doesn't fall within the same category as 6.10.1 and .2.

TIPPING J:

I'm sorry, you'll have to explain why that is. You're making a distinction against yourself at the moment which I'm tending to resist.

MR CAMPBELL:

Yes, well, I'm agreeing with you in the sense that the effect of the agreement is that the investor will get back their initial contribution. It will be returned to them and in the meantime they will get an interest or income return. Now whether it is necessary to, or helpful to also classify the effect of clause 12.2 as a debt security is something that I'll give some more thought to, but it hasn't been the way in which the appellants have articulated their case, so –

WILLIAM YOUNG J:

Look at page 778. Party B's obligations, I mean doesn't exactly hit the nail on the head but reading that you might think that party B is going to be responsible for meeting cash outgoings beyond those that party A has committed to. So, "Providing

an agreement to indemnify the joint venture and pay against all liability for operating the shortfall cash and the property, including obligation to make contribution to joint venture." Now what happens if the mortgage has to be paid back?

MR CAMPBELL:

As a result of a demand by the financier?

WILLIAM YOUNG J:

By the lender or it runs its course. The whole thing with the joint venture agreement was meant to run for about four or five years wasn't it? It wasn't – it was sort of an understanding about that.

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

So it made – operating cash shortfall may not cover a requirement to pay back the mortgage but I'm not sure.

MR CAMPBELL:

As I say, I'll give that more thought but I certainly agree with Justice Tipping and it will become clear during my submissions that the investor wants to get back what they put in and in the meantime they get the return.

WILLIAM YOUNG J:

Is that said in the investment letters, the letters that promote the investment?

MR CAMPBELL:

The letter that I took you to in the general –

WILLIAM YOUNG J:

Or the brochures or whatever?

MR CAMPBELL:

– in the general bundle in relation to the joint venture agreement, described there being basically a return of the initial contributions. I can take you back to that if you like?

WILLIAM YOUNG J:

Yes.

MR CAMPBELL:

So the letter starts at page 118 but the important parts are on page 119.

ELIAS CJ:

Which, I'm sorry, which volume are we in?

MR CAMPBELL:

General bundle 1, miscellaneous documentation.

ELIAS CJ:

Oh, yes, thank you.

TIPPING J:

It's the second bullet point isn't it?

MR CAMPBELL:

On page 119, yes.

TIPPING J:

On 119, up the top.

MR CAMPBELL:

Yes, about a third of the way down, "On termination the property is sold and the sale proceeds are applied first to discharge the loan, then to return the amount of your initial contribution."

WILLIAM YOUNG J:

All right, well that actually is broadly consistent with your interpretation of the joint venture agreement.

MR CAMPBELL:

Yes, and the analysis on page 122 puts it exactly the same way in the table that talks about firstly, "Your fortnightly receipt from Blue Chip," and then, "You've got to make

allowance for tax and accountancy fees," but finally in the fourth row, "In addition to the return of your contribution, you are also entitled to a small portion of the net gain when the property is sold.

TIPPING J:

I thought that was sort of fundamental to the whole structure of it. Now I can't quite understand what the concern is about the termination clause as to why your – you weren't originally of the view that that was part of the whole structure.

MR CAMPBELL:

Yes, well, maybe I can express it this way. If you simply had a joint venture which didn't have the indemnity provision and the procurement fees but simply said, "At the end of the joint venture when we sell the property, investor A will get X and party B will get Y," then in itself I suppose my approach has been that that isn't something that would be governed by the Securities Act, especially if the division of the sale proceeds simply reflected the parties respective contributions to the purchase of the property.

TIPPING J:

But there are two possible ways of looking at the relevant part of the definition of debt security. One is that it's got to be a repayment, the other is it's got to be just monies owing on a more free standing basis.

MR CAMPBELL:

Yes.

TIPPING J:

Now, I would have thought you adopt the second of those as your preferred interpretation but assuming one is driven back to the first, I thought your argument was that there was in substance here a repayment.

MR CAMPBELL:

It is, yes, but – so in that sense, that's why I was saying to you a few minutes ago, your Honour, that this agreement has all the hallmarks of an ordinary common garden debt security which, as you say, involves making an initial payment, having it repaid to you at the end.

TIPPING J:

Making an initial payment, getting a return on it, never mind how it's described and then getting all or at least some of what you've put originally in back.

MR CAMPBELL:

Yes.

TIPPING J:

That's, I would have thought, arguably a classic debt security.

MR CAMPBELL:

Yes, well –

TIPPING J:

And it would fulfil, if necessary, the terms, the need for it to be a repayment.

MR CAMPBELL:

I agree, and that is our –

TIPPING J:

I'm just trying to tease out –

MR CAMPBELL:

That's a fall-back position.

TIPPING J:

– your argument.

MR CAMPBELL:

Yes.

TIPPING J:

Yes, but, I'm not expressing my own view, I'm just trying to make sure that I'm following what you're coming up to.

MR CAMPBELL:

Yes, well, what I'm coming up to is, as you say, the starting position is that there doesn't have to be a repayment as such, that shouldn't be read into the definition –

TIPPING J:

Yes, but if we're against you on that, you say there is actually here a repayment.

MR CAMPBELL:

Yes, indeed.

TIPPING J:

Like there was in *Culverden*.

MR CAMPBELL:

Yes, and the same goes for the other products as well.

TIPPING J:

Well, thank you, that's – sorry to have crossed wires perhaps.

WILLIAM YOUNG J:

And at a low level there is a repayment too, because the working capital facility essentially is recycled, isn't it, as procurement fees, or provides a fund from which procurement fees can be paid?

MR CAMPBELL:

Yes, and it also has to be repaid as, because that's part of the initial contribution, that is, paid by the investor. Now, the premium income product, again, includes both the sale and purchase agreement, plus the premium income product agreement, and I've referred you to the example in the Barclay documentation, volume 2, at page 660. So you'll see here that it's a different Blue Chip company, Blue Chip Premium Income Limited, which is the party to the agreement with the investors. Clause 2 provides that, "This agreement," that's the PIP agreement, "is conditional upon the investor contemporaneously executing and delivering to Blue Chip two copies of the purchase agreement with the vendor," so that's the sale and purchase agreement of course, and then Blue Chip arranging the vendor to sign that agreement. And the agreement recognised under clause 6 that, not surprisingly, the investor would be paying a deposit to the vendor under the sale and purchase agreement. Now, clause 3 of the agreement is probably the key clause. Under this the investor granted to Blue Chip Premium Income an option to accept the deed of nomination and thereby

assume the investor's rights and obligations under the sale and purchase agreement. Now, the deed of nomination you will find from page 667, so it follows the PIP agreement and I'll take you to part of that in a moment.

Remaining with clause 3 of the PIP agreement, firstly, the investor grants the option and then immediately the option fee is provided for, "Blue Chip shall pay to the investor an amount equal to the option fee on the first working day of each calendar month," and so on. Now, you'll see "option fee" is defined on the previous page as, "The annual sum of $6352 plus GST, if any." In fact, the option fee was calculated, although it's a dollar amount there, it was calculated by applying the advertised or marketed interest rate to the amount of the deposit that the investor had paid under the sale and purchase agreement. So –

TIPPING J:

Is this effectively, you're saying interest on the deposit?

MR CAMPBELL:

Effectively, yes, your Honour, and I'll expand upon that in due course. Now, if Blue Chip Premium Income exercise the option, its nominee would reimburse the investor for all money paid by the investor to the vendor under the sale and purchase agreement, which of course was going to include the deposit. And that was provided not in the option or the PIP agreement itself, but in the deed of nomination, you'll see that in clause 6.1, "If the option is exercised then the deed of nomination becomes effective and the nominee must reimburse the nominator," who is the investor, "for all money paid by the nominator to the vendor under the agreement." So, if things went as were probably planned, Blue Chip would in due course exercise the option, they would pay, or its nominee would pay, an equivalent amount of the deposit to the investor, and in the meantime the investor would have been receiving 16% per annum.

It might be useful, I don't know that I've taken you to – going back to the general bundle 1, the miscellaneous documentation – to the PIP brochure at page 22 of that bundle.

WILLIAM YOUNG J:

Sorry what page, 22?

MR CAMPBELL:

Yes it starts at page 22 and the important parts that I wish to take you to are on page 23 starting, "Premium income, a boost to your income through investing in property," and it starts by promising the benefits of a 12.95% return on your investment each year, but fortunately or not for some, Blue Chip is offering an additional 3.05% so you can receive a 16% return on the investment. And then under the heading, "How It Works" Blue Chip help you secure an off the plan investment property and help you place a 10% deposit on that investment property into a solicitor's trust account. The fee you receive from Blue Chip will be greater than the outgoings on your investment property deposit ensuring a high rate of return. And then the premium income product provides Blue Chip the option to buy back the property from you before settlement at the price you originally paid for, repaying your deposit amount and leaving you free to enjoy the option of starting a new investment. So Justice Tipping you'll see that at least the way in which it's marketed is that it's a repayment, if the option is exercised.

Then if you turn a few pages further on to page 25, this is a product summary for the Blue Chip premium income product and you'll see paragraph 3 says, "The amount of the option fee payments per annum will equate to approximately 16% of the percent per annum of the deposit." So that's – the 16% return is on the deposit invested by the investor under this product.

Now it wasn't a given, of course, that Blue Chip would exercise the option but if Blue Chip didn't then the investor had to settle the purchase of the property. Blue Chip promised to pay the investors reasonable costs relating to settlement including the investors' interest costs on the borrowing related to settlement. So the idea, in a way, was well if Blue Chip doesn't exercise the option before settlement, we'll keep you in a neutral position for how long, who knows. Perhaps at some point we will exercise the option and you will get your money back but in the meantime you'll be in a neutral position, you'll still be earning your 16% on the initial deposit and we'll be reimbursing or indemnifying you for your other costs.

In clause 7 the investor of the PIP agreement acknowledged and agreed that the return to the investor set out in this agreement provides an income benefit only to the investor and that there is no entitlement to, or expectation, by the investor of any capital gain in relation to the property." It's rather odd, when one is supposedly investing in a property that, as between – well the effect of the financial product was

that the investor couldn't enjoy any capital gain. In fact, the investor could not even sell the property which is what clause 8 goes on to provide and in the written submissions I refer to clause 6 but it should be clause 8, "The investor shall not assign, transfer or sell any of its rights or obligations under the purchase agreement, or nominate any other party to settle the purchase agreement, or sell the property."

Now, the last product is the put and call product which is an issue only in relation to Icon and for this, we'll have to turn to the Icon bundle, volume 2, where again, the product consists firstly, the sale and purchase agreement but secondly, of an investment product, the put and call option deed which is at page 474 of the Icon bundle, volume 2.

Now, this was a – perhaps an even more straightforward arrangement, in that the investor granted to Amelia, which was a member of the Blue Chip group, the option to purchase the property, in consideration for an option fee of $7500. So that was a one off option fee which was payable, you'll see under clause 5, "That Amelia agrees to pay the call option fee within 14 days of Amelia receiving an underwrite fee from the developer in relation to Amelia's underwrite of the developer's sale of the property."

So the call option fee wasn't actually payable until effectively Amelia, although I think it was some other, in fact some other Blue Chip company who was the underwriter, achieved the condition for earning that underwrite fee and received it from the developer.

Now clause 2, then goes on to provide that, "Amelia granted to the investor a put option, enabling the investor to require Amelia to purchase the property," and then, in clauses 3 and 4, "If either of those options were exercised, Amelia would pay to the investor the amount of any cash deposit paid by the investor under the sale and purchase agreement." So again, like the PIP agreement, this deed was envisaging that the investor was entering into a sale and purchase agreement, paying a deposit under it, if the option, either option was exercised, Amelia would pay the amount of that deposit to the investor.

At clause 7, you'll see that the interest on the deposit in the meantime, "Any interest accrued on the deposit, paid by the purchaser, will be paid to Amelia." So the – if there is some interest being earned while the deposit is sitting in the solicitor's trust

account, then that interest is ultimately to the benefit of the investor, the investor has to account to Amelia for that interest.

Right, so those – I'll return to some of those documents when examining the extent to which they each involved, or constituted securities in terms of the Securities Act. I now deal with the respondents' knowledge of the investment products which is something we've discussed to some extent already.

One has to deal separately with the three respondents. As to Greenstone, Justice Venning found that Mr Abel-Pattison was aware in general terms of the existence of a joint venture product but didn't know the detail of that product, or of any other Blue Chip investment product.

ELIAS CJ:

Are you going to take us to the underwrite agreement?

MR CAMPBELL:

No, I –

ELIAS CJ:

It's got nothing in it –

MR CAMPBELL:

– don't think –

ELIAS CJ:

– that's relevant to this point?

MR CAMPBELL:

No, I don't think so your Honour. I mean, the respondents may disagree but I'm not sure that they do really because I believe it is common ground that although the underwrite agreement provided, for instance, that the Blue Chip company would procure real estate agents to sell the apartments, it is common ground that in fact ordinary Blue Chip sales agents were employed to do that and the respondents knew that and I'm not sure that there's anything else in the underwrite agreement that really impacts on the issues here.

ELIAS CJ:

It's just it's the principal link, is it not, between the developers and – between the respondents and Blue Chip?

MR CAMPBELL:

It's the start of the link because the respondents and the Blue Chip companies didn't actually act in accordance with their agreements. So, in a sense, their appointment, or engagement of the Blue Chip sales agents to do what they did was, in a sense, outside the underwrite agreement and for each of the respondents, Justice Venning found that, as a matter of fact, they impliedly authorised the Blue Chip sales agents to sell the apartments, rather than having real estate agents do that work.

Now, as to Turn and Wave's detailed knowledge, I've already taken you through paragraph 27. I might simply return very briefly to the minutes that Ms Reynolds made of the meeting in January 2007 which is at page 27 of the general bundle. Just to make a point on one of the things that Ms Reynolds has noted there and that's item 1.5 and I think it was Justice Young who noted that Ms Reynolds recorded that, "Blue Chip will in effect be selling the development twice."

What I want to draw your attention to is how that is explained. "The aim is to sell now to PIP purchasers to achieve threshold targets and then to resell through the normal sales process, approximately eight months out from settlement." So it's the contrast between what the respondent knew was happening, whether they understood the detail of it or not and, as I've made clear, we're not challenging Justice Venning's actual findings on that but the contrast between the normal sales process and what was actually happening at this time with the PIP purchasers.

As I've said, in our submission, the fact that the respondents knew in general terms that something outside the normal sales process was happening here, is still something that assists the appellants in relation to, in general terms, the agency issues. Then, as to Icon's knowledge, I've already addressed that and Mr Bryers role there.

Now, the last point before moving on to the submissions on the Securities Act, is to note the relationship between the sale and purchase agreements and the Blue Chip investment products. Now, the Court of Appeal held below, and this was in relation to the appellants' attempts to argue contractual interdependency, that the investors

obligations under the sale and purchase agreements were not conditional upon, or tied to the investment products and that's accepted at this hearing. But it is important to appreciate that the court's finding on that issue was simply made in relation to the attempt to amend the pleadings to argue contractual interdependency, and all that the court was concerned with there was whether, for instance, the fact that Blue Chip may have defaulted on its obligations under the investment products or that perhaps Blue Chip sale agents have misrepresented the effect of those products, couldn't contractually have any effect on the obligations under the sale and purchase agreement.

That is quite a different issue, and I will be expanding upon this in due course, from what's question 3(a) in this appeal, which is whether the sale and purchase agreements were part of the allotment or whether they could be severed from the allotment.

WILLIAM YOUNG J:

Can I just look at, I'm just looking at the sale and purchase agreement, in this case it's for Turn and Wave, volume 2, page 355. It's a substitution provision which is, I think, it's certainly in the Icon agreement, I don't know if it's in the Barclay one as well.

MR CAMPBELL:

It's missing from one of the agreements, I can't remember which one.

WILLIAM YOUNG J:

Okay, well it's in the Barclay agreement at page 437 of volume – sorry, Icon, sorry, of volume 2 of the Icon.

ELIAS CJ:

Sorry, is that reference correct, 355?

WILLIAM YOUNG J:

What I'm looking at is volume 2 of Turn and Wave.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Page 355.

ELIAS CJ:

The special conditions?

WILLIAM YOUNG J:

Yes.

TIPPING J:

Substitution, yes.

ELIAS CJ:

Yes, thank you.

WILLIAM YOUNG J:

The vendor was entitled to a substituting unit providing the value of the substituting unit, the projected investment return in respect of such substitute units is the same or substantially similar to the projected investment return of the unit as described in the agreement at the date of this agreement.

Now, obviously what's described is a unit not the projected investment return, because that's not in the agreement I take it?

MR CAMPBELL:

If it is it would only be in the addendum.

WILLIAM YOUNG J:

Okay. How would that have applied, because how would people know what the projected investment return was?

MR CAMPBELL:

I don't think there was any way that they could have other than through the lease agreement. The addendum to the –

WILLIAM YOUNG J:

Or through –

MR CAMPBELL:

– the sale and purchase agreement.

WILLIAM YOUNG J:

– or through Blue Chip.

MR CAMPBELL:

Or through Blue Chip, ah –

WILLIAM YOUNG J:

How did they know – they knew it was an investment unit because that's the whole base from which they knew Blue Chip was marketing, that they were selling units as part of a package.

MR CAMPBELL:

I think that it's partly the answer but I expect that whether the vendors had used Blue Chip or not these were probably apartments that were simply sold primarily to investor owners rather than owner occupiers but –

ANDERSON J:

These are projected though. Someone has made a projection of investment return.

MR CAMPBELL:

Yes, well I can't really assist you any further on that because I don't know who made the projection. I do rely on those clauses as showing that the lease for the two respondents who had them in there, and I refer at some point to this in my submission, they well understood that this was primarily an investment.

WILLIAM YOUNG J:

But it might be the returns as projected by the sales agents who sold the units which would be the Blue Chip agents, the Blue Chip return.

MR CAMPBELL:

It could be.

WILLIAM YOUNG J:

Well that would be the only projected return that would exist, I guess.

MR CAMPBELL:

Possibly the vendors themselves prepared some marketing material with projected returns but I'm not aware of that Sir.

WILLIAM YOUNG J:

Okay, thank you.

MR CAMPBELL:

Now the last point before coming to the Securities Act submissions is that it's been held below that the investors appreciated that there remained a risk that if the Blue Chip companies didn't perform their obligations the investors might have to settle the sale and purchase agreements and, again, that was a particular focus of the Court of Appeal's judgment because of, or in relation to the arguments for misrepresentation that remained there.

Now the respondents make a lot of this in their submissions, that the investors appreciated, or should have appreciated that there was some risk that they could be called upon to settle but, in my submission, that particular fact is not relevant to the issues that are before the Court today because what we're concerned with here is whether there has been a breach of the Securities Act and, if so, to what extent that might impeach the enforceability of the sale and purchase agreements.

Now whether or not – the Securities Act is meant to ensure that investors are properly informed of the risk, in this case the risk that Blue Chip may fail to perform its obligations. The way in which the Securities Act says that you have to inform investors of that risk is, of course, through a prospectus and the Act simply provides a bright-line rule. If there isn't a prospectus then there are certain consequences and the, what the Court of Appeal in any case is concentrating on in this finding is simply the risk that they might have to settle the sale and purchase agreements. What the Securities Act is really directed towards is a different risk and that is the risk of Blue Chip failure leading to the investors having to settle without any assistance from Blue Chip and that, of course, is what the requirements of the Securities Act would have been directed towards. Informing the investors of, firstly, the existence of that risk and what might impact upon it.

The first question is whether the marketing of the Blue Chip investment products amounted to offers to the public of equity and/or debt securities for the purposes of section 37 of the Securities Act.

Now we are primarily going to be concerned with the definitions of "security" and "debt security" and to a limited extent "equity security". I think it is common ground between the parties that the meaning of those terms has to be ascertained from the text of the Act as a whole and the light of the Act's purpose and as to the purpose of the Securities Act, I think it's clear that the, and it has been held a number of times, that the purpose is to protect the investing public. The products that the appellants were sold were marketed as investments, not only that they were investments and Justice Tipping noted earlier that that word is all over the letters, the brochures and so on. But, as Justice Young noted a moment ago, the Turn and Wave Icon sale and purchase agreements themselves acknowledged that, even the sale and purchase agreements were primarily investments because of the substitution clause.

Now we accept at once that characterising these agreements as investments is not enough. One still has to test them against, or assess them against the Act's definitions and the exemptions but where there is uncertainty as to the application of those, of the Act's provisions, in my submission there isn't any uncertainty but you might come to a different view, any such uncertainty should, in cases like this, where you are clearly dealing with something that is an investment and marketed as such, the fact that it has been structured in a particular way so that it's not as clearly a debt security as, say, an investment of money with a finance company or a bank earning an interest return with the amount being repayable on a certain date and the use of terms like "interest" and "principal repayment". The fact that those, sort of, characteristics might be absent doesn't matter. What's important here is that, in substance, these were investments and that fact should be taken into account when determining, perhaps if you think there are marginal cases, whether or not they do actually meet the Act's requirements.

So that's the purpose of the Act. The scheme of the Act is, in my submission, just as important because the Act proceeds by starting with an extremely wide definition of security. That's the way in which Sir Robin Cooke described the definition in *City Realties Ltd v Securities Commission* [1982] 1 NZLR 74 (CA). The definition has changed since then but not in any way that impacts on the issues before this court, and Darvell and Clarke, in their early text, *Securities Law in New Zealand*

(Butterworths, Wellington 1983) soon after the Act came in to force, noted, correctly in my submission, that the extreme width of the definition is deliberate because they said, "This history of securities law in New Zealand may be seen as a succession of schemes designed to circumvent the narrow definition of the Companies Act and associated legislation." Now we don't have any narrow definitions anymore but there are still some definitions that we must pay heed to but, in my submission, this, whether it was intended or not, doesn't really matter but these products have the hallmark of an attempt to take, to try to take the products outside the scheme, where outside the words of the Act.

McGRATH J:

How do we address the decisions and I think perhaps *Re AIC Merchant Finance (in receivership)* [1990] 2 NZLR 385, (1990) 5 NZCLC 66,153 (CA) is the main one which say that you really have to focus on the transactions as documented. I mean unless you're really sort of mounting a substance argument in relation to the purpose, but aren't there authorities that say that parties can structure their transactions as they wish and we have to have close regard to that.

MR CAMPBELL:

Well I have two responses to that your Honour. The first is that I agree that one has to examine the affect of the documents, and that is what I am going to do. The second is that, when examining the affect of the documents you have to look at the substance of the overall transaction, which is to say, "What is the substantive affect of the arrangement in its entirety?" which is, in the *Culverden Retirement Village Ltd v Registrar of Companies* [1997] 1 NZLR 257, [1997] AC 303 (PC) case, was what the Privy Council were saying as well. So I don't disagree with the proposition that the effect of the agreement is all important.

McGRATH J:

We'll get to *Culverden* though I was really of the impression they were – the Privy Council was saying that in respect of what the ancillary matter was in relation to the transaction but, in effect, I think you're saying that you really have to have regard to substance to understand the form.

MR CAMPBELL:

Yes, well, I suppose, for example, the, as Justice Tipping said earlier, the fact that something is called a procurement fee, in substance it is providing a return on the

initial contribution or investment that the investor has made under the joint venture agreement, likewise with the PIP agreements. The fact that it is called an option fee, and that in the agreement itself we can't – we don't see that it's expressed as a percentage of the deposit, instead it's an absolute amount that is payable monthly. Those things, in my submission, don't matter because whether you say "in form" or "in substance" frankly for those two points, what the investor is receiving is an income return on an investment that they've made. But, maybe a third point, I agree with you, one has to match the agreement as it is with the provisions of the Act. So as I said before, the mere fact that we can characterise it as an investment is, by itself, not enough.

And developing further the scheme of the Act. So the starting point of the Act is to have an extremely wide definition of security, including as part of that a subset debt security, which is also very widely defined, and then to peer back the Act's application by a series of exemptions, and it's worth noting that the Act has really a hierarchy of exemptions. There's a quite extensive set of specific exemptions provided expressly in the Act, primarily in section 5. Further exemptions can be made by regulation and, of course, the Securities Commission and now the FMA, the Financial Markets Authority, has the power to grant exemptions. That used to be in section 5(5) but it's now in section 70B of the Act and, in my submission, what Justice Venning and, to some extent, the Court of Appeal has done in this case is really read in or imply additional exemptions to some extent, in some of the reasoning alone and, in my submission, there's no jurisdiction on the – there's obviously no jurisdiction for the court to grant exemptions, other than through the relief provisions and because of the scheme of the Act and the quite clear hierarchy of exemptions, the court should be very reluctant to imply into the provisions, exemptions that could have been but have not been expressed by Parliament.

Now the definition of security is in section 2D, that's in tab 1 of our bundle of authorities at page 12 of the bundle, and I've set some of that out in our submissions but not all of it.

TIPPING J:

Has anyone discussed, and I'm not suggesting this is decisive, the purport of the word "participate"? When reading it, I just found it a rather curious word but has anyone gone into that, Mr Campbell?

MR CAMPBELL:

Well my understanding is that that word indicates, as you might expect, two or more people participating in a venture, or in this case, participating in capital assets, earnings, royalties and so on. So the idea with that term is that there is a group of people participating in something. I say "something" because what follows in that definition is extremely wide.

TIPPING J:

Quite.

MR CAMPBELL:

Now, in this case there is, of course, participation in the joint venture agreement, but it's accepted that if you have a simple joint venture agreement, either of chattels or of real property, and you have five or fewer persons participating, then there is an exemption in the Act. So that element of participation doesn't get the appellants anywhere.

TIPPING J:

So that is actually expressly excluded is it?

MR CAMPBELL:

Yes.

TIPPING J:

Yes.

MR CAMPBELL:

Basically, under section 5(1)(b), which we'll find two pages on. So section 5(1)(b), and this is the focus of the respondent's attempts to say that, even if there are securities here, they're exempted. "Nothing in part 2 shall apply in respect of any estate or interest in land for which a separate certificate of title can be issued under the Land Transfer Act other than –

TIPPING J:

It's exempted via the real property exemption, not via anything more specific, because you could have lots of joint ventures that didn't involve real property.

MR CAMPBELL:

Well that comes under 5(1)(c).

TIPPING J:

(c).

MR CAMPBELL:

"Any proprietary right to chattels". So co-ownership of a – there were lots of schemes in the 1980s, including bloodstock for instance.

TIPPING J:

Contributory scheme?

MR CAMPBELL:

Yes.

TIPPING J:

Yes, I –

ELIAS CJ:

Was this not a contributory scheme?

MR CAMPBELL:

No because a contributory scheme requires, I think, more than five participants, and so the contributory scheme exception to exemption you'll see is present for both real and personal property. So in general terms the idea is that if you want – well if you're going to be the single owner of property, somebody is just selling you real property or goods, you don't need the Securities Act. You've got sufficient protection with ordinary contract law and you're going to be in control of that property. Likewise, even if you're in association with one or two or three or four other people, co-ownership gives you enough rights. But as soon as you go beyond five, you get into a contributory scheme.

ELIAS CJ:

So it's the avoidance of that restriction, the five, that is a substantial obstacle for you, if one is looking at a scheme and purpose of the Act approach. Is it?

MR CAMPBELL:

Ah, well in a way that's why we're not ever arguing, and never have argued, that the mere fact of co-ownership through the joint venture brings us within the Act.

ELIAS CJ:

Yes.

MR CAMPBELL:

The section 5(1)(b) –

TIPPING J:

But subject to exemptions you are suggesting that a concept of participation is really that of co-ownership or co-sharing?

MR CAMPBELL:

I think co-sharing, it needn't be ownership.

TIPPING J:

Needn't be ownership, no.

MR CAMPBELL:

It might just be a profit sharing agreement. So we're not relying on that early part of the definition of section 2.

ELIAS CJ:

Although – sorry, thinking about contributory schemes, they are not – I mean they're widely defined too so that they're not simply concerned with ownership of property. It's a dimension of it. It's just that, and I may have this quite wrong, the definition of contributory schemes looks pretty well made for the sort of arrangement here but for the limitation to five people.

MR CAMPBELL:

Yes.

ELIAS CJ:

Yes, below five.

MR CAMPBELL:

Yes.

ELIAS CJ:

Would that not be right?

MR CAMPBELL:

Ah –

ELIAS CJ:

Or, sorry I'm not putting it very well because I haven't looked at it before.

MR CAMPBELL:

You mean if there were five or more parties to the joint venture agreement?

ELIAS CJ:

Yes.

MR CAMPBELL:

Well I think that would be –

ELIAS CJ:

Wonderful.

MR CAMPBELL:

– quite straightforward.

ELIAS CJ:

Yes.

MR CAMPBELL:

Yes.

ELIAS CJ:

But don't you have then a problem because the legislation uses five people as the cut off?

MR CAMPBELL:

No, no, because we are not suggesting at all that it is, that the fact of co-ownership or sharing in the ultimate sale proceeds in itself, is a security. That is what we are concentrating on for the joint venture agreement.

ELIAS CJ:

I see.

MR CAMPBELL:

The obligation of Blue Chip Joint Ventures basically to indemnify the interest and pay the procurement fees which is basically the return.

ELIAS CJ:

But if you just look at the definition of "contributory scheme" it's not clear to me that it's, why it's such a point of distinction because that is about a scheme or arrangement that involves investment of money in which the investor may or may not acquire an interest in property. You might – there's probably a very clear answer to it, it's just muddled thinking on my part, but it did seem to me that there might be, if one is thinking about the scheme of the Act, that this provision and the carve out from the exemption, may be adverse to you.

MR CAMPBELL:

Well I – with respect, as I've said, it would certainly be adverse if this was nothing more than a standard co-ownership of the property and co-sharing the rents less the expenses. But it is much more than that and so what we are focusing on is the additional promises made by one of the parties to the other to effectively pay an income return, during the life of the joint venture, which is the Blue Chip company's way of providing an income or interest on the initial contribution made by the investor and the contributory scheme carve out is simply a carve out from the exemption in sections 5(1)(b) and 5(1)(c) for ownership of real property and chattels. There's no carve out for debt securities in relation to contributory schemes because for instance your classic debt security has no element of participation whatsoever. You lend money to a bank, they promise to pay it bank and pay interest in the meantime.

ELIAS CJ:

Yes I see. So your argument is against the exemption not against the carve out to the exemption.

MR CAMPBELL:

Yes. I have no interest in the carve out.

TIPPING J:

Well what I thought might be favourable to you, Mr Campbell, in relation to this subject is it seems to me that the concept of involving the investment of money may be a legislative signal to what this Act is really all about, and I know that term "on its own" is obviously somewhat elusive and imprecise but if one is looking at scheme and purpose it may not be unreasonable to say, well if this is in substance an investment of money, the form of it, and I'm not necessarily borrowing the precise language of the definition, but the form of it isn't particularly crucial.

MR CAMPBELL:

Yes I think that is, I think, I'm grateful, your Honour, for that. I think that's right.

TIPPING J:

It seems that that is – looking at it sort of – but what Parliament was really trying to drive at here.

ELIAS CJ:

Reading statutes sideways.

TIPPING J:

Sideways, yes, reading sideways is better than upside down I suppose.

MR CAMPBELL:

Well if – my submissions that there were debt securities in each of these products takes that approach and that's why I emphasised at the outset that we do have investments here. That's what they look like. That's what they're marketed as. It'd be somewhat surprising, given what we've seen already, without even looking at the definition, it would in my submission be surprising if these products were outside the Act.

That might be a convenient time your Honour.

COURT ADJOURNS: 12.58 PM
COURT RESUMES: 2.16 PM

MR CAMPBELL:

Your Honours, I was at paragraph 39 of the written submissions. I was looking at the definition of security and we were exploring the idea of a right to participate, before the break. Just to be clear, the appellants are not relying on the, what might be called the central part of the definition of security and the opening two or three lines of that definition. What the appellants say is that – what the appellants rely on is the inclusive part of the definition, "That security includes an equity security and a debt security."

It's clear, in my submission, from the way in which section, or the definition of security is phrased, that there is, if you like, a central part to it, "That the term security means any estate or right to participate in any capital assets, et cetera," but then it goes on to say, "and includes" and it's clear when a definition uses that phrasing that the inclusive parts can expand upon, or extend the definition.

So in this case, our submission is that if a product falls within the definition of equity security, or debt security, there is no need to ask yourselves whether that product or those rights also fall within what I've called the central definition of security, in the opening words of section 2(d). I emphasise that because Justice Venning seemed to take a different view in the High Court and even in the Court of Appeal, the court at least thought that the definitions of debt security, or the definition of debt security, should be influenced in some way by the opening words of the definition of security. So the idea of an interest or right to participate in any capital should somehow influence the meaning of debt security. Now –

ELIAS CJ:

I'm not really following this submission because I read it in your written submissions but surely, the definition is extremely wide, as you say and these are simply illustrations of the more common and recognisable forms of security but it's really, your point is that the inclusionary bits expand the definition but I don't think they, they don't seem to me to expand it, they seem to me simply to illustrate it.

MR CAMPBELL:

Yes, with respect your Honour, in my submission they do expand the definition and one way in which that can be illustrated is that your classic debt security would involve depositing funds with the bank or a finance company, on terms that would be that that money would be repaid with interest along the way. Now that most certainly is not a – if we look at the central definition of security, that has two possible elements. You either have an interest in some capital assets, earnings, royalties or other property of any person, or you have a right to participate in those things. Now, with your classic example of a debt security, you certainly don't have a right to participate. All that you have is a right of, to enjoy some payment obligations from the other party.

WILLIAM YOUNG J:

Well, unless the right to participate is very broad, i.e. a right to participate in the insolvency of the borrower if it doesn't repay.

MR CAMPBELL:

Yes, I –

WILLIAM YOUNG J:

I mean, that –

MR CAMPBELL:

– doubt that it means that, your Honour.

ELIAS CJ:

All right, sorry, it probably doesn't –

WILLIAM YOUNG J:

Yes, I don't know what it means actually.

McGRATH J:

Isn't it just sufficient that it precludes any need for enquiry into what the first party –

MR CAMPBELL:

Oh, yes, well –

McGRATH J:

And if that's all it –

MR CAMPBELL:

– I'd be quite happy with that, your Honour.

ELIAS CJ:

Yes.

TIPPING J:

If it's within the definition of "debt security", end of story.

ELIAS CJ:

Yes.

MR CAMPBELL:

Indeed, yes. Well, as I say, I'm happy with that, that approach.

ANDERSON J:

But a debt security involves an interest in capital, mainly the amount advanced, and it involves an interest in earnings, which is the interest thereon, so comes within the central meaning.

MR CAMPBELL:

Yes, but –

ANDERSON J:

The only person can be oneself.

ELIAS CJ:

However, it is really not important, for the reasons that you say, that you're content to say that these were equity and debt securities.

MR CAMPBELL:

Yes, yes, your Honour.

ELIAS CJ:

Quite.

MR CAMPBELL:

The point I think is not really in dispute, and this is that each right has to be assessed when you have a complex transaction like these ones are, at least to determine whether or not they do fall within the definition of debt security or equity security, and that point was made clear by the Privy Council in *Culverden.* So the fact, for instance, that in the joint venture agreement there are, or there may be a number of rights there that don't satisfy the definitions of "security" doesn't mean that we cannot enquire as to whether some of the rights in that agreement or product do fall within the definition.

I'm now going to analyse each of the products against the statutory definitions, starting with the joint venture product. In summary, with the joint venture product, our submission is that this involved an offer of an equity security and an offer of debt securities. Though it would be fair to say that we put most, placed most reliance on there having been debt securities in this product. The equity security simply arises from the fact that what the Blue Chip company was offering was, to the investor, was the right to hold shares, all the shares, in the joint venture company, and the definition –

TIPPING J:

Who was the issuer of the shares?

MR CAMPBELL:

The issuer of the shares is the joint venture company. The issuer of the right to hold those shares is –

TIPPING J:

But was that an issue to the public?

MR CAMPBELL:

No. But what's in question here and what the appellant's argument is, is that before the shares were issued there was an issue of the right to hold those shares when the joint venture agreement was entered into.

TIPPING J:

So it's not the issue of the shares, it's the issue of the right to subscribe for the shares?

MR CAMPBELL:

Or the right to hold the shares. Because under the joint venture agreement it provided that the investor was entitled to hold all the shares in the joint venture company. And the definition of "equity security", which is on page 5 of the appellant's authorities, "An 'equity security' means any interest in or right to a share in or in the share capital of a company."

WILLIAM YOUNG J:

Well, wasn't the right being, the issuer of that right, Blue Chip? It was marketing the rights to hold the shares in the joint venture company. Whether that gets you anywhere, I don't know, but isn't that, that's really your agreement, isn't it?

MR CAMPBELL:

It is, that's exactly the argument.

WILLIAM YOUNG J:

It would have to be to the public, otherwise once the purchasers are, as it were, in the scheme, then marketing to them isn't much good, is it, and getting –

MR CAMPBELL:

No, that's right.

WILLIAM YOUNG J:

Yes.

MR CAMPBELL:

So the Court of Appeal's analysis was that the shares themselves were the relevant equity securities, but that they had not been offered to the public. But our argument is that something happened prior to the issue of the shares and that was that Blue Chip said to the public, "Come and enter into these joint venture agreements with us –

ANDERSON J:

Well it was hawking to the public investment packages in certain components –

MR CAMPBELL:

Yes.

ANDERSON J:

– which, in your argument, gave the package the quality of a security.

MR CAMPBELL:

Yes. And one of the aspects of that package was the right to hold the shares in the joint venture company. So another way of –

WILLIAM YOUNG J:

So the Court – so you say the Court of Appeal judgment doesn't grapple with the argument that what was being sold or offered to the public were rights to shares not the shares themselves?

MR CAMPBELL:

That's right Sir. And as an example, if the Court of Appeal's judgment was right then the Securities Act wouldn't apply to somebody offering options over shares or options to subscribe for shares, or options to have shares issued to somebody and the Act clearly does. There is an exemption notice issued in 2002 for certain but certainly not all share options and warrants and rights. That's the Securities Act (Rights, Options, and Convertible Securities) Exemption Notice 2002. So that's really the nub of the argument for the appellants.

TIPPING J:

But this applies only to the joint venture product?

MR CAMPBELL:

It does Sir.

TIPPING J:

Yes.

MR CAMPBELL:

Yes. Now I might add that the Court of Appeal's approach was as Justices Tipping and Young have been explaining. What the Court of Appeal rejected, however, was

the analysis of Justice Venning in the High Court which was that you wouldn't have an offer of an equity security if the only thing that the company was going to do was to hold, in this case, real property and the Court of Appeal said you couldn't take that approach. I see Mr Neutze for Greenstone is going to try to revive that approach but, in my submission, simply for the reasons that the Court of Appeal gave quite briefly on this issue, that should be rejected.

Now the second aspect of the joint venture agreement which we say triggers the Securities Act is that there were debt securities, and this starts at paragraph 45. And what the appellants focus on are the rights to the interest payments and the, and to the procurement fees in clauses 6.10.1 and 2. Now if we look at the definition of debt security, that's at pages 3 and 4 of the appellants bundle. I've quoted some of it in the written submission. The opening is, "Any interest in or right to be paid money that is or is to be deposited with, lent to, or otherwise owing by any person." Now the words "right to be paid money" et cetera are very, very wide, especially when you read the section 2 definition of money as including money's worth. So you will see that, again, the bundle of authorities.

WILLIAM YOUNG J:

What does "money's worth" mean here?

MR CAMPBELL:

In my submission it means something that the parties have treated as being equivalent to money and that is not so important in the joint venture agreement because there was undoubtedly money going from the investor to the Blue Chip company.

TIPPING J:

Can you pay money's worth? Would you have to read – adjust the word "paid" to include the concept of money's worth?

MR CAMPBELL:

I think you would have to adjust the concept. I might emphasise at this point that the real issue is whether, is not whether the Blue Chip company was providing money's worth in return. There's really no dispute that they were promising to pay money.

TIPPING J:

Yes.

MR CAMPBELL:

It becomes important when we look at what the investor had to do in order to obtain those payment rights from the Blue Chip company and it's really an issue only for the PIP agreements and the PAC agreements, because in those two agreements, as between the, well the way that the Court of Appeal looked at it and Justice Venning, was that all that the investor had done was provide the option to the Blue Chip company and that's obviously not money but in our submission it is money's worth.

WILLIAM YOUNG J:

Well in the PIP and PAC cases, and probably, indeed, as well in the JVA cases, when the purchaser signed the sale and purchase agreement that was worth, in money's worth, 15% or 12.6% of the price to Blue Chip.

MR CAMPBELL:

Do you mean when the option is exercised?

WILLIAM YOUNG J:

No, no, when the purchaser, the investor signs up –

MR CAMPBELL:

Oh, signs up, yes, right.

WILLIAM YOUNG J:

The act of signing up was worth to Blue Chip 12.6% or 15% of the purchase price.

MR CAMPBELL:

Because of the underwrite fee?

WILLIAM YOUNG J:

Yes, now is that money's worth? Because in that case Blue Chip did receive money's worth in relation to the transaction.

MR CAMPBELL:

Yes but –

WILLIAM YOUNG J:

Investors may not have known that's what they were doing.

MR CAMPBELL:

No, no and it's, it doesn't come from the investors.

WILLIAM YOUNG J:

Yes it does, yes it does.

MR CAMPBELL:

Except indirectly.

WILLIAM YOUNG J:

No, it comes, they are say – they are accepting a bundle of obligations which they give their acceptance to Blue Chip and Blue Chip then gets cash that's a percentage of what they sign up for. So in that sense, to Blue Chip, for every $100,000 of property they sold, they got something like $12,000 worth of benefit, money's worth.

MR CAMPBELL:

Yes, though I don't think it is necessary to engage in that analysis, with respect your Honour, because, for instance, with the joint venture agreement.

WILLIAM YOUNG J:

Well they got money anyway.

MR CAMPBELL:

Yes, they paid the initial contribution and so in that sense the joint venture agreement is, in one sense, more straightforward.

WILLIAM YOUNG J:

Yes.

MR CAMPBELL:

But if we look at the PIP agreement or the PACs. The PIP agreement is perhaps the clearest. As between the investor and the Blue Chip company, under the PIP agreement the investor grants, well firstly, the investor has to enter into the sale and purchase agreement and pay the deposit otherwise he won't have the PIP

agreement. Secondly, the investor then grants an option over the agreement to the Blue Chip company. Now the grant of that option, in our submission, is money's worth, because what – for two reasons. Firstly, what it does is, of course, enable Blue Chip by exercising the option to then obtain the benefit of the deposit that has been paid by the purchaser under the agreement, and the parties, that is to say, the investor and Blue Chip, treat the option as money's worth, for two reasons. They – the parties appreciate that the effect of the transaction and the grant of the option is effectively to allow Blue Chip by exercising the option to have enjoyed the benefit of that payment, in between the time the deposit is paid and the option is exercised, and during that intervening period, that benefit is recognised by the fact that Blue Chip has been saying, "We'll pay you 16% of the deposit," and that recognises that the option was worth money to the Blue Chip company. So that's a long way of explaining why there was money's worth in this case but, in answer to your original question, in my submission, money's worth means something that the parties are treating as between themselves as having no money equivalent.

WILLIAM YOUNG J:

Right, yes.

MR CAMPBELL:

What it is not, and this is to foreshadow and argument that Mr Neutze will make. It doesn't simply mean anything that is exchanged for money. So if somebody offers to sell you chattels or property for a certain price, that doesn't suddenly mean that the chattels or other property are now money's worth. So the mere fact that there is an exchange doesn't mean there's money's worth. It has to be something more than that.

McGRATH J:

Is it anything that has value?

MR CAMPBELL:

No it's not anything that has value. It's anything that's treated as being the equivalent to money as between the parties.

Now if I can go back to paragraph 46, the submission that's been made there is that the definition of debt security is so wide, "Money that is otherwise owing by any person. This makes it clear that the right to be paid does not have to arise from the

investor depositing money with or lending money to the person who is to pay the money." So the definition isn't confined to rights to be repaid money. So this is the appellant's starting point as far as debt security is concerned. The definition doesn't require some sense of repayment but, as I discussed before lunch, the second position of the appellants is that in any event, with all of these products, there was an element of repayment.

TIPPING J:

For the purposes of that submission, I suppose you argue that it doesn't matter, that the money is to be "repaid" by a party other than that to which it was paid?

MR CAMPBELL:

Yes, though, of course, with – that's happening with the PIP agreement and the PACs, but our submission is that the grant of the option itself is equivalent to the deposit. It puts the Blue Chip company in the position whereby exercising the option they get the benefit of that money.

TIPPING J:

What was the money flow to pay the vendors? The money came in from the investor to the joint venture company and was then paid by the joint venture company to the vendor, is that the way it was working?

MR CAMPBELL:

Except that I don't believe that the joint venture company actually operated any bank account.

TIPPING J:

Well, I mean, I'm just looking at the structure of the transaction. Was that the way it was designed to work? I seem to remember people had to pay in and then the joint venture company was going to pay out to the vendor. Is that right or not? Because then it would be a repayment.

MR CAMPBELL:

Yes, I think I'm understanding you correctly. The investor would pay the money in.

TIPPING J:

Yes.

MR CAMPBELL:

And at least, under the terms of the joint venture agreement, leaving aside the fact that there was no bank account. That was going to the company.

TIPPING J:

It went to the joint venture company?

MR CAMPBELL:

Yes.

TIPPING J:

And the joint venture company then presumably paid the vendors, of the units.

MR CAMPBELL:

Notionally, though I expect money went directly.

TIPPING J:

Well, yes.

MR CAMPBELL:

Yes, because the joint venture company was to hold the property –

TIPPING J:

Well, no, this is how it was structured –

MR CAMPBELL:

Yes.

TIPPING J:

I'm not interested in what actually happened.

MR CAMPBELL:

Yes, so the joint venture company was to hold the – to become the owner of the property.

TIPPING J:

Yes.

MR CAMPBELL:

And then when it was sold, the joint venture company would, through clauses 12.2 and, I think, 6.2 –

TIPPING J:

But the money was effectively paid by the investor to the same person as the person who had the obligation to pay the money at the end of the day.

MR CAMPBELL:

Yes, so in that sense the joint venture agreement is somewhat more straightforward on this issue than the PIP agreement and the PAC because with the PIP, as between the investor and the party who was going to pay money back, all that the investor - under the PIP agreement, all that the investor provides is the grant of the option which is why I say that that in itself is actually money's worth and I'll develop that.

Now I just want to make clear what our submission is at paragraphs 46 and 47. Our primary position is that the definition of debt security does not require, or is not confined to rights to be repaid money, but this is not to say that any right whatsoever to be paid money is a debt security, regardless of the source or origin of that right, because when you look at other provisions of the Act, particularly the definition of "issuer" in section 2, that contemplates that the right to be paid money will arise from the investor having paid money, or money's worth, in consideration for that right.

So, the –

ELIAS CJ:

Sorry, what does the definition bite on? What are you referring to? Is that in – the "issuer", is that –

MR CAMPBELL:

Issuer?

ELIAS CJ:

Yes.

MR CAMPBELL:

Well, it just shows the general scheme of the Act, your Honour, because the definition of issuer, which is on page 6 of the authorities, in relation to a debt security means – I'll need to get to the end of that long sentence, "The person on whose behalf any money paid in consideration of the allotment of the security is received," and you have to read "money" and including money's worth.

ELIAS CJ:

Yes.

MR CAMPBELL:

So the Act assumes that the issuer of a debt security will receive money, or money's worth, as consideration of allotting or granting the debt security. So, in that sense, it is accepted by the appellants that you will only have a debt security if the right to be paid money, by the other party, arises from the investor having paid money or money's worth in the first place. So –

TIPPING J:

Would you permit then that your paragraph 47 could have added to it, after the bracketed words (or money's worth), contemplates that the investor will pay money to the issuer?

MR CAMPBELL:

Yes.

TIPPING J:

Yes.

MR CAMPBELL:

Yes.

TIPPING J:

To or on behalf of the issuer?

MR CAMPBELL:

Yes.

TIPPING J:

Yes.

WILLIAM YOUNG J:

That's consistent, I think, with the – is it the definition of issuer, isn't it?

TIPPING J:

Yes, mmm.

MR CAMPBELL:

Yes and I stress that point. Firstly because when I review the written submissions I don't know that I – we had clearly put in positive terms what we thought was required for a debt security, so in positive terms, all that the Act requires is that the right to be paid money, be in consideration of money or money's worth, that the investor has paid to the issuers, or on behalf of the issuer and that's all that the Act requires.

I emphasise this really to combat the argument that Mr Neutze is going to make, or one of my learned friend's arguments and it's one of a few scaremongering arguments, if I can put it in those terms which is that, if our submissions are right, suddenly everything, anything that moves is going to be a debt security.

For instance, the offer of an airline or a concert ticket is going to be a debt security because commonly airline and concert tickets have clauses saying that the service provider will provide a refund if the flight is cancelled, or the concert is cancelled. I assume Mr Neutze will say well, you pay money in a consideration for those tickets and you're getting in exchange a potential right to be repaid the money that you've paid, so suddenly that must be a debt security on the appellants' argument.

Well, not at all because in those situations, you have to ask yourself what, in substance, is it that the purchaser of the goods or services is paying the money for and, in those instances, the purchaser is no more paying for the potential refund than any purchaser of goods or services is paying for a potential right to sue somebody for damages if they don't perform, or deliver the goods or services –

TIPPING J:

You're paying for performance not breached?

MR CAMPBELL:

Indeed, yes, yes. So – well, to put it another way, in these Blue Chip transactions, undoubtedly the investors were paying, or investing money, or money's worth, in exchange for an income stream that was to be paid by the – well, a payment stream, that was to be provided by the Blue Chip company and that is not what is happening when you buy concert tickets or airline tickets.

Now, at paragraphs 48 to 49, I make the point that in the *Culverden* case the – firstly, the Court of Appeal ruled that there was no, the Act didn't require some form of repayment obligation, in the definition of debt security. The Privy Council didn't have to decide that point but they inclined to the view and I've quoted this at paragraph 49, "That it was too narrow a reading of the definition of debt security to say that there had to be a repayment obligation."

They didn't have to determine the point because in that case they – the Privy Council held that if you did require repayment well, you had it in that case anyway because the buyer of the retirement unit was paying for the purchase at the outset and one of the terms of the agreement was that when the buyer ceased to occupy the unit, Culverden, the operator, would have to buy it back by, the Privy Council said, basically repaying the purchase price, subject to certain adjustments that were provided for in the agreement.

So, although the Privy Council didn't make a decision on this particular point, the Court of Appeal did in that case and the Privy Council was of the same view. The Court of Appeal, in this case, held contrary to *Culverden* that a debt security did require an obligation to repay money subscribed by investors and they also held that, in the case of the joint venture agreements, there was no such element of repayment and there was a similar holding for the PIP agreements and the PAC deeds.

Now, there are a number of reasons why, in our submissions, a requirement of repayment shouldn't be read into the definition. The very concept of repayment is elusive and we can almost see that in this case, particularly with the joint venture agreements. You have to read the agreement carefully to see exactly what the outcome is, the parties haven't used, in the agreement itself, the exact terminology of repayment, although they do use that, effectively that terminology, when explaining to the investor what is going to happen.

Even in *Culverden* itself you see that the concept of repayment is rather elusive because, if we turn to that decision which is at tab 4 of our bundle, at the very bottom of page 260, the Privy Council is explaining why, even if, contrary to their inclination, debt security requires some form of repayment. Lord Nicholls says, that in this case, "It was not repayment in the sense of repayment of a loan but it was repayment in the sense of payment back of the same amount, subject to adjustment for charges and inflation." So you can see that even in that case the Privy Council is saying well, we know it doesn't look like an ordinary sort of repayment but effectively it was, or in substance it was.

A further reason that this requirement shouldn't be read in is that, as I explained at the start of the Securities Act submissions, the Act has a hierarchy of exemptions, some of which are in the Act, others can be conferred by the FMA and the court shouldn't add to them by reading into or implying a limitation that hasn't been expressed.

Finally, the requirement doesn't seem consistent with the section 2 definition of money, as including money's worth and similarly, the definition of subscribe, as including purchase and contribute to, whether by way of cash or otherwise. So, on the Court's – that definition of subscribe certainly contemplates that you can have a debt security where the investor has provided non-cash consideration but if that is the case how, on the Court of Appeal's approach, does somebody repay the non-cash consideration?

One can think of other transactions where it's very hard to characterise payment obligations as being repayment but one would still expect the Act to apply and an annuity is an example. If somebody purchases an annuity, so an income stream that's to last may be a certain or uncertain time, how does one say that the income stream, or the payment obligations of the issuer are repaying the sum that has been initially paid to purchase that annuity?

Now, at paragraph 52, I engage with the Court of Appeal's reasons for reading this requirement into the section. The first was to say that, "Each of the other terms of the definition of debt security, such as debentures and notes, contains the underlying concept of a payment by a subscriber to an issuer with a right to payment," and the expression "otherwise owing", should take colour from that and from the terms "deposited with" and "lent to". That if one goes back to the origins of the Act and the

scheme and its deliberately wide definitions, it's much more likely that what the drafters wanted to do was to use the very broad word "otherwise" to ensure that the definition would capture forms of debt that were perhaps not the sort that were offered when the Act was drafter but that some person in the future might try to devise, in a way, to otherwise get around the Act.

Secondly, the Court of Appeal relied on the – said that the Act applies only to offers of securities for subscription which they said, in relation to a debt security, normally involved depositing or lending money in exchange for a right to be repaid, that money, with a return –

TIPPING J:
Just going back to your previous point.

MR CAMPBELL:
Yes.

TIPPING J:
Does the Court of Appeal – how do they explain the use of the word "otherwise" which one would immediately think was designed to avoid the ejusdem generis approach, rather than support it? Did they deal discretely with the word "otherwise"?

MR CAMPBELL:
I –

TIPPING J:
I don't recall them doing so –

MR CAMPBELL:
No, I don't believe they do –

TIPPING J:
– but that seems to me to be a very, very significant word in this whole definition and the real issue is whether it was designed to expand or limit and there are arguments both ways but your purpose of argument has some force.

MR CAMPBELL:

Yes, I don't think the Court did deal with that issue that you've raised expressly –

TIPPING J:

Well, do you agree, that the word "otherwise", in the Court of Appeal's view, has to be viewed as limiting, limiting it to the genus –

MR CAMPBELL:

Yes, yes –

TIPPING J:

– of the previous words. Whereas it's unusual, I would have thought, for a drafter to use the word "otherwise" for a limiting purpose?

MR CAMPBELL:

Yes, well it's such a wide expression.

TIPPING J:

But, we shall see.

MR CAMPBELL:

It looks that way to me Sir. As to the second reason which focuses on the idea of subscription, that that reasoning does, with respect, seem to be circular, it has assumed the very thing it's setting out to prove and, in any case, overlooks the definition of subscribe which, as I've said, in the Act is much wider than common law and includes the purchasing for non-cash consideration.

Finally –

WILLIAM YOUNG J:

How do you treat "issuer", in the case of a security which is subscribed for otherwise than in cash?

MR CAMPBELL:

The person who receives the non-cash consideration.

WILLIAM YOUNG J:

Right, okay.

McGRATH J:

Mr Campbell, this perhaps really goes back to the way the Privy Council was explaining repayment but is – do I understand your argument to be that you accept that the idea of repayment involves the money coming back but it doesn't have to come back from the same person it first went to, is that part of your...

MR CAMPBELL:

No, that's not really our argument. Our argument is that in each of these cases there was a payment of money or money's worth by the investor to the person, to the Blue Chip company and that the Blue Chip company, in exchange, promised to make certain payments in the future. Now that's most evident in the joint venture agreement because there was actual money coming backwards and forwards and one doesn't have to rely on money's worth. With the PIP agreement, it is money's worth from the investor to the Blue Chip company, being the grant of the option.

McGRATH J:

So you don't have to – yes, never mind the developer, it was in fact the Blue Chip company that was making the commitment to provide a money flow back to the investor?

MR CAMPBELL:

Yes, yes.

McGRATH J:

Right, thank you.

MR CAMPBELL:

I don't think I need to deal expressly with the third reason that the court gave. Now, if one accepts that there's no right of repayment, then at least in the joint – no requirement of repayment rather, then in the joint venture agreement the rights to the interest payments which is basically an indemnity and the right to the procurement fees, were in consideration of money or money's worth that the investor had paid to Blue Chip Joint Venture Limited and were therefore debt securities.

So clause 6.10 provided that the – provided expressly that these two rights were in consideration for the investor assuming all obligations and responsibilities for the borrowings provided to the joint venture, which was part of what was defined as the initial contribution and the right to the procurement fees was expressed as being in consideration of the investor, providing its contribution to the joint venture.

Now, I might just take you to the joint venture agreement. So, the Barclay volume 2, page 762. So, you'll see there at clauses 6.10.1 and 6.10.2, those rights being expressed in those ways and in the previous page, the initial contribution was treated, there is something that the investor was going to pay. So, "Five working days after the commencement date, each joint venture party must pay to the company that joint venture party's initial contribution in clear funds."

I perhaps don't need really to say much more about that point and as I indicated early on this morning, the correspondence sent by the Blue Chip company to the investor, treated this as being an investment and the initial contribution as being something that was going to be returned to the investor.

In summary, it shouldn't be surprising that the Securities Act applies to those particular rights. What's happening is that an exchange for substantial sums that the investors are paying to Blue Chip Joint Ventures, that company is promising to pay money, firstly an income stream and then to return that contribution at a future date and it is far more like an investment than was the case in *Culverden*, in our submission.

Now, the fallback position which was in the notice of appeal but I think could be more clearly expressed in the written submissions, is that even if the court finds that the definition of debts security envisages some sense of repayment, in the joint venture agreements that's exactly what we had anyway. We had an income return and then ultimately a repayment of the investment.

Now, that takes me to the premium income product and much of what I want to say here, I think I've already said in the previous discussion, that the focus is on the investment return that Blue Chip was offering through the right to be paid the option fee but also Blue Chip offered the investors two other rights. The right to be reimbursed the deposit if the option was exercised, or the reasonable cost of settling if the option was not exercised.

Now, both the right to the option fee and the right to reimbursement, were rights to be paid money that is, or is to be otherwise owning by any person and so falls, in our submission, within the definition. The Court of Appeal's view, in summary, was that these weren't debt securities because there was no obligation on the Blue Chip company to be repaying money or money's worth contributed by the investors.

Now, the appellants first response is that all that the Act requires is that the rights be in consideration of money or money's worth, that the investor repay to Blue Chip, and that did happen here because the grant of the option was money's worth, and I've shown how the option fee was calculated as a percentage of that. And the reason that Blue Chip was paying the advertised interest rate on the amount of the deposit was, as I've explained, that once the option was exercised, it was as if the investor had advanced the deposit to the Blue Chip company. So Blue Chip enjoyed the upside of a binding agreement that wasn't exposed to the downside, but was saved from having to fund the deposit that was needed to obtain that upside, until it exercised the option. And again, as an alternative, if the Court holds that some sense of repayment should be read into the definition of "debt security" that was present here, because the reimbursement right, which is either reimbursement of the deposit or reimbursement of the investor's costs on settling the agreement for sale and purchase, was basically repayment of the value of the option that had been granted to the Blue Chip company.

Now, finally, the put and call product, under the PAC deed the investor received the right to the option fee and the right to be reimbursed the deposit if either option were exercised, and similarly to the analysis of the PIP agreement, the investor received those rights in consideration of money or money's worth that the investor paid to Amelia. And the PAC deeds are perhaps a little easier than the PIP agreements in one sense: that not only was the investor granting the option, the call option, to Amelia, they were also agreeing that the interest on the deposit would be paid to Amelia. So that's all I have to say about whether or not there were securities under these products.

The next question is whether the exemption in section 5(1)(b) applies. Now, we've looked at this briefly. The question is really whether the rights that constitute securities – so, whatever rights the Court may or may not find are securities. The question is whether those rights are in respect of an estate or interest in land. Now,

that little phrase “in respect of” has to be interpreted and applied in the context of the Act. The point really, in my submission, of the section 5(1)(b) exemption, is that an ordinary purchaser of land – or, indeed, an ordinary purchaser of chattels – is sufficiently protected from the sorts of things that might go wrong in a contract by the general law of misrepresentation and the general law of contract, and there’s no need for the disclosure regime imposed by the Act.

Now, on the other hand, it’s important to understand why section 5(1)(b) doesn’t simply confine the exemption to the states or interests in land. So, instead of “in respect of” the Act could have said, “Nothing shall apply to any estate or interest in land for which a separate certificate of title can be issued.” The problem with drafting the exemption in that way would be that the exemption would only apply to the actual offer of the land itself, and there would be room for the Act to apply to associated rights that one commonly finds in offers for the sale of land, such as the right that the purchaser has to an apportionment of income, rents and the like, on settlement. And so the legislature, I think, has deliberately chosen this phrase “in respect of” rather than something narrower, because of a recognition that the narrower terminology wouldn't be enough.

TIPPING J:

Is the point here that the offer was of more than simply an estate or interest in land, it was that plus something by way of how it was to be financed and so on? At a high level, is that the argument?

MR CAMPBELL:

Yes, yes, and that the –

TIPPING J:

Once you get those additional, all that additional dimension, it ceases to be in respect of, because it was more than that?

MR CAMPBELL:

Yes. It was much more than that.

TIPPING J:

Well, however one characterises it, it was more – there would be margins, I dare say, and lines to be drawn, but you say it was sufficiently more than –

MR CAMPBELL:

Yes.

TIPPING J:

– the land, for the purposes of this Act?

MR CAMPBELL:

Yes, and I agree absolutely, the lines do have to be drawn somewhere. That phrase "in respect of" requires some line drawing, and one can do that just by applying the phrase to the facts, or sometimes you might want to articulate what that phrase is trying to indicate, and the best way of doing that is to try to understand why Parliament put it in there in the first place.

ELIAS CJ:

Well, looking at it in context, the whole of the exemptions, it's simply introducing a list. Could you not, could it not be that it simply means, "Shall apply to"? Because that would seem to fit with all the other exemptions. It may not be particularly significant, I suppose, is what I'm raising. In other words, it would mean that it doesn't apply to an estate or interest in land.

MR CAMPBELL:

Yes, well…

ELIAS CJ:

I'm just wondering why you're not arguing for the simpler solution, which is that it's not a very pregnant phrase?

MR CAMPBELL:

Right, well, I agree that it's not terribly pregnant, but unfortunately it also isn't too –

TIPPING J:

It depends what you mean by "pregnant". I mean, it's capable of having quite a wide meaning.

MR CAMPBELL:

It is.

TIPPING J:

What I don't think is being put to you is, is that consistent with the purpose?

MR CAMPBELL:

It is not.

TIPPING J:

It's – we're talking about offers being made to the public, aren't we?

MR CAMPBELL:

Yes.

TIPPING J:

This is basically what the context is.

MR CAMPBELL:

Yes.

TIPPING J:

So if you simply offer land to the public, you're not caught.

MR CAMPBELL:

That's right.

TIPPING J:

But if you do more than that, the fact that land is involved doesn't save it.

MR CAMPBELL:

That's right, and that is essentially what the Privy Council in *Culverden* said. They articulated, in my submission, in the correct way, by saying that the way in which you draw the line is by asking whether the rights in question are ones that you would ordinarily associate with an offer of land or of chattels, and that's why I gave the example of the right that a purchaser ordinarily has to an apportionment of income, when it comes to the settlement date.

McGRATH J:

Did the Privy Council address section 5(1)(b)?

MR CAMPBELL:

Yes, they were – that was the whole point of the ancillary rights argument before the Privy Council.

McGRATH J:

The ancillary rights argument?

MR CAMPBELL:

Yes, yes. Because Culverden was arguing that the offer made to the public, which was an offer of a retirement unit, together with an obligation to buy it back when the owner ceased to occupy it; Culverden was saying, "Well, even if the obligation to buy it back, and therefore to pay money to the owner, falls within the definition of debt security, then it's nonetheless exempted because it's just in respect of –

McGRATH J:

Land.

MR CAMPBELL:

– an estate or interest in land. And the Privy Council had to deal with that argument and said, "Well, no, you can't hide the entire transaction behind the exemption, firstly, just because there is land involved, you have to look at the transaction as a whole," and the way in which they phrased the test was to ask whether this was simply an unexceptional ancillary term to an offer of land. And the Privy Council said, "It's anything but, it's one of the cardinal parts of the transaction."

McGRATH J:

Yes.

MR CAMPBELL:

So, in summary, in this instance, when you look at the PIP product or the joint venture agreement and the obligations therein which, we say, give rise to equity securities or debt securities, if you just ask yourself, "Are these the sorts of things that you ordinarily find when land is offered for sale?" Of course they're not.

TIPPING J:

Well you pay for the land you don't expect your money back.

MR CAMPBELL:

No, and you don't expect an income return between the time of signing up the agreement and settlement. All sorts of things that you don't expect, and that's the argument in a nutshell. Justice Venning didn't accept any of it. The Court of Appeal accepted some, because in the Court of Appeal – obiter, of course because they decided there were no securities – they said that some of the rights were exempted but some were not, and I can come to that in a moment.

If I can just come back to that phrase "in respect of the line drawing". That does seem to me to be the starting issue, and the point really is that a line has to be drawn and the way in which it is likely that Parliament wanted it drawn is that they were simply wanting to exempt rights that might be found in an offer of land, or an offer of chattels, that although falling within the definition of say debt security, are just rights that you see in an every day off of land or of chattels.

Now I haven't really been able to think of anything other than the right of apportionment that a purchaser already has. That's a right to be paid money on settlement by the vendor for an account that the vendor's already received for a period that relates to post-settlement. So undoubtedly that's sort of right, although it might be a pitfall within the definition of debt security, would be exempted by section 5(1)(b).

ANDERSON J:

Typical that it would be pre-paid rent.

MR CAMPBELL:

Yes, yes. Now what the respondents want to do though, is basically say that if there's some passing acquaintance with an estate or interest in land, if the transaction or the rights relate to or – I can't quite remember the phraseology, it certainly relates to an estate or interest in land, then they should be exempted and, in my submission, that is far too wide.

Now at paragraph 63 I explain the way in which the Privy Council dealt with this in *Culverden*. Now there's an initial point that I want to make and that is that Mr Neutze

is going to submit, as he did in the Court of Appeal, that the Privy Council wasn't actually terribly much concerned with section 5(1)(b) in that judgment. Now if you look at the passages that I've quoted at paragraph 63, you'll see that Their Lordships begin by accepting that the Act of 1978 was not intended to protect ordinary buyers of land. That is made clear by the exemption in section 5(1)(b). So you might think, from that passage alone, it's pretty clear that that's what they're dealing with.

It's even clearer if you look at the report of the judgment in the Appeal Cases because there the argument of counsel is set out and the point that the Privy Council is dealing with here, what's called the ancillary rights point, is couched exactly in relation to section 5(1)(b). Now I had meant to put that in the bundle of authorities but we've just got the New Zealand Law Report judgment there. And you'll see that at page 305 of the appeal case report, 1997 appeal case, this is 303 at page 305, and the way in which the Privy Council applied section 5(1)(b) you'll see is to say, "Well, to decide whether one right is ancillary to another involves looking for the substance of the overall transaction." And then they explore what the substance of the transaction was in that particular case and say that, "The repayment right, far from being ancillary, is a cardinal feature of the transaction. That being so, the repayment right cannot be sheltered behind the section 5(1)(b) exemption as an unexceptional term ancillary to the purchase of an interest in land," and they repeat that same phrase in the following paragraph that I've quoted.

Now in my submission that is the appropriate way of applying section 5(1)(b). It is true that the Privy Council didn't engage in any interpretative exercise of the phrase "in respect of". They didn't, for instance, rely on a variety of cases from completely different contexts to try to understand what that phrase meant, which is what, with respect, my learned friend is going to do in his submissions on section 5(1)(b). He'll take you to a number of cases, none of which have anything to do with the Securities Act to say that "in respect of" is a phrase of the widest possible meaning. Well, it's true that that is so in some contexts, but not in this, and the reason is that, in our submission, the Privy Council was correct in that firstly, as a matter of context, the purpose of the exemption is that Parliament recognises that if you're just offering an interest in land or in chattels, you don't – the purchaser doesn't need the protection of the Act. Secondly, that nonetheless, sometimes there'll be the odd right that might come along with those, that land or chattels that might fall within the definition of security but should be nonetheless exempted. But that phrase must still have some limits and it should be drawn fairly narrowly as the Privy Council did.

I understand my learned friend will say that the exemption will apply if the relevant rights refer to, or relate to, an estate or interest in land. But if that was the test then *Culverden* would have been decided entirely differently because, undoubtedly, the buyback right related to an estate in land. By exercising it Culverden bought the land back, bought an estate or interest in land. And you can think of situations where a financier makes an offer of say, deposit securities to the public saying, "We'll lend you money provided that it's just for the purpose of buying an estate or interest in land." Now, on the respondent's test that relates to, or refers to, an estate or interest in land. So suddenly there'd be an exemption as well. You cannot, in my submission, draw that – use that phrase so wildly.

Now, at paragraph 65, we address the particular rights and whether they were unexceptional ancillary terms. In the joint venture product, obviously the rights to interest payments and the procurement fee were the central features, in the sense that these were the means by which the investor was to receive an income return. So that's the first point, and the second is that those rights and the right to shares are not rights that you ever see when land is offered for sale, or even when you see a joint venture, an ordinary joint venture agreement offered. So an offer to participate with somebody, just one other person in the ownership and management of land, you wouldn't ordinarily see that other person saying, "Well by the way, any money that you put in I'll pay you an income return on." The same analysis applies to the PIP agreement, and, in my submission, to the PAC deed because the relevant rights there arose only because the PIP agreement or the PAC deed was entered into in relation to a sale and purchase agreement. But one does not ordinarily see such rights offered in conjunction with land.

Now, I then engaged, to some extent, with the Court of Appeal's reasoning and, as I noted earlier, the Court held that some of the rights were exempt but some were not. In our submission, all of the rights that we've identified are not exempted by section 5(1)(b).

Now that takes me to what is question 3A? If there was a breach of the Act, were the sale and purchase agreements part of the relevant allotments and thus void, under section 37(4).

ELIAS CJ:

Voidable.

MR CAMPBELL:

Sorry?

ELIAS CJ:

Voidable, aren't they?

MR CAMPBELL:

No, void. Voidability comes in section 37(a) –

ELIAS CJ:

Ah, yes.

MR CAMPBELL:

– which…

ELIAS CJ:

Yes.

MR CAMPBELL:

Different concern. Now, section 37 subsection (1) prohibited the allotment of these securities, if that's what they were, and subsection (4) then provides that any allotment in contravention of subsection (1) is invalid and of no effect. Now, the allotment consists of the entry into the agreements that give rise to the securities. This is clear from a series of cases: *Re AIC Merchant Finance Ltd*, a decision of Justice Fisher in *DFC Financial Services Lid v Abel* [1991] 2 NZLR 619, which probably gives the most detailed consideration to the meaning of the term "allotment", and Justice Fisher's analysis was approved and adopted by the Court of Appeal.

TIPPING J:

What is meant by the expression "that gave rise to"? Is that a term that's deployed in these authorities or is it part of your submission?

MR CAMPBELL:

Part of my submission.

TIPPING J:

This implies that there's a causative effect, or are you simply denoting a linkage?

MR CAMPBELL:

Well, yes. I think, your Honour, a linkage. I say, "In my submission," rather than, "In the authorities," I don't believe that phrase is in the authorities itself. But, of course, what those authorities are saying is that you have to ask yourself, what was it, at what point in time did these rights spring in to being?

TIPPING J:

Would it be fair to say, "if it's part and parcel"? That's my expression.

MR CAMPBELL:

Yes.

TIPPING J:

Just off the top of my head. If it's part and parcel of the whole product, if you like, then you don't, you can't treat it as separate for the purposes of not being part of the allotment.

MR CAMPBELL:

Yes. I think that is right, that's another way of expressing it.

TIPPING J:

Because clearly, I mean, they're all linked together here.

MR CAMPBELL:

Yes, although I –

TIPPING J:

I mean, without one there wouldn't be the other and without the other there wouldn't be the one.

MR CAMPBELL:

Yes, although I should emphasise, because my learned friends will make the point anyway, that although there are those clear linkages, in the sense that you've just described, the obligations in the sale and purchase agreement are not in any way –

TIPPING J:

Oh, no, no, no.

MR CAMPBELL:

– dependent upon…

TIPPING J:

No, no, not expressly.

MR CAMPBELL:

Yes.

TIPPING J:

But looking at it, at least where I'm sitting from at the moment, it looks pretty obvious that they were designed to work together.

MR CAMPBELL:

Well, I certainly agree, in the sense that the investors would not have signed up to the sale and purchase agreements without the associated products. It was part and parcel from their perspective, and it's their perspective of course which counts for purposes of the Act.

WILLIAM YOUNG J:

And, in substance, one way of looking at it is that the consideration, the way in which the investors subscribe, as it were, to the securities, is by signing the sale and purchase agreement. All that's really required of them is that – well, not all, but substantially what's required of them is that they sign and then honour the sale and purchase agreements, it's a bit more than that in the JVA cases.

MR CAMPBELL:

Yes, that's right, your Honour, and it's, each of the investment products makes that quite clear by either, I think in the case of the joint venture agreements for instance, the rights to the interest and the procurement fees were in consideration of providing

the initial contribution, which included paying the deposit under the sale and purchase agreement, so in that sense you had to sign up to the sale and purchase agreement and pay the deposit before you could get the rights.

WILLIAM YOUNG J:

But the quid pro quo, the quid, the investor's quid is signing the sale and purchase agreement and honouring it, and the quo is they get the benefit of the Blue Chip investment product.

MR CAMPBELL:

Yes.

TIPPING J:

And you'll be pleased to hear that I've solved, at least provisionally, my difficulty with the lot, the concept of allotment, because of the fact that it's defined to include "convey".

MR CAMPBELL:

Right, yes, yes.

ELIAS CJ:

And sell.

MR CAMPBELL:

And, like almost everything else in the Act, it is rather widely defined.

ELIAS CJ:

But I too have some difficulty with the way you've expressed it here, that it's the entry into the agreements that give rise to the securities. Is that more elaborate than is necessary? Is it sufficient that it consisted or took effect with the entry into the agreement? Is that not what you mean?

MR CAMPBELL:

Ah –

ELIAS CJ:

That the allotment was the entry into the agreements?

MR CAMPBELL:

The allotment is the entry into the agreements from which the rights come into being.

TIPPING J:

If they just entered into the agreements, it wouldn't have been enough. There has to be some linkage or some part of a composite whole between the agreements and the product. It's the conjunction of the agreement and the product that seems to me to be your best argument for this being all part of the allotment.

ELIAS CJ:

I thought the agreement was the product.

ELIAS CJ:

No, it's – well, the agreement on its own, it's just simply an agreement to buy and sell the land, isn't it?

MR CAMPBELL:

Yes.

TIPPING J:

You need the financial product to make the whole thing work.

McGRATH J:

Giving effect to the agreement.

TIPPING J:

Well, no, not in terms, because there's no express contractual linkage. I think what you're saying, Mr Campbell, is that, in reality, the one couldn't go ahead without the other and the other couldn't go ahead without the one, and that was blindingly obvious.

MR CAMPBELL:

And, perhaps most importantly, and this is the way that I try to express it in paragraph 70, you needed to enter it, you needed to have the sale and purchase agreement before the rights under the investment agreements would arise. Without the sale and purchase agreement there'd be no rights under the PIP agreement,

because it was conditional upon entering into a sale and purchase agreement, for instance.

TIPPING J:

Well, the joint venture agreement is drafted on the premise that there will have earlier been the sale and purchase agreement.

MR CAMPBELL:

Absolutely, all three of them are.

TIPPING J:

So although there's no express contractual linkage, as your opponents are no doubt going to emphasise, and here I'm just following or trying to follow the agreement, you say that that's not necessary because, looked at in a realistic way, each was dependent on the other. I mean, I'm not trying to improve –

MR CAMPBELL:

Yes.

TIPPING J:

– on your argument, but that seems to me to be what you're effectively saying.

MR CAMPBELL:

I think I would prefer to rest it mostly on the Blue Chip investment products which, we say, give rise to the, create the securities, that they themselves depended upon the existence of a sale and purchase agreement, so that is the linkage from the sale and purchase agreement to the investment products. Because if you look at it back the other way, the sale and purchase agreements do work just by themselves. They wouldn't have been entered into without the associated product, but they are stand alone in the sense that, and only in the sense that, the obligations of the purchaser under the sale and purchase agreement aren't tied to or dependent upon the performance of the investment agreement.

TIPPING J:

How far outside the compass of the legal documents do you suggest the Court can properly go? Reading *Culverden*, it seemed to me, and you seem to have, implicitly relying on this, said, "Well, how this thing was designed to work can be informed by

the previous publicity." They didn't say that in terms, but there is a passage in *Culverden*, isn't there, which seems to suggest you can look wider than the actual legal documents to see what was really going on.

MR CAMPBELL:

I'm not sure, with respect, that the Privy Council do quite say that, and in any event, your Honour, it's sufficient to rely on the products –

TIPPING J:

Well, it is –

MR CAMPBELL:

– themselves.

TIPPING J:

Yes.

MR CAMPBELL:

And the only reason that I've taken you to the letters and the brochure is because they basically articulate in –

WILLIAM YOUNG J:

Lay language.

MR CAMPBELL:

– lay language, the effect of the agreements.

TIPPING J:

Anyway, I'll look it up for myself and, if necessary, I'll draw your attention to it.

MR CAMPBELL:

Certainly, thank you. Now, there are three – there are some matters that I think I should deal with now, that are of a preliminary sort that the respondents have raised in relation to this particular argument and you may recall, those of you who determined the leave application, that they were raised in opposition to the application for leave, or some of them were.

The first was the suggestion that the investors didn't plead that the sale and purchase agreements were part of the relevant allotment and in relation to that I thought I should take you to some pleadings –

TIPPING J:
Is this point still alive?

MR CAMPBELL:
Well –

TIPPING J:
It seems a somewhat unsatisfactory one at this level.

MR CAMPBELL:
Yes, well I tend to agree and it may be better if I just leave that until my reply, if it seems to be necessary your Honour.

ELIAS CJ:
Is your point though, that you say it was pleaded?

MR CAMPBELL:
It was sufficiently pleaded, yes.

ELIAS CJ:
It was sufficiently pleaded and –

MR CAMPBELL:
And then the respondents raise an argument about the release that the appellants are seeking, not being available under section 37AL. I'll just leave the respondents to try to make that argument and see if there's anything left for me to say.

Now, at paragraph 72, if the sale and purchase agreement is part of the allotment and therefore invalid under subsection 4, it may be that the court can exercise a common law jurisdiction to sever the sale and purchase agreement from the investment product. Now, I say "may" because firstly, just to be clear, the Illegal Contracts Act doesn't apply by reason of section 4(5) and I think that's common ground.

One of the reasons that the Illegal Contracts Act doesn't apply is a matter of legislative history, there was a series of cases, I think, in the 1990s which determined that the Illegal Contracts Act actually did apply. Parliament responded to that with section 4 subsection 5 and when incorporating that provision, introduced a special regime under the Securities Act for dealing with relief against invalidity. So in place of the regime that you have for relief under the Illegal Contracts Act, there's a special regime in the Securities Act.

In light of that, it's doubtful whether the, in my submission, that the court has some residual common law jurisdiction to grant relief. So what follows in the rest of the section is really a backstop –

TIPPING J:

How could we have a common law jurisdiction to give relief from a statute that says that something is void and unenforceable, or of not effect, invalid and of no effect? How could we, at common law – this is in your favour.

MR CAMPBELL:

Yes, I understand that Sir, yes.

TIPPING J:

I'm not trying to be difficult Mr Campbell, I just don't understand how one could. I mean, maybe the respondents have got some cunning plan but...

MR CAMPBELL:

Well, I agree that it is most unlikely. The courts did have the ability at common law to sever, for instance, if you just had one sole agreement and there was a term in it that was illegal it could be severed –

TIPPING J:

But if you've already held that it's part and parcel, so as to bring it in as part of the allotment, I don't see how you could then turn round and say well, it's not actually part and parcel because we're going to sever it.

MR CAMPBELL:

Well, I agree with you because it seems to me that if there is any jurisdiction, it has to be under the Act and under the relief provisions in the Act. I, nonetheless, want to deal with the possibility in part because there have been a few other cases in New Zealand and Australia where similar issues have arisen and I think it will be helpful to see the way in which, say the New Zealand courts, have dealt with similar issues here before.

ELIAS CJ:

We have read these submissions, so I am a little concerned that we should make a little more progress.

MR CAMPBELL:

I'm happy to do that your Honour.

ELIAS CJ:

So if you would like to emphasise anything, or if there's anything you do need to take us to that would be helpful, that's fine but perhaps you could summarise, since this is a fallback argument for you.

MR CAMPBELL:

Yes, certainly. In terms of, an addition I suppose, I don't want to emphasise one paragraph over the other to be frank –

WILLIAM YOUNG J:

Well they're all equally good, are they?

MR CAMPBELL:

Yes, equally as ineffective as the other. One point to add is that this is not a case in which – and this comes to some extent from the reference to *Nathan v Dollars & Sense* [2008] NZSC 20, [2008] 2 NZLR 557. This is not a case in which the appellants are saying that the respondents should have some liability in damages, or to compensate the appellants for loses that have occurred as a result of the breach of the Act. It is simply a case where the appellants' position is that the agreements should not be enforceable, so that effectively the parties are returned to their previous position.

In my submission, that's an important consideration in determining, to put it in general terms, whether the respondents should be responsible for what their agents did because albeit that the agents were simply engaged to procure purchasers, in my submission because the respondents knew, in general terms, or in the *Icon* case in quite detailed terms, how the agents were going to procure purchasers. The Court should be quite ready to say to the respondents well, that's your lookout, particularly where the appellants are not even attempting to impose some form of additional liability on the respondents and, as I say, that –

WILLIAM YOUNG J:
Well, what would they have had to have done about their deposits?

MR CAMPBELL:
I beg your pardon?

WILLIAM YOUNG J:
What do they want about their deposits, don't they want their deposits back?

MR CAMPBELL:
Yes but that's not a liability, that's just returning the parties to the position, that's an ordinary consequence of the agreements being invalid and of no effect.

WILLIAM YOUNG J:
All right, okay. Just, while I'm thinking of that, is specific performance still the remedy that's sought? The apartments haven't been resold?

MR CAMPBELL:
It is?

MR O'CALLAHAN:
No, not in Icon's case.

WILLIAM YOUNG J:
Okay, thank you.

MR CAMPBELL:
I think I can just move on to tainting in that case, at paragraph –

WILLIAM YOUNG J:

Well is *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 (CA) – I haven't read *Hurst v Vestcorp* but is that the primary case you rely on?

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

As being reasonably comparable to this?

MR CAMPBELL:

Yes, it is.

WILLIAM YOUNG J:

Because the other cases are more general, the New Zealand cases?

MR CAMPBELL:

Well the two New Zealand cases are ones where, in contrast to this, they were bloodstock cases, where the promoter of the investment which was held to be in breach of the Securities Act, said to the potential investors, not only should you come and form a partnership in these horses with others but we'll arrange finance for you and the investors appointed a promoter as their agent to go and get finance. Finance was arranged, money was advanced and the financier sued the investors on the loan agreements and the investors resisted the claim on the basis that there had been a breach of the Securities Act by the promoter of the partnership which there had been and that should impeach the loan agreement.

In both cases, firstly a series of cases including *DFC Financial Services Ltd v Abel* [1991] 2 NZLR 619 (HC) and *Abbott v UDC Finance Ltd* [1992] 1 NZLR 405 (CA), the court said that the lender was not implicated, or their rights were not impeached.

One of the important differences between that case and this case is that it was absolutely clear in that case that the lender did not appoint the promoter at all to act on its behalf. It was the other way around, the investors there appointed the promoter as their agent to go and secure loan finance. Here we have essentially the reverse, where the respondents, although we acknowledge they didn't appoint the

Blue Chip sales agents as their agent to sell the investment products, they did appoint them to go and sell the apartments and they knew, to varying degrees as we've discussed, that the sales agents were going to do that in conjunction with investment products. So, in many ways, the reverse of those bloodstock cases.

Now, as to the tainting, there's reasonably common ground here as to the legal principles, subject I think to one point. It's more their application which is in issue. The first is whether the purpose or the object of the sale and purchase agreements was to assist or promote illegal investments. Now, both Justice Venning and the Court of Appeal held that that was not the purpose of the sale and purchase agreement and our response is really a short one, at paragraph 88, that in our submission, the mere fact that the investment products were dependent upon the existence of the sale and purchase agreements and so couldn't have been offered without those sale and purchase agreements and, I should add to that paragraph, that the respondents knew that the sale and purchase agreements were going to be offered with the investment products, means that one of the purposes or objects of the sale and purchase agreement, indeed a mutual purpose, was to assist or promote the offers of the investment products. So that's the short point on that aspect of tainting.

The second question is knowledge of that illegality and the first issue is whether – is where the legal dispute is between the parties in this area and that is whether it is sufficient that the respondents knew of the underlying facts which constituted a breach, or whether it's necessary to show also that the respondents knew that the Act was breached.

ELIAS CJ:

I'm sorry because I probably rushed you through it but the severability here which you're relying on, or the prospect, is what you're addressing in the tainting argument. It's not really severability, is it, it's if it is distinct, if the contracts are distinct, if the sale and purchase agreement is distinct, then you say that it's nevertheless tainted. It's just that severability is –

WILLIAM YOUNG J:

No, I think he's saying if it's not part of the allotment –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

– then we get to tainting

ELIAS CJ:

Yes but why is severability coming into it, that's what I don't understand. I would have thought that was a remedial response?

MR CAMPBELL:

Severability is coming into it only because – and that was before these paragraphs of course –

ELIAS CJ:

Yes, I know –

MR CAMPBELL:

– only because of the possibility which essentially the respondents want there to be, that the court can sever the sale and purchase agreement –

TIPPING J:

You're heading off a problem that –

ELIAS CJ:

Yes but there's a fallback argument whether or not the court exercises any powers to sever and the fallback argument is that even if it's not part of the allotment, it is tainted?

MR CAMPBELL:

Yes.

ELIAS CJ:

Yes, okay, I just, sorry, was boggling at the word "severable" here, in 83 because it doesn't seem to me that this argument springboards off whether the sale and purchase –

MR CAMPBELL:

Right, yes –

ELIAS CJ:

– agreements are severable?

MR CAMPBELL:

Sorry, no, you're quite right your Honour. It would be better to phrase that, I think, even if, just to say, even if the sale and purchase agreements are not part of the allotment –

ELIAS CJ:

Yes, yes.

MR CAMPBELL:

– just to make clear that it is and this is how leave was granted, it's an alternative.

ELIAS CJ:

Yes, thank you.

MR CAMPBELL:

So, in terms of knowledge of the illegality, is knowledge of the fact sufficient, or do you have to appreciate that the facts mean that there's been a breach of the statute? In my submission, conflicting dicta on the point in the Court of Appeal's judgment in *Portland Holdings Ltd v Cameo Motors Ltd* [1966] NZLR 571 (CA), a rather, with respect, dense passage from Justice Turner at one point which, I think properly read, suggests that he has difficulty with the idea that if you know all the facts you can nonetheless say that you didn't realise that those facts amounted to some sort of illegality and, in our submission, that is the right way to approach this question.

It's not necessary, in our submission, to show that the person who has participated in the illegality, by being a party to an agreement, that we are assuming because we wouldn't be here otherwise, we wouldn't be looking at knowledge, we are assuming that the party has engaged in an agreement whose purpose or object was to assist or promote an illegal transaction. Having made that assumption, the question that you have to ask yourself is well, ordinarily how does the law approach a situation where somebody has participated in illegal acts? Does the illegality – or can that person say well, unfortunately I didn't realise that those acts that I was participating in were

illegal and, of course, the law leans very heavily against that by saying that ignorance of the law is no excuse.

It's not to say that parties are presumed to know what the law is. I accept that that's not the relevant test, rather the question, or the true principle is that somebody who has participated in illegal acts cannot say that they were ignorant of what the law was.

TIPPING J:

Well when you breach a contract, you can't say I knew I did that but I didn't realise it was a breach of contract. If you breach a statute it seems, by analogy, you shouldn't be able to say well, I know I did that, I knew that but I didn't know I was breaching the statute. Here, of course, it's not precisely breaching the statute, is it, it's the tainting but on the knowledge issue, it does seem a little strange that you can be found to – or it can be a defence to say that well, I knew such and such, I didn't know such and such was against the law.

MR CAMPBELL:

Yes, indeed and that is our submission. One of the authorities that we rely on at paragraph 92 –

TIPPING J:

What's the – is this this *Allan* case?

MR CAMPBELL:

Yes, now that, I emphasise, was simply one agreement between two parties but the general principle that Lord Denning expresses is that if you participate in illegal activity, then you cannot say that you were ignorant of the illegality and the question really for the court is whether, if you assume that a purpose or object of the sale and purchase agreement was to promote or assist the investment products, does that mean that the respondents, by that fact alone, were participating in the act which breached the Securities Act?

ANDERSON J:

The quality of the act is not – the quality of the state of mind that is relevant, isn't it because the – Blue Chip couldn't say well, we're all right because we didn't know it was contrary to the Securities Act, so they certainly can't. Whether a different

situation applies to the vendors, will depend on the nature and extent of their culpable participation in the acts themselves?

MR CAMPBELL:

Yes, I agree and it is, I think, the key concept is participation. There is a remaining question of course and that is whether, even if you accept that submission, one still has to show that there are relevant respondents who knew what was being offered to the investors. Now for Icon, that's not a problem for the appellants because Mr Bryers, whose knowledge is attributed to Icon, knew what the products were. For the other two respondents, we have holdings which aren't being challenged here, that they didn't have detailed knowledge of the products and by that we accept that that means they don't know enough about the products to realise that there are, say, rights being offered to - that provide an income return to the investor. That has to be accepted.

So it as at that point that questions of imputation of knowledge of the Blue Chip sales agents arise. That's the only point at which they arise, and I deal with that at paragraphs 95 and 96, in particular, the Court of Appeal, as Justice Venning did, held that the knowledge of the sales agents shouldn't be attributed to, or imputed to, Greenstone and Turn and Wave because the knowledge was obtained outside the mandate given to the agents, and the Court simply applied what they saw as the general rule that an agent's knowledge obtained outside, mandate is not imputed to the principle.

Now, our first response is to say, well if that general rule is applicable here, the sales agents' knowledge of the investment product was obtained within the scope of their engagement by the respondents. Here we have to engage in the sort of analysis that this court was involved in with *Nathan v Dollars & Sense,* which is: what is the scope of the task for which the sales agents were engaged? And it is at this point where it seems to me that it is crucially important that Turn and Wave and Greenstone, although they didn't know the detail of the investment products, knew that investment products of some sort would have been offered to the investors, along with the apartments. Given that knowledge, the agents, the sales agents' knowledge of the products was relevant to the task for which they'd been engaged.

Another way of looking at this, which may or may not be useful, is to consider the ordinary situation in which an agent's behaviour is imputed to the principle. So the

respondents accept, for instance, that if the sales agents had misrepresented the quality or nature of the apartments, but that is something for which the respondents would be responsible for, and the reason for that is that such misrepresentations go to the very task that the agents are engaged upon which is trying to obtain purchasers. Equally here though, because the respondents knew that the sales agents would be obtaining purchasers by wrapping the apartments up with an investment product, the way in which that investment product was structured and marketed was just as relevant to the task for which the sales agents had been engaged, as a misrepresentation or, misrepresentation by the agents would have been.

And the fallback position to that is that, in any case, this is not an appropriate case for the general rule to be applied. Although the sales agents had limited authority, like any other real estate agent they were what are normally called canvassing agents. They're just there to procure purchasers. They can't sign up to the contract. None the less, they were given the entire task of obtaining purchasers. Nobody else was doing it. The respondents weren't doing it. It was the Blue Chip sales agents themselves and, in situations like that the agents are basically taken over from the respondents, that part of the sales process and so the same legal effect should follow as if the respondents had been present personally in the agents' shoes when the investments products were being offered.

Now those were our submissions, unless there are further questions.

TIPPING J:

Can I just ask something? I've read somewhere that the developers in some case, I don't know how many or whether it was all, were dealing with land that came from, I'm not sure where, but someone associated with Blue Chip. So what is in my mind is that in a sense, the developers and Blue Chip were in a sort of partnership or in a sort of, dare I say it, joint venture, which was to turn the land and what was constructed on it to account in whatever way was thought advantageous. Now, my thinking is just very vestigial here, Mr Campbell, but it just seemed to me that if there was anything in that, that might give some credence to the view that the developers had, in effect, delegated, if you like, to Blue Chip the whole task and it would be easier if that was the analysis to implicate the developers with the Blue Chip agents, Blue Chip sales people's knowledge. That's a long, convoluted, but it's to do with

this sort of working together, if you like, idea. Now I may be quite wrong. I'd just if you could help me with that.

MR CAMPBELL:

You are right that with some but I don't think with all these developments the land originated in some Blue Chip company.

WILLIAM YOUNG J:

I thought it was with all of them. I may be wrong. Well it is with Icon obviously. The Barclay development originated with a Blue Chip company didn't it and I think the Bianco development was too? So I think all three were.

MR CAMPBELL:

Well it is all three, yes.

WILLIAM YOUNG J:

That's if you, I think if you had to conflate Mr Bryers with Blue Chip.

MR CAMPBELL:

Yes. I mean that is perhaps context to what happened in the sense of the wholesale delegation of the selling process. But even if that hadn't been part of the background, the findings of Justice Venning in each of the cases was that, in fact, the sales process was handed over to the sales agents.

TIPPING J:

Yes. It's a question as I think *Dollars & Sense* shows, you've got to have a fairly clear ideas of what the task was that the agent was engaged to perform. That's why I raised how wide was that task. Was it solely to find a buyer or was it to facilitate the purchase by assisting with the finance?

MR CAMPBELL:

Ah, so the, obtaining the finance from Westpac as it happened in each of the developments.

TIPPING J:

Yes.

MR CAMPBELL:

Right.

TIPPING J:

And then you'd have to say, well, you see there is a clear divide isn't there between the external finance, if you like, the Westpac finance and the arrangements that took place between the investors in Blue Chip. I think you've got to bridge that gap somehow and make it part of the agents' task, albeit that they were Blue Chip people, to the task given to them by the developers that got into that area. I'm not quite sure exactly how you seek to do that, other than in the most general of terms.

WILLIAM YOUNG J:

Well there are some emails out there because there's a lot of pressure from the developers to hit the sales targets and from Blue Chip and to the agents to hit the same sales targets because the developers want the Westpac cash and Blue Chip wants the underwrite fee.

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

And there are emails that link all that up – or at least one I think isn't there?

MR CAMPBELL:

Yes, the – I must confess, the extent to which that background additionally bolsters the argument for imputation is perhaps something I need to think through a bit more carefully.

TIPPING J:

This, the key concepts in *Dollars & Sense*, at least my perception, and I was party to it, are that the definition of the task and whether what went wrong was within the risks associated with the task. You may remember those.

MR CAMPBELL:

Yes.

TIPPING J:

Yes, that's where I think we may have to be quite sharply focusing if we're getting into this aspect of the case.

MR CAMPBELL:

Yes, I engaged a bit more with that part of *Dollars & Sense* in the back up submissions dealing with severability and not when dealing with the scope of task.

TIPPING J:

Well I'll undertake to read them more closely overnight.

MR CAMPBELL:

But I accept that analysis absolutely. You do have to ask what was the task, and given the relationship between, in this case the respondents and the Blue Chip companies, was the risk that eventuated within this, something that it's reasonable for the respondents to bear, and that's why, in my submission, it is important and helpful still to the appellants that for, in the case of Turn and Wave and Greenstone, quite apart from the matters that your Honour has raised, that both of those respondents, even if they didn't know the detail of the products, they knew that this was more than just trying to find purchasers. So quite different from the ordinary engagement of a real estate agent who, on a complete whim, tries to wrap the property up with something, without the vendor having any knowledge of it whatsoever.

TIPPING J:

Yes, thank you.

ELIAS CJ:

Thank you counsel, we'll take the adjournment.

COURT ADJOURNS: 4.01 PM

COURT RESUMES ON TUESDAY 8 NOVEMBER 2011 AT 10.03 AM

ELIAS CJ:

Yes Mr Barter.

MR BARTER:

I have the advantage of my learned friend Mr Campbell's submissions in respect of the appellants which I generally adopt. I simply seek to raise one further alternative submission in respect of the Herricks and probably other parties in the Icon development, solely relating to the definition of debt security.

Fundamentally, the argument runs that the Herricks were required to pay a deposit and because of the particular nature of the put and call, as opposed to the PIP, they were always in a position where they could demand and require the repayment of that deposit.

The Court of Appeal and the High Court adopted this matter fundamentally by saying that, whereas that may lead to a debt security because of the simple obligation to repay, the issuer is not the person to whom the money was paid. If Blue Chip was the issuer, the money paid under the security, the deposit, was in fact paid to Icon and on that basis, particularly in paragraph 14 of my submissions, the decision of Justice Venning specifically said the Blue Chip entity is not an issuer of any security, the deposit is paid to the vendor developer and is not received by the developer or stakeholder on behalf of, or for the benefit of the Blue Chip entity. The Court of Appeal held likewise.

The submission that the Herricks would wish to advance is that in fact the deposit was clearly paid, if not to the issuer but clearly on behalf of the issuer. The reciprocal part of PAC which was the right of the Blue Chip company to take over the agreement for sale and purchase and thereby to stand possessed of the deposit, puts the deposit then clearly as a payment made on behalf of the Blue Chip entity. The deposit simply sits with a stakeholder and is a credit towards the purchase. If the Blue Chip company is required by the call to take over the agreement, it must repay the deposit and if it elects itself to take over the agreement then it has the benefit of that deposit.

It's quite clear from the background evidence that there was a clear business necessity for such a scheme. My friend has dealt with parts of evidence which made it clear that Blue Chip intended to resell the units and obviously needed a mechanism whereby they could enforce that long-term plan by acquiring them through a devise such as the put and call.

My submission is that, by the very nature of the put and call, it is a different animal from PIP and there is a direct obligation on Blue Chip to repay the deposit at the election of the Herricks. The only reason, as I see the existing decisions for the two courts below to have not found that there was a debt security, is simply the argument that the issuer did not receive the money directly. It obviously, in my submission, received the benefit of the deposit and therefore it falls within the definition of an issuer as being the person on whose behalf any money paid in consideration of the allotment of security is received.

On that basis, as far as the Icon parties with the put and call option are concerned, it is submitted there's no need to dwell further on money's worth, there is a simple obligation to repay money which is entirely clear and it's at the very essence of the put and call itself. So the deposit is simply an advance on the purchase price and it is always available to Blue Chip to have that for itself. It's paid for by the Herricks, or similar parties. It is therefore always a payment that is able to be claimed by the issuer on its own behalf.

That's the simple submission that I have to add. What my friend has already said, I adopt. The remaining submissions made in respect of debt security but in respect of those who were induced into the Blue Chip scheme via PAC, it's my submission that they have a very much closer argument, which is direct requirement for the repayment of money. Obviously there are matters which I would like to be heard on in reply, which I take it the court would rather leave until later in respect of the tainting and other parts.

ELIAS CJ:

Well, if there are some matters which you obviously will be dealing with in reply, based on the written submissions, it would be helpful for the respondents to hear them at this stage, and we'd be assisted too. But if they're specifically in response to points developed orally, yes, you will have an opportunity to reply.

MR BARTER:

I think, Ma'am, my perception at where the responses are likely to come from, I think anything that I wish to say can be safely dealt with by reply. I would make only one point that at this stage may be at all novel, in relation to the doctrine of tainting, particularly the Court of Appeal chose to deal with this matter by the adoption of the decision in *Portland Holdings* and I think both parties have rested on what is alleged or said to have been the ratio of the *Portland* case which, to my submission, is a little formulaic in that it requires one contract to have been designed to lead to another. And that, I think, comes from a particular part of the *Portland* case, which is the excerpt from Halsbury's. The only thing I would add at this stage is that I believe that within *Portland*, that very same decision, there are references to the doctrine of tainting, which would suggest that there's no need for such a restricted definition of "tainting" may be, and it refers simply to the mere association of the illegal contract. And that's in the very same decision that's relied upon, and that may be at this stage a matter that I would put before my learned friends, because it may not be something that they're aware I may raise later.

ELIAS CJ:

Yes, thank you, that's helpful. Thank you, Mr Barter. Now the order, Mr Neutze first?

MR NEUTZE:

I'm first.

ELIAS CJ:

Thank you.

MR NEUTZE:

As you're aware, I've filed a general submission, which is relevant to all three appeals, on questions 1, 2 and 3A. I haven't dealt with PACs at all, which are only relevant to the Icon development, so I propose to – what I propose to start with before getting into the detail of that submission is to just talk a little bit about the Greenstone facts, and particularly how they became involved and the knowledge issue.

If I could ask you to open volume 1 at page 209?

ELIAS CJ:

Volume 1 of…

MR NEUTZE:

Of Barclay. Everything I'll be talking about is Barclay –

ELIAS CJ:

Yes.

MR NEUTZE:

– which is Justice Venning's judgment, and also if you could have volume 3 open, which is the evidence of Mr Abel-Pattinson, who's the main, was the main witness for Greenstone.

TIPPING J:

Is your purpose informative or challenging? Are you just giving us further understanding of the facts, or are you actually intending to challenge?

MR NEUTZE:

I'm not challenging the facts, the findings, and it's partly informative but I am challenging some of the statements that have been made by my friend Mr Campbell in relation to knowledge, and that's the purpose of doing this.

So, just briefly starting with Mr Abel-Pattinson's evidence, I can go through it pretty quickly, at paragraph 4, "Greenstone was incorporated in October 2005 for the sole purpose of developing the building known as the Barclay." Para 5, there were two directors, Mr Abel-Pattinson and Mr Cox. Mr Cox dealt with – he was an engineer and dealt with the developments, so Mr Abel-Pattinson was the person who was most relevant to these issues.

McGRATH J:

So what page are you at, excuse me?

MR NEUTZE:

Page 3 of volume 3. It's got "P3" at the top.

McGRATH J:

Thank you.

TIPPING J:

I've got an awful lot of marking up and comments in the margin.

MR NEUTZE:

None of it's mine.

TIPPING J:

No, no, but we shouldn't have them.

MR NEUTZE:

No, I think it's all the appellants'.

ELIAS CJ:

There's similar marking up on some of the authorities, so, it's regrettable. Anyway, we'll –

TIPPING J:

Just most on the ….

ELIAS CJ:

– ignore it.

TIPPING J:

Well, one will, but…

MR NEUTZE:

Paragraphs 8 and 9, they make the point that they have no connection with any of the Blue Chip companies, or have had no connection. And then 10 onwards, he deals with how he came to, or how they came to enter into the profit share and underwrite agreements. Those agreements are at the beginning of bundle 2 for the

Barclay – I won't need to take them to you but I can summarise them through a combination of his evidence and the judgment.

He was first introduced to Mr Bryers, a company associated with Mr Bryers, called Ingot, in early 2005, and that's since changed its name and gone into liquidation. They were going to use their services to do project management services, but that didn't end up happening, and then in paragraph 13, he explains that through some further consultancy work he did with Ingot he met with Mr Bryers and some senior managers. He was only dealing with what was called the "procurement arm" of Blue Chip. Blue Chip is divided into procurement and sales, and he understood in general terms that Ingot's role was to develop new apartments for Blue Chip, and then through Blue Chip sales personnel they'd introduce the purchasers to Ingot Properties.

Para 14, he was told by Mr Bryers that he had a number of investors who were waiting for properties to come on the market and that there was not enough property stock available, and he was asked whether he would consider developing an apartment building into which Blue Chip could introduce investors.

15 onwards, they did due diligence and decided to proceed, and 18, he explains, 18 and following, he explains why they entered into the underwrite arrangements with Lyell. Essentially, they didn't have a sales team and, in order to get certainty of sales, paragraph 20, pre-sales, they entered into the underwrite agreement with Lyell. Now that, and then in March 2006, over on paragraph 25, they proceeded with the underwrite and profit share agreements. Just above that, he explains how he did due diligence on Blue Chip. Blue Chip was a public company, which is, of course, which has some relevance to the investors, in that anyone was able to access the public documents and the accounts, which he did, and decided that it was safe to proceed with it.

So, that summary also appears in Justice Venning's judgment at paragraphs 42 through to 48 and then, now turning to Justice Venning's judgment, he summarises the profit share agreement at paragraphs 49 onwards. Lyell's – Greenstone's obligation were to settle the purchase of the land, build the apartments and settle the sales and enter into a lease – that's paragraph 49 – and at paragraph 52 Justice Venning sets out the no partnership clause.

At paragraph 54 and onwards he describes the underwrite agreement. Lyell agreed to underwrite to the amount of $20 million which is about half the value of the development in exchange for providing the underwriter was to be paid an underwrite fee of 12.6% of the sale price of each unit. Now at 56 the underwrite agreement also authorised Lyell to procure a real estate firm at its cost, introduce purchasers to the units and then 58 and 59 he explains, he accepts Mr Abel-Pattinson's explanation as to why Greenstone Barclay saw a number of advantages in that agreement.

59, Greenstone actually ended up arranging the funding itself and 60 sets out what was required to obtain funding, pre-sales of 80%, arm's length transactions, personal guarantees for the borrowing and Barclay management and associated company had to be the lessee. He also explains that they, that the funding was about $34 million.

In bundle 3, there is evidence from Peter Farrow of Westpac and Peter Ferguson of Westpac – of Simpson Grierson who reviewed all the agreements and they satisfied themselves that these were arm's length transactions and they met with the requirements of a loan offers –

ELIAS CJ:

But Mr Neutze are you inviting us to augment the findings of fact in the High Court?

MR NEUTZE:

No, not at all.

ELIAS CJ:

Then I'm not sure why we're going to all this material.

MR NEUTZE:

It was leading up to the knowledge question and also there was a bit of a debate yesterday about whether Greenstone might have been in some sort of joint venture type arrangement and the Judge had found that there wasn't any partnership or joint venture arrangement and that the only agency which arose was under the underwrite agreement so I was, I was addressing that issue but if that's no longer an issue –

ELIAS CJ:

Well you're going through it quite fast so it's not taking a lot of time but I'm not quite sure what you're inviting us to put this material to, but if it's necessary background for your argument just proceed.

MR NEUTZE:

Thank you. 61, Greenstone proceeded with the development. They got, at 62, valuation evidence, independent valuation evidence confirming the values of the apartments and then at 63, Blue Chip collapsed. Sixty-four, Greenstone has now completed the development and has called on investors to settle. They have refused to do so and have sought to cancel the agreements and they brought these proceedings –

WILLIAM YOUNG J:

So what's happened to the apartment building now?

MR NEUTZE:

It's built and there have been a number of re-sales.

WILLIAM YOUNG J:

A number of what, sorry, what?

MR NEUTZE:

Re-sales.

WILLIAM YOUNG J:

Yes. By purchasers?

MR NEUTZE:

No the – well the purchasers who are part of this proceeding have refused to settle.

WILLIAM YOUNG J:

Yes.

MR NEUTZE:

So the developer has re-sold a number of the units.

WILLIAM YOUNG J:

I see, so some of the claims aren't for specific performance but will be for damages?

MR NEUTZE:

Well we're actually a defendant and the –

WILLIAM YOUNG J:

I see.

MR NEUTZE:

– and the appellant's sought an order cancelling on various grounds, a number of grounds, the last of which is here now.

WILLIAM YOUNG J:

And have you counterclaimed for specific performance?

MR NEUTZE:

That's been put on hold pending this proceeding as have any issues relating to the Securities Act issues. That was so that the trial could be expedited effectively.

And just turning to the knowledge question at –

TIPPING J:

Are you content with the Judge's findings that your client knew, broadly, that there was going to be some financing involving Blue Chip but not the details?

MR NEUTZE:

Ah, no – well he didn't quite find that.

TIPPING J:

Well whatever he did find. I may not have paraphrased it accurately but whatever he did find you're not attacking?

MR NEUTZE:

I'm not attacking it, no. But I would like to just show it to you now and it appears at paragraph 126 and following.

ELIAS CJ:

Which volume?

MR NEUTZE:

The judgment, volume 1.

ELIAS CJ:

Yes, sorry, I've been reading it in a different form so I haven't looked at it in this bundle. Where is it in the bundle?

MR NEUTZE:

It's page 321.

ELIAS CJ:

Thank you.

MR NEUTZE:

So there was an allegation that Greenstone Barclay had knowledge of the Blue Chip products and sales agents methods, which is set out in para 126. Para 127, Mr Abel-Pattinson said he was aware of the detail the investment products marketed and sold by the Blue Chip agents. Neither he nor Mr Cox had any dealings with the sales agents or the licensees. In cross-examination he confirms his understanding that Blue Chip introduced investment properties to the investors, in this case apartments sold with leases in place.

He thought that Blue Chip then advised the investors without forming the appropriate entity to invest in the particular product. He understood there were different types of investment vehicles that an investor could use such as a family trust or LAQC and that Blue Chip would set up the entity for the investor, and that’s explained in his cross-examination.

He understood that the investors would buy the apartments with leases in place a rental investments and that Blue Chip would manage all the rental and tenancy issues so the investors could receive rental from the management company without hands-on managers.

So he had that general understanding but he said, this is 128, “And neither he nor Greenstone directly involved themselves in the sales to the Blue Chip investors and had no knowledge of the detail of the Blue Chip investment products.”

He took comfort from the fact that they produced standard form agreements and deposits.

TIPPING J:

It appears from the fourth line at 128 that Greenstone, in effect, delegated the whole process to Lyell and the sale agents.

MR NEUTZE:

Under the underwrite agreement Lyell had an obligation, if they needed to, to procure real estate agents.

TIPPING J:

Yes.

MR NEUTZE:

As it turned out they didn't need to and they promised, well they had promised to underwrite to the tune of $20 million.

WILLIAM YOUNG J:

Just pausing there, is it they didn't require real estate agents because they were only acting as agents for one person they weren't acting as agents for the public at large, is that, or is it not of interest to you, the absence of real estate agents?

MR NEUTZE:

Well under the underwrite agreement it was actually an obligation on Lyell to procure, to use real estate agents.

ELIAS CJ:

I don't think we were taken to the underwrite agreement yesterday, were we?

MR NEUTZE:

No.

ELIAS CJ:

Are you going to take us to it?

MR NEUTZE:

I'll take you to it now, yes. Well perhaps I could finish the knowledge bit –

ELIAS CJ:

Yes.

MR NEUTZE:

– and then we'll come back to that.

ELIAS CJ:

But the profit share agreement, what's that a reference to, to the underwrite agreement?

MR NEUTZE:

No there's a separate agreement –

ELIAS CJ:

Oh the separate agreement, yes.

MR NEUTZE:

And Justice Venning held that that didn't create any agency or partnership or it was of any significance, however, he did hold that there was a sub-agency created by the underwrite agreement.

ELIAS CJ:

Yes. It seems to me that we really should be taken to both the underwrite agreement and the profit share agreement.

MR NEUTZE:

Certainly. So 129, he had no contact with a sales agents or licensees and as I understand the structure from the evidence, the people who are doing the selling were either licensees or sometimes independent sales agents or commission sales agents, certainly not part of, or associated with Lyell. There were meant to be monthly meetings of the management committee under the profit share agreement.

The focus in issue was in the design and construction of the building but as it progressed the meetings with sales and procurement managers primarily reviewed the sales. Then there was a, 130 onwards a –

ELIAS CJ:

The agreement however contemplated more involvement than was actually carried into effect. That seems to be what the Judge is saying here.

MR NEUTZE:

More involvement of who?

ELIAS CJ:

Yes, yes, more involvement of Barclay. Is that what he's saying here? That the, that under the –

MR NEUTZE:

It was initially contemplated that there'd be management meetings, mostly to do with the construction, and Mr Abel-Pattinson explains that they had three or four of them and then they stopped.

ELIAS CJ:

Yes. I'm just really wondering whether if it was contemplated by the arrangements between the parties that there would be more involvement, the fact that they left it to Blue Chip is a total answer.

MR NEUTZE:

To what?

ELIAS CJ:

Well to lack of knowledge that they would have obtained if they fulfilled what was contemplated by the profit sharing agreement.

MR NEUTZE:

It certainly wouldn't have involved them in the sales process because as Mr Abel-Pattinson explained it was a separate sales arm which was mostly licensees and sales agents and he only dealt with the procurement arm of Blue Chip.

ELIAS CJ:

Yes well as I say I think you do need to take us to these agreements.

MR NEUTZE:

There was some evidence that at some stage during the sales process, some way down the track, there was a meeting with a Mr Miles of Blue Chip and Mr Miles said that he had explained in general, they had a meeting about the joint venture agreement and then Justice Venning at paragraphs 132 and following makes findings in relation to that meeting, that he had no particular reason to concern himself with the products and not the detail of them and that their presentation would not have made any particular impact on him and it failed to register with him at the time. He was – if he had been alerted to, this is 133, or had his attention drawn to the detail of the products, this is the joint venture of the PIPs, in Justice Venning's view he is the type of person who would have made further enquiries about them from senior management of Blue Chip and he explained that in his evidence, that once he found about them that he would have wanted to know.

ELIAS CJ:

What detail was there that would have not been apparent from simply a description of the fact of the joint venture arrangement which the Judge accepts was explained.

MR NEUTZE:

He explains that it was only in very general terms and it would have no – well Mr Abel-Pattinson didn't recall the meeting at all or the presentation but the Judge accepted that it would have had, the joint venture agreement was complicated and a brief presentation wouldn't have made any impact on him. It wasn't an agreement given to him or anything like that and there were only six or seven slides about, apparently about the general arrangements which had no impact on Mr Abel-Pattinson.

TIPPING J:

Is the essence of your client's argument, that sales were delegated to Blue Chip but not, the Blue Chip people, but not finances?

MR NEUTZE:

Well –

TIPPING J:

Is that the –

MR NEUTZE:

– when you say –

TIPPING J:

Undoubtedly, say there'd been a fraudulent misrepresentation by one of these sale agents as a result of – about the property. That would undoubtedly have gone back to the developer as principal because that was to do with sale. But is the essential distinction your client is making that the agency went no further than sales simpliciter and didn't involve anything to do with financing either with Westpac or on the Blue Chip side of the –

MR NEUTZE:

That's actually the finding of the Judge. That's the finding of the Judge.

TIPPING J:

I didn't ask you that. I asked whether that was the essence of your argument?

MR NEUTZE:

Yes, the agency was limited to introducing purchasers and any mis-descriptions relating to the property would have bit the vendor but nothing else. Mr Chisholm has got the carriage in most of this argument, I'm just –

TIPPING J:

I see. But I just wanted to see where we were heading.

ELIAS CJ:

But the joint venture agreement was not, that was key to the financing.

MR NEUTZE:

The profit sharing your Honour.

ELIAS CJ:

Sorry?

MR NEUTZE:

Sorry, would the investors?

ELIAS CJ:

Yes it's the joint venture agreement that was explained as the Judge accepts in general terms.

MR NEUTZE:

Yes and he goes on to accept –

ELIAS CJ:

And the PIPs.

MR NEUTZE:

No the PIPs were never –

ELIAS CJ:

I see so the joint venture agreement.

MR NEUTZE:

And this is some time after the agency had commenced because the agency started in, when the underwrite agreement on the Judge's findings was signed and this meeting was some time through the sales process.

TIPPING J:

So whether it's precisely your argument or not, the essential divide is between the sale on one side of it and the mechanics, if you like, of the process on the other? You say the agency was limited to just getting a sale, it wasn't, it didn't extend into the mechanics of how the sale was to be affected?

MR NEUTZE:

Correct.

TIPPING J:

That's the key distinction that's being made, is it?

MR NEUTZE:

Correct, yes. And the agency was limited to particular terms so there was no ability to negotiate the terms and the reason for that distinction is because Blue Chip had a number of roles because – well Mr Chisholm can develop this further but they signed letters of authority – the purchasers signed letters of authority giving the Blue Chip sales agents authority to organise financing for themselves and to find an apartment.

TIPPING J:

The whole question of knowledge is focused, as I understand it, on the extent of the agency.

MR NEUTZE:

Correct.

TIPPING J:

That's certainly how the appellants seem to be putting it.

MR NEUTZE:

And the appellants have accepted the findings in relation to knowledge and aren't seeking to challenge the findings but they are, or they did make some statements about, to the effect that the respondents knew – para 25 of the submissions, this is the appellant's submissions, the respondents knew that the Blue Chip sales agents would be marketing apartments in conjunction with or as part of Blue Chip investment products and at 78B they knew that the sales agents would offer them in conjunction with the Blue Chip products and the same statement is made at 79 of the appellant's submissions. And that goes beyond the evidence and the findings of the lower courts.

WILLIAM YOUNG J:

I mean the Judge has found that Mr Abel-Pattinson wasn't really interested in the detail but he did know that there was an investment package when he was told there was an investment package. The fact that he pays no attention to it doesn't mean

that he doesn't know it or that the fact that the significance of it doesn't register with him doesn't mean that he doesn't know it.

MR NEUTZE:

Well –

WILLIAM YOUNG J:

It may depend on what you mean by "know" but it's hard to see how he could have thought anything other than that, there was an investment package going down.

ANDERSON J:

It would obviously have some concern that the purchaser was able to settle, for example, so you would have, surely you'd take an interest in really how viable the sale and purchase transactions were.

MR NEUTZE:

Well, his evidence was that with the unconditional agreements and the 15% deposits, that was enough as far as the developer was concerned, which is understandable because the vendor wouldn't necessarily enquire as to how a purchaser is going to settle or pay or…

WILLIAM YOUNG J:

Have we got Mr Miles' evidence?

MR NEUTZE:

No, it hasn't been included in the bundle. I did ask for it to be, but it was too late.

ELIAS CJ:

Well, it can still come in, of course.

WILLIAM YOUNG J:

I mean, if we looked – if Mr Miles' evidence contained anything that was akin to the breakdown that appeared on the investor statements that they were buying units for a particular value but that they were having to put in far more than that –

MR NEUTZE:

Yes –

WILLIAM YOUNG J:

– it would have been perfectly obvious that there was an investment package in there. Now, was it at that level of detail, or not?

MR NEUTZE:

No, no, it wasn't.

ELIAS CJ:

But the –

MR NEUTZE:

If I –

ELIAS CJ:

– very fact of the joint venture agreement, which was known, leaving aside whether or not he read the details of it, on its face it's a joint venture agreement between Blue Chip and the investors.

MR NEUTZE:

He wasn't given a copy of it.

ELIAS CJ:

But it can't have been mentioned without indicating that there was an arrangement, which must have been as to finance, between Blue Chip and the investors.

MR NEUTZE:

It's totally unclear from Mr Miles' evidence what he said or – and that's, it actually came out in re-examination of Mr Miles, and there was leave granted to cross-examination Mr Miles, and when he was cross-examined it was just completely unclear what was actually said at the meeting, and he had no recollection of what he'd told them.

McGRATH J:

He had some slides, as I understand it?

MR NEUTZE:

Yes.

McGRATH J:

Did they get produced in evidence?

MR NEUTZE:

No, no, they didn't. He had no record of slides or when the meeting happened or, and it was denied by Mr Abel-Pattinson, which I think is why the Judge thought that, obviously found it to be relatively unsatisfactory and took the view that it didn't assist the appellants in relation to knowledge.

ELIAS CJ:

But the Judge has made a finding that he accepts Mr Miles' evidence that in general terms the joint venture product marketed by Blue Chip was explained. That must mean that he accepts that the fact that there was a joint venture arrangement between Blue Chip and the investors was part of the arrangement.

MR NEUTZE:

Well, he goes on to say that he had no knowledge of the detail.

ELIAS CJ:

Yes, I know, but it depends what you mean by, "Knowledge of the detail."

MR NEUTZE:

And part of that will be because of the unsatisfactory nature of Mr Miles' evidence. The Court of Appeal –

ELIAS CJ:

Well, the Judge doesn't regard it as unsatisfactory, he generally accepts it.

MR NEUTZE:

Well, it was very general, there's no detail of what was said.

ELIAS CJ:

Well, it's a general acceptance, yes. All right.

MR NEUTZE:

It was also reviewed –

TIPPING J:

Isn't the point about the very mention of a joint venture that Blue Chip was in there beneficially, and that surely would lead one on to know that there must be some inter se financial arrangements between the parties, i.e. Blue Chip and the investor? That's the point that's troubling me, Mr Neutze.

MR NEUTZE:

Well, it's speculation as to what Mr Miles said –

TIPPING J:

No, no, I'm not worried about what precisely he said. It is perfectly clear that your client knew that there was a, or one of the products involved a joint venture. Now, surely that means that the parties are in it beneficially, or at least it's considerably likely that it means that. Now, if you choose not to enquire, don't you take the risk?

MR NEUTZE:

The Judge actually finds, having heard the evidence that Mr Miles wasn't – sorry, Mr Abel-Pattinson, wasn't put on notice or put on inquiry.

TIPPING J:

Of what? He knew that some of these products or one of the products involved a joint venture. I mean, I don't think that can be disputed.

WILLIAM YOUNG J:

And, looking at 135, Mr Mudaliar, which was copied to him, presumably did contain chapter and verse about it?

MR NEUTZE:

No, absolutely not.

WILLIAM YOUNG J:

It says it's quite detailed. Mr Mudaliar gets the wrong end of the stick and he's not actually asked about this because the email is about the other joint venture. But the email was quite details in its terms. We don't have a copy of that email?

MR NEUTZE:

No.

WILLIAM YOUNG J:

I mean, it –

MR NEUTZE:

It was copied to him rather than addressed to him, and there's evidence that he got about 200 emails a day and it was –

WILLIAM YOUNG J:

If people are told, if someone's told something, do they say, "Well, I didn't know because I've blocked my ears," or, "I was distracted by something else"?

TIPPING J:

Or, "I wasn't interested."

MR NEUTZE:

Or it didn't register with him, according to the Judge's findings.

ELIAS CJ:

Well, it's very – I must say that it does seem to me that the Judge's findings are slightly contradictory. Because he says, at 135, "If he did happen to read the email I accept he didn't place any significance on the reference to the joint venture product." But the Judge has found that the joint venture product marketed by Blue Chip had been explained in general terms. So it must have registered to that extent, that there was a joint venture product.

MR NEUTZE:

Well –

ELIAS CJ:

He may not have, yes, taken it any further but…

WILLIAM YOUNG J:

We may want Mr Miles' evidence and the Mudaliar email, mightn't we? Because it's a bit difficult dealing with this in a sort of shadow-boxing way.

MR NEUTZE:

In that event, we also put in, for the Court of Appeal, about five or six pages of submissions in relation to that. Could I also provide a copy of that as well?

ELIAS CJ:

Well, you can address us on the point perhaps, rather than take it in as submission that's already been made to the Court of Appeal, because you might want to – but I think we should have that material. You indicated that you had wanted it to be included in the bundle –

MR NEUTZE:

I had asked for it, yes.

ELIAS CJ:

– and that it was not, so there can't be any impediment about it coming in, one would have thought.

MR NEUTZE:

No, it's just, it's hard for me to make submissions on it now without it being before you.

ELIAS CJ:

Yes, yes, that's all right. Well, if – presumably others in the Court can assemble this material and you'll be able to address us on it once it comes in.

MR NEUTZE:

Thank you. The Court of Appeal did review all the evidence and summarised their findings at paragraph 209 and, in relation to Greenstone, the investors accepted that, "Neither Mr Abel-Pattinson nor Greenstone had any actual knowledge of the PIP product and that it did not have actual knowledge of the detail of the joint venture agreement and there was no basis to find that it had constructive or imputed knowledge of the Blue Chip investment products or the financial circumstances of the investors and their ability or otherwise to settle if Blue Chip did not perform its obligations," and that's after having reviewed the evidence. So there are concurrent findings to that effect.

WILLIAM YOUNG J:

But they're not really. I mean, the first line of the third bullet point it was just simply not right. They'd been told. They may not have internally, internalised it or digested it but they did get told, in general terms, about the joint venture product.

MR NEUTZE:

Well it says, "Knowledge of the detail."

WILLIAM YOUNG J:

No there's no basis to find that Greenstone had constructive and imputed knowledge of the Blue Chip investment products. I mean, that can't be right, can it?

MR NEUTZE:

Well I think when you see Mr Mile's evidence you may agree.

TIPPING J:

Well the Judge found that he did have knowledge of the joint venture. He may not have appreciated all the ramifications of it but he knew about it. This is what seems to me we are just going round and round in circles. It was a clear and expressed finding of the Judge and we're not going to go behind it.

MR NEUTZE:

Oh well I'm not inviting you to go behind the finding, no.

TIPPING J:

No, well that's right. I mean, how can it be – this case must be decided on that premise and the question is whether that's enough. Or sufficient actual knowledge or whether it aids the imputation point, I think is the way Mr Campbell point it.

MR NEUTZE:

Yes. And in relation to that Mr Chisholm is going to present the legal submissions.

TIPPING J:

Right, okay.

MR NEUTZE:

So I will come back to you on that.

ELIAS CJ:

Thank you.

MR NEUTZE:

Can I perhaps just organise the copying of – now I want to next look at the sample documentation and that's in bundle 2. The first is the sale and purchase agreement at page 589. The second page is the operative clause, it was described as an agreement for sale and purchase, the operative clause, signed by the vendor and purchaser and then further down there's a warning which says, "This is a binding contract and if either party has any doubts legal advice should be sought before signing." There is in the Greenstone documentation there is no substitution clause in the special conditions. There is at page 604, an entire agreement and third party representations clause, clause 27. Which says that, talks about, "Representatives of any third party relating to financial packages between the purchaser and the third party independent of and unrelated to the agreement."

WILLIAM YOUNG J:

Well doesn't that mean they knew there was a financial package. I mean, why put it in if you don't know there's a financial package?

MR NEUTZE:

Mr Abel-Pattinson explains that he wasn't having any, as he wasn't having any contact with the purchasers he wanted to make sure that there was, if there was any arrangements with third parties that it didn't affect this agreement.

WILLIAM YOUNG J:

But does he deal with that in his brief of evidence?

MR NEUTZE:

He does.

TIPPING J:

This is representations as to financial packages, it's not ramifications of financial packages?

MR NEUTZE:

Correct.

TIPPING J:

I'm not quite sure why you are invoking it because this is not a misrepresentation case, is it?

MR NEUTZE:

Ah well it –

TIPPING J:

Not –

WILLIAM YOUNG J:

Not now.

MR NEUTZE:

– not now.

TIPPING J:

Not now.

WILLIAM YOUNG J:

But he – at paragraph 40 of his brief is the one you're talking about. It just says it records, "Any representations made by third parties, for example, Blue Chip relating to financial packages between the purchaser and third party independent of and unrelated to sale and purchase agreement," but it does rather suggest that you wouldn't put that in unless you knew that there were financial packages between Blue Chip and the investors?

MR NEUTZE:

Well his brief, his brief says that he didn't.

WILLIAM YOUNG J:

But his brief doesn't say anything, does it? Where does it say that he says what you're attributing to it? I'm just looking at para 40, I haven't read the whole thing.

MR NEUTZE:

Yes, paragraph 38 and then Justice Venning explained that the sort of arrangements which would elaborate on in cross-examination, the sort of arrangements he was talking about where LAQCs or trusts and leases with rental streams in place.

WILLIAM YOUNG J:

Financial packages between the purchaser and third party.

ELIAS CJ:

Sorry, what are you referring to, the agreement?

WILLIAM YOUNG J:

Yes, it's a funny – it's referring to agreements between the investor and Blue Chip. I mean, that's obviously what both the clause 27.2 and para 40 of the brief are referring to it.

ELIAS CJ:

And para 38.

WILLIAM YOUNG J:

I mean, it's a financial package, it's not a management package.

MR NEUTZE:

Well he explains why that was put in there in paragraph 40.

TIPPING J:

It may be good in parts and bad in parts for you, that clause. Heads off the misrepresentation claim as being relevant to this contract but it makes it perfectly plain that your client was aware that there were financial packages between the investors and Blue Chip intricately involved in all this?

MR NEUTZE:

But none of the detail.

TIPPING J:

Well I'm inclining – well this is a point of serious argument but it is arguable that if you know of the fact and you choose not to enquire as to the detail you take the risk. I'm not saying that's my view at the moment but it's the authorities, I think, leave open that as a possible view.

MR NEUTZE:

In relation to tainting?

TIPPING J:

And in relation to agency generally, imputed knowledge.

MR NEUTZE:

Yes, well again Mr Chisholm is going to deal with the legal submissions.

TIPPING J:

Mr Chisholm is obviously –

ELIAS CJ:

And in any event –

TIPPING J:

– going to have a great time.

ELIAS CJ:

– why is anything, why is knowledge beyond the fact of the joint venture being part of a financial package rather than a management package not sufficient for the Securities Act purposes?

MR NEUTZE:

In relation to tainting?

ELIAS CJ:

In relation to allotment.

MR NEUTZE:

In my submission –

ELIAS CJ:

And tainting.

MR NEUTZE:

– knowledge has little to do with the allotment issue and that's a – something which I'll come to and the sole question is whether it's part of the allotment. In relation to tainting, it falls far short, well on our submissions, of the test required. I know my friend, Mr Campbell, is trying to merge the two but in relation to allotment I can't see how knowledge really has any relevance.

ELIAS CJ:

Yes, I understand that.

MR NEUTZE:

So however much detail you might be able to infer from, well from the evidence and on the basis of the findings of the two courts below, it's not anywhere near enough for tainting. And again Mr Chisholm will be addressing on the law.

TIPPING J:

Without sounding at all unkind, what are you actually addressing us on Mr Neutze? Could you just say 1-2-3?

MR NEUTZE:

The, well – whether there are – at the moment or?

TIPPING J:

No, well I think you've probably done your dash on knowledge.

MR NEUTZE:

Whether there are debt securities, whether it's protected by section 5(1)(b) and the allotment issue.

TIPPING J:

Thank you.

MR NEUTZE:

Which would be an appropriate time to now talk about the PIP agreement first. At page 661, I just want to take you through the documents before I get to the legal submissions. Para 3A is the option fee, which you've – page 662, which you've been taken to. Para 3B, just a point of clarification. Justice Venning got that slightly wrong at para 208 of his judgment. I think he said it could be exercised at any time during the 30 days prior to settlement. In fact it's at any time other than during the 30 days.

WILLIAM YOUNG J:

What's the para reference of his judgment?

MR NEUTZE:

208. Para 4A, the investor acknowledges and agrees that the purchase agreement is binding on the investor unless Blue Chip exercises the option and the investor also acknowledges that they will settle the purchase of the property with the vendor if Blue Chip does not exercise the option and that nothing contained in this agreement shall be construed to constitute a representation by any party to the contrary. Paragraph 5 deals with what happens if the option isn't exercised. 5A talks about paying reasonable settlement costs excluding the purchase price and the reason for that is that 5C in the event that the investor is required to settle the lease should be

amended to include an option for the lessee to purchase the property at any time. So those causes are linked.

So clearly settlement was contemplated by the PIP agreement and then over at page 669, para 6.1, this is in the event that the option is exercised, the vendor – sorry, the purchaser effectively gets – reimbursed the deposit which one would expect in the event of exercising the option.

Now my friend Mr Campbell commented just back on page 663 about the paragraph 8, where the investor shall assign, transfer or sell the rights. That's a perfectly understandable clause in an option – the option holder wouldn't want the property to be sold prior to the ability to exercise it.

Just a general submission in relation to the PIPs. I submit that they are what they purport to be on their face which is an option agreement whereby the client deals with its interest in an apartment by granting Blue Chip an option and receiving a price for it. As a matter of law they could, of course, cancel and be free of the encumbrance if Blue Chip breaches the agreement or doesn't comply with its obligations. In that event they will get title to the unit and will be – will have tangible property, which is relevant to the section 5(1)(b) exemption.

WILLIAM YOUNG J:

Under the PIP agreement it's – well it's theoretically possible for the transaction to go on in perpetuity with Blue Chip and/or the lessee never accepting the option to purchase and –

MR NEUTZE:

Well Blue Chip has to do it prior to 30 days prior to settlement.

WILLIAM YOUNG J:

Okay and if it doesn't then the option gets transferred to the lessee which –

MR NEUTZE:

Correct.

WILLIAM YOUNG J:

– is presumably a Blue Chip company. And then what happens? The apartment is just run on indefinitely with Blue Chip indemnifying the apartment owner against any problems over the mortgage?

MR NEUTZE:

Yes well in actual fact the, Barclay Management was to be the lessee under the lease because Westpac required that. But the contention is that the payments will continue through the lessee and the option remains.

WILLIAM YOUNG J:

What happens when the mortgage comes to be repaid? You know, say it's a 20 year mortgage and 20 years tick by and –

MR NEUTZE:

Well the lease was going to be for probably four years to a maximum of eight so it was going to come to an end during that period.

WILLIAM YOUNG J:

So what happens when the lease ends?

MR NEUTZE:

The lease with Barclay anyway.

WILLIAM YOUNG J:

What happens when the lease ends? I mean obviously it was envisaged that Blue Chip would take out the investor, that was what was envisaged, although not strictly provided for contractually.

MR NEUTZE:

Well it was an option –

WILLIAM YOUNG J:

Yes.

MR NEUTZE:

– not a requirement or obligation.

WILLIAM YOUNG J:

Yes, so what I'm, what happens if Blue Chip doesn't take out the investor, the property is then leased to Barclay –

MR NEUTZE:

As lessee.

WILLIAM YOUNG J:

As lessee.

MR NEUTZE:

And the vendor – sorry the purchaser owns the property and gets a rental stream.

WILLIAM YOUNG J:

But Blue Chip has to continue to meet the interest costs?

MR NEUTZE:

Or arrange through clause 5C for the lessee to do so.

ELIAS CJ:

Sorry which document are we looking at?

MR NEUTZE:

Page 663.

ELIAS CJ:

Thank you.

WILLIAM YOUNG J:

So Barclay – how did Barclay management come into this? This is because it was required to by Westpac?

MR NEUTZE:

Correct. It was originally going to be ART Apartments, Westpac required it to be Barclay Management, at least prior to settlement.

WILLIAM YOUNG J:

So did those leases, were the lease forms ever prepared or did it never get that far?

MR NEUTZE:

Yes the lease forms are in the bundle.

WILLIAM YOUNG J:

And do they give Barclay Management the option to buy the units?

MR NEUTZE:

627.

WILLIAM YOUNG J:

They know that Blue Chip's a guarantor –

MR NEUTZE:

Para 33.

WILLIAM YOUNG J:

Sorry?

MR NEUTZE:

33 is the first right of refusal. The evidence actually was that Westpac required the Barclay company to substitute itself for Blue Chip as well. But this was the former lease which was attached to –

WILLIAM YOUNG J:

So when the sale and purchase is going to go through Greenstone Barclay Trustees Limited assigns this lease to the purchaser, is that right?

MR NEUTZE:

Yes.

WILLIAM YOUNG J:

So they know that whatever the deal is, Blue Chip's guaranteeing it?

MR NEUTZE:

Well, there was actually an addendum to that, if you have a look at page 621. The vendor, again, a Westpac requirement, they got the purchasers to sign this, saying that, "The vendor shall be the guarantor under the lease, provided that they may substitute Blue Chip New Zealand Limited."

WILLIAM YOUNG J:

So, whatever the financial package is that Greenstone realises there, they must know that a component of it is a Blue Chip guarantee to the investor.

MR NEUTZE:

Well, guaranteeing the lease obligations, yes.

WILLIAM YOUNG J:

And this lease agreement clips into, is congruent with the PIP agreement?

MR NEUTZE:

No –

WILLIAM YOUNG J:

Isn't it?

MR NEUTZE:

– this is congruent with the sale and purchase agreement.

WILLIAM YOUNG J:

But isn't it also, in terms of the PIP agreement, the option to purchase?

MR NEUTZE:

Every –

WILLIAM YOUNG J:

Or this is actually a right of first refusal, rather than option to purchase.

MR NEUTZE:

Every purchaser signed a sale and purchase agreement, and then there was a request for a lease, and then eventually an addendum was signed as well.

WILLIAM YOUNG J:

But, you see, the PIP agreement addresses directly an amendment to the lease to which Greenstone's a party, 663?

MR NEUTZE:

Yes. Well, Greenstone certainly knew nothing about the PIP agreement, and that's the finding of the courts below. So, I guess, the intention was that the figure, the rental figure, was going to be sufficient, and that's Blue Chip's intention to cover the purchaser's costs. Probably initially it was anticipated that it would be a Blue Chip company, that there was a lessee, but then Westpac required –

WILLIAM YOUNG J:

Oh, I – so when the PIP signed, it's going to be, this is, is going to buy it with a Blue Chip company, which is –

MR NEUTZE:

Yes.

WILLIAM YOUNG J:

– going to be the lessor?

MR NEUTZE:

Yes.

WILLIAM YOUNG J:

Lessee, sorry.

MR NEUTZE:

Originally it was ART Apartments, yes.

WILLIAM YOUNG J:

Yes, I understand.

MR NEUTZE:

Turning now to the joint venture agreement, at page 756, my friend took you to – 759. My friend took you to paragraph 3.1, though I would just like to dwell on that for a moment.

The purpose of the joint venture was to enable each joint venture party to engage in the business of owning and renting residential property in such other businesses that joint venture may by resolution agree. 3.3, the joint ownership of control of the property is to be as tenants in common for their respect interests; 5.1, it's to be tenanted; 6.1, each owns a share in the joint venture property as tenants in common, and I just interpolate that, at clause 11.7, "A joint venture may insist on holding the title in his or her own name." And I mentioned in my written submissions at paragraph 3.7(d) that as a result of section 72 of the Land Transfer Act, which is in the bundle, each person who holds an interest as tenant in common can call for a certificate of title, which is potentially relevant to section 5(1)(b).

TIPPING J:

Of significance for that proportionate interest.

MR NEUTZE:

For the proportionate interest, which is 75:25. 6.3 and 4 talks about the initial contributions, and it's contributions to the joint venture company. 6.10.1 and 2 has been discussed already. There was generally an amount in the procurement fee section, I'm not sure why this says, "0 %," and these are the two obligations, as well as the equity security issue, which the appellants say give rise to a debt security. And there's never been any allegation that any other aspect of this joint venture agreement gives rise to a security issue, other than the equity security issue, which I'll deal with. 6.10.4, "Upon distribution of the net proceeds of sale of the property," it's going to be split 5% to party A and 95% to party B. So that's where there's a sale during the life of the joint venture.

There was some evidence – which I think it was probably summarised in Justice Venning's summary at the end – where some of the purchasers were told that it would probably be for four years, it might be rolled over for another two, and then another two after that, which is effectively the intended life of the lease, and if that happened then it's your property at the end of it, and several investors who said that's what they were told by Blue Chip sales agents. 7.1, "Party A is entitled to hold all the shares in the company and appoint the directors," we'll come back to that in a

moment; 8.3 talks about powers of a general meeting and, at the end of 8.3, "A resolution in writing signed by a joint venture holding 75% or more of the units will be as valid and as effectual as if it had been passed at a general meeting." 8.4 talks about the accounts for the joint venture, so it was contemplated there would be accounts; 8.5 talks about the powers exercisable by its special resolution; and 8.6 a quorum, 51% is a quorum. So the joint, party A effectively has control of this joint venture.

9.1.2, "On a distribution or winding up of the joint venture," so this is if the property isn't sold during the life of it. "The holder of A units is entitled to receive 100% of the net dividend or proceeds of sale attributed to the land and buildings and party B gets 100% of the chattels, plant and equipment." 12.1, it's the termination provisions, and there was a discussion about that yesterday. The 12.2 requires the joint venture company – not the Blue Chip company who's alleged to be the issuer here – the joint venture company to make the payments, which are described in 12.2; and 12.4 deals with what happens on termination, "Other than pursuant to 12.1.1, the company must transfer to each joint venture that joint venturer's interest in the manner set out in 12.7.

ANDERSON J:

How could it terminate, other than by 12.1.1? And the termination date is defined as the date on which it's wound up. So does it envisage some sort of creditors' process or something?

MR NEUTZE:

It's a good point. There must be…

ANDERSON J:

It's perpetual.

TIPPING J:

Is this in recognition of the fact that the joint venture can go into other areas than selling the property? I must say the interrelationship between all these provisions is somewhat obscure but maybe that's what they had in mind, because there is power to add, isn't there, further?

MR NEUTZE:

There is power earlier to add, yes, but the essential purpose –

ANDERSON J:

But how does, how does it end?

MR NEUTZE:

– is to hold the rental properties.

ANDERSON J:

How does it end other than by 12.1.1, because the definition clause says determination date is the date on which it's wound up?

MR NEUTZE:

I will have to see if I can find an answer to that question.

ELIAS CJ:

But is it necessary to have an answer to the question, does it go anywhere?

MR NEUTZE:

Ah –

ELIAS CJ:

It may just be faulty drafting.

ANDERSON J:

Well it may bear on how proceeds are distributed otherwise.

TIPPING J:

Well under this provision you get your initial contribution back as a priority figure and then you get plus 5% of any profit. The draftsman obviously had greater optimism than the facts demonstrated but this is the key point of getting your money back, isn't it, as well as getting your interest, in inverted commas?

MR NEUTZE:

It comes from the, from the company, yes.

TIPPING J:

Yes.

MR NEUTZE:

But there's also 9.1.2 which I took you to.

TIPPING J:

Yes I appreciate that and that's why I'm saying that I can't immediately reconcile how all these are supposed to fit together but that's probably not a problem but 12.1 clearly envisages a certain process and I don't think you can, companies can be heard to say, well this is all so messy that we're not bound by that.

MR NEUTZE:

So just a few observations on the agreement which are relevant to the discussion that, oh sorry, there's one other clause and that is clause 13.9 on page 773. Severability. "If any provision of this agreement or application of this agreement to any person or circumstance is or becomes invalid or unenforceable the remaining provisions will not be affected by that event and each provision of this agreement will be valid and enforceable to the fullest extent permitted by law." That may be relevant to the discussion about, well what it possibly means is that the 6.1, 6.10.1 and 6.10.2 could get severed out if they are held to be debt securities.

ELIAS CJ:

Does that depend on the application of the remedial provisions, however, in the Securities Act?

MR NEUTZE:

It will have an interrelationship with that, yes. So just on the question of whether 12.1 and those provisions are inevitably going to result in payment by that means, I would submit that it is actually not inevitable that the JV party will be, or the property will be sold and that the initial contribution repaid. There is actually no obligation to terminate and no fixed term and is actually perfectly feasible that party A can keep his or her share of the property on termination of the joint venture. In that regard I refer to clause 8.5.7 and 12.4 and 12.7. So the aim is the tenants in common would be entitled to keep the land and get a Certificate of Title under section 72 of the Land Transfer Act.

ANDERSON J:

Is this particular agreement atypical in that no procurement fee is to be paid?

MR NEUTZE:

This is –

ANDERSON J:

Or is that a typo or something?

MR NEUTZE:

This is unusual.

TIPPING J:

We've had, we've been down this road before.

MR NEUTZE:

In fact this particular, it's been in the bundle but this particular party is not one of the representative plaintiffs so I'm not quite – I think it's just, assume there is going to be a procurement fee in there.

TIPPING J:

But you'd have to be even crazier to sign it on the basis of no procurement fee.

MR NEUTZE:

Well that's true. And the other point is, any repayment is going to be by the joint venture company and not the alleged issuer, which is Blue Chip Joint Ventures Limited.

Now the second point I wish to make about the joint venture which is relevant to the equity security point is that it is in fact an obligation, in my submission, not just a right. As my learned friend submit, for party A to hold all shares in the company, and I refer to clause 11.6.1. In fact party A had to hold the shares and incorporate the company and it's in that regard, fulfilling an obligation not exercising a right.

WILLIAM YOUNG J:

Sorry, where does it, the part that says party A must form the company?

MR NEUTZE:

11.6.1, the shares in the company will be held in the joint venture as comprising the holders of the A units. So it's an obligation for party A to hold the shares. And if you transfer you have to transfer it to the next party A.

The second point –

TIPPING J:

You did say, I think my brother was referring to, he said there was an obligation on party A actually to incorporate the company. Did you mean to say that or was it just to hold the shares?

MR NEUTZE:

Well in actual fact –

TIPPING J:

Because it could be of some relevance to the equity security point as to who was actually going to do the forming.

MR NEUTZE:

Well party A is going to hold all the shares on trust for the joint venture so it's contemplating that it will be party A, although I see as part of its contribution there are some funds paid for that purpose.

TIPPING J:

For that purpose. Does the joint venture agreement expressly state who is responsible for forming the joint venture company?

MR NEUTZE:

Para – clause 11 talks about, 11.1 talks about the company holding all the property of their trustee. As the party A was to hold all the shares and actually has control of the company, effectively party A will be responsible for that.

TIPPING J:

Because it is the company that allots the shares to the shareholder, isn't it, my knowledge of company law has never been great, it's probably even less than it was

but isn't that, is that the normal – a company allots the shares to the shareholders, that used to be, as my vestigial memory of these things? I'm not sure this takes us anywhere but I'd like to be clear on it.

MR NEUTZE:

Yes, that's my understanding, yes.

WILLIAM YOUNG J:

But the reality is that Blue Chip was going to form a company?

TIPPING J:

Yes, that's what I would have thought.

MR NEUTZE:

We have – for Securities Act purposes, we are guided by the documents which are alleged to be securities, in my submission, or *Hyslop* and other cases makes that clear. In fact *Culverden* didn't go beyond the documents so we need to be guided by what the document actually says.

TIPPING J:

Well the anticipation clearly is that the company, whoever forms it, will allot the shares to party A?

MR NEUTZE:

Correct.

TIPPING J:

So we can build on that premise, whatever one builds out of that.

MR NEUTZE:

The next point in relation to this, and it's dealing with my friend's point about equity security. He pointed to the right in clause 7.1 to be entitled to hold all shares in a company and appoint the directors, and that is not a right offered to the public for subscription. It can only ever be accepted by – or can't be accepted by anyone other than party A.

ELIAS CJ:

I'm sorry, just reverting to that point about whose responsibility it is to form the company, the – I might be a little behind on this but the agreement is actually silent on that, so it's not inconsistent with the agreement to look at what happened and one would have thought it was documented in the correspondence or some of the material that went between the investors and Blue Chip, how the company was to be formed?

MR NEUTZE:

Yes, not much of that is in the material before this court.

ELIAS CJ:

No, no. No, I'm just responding to your point that the case law doesn't take you beyond the documents, there's nothing contradictory. There's nothing in this document, it's silent on the whole question.

MR NEUTZE:

On that topic, I don't believe it's important.

ELIAS CJ:

No.

MR NEUTZE:

The important clauses are the obligations to hold the shares –

ELIAS CJ:

Yes, I accept that.

MR NEUTZE:

– and the fact that only party A can accept the alleged right, in clause 7.1. Is that a convenient moment?

ELIAS CJ:

Yes, we'll take the adjournment now. Thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

MR NEUTZE:

Just coming back to your Honour Justice Anderson's question about whether 12.7 means that it can be any termination other than pursuant to clause 12.1.1. I think the answer is in 8.5.7, so it can be done by a special resolution and then, upon termination, the parties will have their 75/25 interest vested them and they can obtain a certificate of title.

ANDERSON J:

8.5.7 is exactly the same as 12.1.2, so I see, yes.

MR NEUTZE:

So either that's a typographical error – of course, done of these developers had any hand in drafting this documentation. Now, another point on the equity share issue, is that there is in fact no subscription money payable for the shares. They are – initial shares are issued by, on incorporation, I have checked that and are taken up by party A.

My understanding of the evidence is that the investor has signed an incorporation document, is how is it generally done, amongst the documentation put to them.

Finally, of course, in relation to this joint venture, it is in respect of, we say, an offer of land, it relates to a particular unit in respect of which a separate certificate of title will be available.

On the debt security point, I would submit that there is no special significance in debt security terms of the investor contributing its working capital. Moneys that –

WILLIAM YOUNG J:

Just pause there. If I can just really start right at the top. One can issue a security without there being any repayment required, can't one? I mean, a perpetual bond would be a security, even though it never has to be repaid. So if you're getting something that looks like interest, then that might be enough, isn't it?

MR NEUTZE:

That looks like interest?

WILLIAM YOUNG J:

Yes. You see, I mean, say a perpetual bond is issued, there couldn't be any question but that that would be a security, would you agree?

MR NEUTZE:

The question might be what sort of security it is.

WILLIAM YOUNG J:

Well, wouldn't it be a debt security? I mean, there still are apparently – I was sort of looking at this Google, there are still are consuls issued by the British government in the 18th century, trading at no doubt something of a discount to the original value but returning two and a half percent in perpetuity. So, if that were to happen –

MR NEUTZE:

I haven't looked that up on Google myself Sir.

WILLIAM YOUNG J:

Yes but wouldn't that be a debt security, or the example given by Mr Campbell on annuity?

MR NEUTZE:

Well there has to be money otherwise owing.

WILLIAM YOUNG J:

Yes but can't – I mean, in substance, the investors here were getting an interest on the money they put up.

MR NEUTZE:

In relation to the – well no, I say in substance they were getting an interest in the joint venture company which held land and they –

WILLIAM YOUNG J:

All right but I mean –

MR NEUTZE:

– controlled it –

WILLIAM YOUNG J:

– let's, I mean, let's ignore the trees and look at the wood. They were getting a procurement fee or an option fee that was calculated as a percentage return on the money they outlaid?

MR NEUTZE:

I'm not sure about the last point but they were getting a procurement fee, yes.

WILLIAM YOUNG J:

I thought we were told yesterday that it was – and, for instance, one of them was 16% return on the deposit.

MR NEUTZE:

That was the PIP.

WILLIAM YOUNG J:

Yes.

MR NEUTZE:

But I would submit that you can't, you can't rewrite the documents and treat them as being something other than what they are, both for the –

WILLIAM YOUNG J:

Well why wouldn't one, if it's a consumer protection legislation. I mean, why would you allow something that in substance is an interest payment, to be described as something else and allow that in turn to take the transaction outside the reach of the Act?

MR NEUTZE:

The – well, parties are free to document their arrangements as they see fit and in relation – well, it would be exceptional circumstances, in my submission, where you actually treat something as being different from what it is on the documents.

WILLIAM YOUNG J:

But you're not treating it as something different, you're just applying a different label and, in fact, you don't even really have to apply a different label because the language of section – of the definition of debt security is incredibly general.

MR NEUTZE:

Yes, I'll come to that –

WILLIAM YOUNG J:

It's money otherwise paid and if you're satisfied that it's money that is – partakes of the character of interest, might that not make one rather comfortable with a conclusion that it's a security?

MR NEUTZE:

Well, my submission is it's just one term of a joint venture agreement and that one should be slow to start picking out obligations to make payments and –

WILLIAM YOUNG J:

Okay.

ANDERSON J:

Why would you pay potentially perpetual, certainly long-term recurrent fee, for a single act of procreation?

MR NEUTZE:

Why would the joint company do that?

ANDERSON J:

Well, why would anyone? I mean, it's plainly in the nature of interest because it's a continuing periodic payment on a single deposit of money.

MR NEUTZE:

In exchange for the party A's contributions under the joint venture agreement, yes.

ANDERSON J:

Providing contribution initially.

MR NEUTZE:

Yes.

ANDERSON J:

They could have called it anything but it would still have the same character as interest.

MR NEUTZE:

Well interest on what, would be my retort to that.

ANDERSON J:

On the amount of the initial contribution.

WILLIAM YOUNG J:

Do we have the Blue Chip brochures? We do somewhere. Are they in this volume 1, it's the only volume 1, the volume –

MR NEUTZE:

There's a PIP brochure, yes in volume 1, page 5. Sorry, there's a PIP final analysis in the brochures at page 25.

WILLIAM YOUNG J:

That's the general bundle?

MR NEUTZE:

That's the case on appeal, general bundle 1, miscellaneous documentation.

TIPPING J:

The first bullet point on page 23 really sums it up, under the heading "Premium income. A boost to your income through investing in property. With the Blue Chip premium you can enjoy the benefits of a 12.95% return on your investment each year."

MR NEUTZE:

It's not entirely clear what that brochure was used for or – I think Mr Chisholm probably knows about it than I do.

TIPPING J:

Well shall we put that one in Mr Chisholm's camp too Mr Neutze? I mean, that's really what it was all about. The question is, whether the way in which it was achieved is, or is not, within the purport, if you like, of the Securities Act.

WILLIAM YOUNG J:

Look at page 21. "Blue Chip pays 1.3% of property cost." It's actually 13% on 10% deposit. It jolly well does look like interest, doesn't it?

MR NEUTZE:

Well, it's a fee in exchange for granting an option, is what the documentation, the actual documentation that they enter into described.

WILLIAM YOUNG J:

But it's not, I mean normally something for granting an option would be capital, wouldn't it? If I get paid, you know, an option fee, normally that would be a capital amount, wouldn't it, whereas they always accept here it's income? Look at page 18, client places 100K in solicitor's trust account. Blue Chip pays a fee of 13% PA on the deposit monthly.

MR NEUTZE:

Yes this is a Blue Chip circular to lawyers. My submission would be that issue – well this is a document provided to the lawyers and shouldn't be taken into account in construing whether the actual documentation complies with the Act or not. Either it's a debt security or section 5(1)(b) applies. I mean the documents should fall to be construed on their face and there's no particular reason why one should go, or how far does one go would be the question in looking at what solicitors were told. We have here something to licensees, document 5. There should be, the court should be slow, in my submission, to take that sort of information into account in construing it.

ELIAS CJ:

But what's really been put to you is that you can draw this inference from the face of the documents and look. That is exactly what was said about them so it's not as if it's not an available inference to take from the face of the documents.

MR NEUTZE:

Well all I can say in relation to that is on the face of it, it's an option fee payable for the grant of the option and most importantly it's in respect of an estate or interest in land so it would be covered by 5(1)(b).

TIPPING J:

In *Culverden* Their Lordships said, 260, line 8, "In practical terms the substance of this transaction is," and then went on to describe it. Now that seems to me to give some guidance as to how one ought to look at the present – in practical terms the substance of this transaction is, and then a little lower down the page they said that the right must be – the right must not be considered in isolation from its actual factual and legal setting. In other words it must be seen in a wider context so –

MR NEUTZE:

It was construed on the face of the documents. So the first point is there was no suggestion that it, they went outside the documents. And secondly the essence of the decision was, in substance it was actually a licence to occupy and not a transfer of property because of the inevitably of the buy back provision. The other point about *Culverden* is that it was also a contributory scheme so that 5(1)(b) wouldn't apply anyway because there was – contributory scheme relating to the shared facilities with a pool and a bowling –

TIPPING J:

I'm just, here, talking about the general approach that the court should take and it seems to me that the Privy Council has indicated here that you don't take a totally legalistic purely analytical approach, you look more at the substance of what is going on, rather than the precise legal analysis by which that was achieved.

ELIAS CJ:

Or the labels attached in the documents.

MR NEUTZE:

Well that's the Privy Council did in *Culverden*. *Culverden* has been criticised by some commentators and I put three articles in the bundle.

TIPPING J:

Yes well is Mr Chisholm going to deal with that too Mr Neutze?

MR NEUTZE:

No I'm dealing with that.

TIPPING J:

Well I'd like to hear you on it sooner rather than later because I think this case fundamentally involves the correct approach to this statute.

MR NEUTZE:

Yes. I'll come to that –

TIPPING J:

Whenever it suits you but I don't want the point to escape.

MR NEUTZE:

Yes the final point I wanted to make about the joint venture agreement is that it's recorded at paragraph 256 of Justice Venning's judgment. Counsel for the appellants Mr Dale concede, and I understand that Mr Campbell said pretty much the same thing, that the offer of a joint venture interest in the land itself is covered by section 5(1)(b), that's at paragraph 256, so the only issue is whether you can pluck out these two clauses, 6.10.1 –

ELIAS CJ:

Sorry what are you at now?

MR NEUTZE:

256 in Justice Venning's judgment.

ELIAS CJ:

Thank you.

MR NEUTZE:

Mr Campbell said something similar during the course of his argument. So an offer of a joint venture interest in the land itself comes within the exemption in 5(1)(b) but it's just whether these two rights, I say, can be plucked out and treated as debt securities when they're just two obligations against many in the joint venture agreement.

TIPPING J:

This was far more than just a simple agreement in relation to land. The issue is whether the land component saves the whole.

MR NEUTZE:

Yes, in relation to the joint venture agreement, for example. My friend did make, did say that a simple joint venture would be 50/50 ownership, or something like that, but in my submission a joint venture, there's no such thing as a simple joint venture and the exemption doesn't just apply to ordinary estates and land or simple joint ventures. In fact joint ventures are often quite complex. Some parties put in money, some parties put in management – they can bring different skills to bear, or contributions, so I would –

WILLIAM YOUNG J:

But it's not normally going to be that – that sort of joint venture isn't normally going to be offered to the public. I mean it's got to be basically a reasonably homogenous product to offer to the public. So if you're saying, right, here's a property investment, it would have to be, you know, a very standard one that you could offer in a way that might trigger the Securities Act.

MR NEUTZE:

Well the appellants aren't arguing that the offer – as you see from paragraph 256, that the offer of the joint venture itself isn't covered by 5(1)(b), it's just whether these two provisions amount to debt securities or whether there's an equity security which we address.

WILLIAM YOUNG J:

If in substance it's a financing transaction, isn't that quite an important issue in terms of the application of the exemption? If it really wasn't a financing transaction in an orthodox sense but it still fell foul of the Act.

MR NEUTZE:

Well the two –

WILLIAM YOUNG J:

Well I mean you can take a big picture here. The big scheme for Blue Chip is they're going to sell these apartments twice. Once to the intermediate investors and once to their mainstream investors. They've got a bit of a problem, they want to hold stock, they want to inventory stock, stock being apartments, keep it on their shelf so they can sell it to their mainstream investors, and view that in this way, this is just a big financing transaction.

MR NEUTZE:

Well I'm not sure there's actually evidence in this case about that.

WILLIAM YOUNG J:

There's some for the PIP scheme just in that brochure and there's other ones where they're saying we've got – the trick is they've got to sell them twice. There's a reference in one, in relation, not I think to Greenstone transaction.

MR NEUTZE:

Well, certainly the Court of Appeal considered that the suggestion –

WILLIAM YOUNG J:

Look at page 17.

ELIAS CJ:

Sorry, which one are we at, volume…

WILLIAM YOUNG J:

Sorry, the case on appeal, general bundle 1.

MR NEUTZE:

This one that goes to lawyers.

WILLIAM YOUNG J:

So that envisages that, where the exit being via a sale to a mainstream client, and then if you look at page 21, what's in it for Blue Chip? "Significant volumes of future stock requirements, puts stock on the shelf, excellent stock management tool." It doesn't look like a financing transaction in which the investors are the financiers.

MR NEUTZE:

Well, that depends on the extent to which this information should be taken into account and, you know, interpreted in the documents. The investors were well aware too, of course, that they may have to settle.

WILLIAM YOUNG J:

Oh, yes.

MR NEUTZE:

I'm not sure I can take that point much further at this stage.

Turning to the legal submissions, if I could start at page – my Securities Act submissions, at page 4. 2.1, I've cited *Society of Lloyds & Oxford Members' Agency Ltd v Hyslop* [1993] 3 NZLR 135 (CA), and that's really the point we're just talking about, is the extent to which this extraneous material should be taken into account; I submit it shouldn't, but I accept that it will be a matter of construing the documents.

ELIAS CJ:

And perhaps the statute.

MR NEUTZE:

And the statute, yes, of course. Because at the end of the day, if it is in respect of an estate or interest in the land then it's saved, even if it is technically a debt security. And looking at the definition of "debt security", if I could take you to the appellant's bundle, page 3 I think, at the bottom…

ELIAS CJ:

Tab 3?

MR NEUTZE:

Tab 1, page 3.

WILLIAM YOUNG J:

Sorry, whereabouts in your –

MR NEUTZE:

Appellant's bundle of authorities.

ELIAS CJ:

Oh, this is the Securities Act, thanks, yes.

MR NEUTZE:

This is the debt security, yes. The first submission is that the words "otherwise owing" should take their colour from both the preceding words, "deposited with", "lent to" and succeeding words, which include "a debenture", "debenture stock", "bond", "note", "certificate of deposit" and "convertible note", "(a) interest or right that it's declared by regulation which is not relevant or renewal, or variation of such a right," and (c), and it doesn't include a contributory mortgage, and the reason for that is that they're governed by their own regulations

TIPPING J:

So your submission is that it otherwise reinforces ejusdem generis, rather than signals a departure from it?

MR NEUTZE:

Yes. When you look at it in the context of both the preceding and succeeding words. And I am aware that there are conflicting authorities on, which way otherwise go, can go – it certainly be construed ejusdem generis, and it can be construed the other way. And my submission is that, in the context of that definition, it's reasonably obvious –

TIPPING J:

A point in your favour is that, if it is intended to be more expansive, it would have just used the word "owing" –

MR NEUTZE:

Correct.

TIPPING J:

– rather than “otherwise owing”.

MR NEUTZE:

And if it’s to be treated as just any obligation to pay money, that, in my submission, goes beyond what would be considered to be a normal debt security, and it runs into the problem that the Court of Appeal identified, that what happens to the residual definition of “participator of security”, but that suggests that it’s not intended that the debt security is as wide as contended for by he appellants.

WILLIAM YOUNG J:

How would your interpretation work if perpetual bonds were offered? Because it’s not a right to be paid money that's deposited with or lent to, because it’s not a right to be repaid, it’s a right instead to be paid interest on. And what about an annuity?

MR NEUTZE:

I’m not particularly familiar with perpetual bonds, so perhaps over the break I’ll come back with an answer on that.

WILLIAM YOUNG J:

And if we thought that this is like money lent or like money deposited, wouldn't that be, wouldn't that fit within even a ejusdem generis interpretation? I mean, what you're really saying is this should be confined to transactions that are in substance by way of financing.

MR NEUTZE:

In the nature of payment and repayment, yes.

WILLIAM YOUNG J:

But I don’t think you can have repayment as a fundamental test, because there will be debt securities where repayments not, on those terms, doesn’t necessarily apply. So what’s wrong with saying, “Well, if it looks like a financing transaction then it’s within the ejusdem generis interpretation”?

MR NEUTZE:

Well, if it’s in the nature of one of these interests, then it is within that interpretation, yes, but “looks like” –

WILLIAM YOUNG J:

I mean, it can't be confined to money that's deposited with or lent to, because there's no point in it having or otherwise.

MR NEUTZE:

I accept that, yes.

WILLIAM YOUNG J:

So what would be wrong with, if it's "like" money, "like" a right to be paid in relation to money that's…

MR NEUTZE:

In that nature, I would have to accept that that would be acceptable. Whether that applies to these particular obligations is another matter.

WILLIAM YOUNG J:

I note that, I just had a look at *Hyslop*; it didn't suggest, the passage you referred to, didn't suggest that the Court is confined to the offer documents, that it's, you can't, that other inter-related documents can be taken into account.

MR NEUTZE:

Well, they would, in my submission, have to be part of the allotment of the security, otherwise how far do you go in construing extraneous contractual documents which are part of the allotment of the security?

WILLIAM YOUNG J:

On any view of it, the words "or otherwise" introduce an element of indeterminacy into the definition.

MR NEUTZE:

It's not specific, correct.

WILLIAM YOUNG J:

Which might invite a substantiality inquiry.

TIPPING J:

One thing is clear, it's got to be owing.

MR NEUTZE:

It does have to be owing and not maybe owing, or possibly owing.

TIPPING J:

Owing. It may be that it means owing in a like manner. In other words, like the money is owing with these transactions but with a substantive rather than technical approach to that idea.

MR NEUTZE:

Well I would accept like.

TIPPING J:

You'd accept that.

MR NEUTZE:

Yes.

TIPPING J:

Because there's got to be some mechanism to take it out of just simply money owing –

MR NEUTZE:

Yes.

TIPPING J:

– because that's clearly too wide. So I agree there must be some linkage but the question is whether the linkage is technical or substantive.

MR NEUTZE:

As long as you're not saying you look at the substance rather than, or you look at – you treat the documents as something other than what they are then –

TIPPING J:

Well I'm saying you look at the substance of what's going on rather than being fixated by the precise legal clothing.

MR NEUTZE:

I think, in my submission, the Court should be slow to treat the documents as something other than what they are but beyond that I can't assist.

McGRATH J:

Is that really, Mr Neutze, saying that you can contract out of the Securities Act if you can settle the form for a transaction that, looking at it technically as Justice Tipping puts it, doesn't involve something in the nature of a financing arrangement. Is this a contracting-out route argument that you are advancing?

MR NEUTZE:

The, there's a need for certainty and the Court of Appeal quoted a passage about how it's important that people know what's intended by the Securities Act and therefore if the parties, so not so much contracting out but if the parties structure the arrangement in such a way that it's not caught by this definition or is protected by 5(1)(b) then the court should be slow to treat it as something other than what it is, because there are significant consequences for breaches of the Securities Act for –

McGRATH J:

Yes.

MR NEUTZE:

– in fact for people who aren't here, the directors of the issuer are the ones who probably face the biggest consequences. So there does need to be certainty about how these definitions are applied, and the passage I was referring to in the Court of Appeal judgment, para 273. So it's *Morrison's Company Law* and says, "The definition was intended to cover more than just shares and debentures but which would allow a degree of precision over the way in which the word "security" was used and understood in commercial practice," and the three articles I'm going to take you to do suggest that there does need to be some, not rigidity, but precision about what's going to be covered so that people know where they stand. And just while I'm on the Court of Appeal judgment, at 368, which is the last paragraph of its judgment. In its view if there was illegality it was not obvious that that was so and it

would describe the illegality as unusual or even obscure and there is certainly no evidence at all in this case that anyone associated with Blue Chip considered there was a securities issue let alone developers of course.

So returning to my submissions, 2.4, so you should also look at the context and then 2.5 I've set out some provisions which lead to the conclusion at 2.6 which the Securities Act contemplates, in respect at least of the usual issue of debt securities, any interest in or right to be paid money that is owing or to be owing and it will be found in the context that, of a payment of money by the subscriber to the issuer in respect of the debt security, the monies must be owing or are definitely to be owing and generally there will be multiple security holders, holding the securities of the same type represented by a trustee under a trust deed. And just in that regard, Justice Venning commented that it would be odd for there to be a trustee in respect of the joint venture parties, for example. So my submission in relation to the definition that looks at both the words itself and then the context of the Act with a plea for precision.

My friend, in his written submission, says that if there is any doubt one should favour the application of the Act. I would say the need for a degree of precision actually runs counter to that submission.

Now in relation to the *Culverden* case which I've finally arrived at, 2.9, I will just stress the fact that there was an inevitable buyback option not a, sorry, not merely an option, it was a requirement. It was going to happen at the latest on death of the resident and in the end their Lordships analysed it as payment to *Culverden*, being the same issue, being the issuer and then a payment back by *Culverden* of that same money with adjustments according to a formula as set out in the contractual arrangements. Because of the inevitability of the payment it was treated as merely a licence rather than the transfer of land.

The ancillary right point which I –

McGRATH J:

Were they really saying that or were they saying that it had both characteristics that, there was a right of occupation. I mean, it seems to me that in relation to whether – and looking at whether it was an ordinary purchase they focused on whether or not the occupation right was merely ancillary or whether it was in fact another right of

substance in itself, and because it was another right of substance that's, it was too important to be classified as merely incidental to a land transaction, and it brought the whole, it brought that aspect of the transaction, not the whole transaction but the ultimate payment back of money when you died in under the Securities Act.

MR NEUTZE:

Yes. So there were actually two rights as the Privy Council answer it, it was the right to occupy and the right to the repayment. What ultimately happened I'm not sure because this was just an application by the registrar to inspect records. So what was ultimately struck down or if anything was it's not totally clear but, yes, you're correct that it was the repayment right which was treated as coming within the Securities Act.

McGRATH J:

That brought – that came within the Securities Act –

MR NEUTZE:

Yes.

McGRATH J:

– and that really meant that, yes, because the, because section 5(1)(b) didn't apply to it, because that particular aspect of the transaction wasn't a dealing in land or wasn't in respect of land.

MR NEUTZE:

Well the words "in respect of" aren't discussed in any of the courts in *Culverden*.

McGRATH J:

No.

MR NEUTZE:

And –

McGRATH J:

But that's what effectively they found?

MR NEUTZE:

That is effectively what they found, yes, but they – there is another way of looking at the case which I will come to in a minute and that's the contributory scheme but –

WILLIAM YOUNG J:

But that's not the way they looked at it though.

MR NEUTZE:

That isn't the way, they accept that.

McGRATH J:

So it does seem to me that, in that respect, they were very much focusing on the substance of particular components, and they wouldn't have been too impressed with your form argument, based on *Hyslop.*

MR NEUTZE:

That's possible. Well, they were certainly, certainly looked only at the documents, and they did consider that the payment and repayment took it outside what they called, "An ordinary interest in land." My submission, which I've elaborated on here, is that both the Privy Council and the Court of Appeal in this case, read into section 5(1)(b) words like "ordinary", "unexceptional", which you shouldn't really do, because they're not there. Also, the Privy Council didn't appear to consider the breadth of the words "in respect of". My friend, Mr Campbell, mentioned that the argument that was put to the Privy Council is summarised in the appeal cases, and it's clear that he was simply arguing that the payback, as a right, was ancillary to an ordinary purchase in land. So that was the argument that was put and that was the argument that was rejected.

WILLIAM YOUNG J:

What about timeshare marketing, is that governed by the Securities Act, or is there other legislation?

MR NEUTZE:

I didn't want to put you wrong. It is usually governed by the Securities Act, but there is also a land exception.

WILLIAM YOUNG J:

Because the timeshare, the people who buy timeshares can buy, get a fractionated certificate of title, can't they, I think?

MR NEUTZE:

Yes.

WILLIAM YOUNG J:

So how would that work with the exemption? Well, don't – I mean, I've just sprung that out.

MR NEUTZE:

Can I come back to that?

WILLIAM YOUNG J:

Just think about it over lunch or whatever, yes.

MR NEUTZE:

I'll do that. There are a couple of things to think about.

2.13 is this question of whether there has to be a payment and repayment. They certainly haven't decided that there does, and I've emphasised the words in that passage, because they decided that, on the facts of the case, there was in effect a payment and repayment. In 2.15 – I've summarised the two rights that Justice McGrath mentioned: the occupation rights and the repayments – and the repayment right was considered to be a cardinal feature of the transaction. The difficulty, in my submission, with that judgment, is it is reading in a lot of words to section 5(1)(d).

McGRATH J:

Well, it's another way of saying that would be to say it's reading 5(1)(b) narrowly.

MR NEUTZE:

Yes, well, or read – yes, well, reading in words that aren't there, would be how I would put it. The way that Justice Venning looked at it, and I mention it in the submissions, is he said that if it's ancillary to an estate or interest in land, then it's probably "in respect of", and the Court of Appeal in this case went further and says it's got to be ancillary to an ordinary or unexceptional or normal sale and purchase

agreement or interest in land. And my submission would be that Justice Venning's approach is actually the better one on the wording of the exemption.

ELIAS CJ:

Both of course read in quite a few more words.

MR NEUTZE:

Well, "ancillary" is closer to "in respect of".

ELIAS CJ:

Yes, although it's a more loaded term, isn't it?

MR NEUTZE:

Yes. Just on the contributory scheme point which I've mentioned, it was obiter, but Their Lordships did consider that there was an investment in a contributory scheme such that section 5(1)(b) wouldn't apply, and that would be, so there would be another way of looking at the correct outcome in that case. And on the likely rationale for the exemption – well, first of all, the contributory scheme suggests that if you have a degree of control, or, the more control you have the more likely the land exemption is going to apply.

So, on a chattels exemption, for example, if you have a quarter share in a super yacht it will be covered, if you have a tenth share, it won't be, and the likely rationale for that is control. Similarly, in relation to the land in the joint venture product in particular, when you've just got two parties and they are owning it for the purposes of investing, at least in residential property, and in fact the purchaser has control of the joint venture, as I've demonstrated, it's more likely that the presumption, or the exemption, should apply.

And I think there's two other reasons for the likely exemption. One is that a purchaser's going to get tangible property. So, part of the exemption is you have to get a certificate of title, and whilst property goes up and down it's tangible. You're not getting an intangible right to be paid some money in the future which is contained on a piece of paper, which is a classic security. So that's one reason. And the other is the likelihood that solicitors will be involved in a transaction relating to land, to use an analogous term, so the presumption is that they should be able to advise better than a prospectus.

McGRATH J:

This exemption is, I gather, common in overseas securities legislation that was in existence in 1978, is that right?

MR NEUTZE:

This was – yes.

McGRATH J:

Are you able to point to any cases on that legislation that expressed the purpose behind the property exemption and/or land exemption in the way you've described it, this tangible property as against intangible property, the difference?

MR NEUTZE:

No, but it's a logical deduction. There have been very few cases of it, in fact.

McGRATH J:

Right, thank you.

MR NEUTZE:

Just to illustrate that point, if I could take you to paragraph 429 of Justice Venning's judgment. This is one of the joint venture partners, Mr Crawford-Green, and Justice Venning summarises facts relating to him and with his solicitors, and then at 429 he concludes an email exchange by saying, "I guess I have to hope that Blue Chip doesn't go bottoms up," which all the investors were aware was at least a risk, and both he and his solicitor – so he had solicitor's advice – took some comfort that he was party to an agreement to purchase a real apartment in Auckland, as opposed to investing in a debenture from a finance company. So it's just an exchange on the evidence, but it illustrates the point that I'm making that that's the likely rationale for the exemption and he wasn't the only solicitor who advised of the risks.

So, looking at 5(1)(b), I can probably just leave you with – the most informative case is *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 in paragraph 2.27. It is considered to be a wide phrase. My friend said, something to the effect of it should relate to, or be connected to, in terms of, at least according to – in these authorities I've cited, in respect of, is probably the widest of all of those phrases, conveying some sort of connection.

McGRATH J:

Chief Justice Dixon is a strong authority in many areas of the law but I really feel I have to put to you that Sir Robin Cooke had a different view of in respect of. In a copyright case, *Phonographic Performances (NZ) Ltd v Lion Breweries Ltd* [1979] 2 NZLR 252 (CA), you may like to look at it over the lunch hour but he observed that, "It's a phrase used by lawyers, yet it cannot be said to have a precise legal meaning." He came to the view that, "The real question was whether the agreed facts fell fairly and naturally within the actual words chosen by Parliament." So the connection wasn't – the connection "in respect of" covered wasn't in the widest possible terms, it was something that was indeterminate on the language and you had to go to the context to find it out which would not be quite such a secure footing for you in this argument and that's – because it's the way I've always seen in respect of, I thought I should put it to you and you may want to comment on that now or later but not everybody thinks it's the widest possible formulation.

MR NEUTZE:

Well, there's certainly a number of authorities I've cited which suggest that others do but I would accept that –

McGRATH J:

Fowler's Modern English says it's so unsatisfactory it should be used as little as possible.

MR NEUTZE:

Well it's used quite a bit in the Securities Act though because we're going to come across it at least one more time. Well it's certainly wider than "to" and it must be at least as wide as "relates to", or "connected to" would be my submission but the context undoubtedly will be important which is why I attempted to articulate some of the likely rationale behind the exemption.

At 2.3, I just repeat the submission that it doesn't appear to have been considered in *Culverden*. Then over the page, I criticise the reading in of too many terms that aren't there in section 5(1)(b).

Now in 2.33 through to 2.35, I've summarised the three articles. Do you want me to actually take them to you, they're in the bundle at –

WILLIAM YOUNG J:

Are they in the bundle, I couldn't see them actually?

MR NEUTZE:

Yes, they're in my bundle.

WILLIAM YOUNG J:

Are they, in the respondents' bundle, right.

MR NEUTZE:

At tabs 10, 11 and 12. I've summarised the points that are made by these commentators who are – consider themselves to be knowledgeable in the field and certainly Associate Professor Watts, as he then was, considered *Culverden* to be a plain case for the application of ejusdem generis rule –

TIPPING J:

Well that's all very well, it depends what you mean by the ejusdem – or, there are rigid and wider ways of applying ejusdem generis. It's a question of how you define the genus, but I don't want to get into an astute debate with Professor Watts but I have to say that academics are generally beloved of formulae so that they can teach their students with greater degree of precision than perhaps the law –

ELIAS CJ:

Permits.

TIPPING J:

– wise to assay.

ELIAS CJ:

I've lost the bundle, which bundle are we looking at. The respondents' bundle, have you got that?

McGRATH J:

Yes.

MR NEUTZE:

Yes. Well I'm actually just speaking to my submissions –

TIPPING J:

You are indeed and very helpfully but I have to say that I just don't think it's as simple as saying ejusdem generis or not and you, I think, yourself recognised that quite appropriately a little early. It's what is the genus. How wide do you define the class signalled by the legislation, the class of debt?

MR NEUTZE:

And that's why I've highlighted the words "preceding" and "succeeding" and the –

TIPPING J:

I fully understand your argument, I just say that I'm not overwhelmed by Professor Watts' proposition.

ELIAS CJ:

I'm glad you went on.

TIPPING J:

I'm sure he'll be delighted to hear that.

MR NEUTZE:

I think he gets mentioned later in agency as well Sir.

TIPPING J:

Yes he does.

MR NEUTZE:

Perhaps he's an expert in all matters. And in 2.3 –

TIPPING J:

Well he now edits *Bowstead* so I think he's entitled to be regard as an expert in agency.

McGRATH J:

Absolutely.

MR NEUTZE:

And Francis Dawson wrote an article which is in the bundle, expressing some concern about the notion that you can pick out obligations as *Culverden* did and suggesting that, in the intervening years, has come to be seen as a case that turned on it's on special facts. And he raised the problem if you have debt security interpreted to why it is, what happens, well there is going to be an overlap and that's not intended and he posed the question in relation to redeemable preference shares. Not intending any of this commentary to be definitive but it is of relevance that *Culverden* is considered, probably to be a case which should be treated as having been determined on its own special facts.

As I conclude at the end of 2.36 it may be that the –

ELIAS CJ:

What special facts? Just the – what would you isolate as being special?

MR NEUTZE:

Well the notion that you can pluck out obligations in an overall transaction and then treating it – well the better way of looking at it, in my submission, is to treat it as a contributory scheme such that section 5(1)(b) doesn't apply and the reason for saying that is it would seem to drive the law lords to read in words on 5(1)(b) that weren't there when there was an outcome which was more conceptually sound in my submission.

ELIAS CJ:

Well that's a criticism of the reasoning rather than distinguishing on the facts. You did say a moment ago that it should be confined to its facts. I was trying to ascertain whether there were any facts but it seems you – it's more that you think that the analysis was wrong.

MR NEUTZE:

Yes, well I'm actually just quoting from Francis Dawson there but I don't think he elaborates.

ELIAS CJ:

Right, thank you.

MR NEUTZE:

Now the joint venture, I can probably skip over this reasonably quickly, having looked at the documents in some detail. 3.5 is the essence of my submission in relation to the joint venture agreement. 3.7 is the terms and 3.8 to 12, summarising and analysing the nature of the agreements, arrangements.

Just in answer to – we've been searching for an answer to who incorporates the company, and my understanding is that in the *Bartle* case, the Bartles applied to incorporate their company themselves as the directors and shareholders, so presumably that's a matter of public record. My understanding is that they signed an incorporation document.

3.13, my submission, with which the Court of Appeal agreed, is that you can't and shouldn't just pluck out those two obligations, and single them out for special treatment when they are just part of the joint venture arrangement and, secondly, as it relates to – or, sorry, it was in respect of interest and land, and it should be covered by the exemption.

3.14, neither of these terms, in my submission, is a debt security under the terms of the Securities Act, it doesn't have the usual characteristics which I've described above. Party A is not a subscriber, as it does not pay money to the joint venture for the debt security. BCJVL is not an issuer, because it does not receive any monies for the debt security if the documents have the monies being paid to the joint venture company. And these provisions do not confer a right to participate in the property of another. Now just on that topic, the general definition, followed by the inclusive definition, would submit that you don't have to comply with both necessarily, however the specific, or the more specific definition can appropriately be coloured by the general definition, and especially in this area of the law the concept of security can be elusive, and if the appellants are right, then many obligations contained in commercial arrangements could be capable of being a debt security, which is unlikely to be the intention. The notion of participate can still apply to –

TIPPING J:

Just pause there. Isn't the notion of "offering to the public" a very substantial control over the undue width – in other words, if it's ordinary inter partes stuff, there's going to be no concern.

MR NEUTZE:

Correct.

TIPPING J:

It's when you offer to the public that the real problems –

MR NEUTZE:

Yes, I accept that.

TIPPING J:

– are manifest. And this sort of in terrorem argument, if you like, that it's going to go everywhere and create chaos, doesn't really resonate with me because of that fundamental need.

MR NEUTZE:

If I may just alter the chaos argument to the need for some precision, which I referred to in the Court of Appeal judgment, rather than –

TIPPING J:

I understand that submission entirely, but I was addressing this proposition that, if you construe it too widely, you're going to be involved in all sorts of commercial transactions that were nowhere near it. Well, you won't, unless you're offering something for the public.

MR NEUTZE:

I accept that entirely. The additional submission I want to make about debt security is that the definition resorts to the word "includes" for the sensible legal reason that it needs to be legally certain, as I've mentioned, both for debt and equity securities, and they are considered to be in the general notion of an interest or right to participate in. So just a plain debt wouldn't ordinarily be considered enough, whereas a debt for five years or a long period of time is really participating in the property of another. So, more is required than just an obligation, in my submission, and that's the extent to which the general definition of security could be relevant.

3.18 summarises the Court of Appeal's finding, which I commend to you as being the correct outcome in relation to the joint venture agreement. I've mentioned and included in the bundle two overseas cases on joint ventures, they haven't found any in New Zealand. The statutory context is different, but the result is instructive and should given some comfort, in this case, that where there's control and just two parties, it's normally considered to be a security. I can't take it any further than that as a different statutory regime, but those are two US cases dealing with the joint venture arrangements, which is not inconsistent with our legislation, given the definition of "contributory scheme". And that's the submission I make at paragraph 3.22. I've summarised the courts findings below in the next passage, which I can pass over.

Equity securities, I think I've probably dealt with that reasonably fully. It's not offered to the public, it's only offered to the joint venture partner, and it's an obligation rather than a right, an obligation to hold all the shares of the company as, be a trustee, which has in itself no value. And at 3.35, the Court of Appeal agreed – or 3.35, in my submission, I refer to the Court of Appeal's decision, where they agreed that there was no offer to the public for subscription in terms of section 33.

Dealing with the PIP agreement. Broadly, I say it is just an option, although I accept some concern that, at least based on the extraneous material, it may look like something else that I would urge the court not to, to lightly tread, as there's something other than what it actually is in the documents. It will be right if the right to be paid an option fee were a debt security, in my submission. There's no payment to the issuer, and it's expressed in the documentation to be in consideration for the granting of the option. My friend has raised the money's worth argument, which wasn't raised in the High Court but was in the Court of Appeal. That seemed to be designed to overcome the finding of Justice Venning at paragraphs 279 to 281, that Blue Chip can't be the issuer, and my friend's answer at paragraphs 51 and 57 of his submissions is that the option itself is money's worth and included within the definition of "money".

My responses to that are that certainly it doesn't fit well within the definition of "debt security" or issuer. You can't pay back an option or re-grant it and it would be an odd outcome and the fact that Blue Chip acquires an equitable interest in the land,

as Justice Venning recognised, also points away from the relevant transaction being in the nature of lending, which is not, in my submission, the way it should be viewed.

And then, in terms of consumer protection, which is largely designed to protect intangible assets, if Blue Chip defaults there the purchaser ends up, or breaches its obligations, the purchaser ends up with tangible property which also demonstrates the flaw in the money's worth argument, because the purchaser can cancel the option and remove the encumbrance.

COURT ADJOURNS: 1.01 PM
COURT RESUMES: 2.16 PM

ELIAS CJ:
Yes Mr Neutze.

MR NEUTZE:
I had come to PIPs and I think we've discussed that sufficiently already. I would say broadly speaking in relation to it that if it was to be treated as an investment or a financial product then, well first of all not all financial products are covered by the Act, you have to look at the definition and secondly, it is an investment in an estate or interest of land for which a certificate of title can be granted.

Now just dealing with some of the issues that Justice Young asked before the break. Firstly in relation to perpetual bonds, assuming that it's an investment in an issuer with an annual or periodic return it's generally, as I understand it, to be repaid, to be repaid the principal amount on a liquidation and if that were the case it would fit within the definition of "debt security" –

WILLIAM YOUNG J:
I think if the perpetual bond is by definition, perpetual.

MR NEUTZE:
Well I understand often it is on repayment of liquidation but if however it is perpetual then the argument, the – our position would be that it's not a debt security at all and in fact a participatory security because there's no right for repayment. As two timeshares, they're usually structured – for example, there's a right to occupy a

specific apartment for say two weeks a year and the security would be a participatory security –

WILLIAM YOUNG J:

Well I think it's often, it's a one fifty-first or a one fiftieth interest, undivided interest in the title.

MR NEUTZE:

That's one way of doing it. And if you can get a certificate of title that may well be a, still may well be a contributory scheme.

WILLIAM YOUNG J:

Right.

MR NEUTZE:

There is apparently an exemption notice that relates to it, I think it's the property ownership exemption notice and there are ways of structuring it so that it is actually just a mere licence, if it's not a right to occupy a particular piece of property but a property, so it's just a contractual right so there are various ways of doing it.

And finally on annuity because it's payable to an insurance company for, say it's for when you die – that would certainly be a participatory security however not a debt security if there's no payment back, just a – you just bought a stream of income. So I think those were the issues that you raised with me.

Turning now to section 5 of my submissions at page 24. This is this question 3(a) whether the sale and purchase agreement is part of the allotment and invalid and of no effect. My first proposition is that this argument is directly contrary to the case that was run in the High Court and counsels' concession which we submit was properly made, at paragraphs 225 of the Greenstone judgment, Justice Venning records sort of about the third, just on second, third sentence, "In relation to the joint venture and PIP agreements, they accept that the agreements for sale and purchase themselves are exempted from the Securities Act," they say that the agreements are nevertheless tainted by the illegality of the Blue Chip products. And then there was an argument in the lower court which is dealt with in the next –

WILLIAM YOUNG J:

There must be a mistake there isn't there? I see, sorry it's – the agreements for sale and purchase are exempt, I'm sorry, thank you.

MR NEUTZE:

Yes and exactly the same concession is recorded at 292 following on page 297, or 293 really there's a pleading which is clearly just a tainting pleading and then 293, "While at section 37(4) invalidates an allotment of a security in breach of section 36, the plaintiffs accept that the agreements for sale and purchase are themselves exempt from the provision of the Act because of section 5(1)(b)," which in my submission is a concession properly made. If there were ever an obligation to be carved out, the sale and purchase agreement is it. So clearly the case was run purely on a tainting basis. My friend Mr Campbell didn't actually deal with this issue or the 37(AL) issue which I'm about to deal with which is somewhat surprising given that I've raised it both in the opposition to leave and in my submissions, so in the event that he raises that I haven't had had an opportunity to comment on, I would ask for leave to come back on those, because he didn't raise either, he didn't deal either with this point or the 37 –

ELIAS CJ:

I'm sorry, what – I'm a little lost about that – you say he hasn't developed it?

MR NEUTZE:

He hasn't responded to this paragraph 5(1) which is also raised in the leave opposition, nor has he dealt with the subsequent section which deals with 37(AL).

TIPPING J:

Are you arguing that they are precluded, which I don't understand you to be arguing or just that they were right to make the concession?

MR NEUTZE:

Well right to make the concession –

TIPPING J:

Yes.

MR NEUTZE:

– and if they're permitted, if there is say, there's an integrated scheme, given the pleading that there was, I would say at this stage they should be prevented from doing so because we should have been able to explore that better.

ELIAS CJ:

Should – isn't it though covered by the leave that was granted?

MR NEUTZE:

Well leave has been granted –

ELIAS CJ:

Yes.

MR NEUTZE:

– but there's still a question of whether the relief they're seeking should be granted and whether –

TIPPING J:

Well is, it doesn't seem like a point on which evidence could have been called.

MR NEUTZE:

The gap –

TIPPING J:

– which is the classic reason for not allowing a point to be taken on appeal, when it's not taken at first instance.

MR NEUTZE:

The sale and purchase agreements and the joint ventures were often signed at different times so those sort of issues could have been explored. My main point is that it's the concession correctly made and –

ELIAS CJ:

But if we're not with you on that, that it's correct, what are you asking us to do?

MR NEUTZE:

My friend Mr Chisholm in section 3 of his submissions, develops the reason why it wasn't on the pleadings –

ELIAS CJ:

Yes.

MR NEUTZE:

– and I've simply adopted his submission in relation to that, perhaps –

ELIAS CJ:

What, are you saying we cannot resolve the matter?

MR NEUTZE:

I'm saying that it would be unfair for that to be raised at this level.

ELIAS CJ:

But as you say you did raise this in your notice of opposition and leave was granted on the point.

MR NEUTZE:

Yes.

ELIAS CJ:

So it's on the table, Mr Neutze. You can argue that we're not in a position to determine it because there might have been some evidence or something along those lines I suppose but why should it not be resolved simply on the documents?

MR NEUTZE:

Well you don't have all the evidence of the investors and what was told to them and how it was sold to them.

WILLIAM YOUNG J:

But isn't it just a matter of – isn't it being realistic, isn't it just a judgment which has to be made in relation to the facts that are before us and particularly the documents –

ELIAS CJ:

And as found?

WILLIAM YOUNG J:

I mean realistically it will turn on what we make of the concept of allotment under the statute and what we make of what happened here and there can't be much scope for debate or doubt as to what happened, can there?

MR NEUTZE:

Each investor was different. It wasn't, there wasn't all the same so –

TIPPING J:

To the extent the facts are missing, that may go against the plaintiffs, the appellants but I don't – unless you can say in more than generalities what evidence might have been called from your point of view, I don't see the prejudice.

MR NEUTZE:

Perhaps I will discuss it further with Mr Chisholm and we'll decide whether to pursue it. He's actually raised it on his submissions.

TIPPING J:

Well he'll now know what correctly he's got to address, if he wants to take the point in the sense of can't be raised or can't be pursued if you like.

MR NEUTZE:

So assuming the 5(1)(b) doesn't save the sale and purchase agreement which I strongly submit it should, the question is whether it's part of the allotment at 5(3) and was made in contravention of the provisions of this section, which is section 37(4). 37(4) just refers to an allotment but it refers back to 37(1) which talks about an allotment of the security so it's – allotment of the security we're talking about. Justice Fisher, as he then was, rightly observed in *DFC Financial Services Ltd v Abel* in the case involving a breach of section 37 is the allotment that is avoided so it was essential in every case to identify the allotment before one can know what it is that has been avoided. It is also important to note that there cannot be an allotment without a security and that's the reference back to 37(1). We say the relevant securities, if there are any, a lot of them in this case are those set out in (a) and (b) of 5.6. The two obligations in the JVA agreement and the three obligations in the PIP agreement, and that's all.

WILLIAM YOUNG J:

Just have a look at page 662 of your, of volume 2 of the Barclay documents. This is the PIP agreement and if you look at clause 2, the allotment involves the entering into the agreement, if we say that it's a security by Blue Chip, requires the investor simultaneously to execute the agreements and for Blue Chip to arrange for the purchase agreement to be executed by the vendor. So it's hugely integrated, isn't it?

MR NEUTZE:

Well from the perspective of the PIP agreement it's a condition, yes, but it can't make the sale of the purchase agreement an allotment of the security.

WILLIAM YOUNG J:

Except that it's viewed sort of functionally that the execution of the sale and purchase agreement is the way in which the PIP agreement is concluded, is brought into the system.

MR NEUTZE:

I accept it's a condition on the delivery of the sale and purchase agreement. The reverse, of course, doesn't apply as was – so the sale and purchase agreement was perfectly functional without it, as was held in the lower courts.

5.7, an allotment of a debt security occurred in *AIC Merchant Finance* when an issuer accepted the investors offer to place funds on deposit i.e. on the creation of the contract to invest and in *DFC v Abel* Justice Fisher, as he then was, said that the allotment to be avoided under section 37(4) would normally be the contract formed by the issuer's acceptance of the subscribers offer for a security.

The – at 5.8, the allotment in respect of the joint venture obligations that are held to be securities will be the entry into the joint venture. The same comments in relation to the PIP don't apply to the joint venture, your Honour, in my submission, but I don't accept that the conditional nature of the PIPs actually make the sale and purchase agreement part of the allotment of the security. What I say is, is that it's the entry into the PIP deed of nomination. It may be a conditional allotment but nevertheless that's the allotment.

The sale and purchase agreement has been found to be an independent agreement in both lower courts and there are Court of Appeal references for that. At paragraph 358, which refers back to the paragraphs 255 to 264 which also refers to the High Court findings in that respect. As I say at 5.9, the second sentence, is existence is not on its terms conditioned on the validity or pre-existence of the JVA or the validity of the PIP and that's the test that was used in *DFC v Abel*. It is – the SPA itself can't be a security in my submission and – or if it was it would be exempt, and it is not allotted by Blue Chip as a security, so who is the issuer? The validation of the JVAs or the PIPs does not, of itself, render the independent SPA invalid and I did raise that issue of severance too in relation to the joint venture agreement.

5.10, such a conclusion is, in my submission, entirely consistent with existing authorities. The deciding cases show that even where there was a breach of section 37 and a security such as interest in a horse partnership, which has been allotted in breach of the Act, a related transaction, such as a loan, is not rendered invalid. If there is nothing to suggest that the lender had grounds to believe that it was participating in an illegality. And I refer there to *DFC v Abel* and *Abbott v UDC Finance*. The courts have held that the lenders to the horse partnerships formed in breach of the Act could enforce their loans against the partners, notwithstanding the loans were an important component of the partnership scheme and the partnership agreements created with the partnership were invalid.

Just pausing there for a moment, a lender lending to a horse partnership is going to make enquiries about the purpose of the loan and indeed in both cases did. It was conditional on approval of the partners and there was a memorandum which I come to which –

TIPPING J:

Isn't the position here more akin to that of Westpac when one is looking at the case to which you are now addressing? In other words it's an external lender with no knowledge or notice of.

MR NEUTZE:

Well it had, as I was saying, particularly in *UDC Finance* it certainly had knowledge of what the purpose of the loan was and, in fact, I would say that the developer in this case is more remote than the lender there because with payment of deposits and seemingly valid sale and purchase agreements why would a developer need to

enquire more about how the purchasers are going to fund the purchase. So I wouldn't accept it was more like Westpac. I'd say we're in a better position than in those cases.

It is, 5.11, the consequences of an infraction are a matter of discerning the statutory intention. The relevant principles, which are defined from the High Court of Australia's judgment in *Yango Pastoral Co Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, I put that in our bundle. In that case the banker was acting in breach of a section of the Banking Act and entered into mortgages which were held to be enforceable and there was no implied statutory intention that the mortgages should be struck down, even though the banker was in breach of the Banking Act. And that's a High Court of Australia decision.

The principles are summarised usefully in *Abbott* and I've set them out, 1 through to 4. You've got to look at the statutory intention. The court might, if the intention is that it should be illegal, to effect to the statute the court will decline to enforce it, that's 1. However, that will –

ELIAS CJ:

Are these statutes where there isn't a – where the consequences aren't spelled out beyond the illegality because – and there aren't remedy provisions in the statutes. Is that – I'm sorry I haven't looked at *Yango*.

MR NEUTZE:

Both *Hurst v Vestcorp* and – or certainly *Hurst v Vestcorp* the consequences were not spelled out.

ELIAS CJ:

Yes.

MR NEUTZE:

And I think *Yango* was the same. Of course in the *Abbott* and *DFC* cases, well it was the Securities Act, and there were consequences spelled out which Justice Fisher mentioned but there wasn't the detailed regime that we now have.

ELIAS CJ:

Yes. That makes a difference, doesn't it? These cases are back in the days when courts used to have to scramble as to how they would react to illegality.

MR NEUTZE:

Yes, yes it does make a difference. If there's no guidance in the statute then it's more difficult for the court to –

TIPPING J:

And the Illegal Contracts Act has never applied in this field, is that right?

MR NEUTZE:

Not quite. *AIC Merchant Finance* held that it wouldn't validate under the Illegal Contracts Act and then there was an amendment to section 4(4) that said something like, nothing in the – well the Illegal Contracts Act, could apply and then there's now an amendment saying it doesn't. It would –

TIPPING J:

So there's been a progressive –

ELIAS CJ:

But the point is that the legislature stepped in to – so that the courts don't have to invent the consequences by reference to common law principles and either it's under the Illegal Contracts Act or now it's under section 4 – what's the remedial provision, there's a general discretion isn't there?

MR NEUTZE:

37(AL) or 37(AA) through to (AL) –

ELIAS CJ:

Yes.

MR NEUTZE:

And section 4, subsection (5) makes it clear the Illegal Contracts Act does not apply but now there's a detailed regime which I'll come to.

TIPPING J:

Unless that was in force at the relevant times, for these cases?

MR NEUTZE:

Yes. But not in *DFC Financial Services Ltd v Abel* or *Abbott v UDC Finance Ltd.* The Court of Appeal in *Abbott* found that the lenders were in the category of innocent third parties and I would submit were in the same category and for the reasons set out in 5.13. At 5.14 the appellants rely heavily in *Hurst v Vestcorp Ltd* as Justice Fisher in *DFC Financial Services v Abel* pointed out at 631, the lender was the promoter of the contracts and although they were documented separately, the loan agreement in the investment contract were together one transaction. So in the present case it would be like Blue Chip being the vendor as well as the issuer –

TIPPING J:

Wasn't *DFC Financial Services Ltd v Abel* a case where the borrowers were trying to get the advantage of the Act rather than lenders? The Securities Act is for the advantage of lenders isn't it, or this provision of it, the people who advance money, who invest money?

MR NEUTZE:

That is –

TIPPING J:

In *Abel* it's the other way round as I vaguely recall?

MR NEUTZE:

That was, that was part of the reasoning Justice Fisher used. But in *Abbott v UDC Finance Ltd* there certainly was quite a lot of knowledge about the police, the nature of the partnership and in this case the purchasers are trying to, it's just like the borrowers vis-à-vis the lender were borrowers here, the purchasers vis-à-vis the vendor are trying to get an advantage which is, at best, obscure as the Court of Appeal held. And in *DFC Financial Services Ltd v Abel*, sorry 5(1)(5) the analysis of *Hurst v Vestcorp Ltd* shows that Filmco was both the promoter and the lender, the loan was available only for the purpose of investing in film production. The borrowers had to repay Filmco, the borrowers covenanted not to assign or charge their interest in the copyright of the films or their receipts from the firms until the loan and the interest had been repaid. The receipts from the films were the sole source of repayment of the loan during its term unless the borrowers decided to

repay earlier and this is important to the part of the consideration for making the loan was that Filmco was entitled to 25% of the borrowers' interest in the net profits from the investment agreement. That wasn't documented itself but the Court was satisfied that it was part of the consideration for the loan agreement, i.e. and implied term. So it's a very different case, in my submission, from here. It just so happens there's two agreements but they're the same parties. It's in reality one transaction which is impossible to find here in my submission.

5.16 the Court of Appeal in this case, rightly in our submission, saw the question of enforceability of a contractual question. Was it part of the Blue Chip contracts or was it independent and the findings in both courts below was it was dependent. You can, in my submission, imply a term that the associated transactions such as a loan are dependent on the ability of the investment agreement, that's what – that's how Justice Fisher analysed what had happened in *Hurst v Vestcorp Ltd* and he goes on to say, "I do not think it could be implied under the loan contract that the defendants' obligations will be dependent on the validity of the contract of allotment between the defendants and CEF Limited. It would be remarkable to find an independent financier agreement to forego its contractual right to principal and interest if the venture for which the funds had been advanced failed proved abortive."

We say it's the same here, obviously it would depend on a review of the age of that limited agency but certainly with no knowledge of the illegality, would be remarkable to find the developer agreeing to forego his or her rights to be paid the purchase price if the underlying Blue Chip agreements, products, failed or proved abortive. You couldn't imply that sort of term into these contracts.

There is a discussion of severability in *Hurst v Vestcorp Ltd* but all of those cases are actually single contracts and then the Court of Appeal's conclusion is set out at 5.20. My learned friend has not challenged the Court of Appeal's findings and indeed, at – too much paper now. Paragraphs 29 and 30 of his submissions, he accepts that the SPA is not tied to or conditional and that the investors, as a matter of fact, appreciated there remained a risk that if Blue Chip did not perform their obligations that they might have to settle and indeed, some have which demonstrates the dependence, in my submission.

Dealing now with the scheme of the Act. There is a detailed set of provisions which provide a code in my submission. *AIC Merchant Finance* was held at the allotment

which was invalid, could not be validated under the Illegal Contracts Act. The latest amendment in 2004, basically confirmed this decision by inserting section 4(5) and introduced a special regime for granting of relief in cases in which securities had been allotted.

The scheme of the Act, in respect of invalid allotments, is to make the issuer and its directors primarily liable to pay the investors their subscription monies and that's clear from sections 37 subsections (5) and (6) which you will find in the appellants' bundle of authorities at tab 1, page 21. So if there's been a breach, the issuer and its directors, it can't possibly be suggested that Greenstone is an issuer, well I don't understand that it's been suggested that, are primarily responsible.

Then, in section 37AA through to AL which is in my bundle at tab 1, there's a number of relief orders which are set out, so relief can be granted. I'm summarised, broadly speaking, what they are in paragraph 5.24 and then 37AL, first of all provides, "That this section applies to all proceedings commenced after this section comes into force," which this proceeding has. Then section 2, "The court must not, in respect of an allotment of a security made in contravention of section 37, make any order or declaration –

WILLIAM YOUNG J:
Sorry, what section is it, I'm sorry.

MR NEUTZE:
Section 37AL(2).

ELIAS CJ:
Sorry, I was trying to look at the Act. It's almost impossible to find it in here.

MR NEUTZE:
Section 37A comes afterwards, it's a bit odd. So have you found –

TIPPING J:
Does it come after AK?

McGRATH J:
It's page 602, is it?

ELIAS CJ:

Yes, yes.

TIPPING J:

Oh, here it is, here it is.

MR NEUTZE:

Yes. 37AL(2), "The court must not in respect of an allotment of a security made in contravention of section 37 make any order or declaration, including an order or declaration in respect of moneys payable," et cetera, except the orders set out there under which include the sections I've talked about and 37(5) and (6). So it provides an exclusive set of remedies and was in no doubt intended to do so to ensure that the persons primarily responsible, i.e. the directors of the issuer are brought to account and this prevents the very relief that's being sought in this case by the appellants. There's about eight declarations sought by the appellant in paragraph 8 of the notice of appeal, most of which aren't in the pleadings by the way.

TIPPING J:

But for better or for worse – a staged hearing not implicating that point is before us. You say it should have gone to the end and said well you can't get anywhere anyway because of this, yet – is that your point?

MR NEUTZE:

Correct.

TIPPING J:

But what do we make of that when we have the issues in front of us as they are?

MR NEUTZE:

Well if – my submission is that if the court can't make the declaration sought then that's the answer.

TIPPING J:

Well that may be in the underlying proceeding but we've given leave to appeal on certain issues in the course of getting there. If you'd been able to persuade the

High Court to say well you can't get anywhere anyway because of this, then we wouldn't be here now would we?

MR NEUTZE:

They weren't arguing it –

TIPPING J:

Well it would be –

MR NEUTZE:

– because they'd made a concession.

TIPPING J:

It would be you, would be your side that would be arguing it wouldn't it?

MR NEUTZE:

That they conceded that it wasn't part of the allotment and we're only arguing tainting.

TIPPING J:

Right.

MR NEUTZE:

That's the unsatisfactory nature of –

TIPPING J:

I see what you mean. You mean that having, having now resiled from that, you're saying they should be held caught by this?

MR NEUTZE:

Correct.

TIPPING J:

I understand it now.

MR NEUTZE:

And they – well that's my submission yes. Now the final issue I wish to address is I have Mr Miles' evidence, I did – I do, we did do a – extracted the submission that we made on it for the Court of Appeal which would probably save time if I was just to hand that with Mr Miles' evidence rather than me speak to it now.

ELIAS CJ:

It's more, I think you should pass up the evidence and you should take us to what you want to take – or I suppose we ask for the evidence, can you summarise for us, I'm just reluctant to take in more paper, if you can tell us what the point is you're making in relation to the evidence?

MR NEUTZE:

It will take a wee while but yes I can. And there's also the email that's referred to.

MR NEUTZE:

Your Honour, given that I hadn't prepared to deal with it in –

ELIAS CJ:

Well perhaps Mr Neutze we should take in your submission then.

MR NEUTZE:

This is the extract from the Court of Appeal bit, yes. From the submission we made in the Court of Appeal.

ELIAS CJ:

The submission, but how long is it?

MR NEUTZE:

Five, four pages.

ELIAS CJ:

All right. Yes, right thank you we will take that as well.

TIPPING J:

This, just to be clear, I'm sorry I've probably missed a step. These are your submissions in the Court of Appeal on this point?

MR NEUTZE:

Yes, on this point. And I'd already taken you to the Court of Appeal's finding in relation to it and I just, can quickly summarise it. Paragraph 8.1 is self-explanatory. 8.2 and so 198 is the bottom of the page reference to Mr Miles where it says 190, 98, "Page 98 line 4. He was subpoenaed to give evidence, he acknowledged in cross-examination from me that he was never asked to provide a statement and then he said in re-examination that he'd made a presentation to the Greenstone directors." That presentation is summarised at 8.4 which refers to page 116 of his evidence. We were granted leave to cross-examine him, given the way the evidence came out and the points that came out of that was that he couldn't recall the date of the presentation except to say that having looked through his records he would've been at some point mid, between mid and end of 2006 – June or July. He kept an electronic diary but it was blank, he didn't give the directors a copy of the joint venture agreement, he didn't have one with him when he gave presentations. He described it as complex and very few people would have understood its intricacies and despite retaining his files he was unable to locate the PowerPoint presentation. It would have comprised no more than seven slides and the developers would have been more interested in the sales and deposits and those references are to the answers he gave.

ELIAS CJ:

Which we have in the sheets handed up.

MR NEUTZE:

Which you have, yes. And then Mr Pattinson's, Abel-Pattinson's evidence is in the bundle, volume 3 and I've taken you to parts of it and that shows his responses and then the Judges' findings are at 8.12 and following, 8.12.

TIPPING J:

Well the head-on conflict, not just that they couldn't remember it, he says, "It was unusual enough for me to have remembered it." So he wasn't believed?

MR NEUTZE:

Well he was to an extent that he, it didn't – the Judge didn't say "I don't believe you" but it didn't register really was what the Judge said.

TIPPING J:

Well that's just a polite way of putting it.

MR NEUTZE:

No. No the Judge that he, the Judge went on to say, it would have registered with Mr Abel-Pattinson because of the sort person he was and it clearly wasn't such that it registered with him.

TIPPING J:

Well that's contrary to his evidence that he would, it would have been unusual enough for me to have remembered it. Anyway never mind Mr Neutze.

MR NEUTZE:

It all depends on what Mr – the point is we've got no idea really what Mr Miles said.

TIPPING J:

Well that's what you're trying to show?

MR NEUTZE:

Yes that is the point, yes, well that is a point. And then we'd deal with the email exchanges, I don't need to take you through those because I've got that there.

ELIAS CJ:

Yes thank you.

MR NEUTZE:

No further questions?

ELIAS CJ:

No thank you Mr Neutze.

MR CHISHOLM:

If it pleases the court, the task that I've been appointed to undertake is effectively the tainting which is the final ground and also issues of agency. The issues of agency affect primarily – come in, in respect of tainting but there's also a reference or a relevant reference to tainting in the context of the appellants' section 37 argument that I'll address and that will effectively start with a consideration of *Dollars & Sense*

and I suspect that Justice Tipping, you hit the matter on the head in really examining the scope of the task.

Before I cover those points, which in the scheme of things are relatively narrow, I should say that the procedural point that you're discussing with my friend Mr Neutze, there is no challenge to the pleadings or taken any sort of pleadings point as such. The issue, in my submission, simply reinforces the fact that there is different relief sought in the statement of claim that – to the leave application and once again, which is quite different to what is actually allowed pursuant to section 37AL, so there is no pleading point being taken as such, no pleading point, but there is a substantive point there and the submission, the decision that the respondents have taken is that this Court, or indeed any court, can't go beyond the relief in section 37AL.

TIPPING J:

But we're not into relief are we?

MR CHISHOLM:

Well there is – section 37AL restricts you from finding that the SPA, the agreement for sale and purchase is unenforceable or void, you're restricted if you find that that's part of the allotment to the relief that's listed in section 37AL

TIPPING J:

But you say, well I hadn't appreciated that until you'd just said it – it's probably my fault but you say 37AL prevents, prevents relief in the form of, effectively, cancellation?

MR CHISHOLM:

That's correct your Honour. Essentially, as Justice Elias said, effectively a code's been created now and the relief that can be provided – this is essentially the last two or three pages of Mr Neutze's submission, but the relief that can be provided, section 37AL(2), "the court must not, in respect of an allotment of a security made in contravention of section 37," so the starting point is that there is a breach, "make any order or declaration, including an order or declaration in respect of moneys payable, relief, validation, restitution, compensation, variation of a contract, or relief of a

contract in whole or part or for any particular purpose other than any of the following orders."

ELIAS CJ:

I wonder really though looking at that provision whether it's quite as wide as you seem to be suggesting because on one view it's simply means that, I'm just looking at it rather quickly, that it means that the invalidity remains which would have the consequence of unenforceability wouldn't it?

MR CHISHOLM:

Your –

ELIAS CJ:

So it's the relief you're precluded from granting?

MR CHISHOLM:

Well you would be making a declaration of invalidity, effectively that's what –

ELIAS CJ:

I wonder whether it's needed, a declaration of invalidity of the effect is that it's void.

MR CHISHOLM:

In my submission that's precisely what would be required and, indeed, what would need to be sought.

ELIAS CJ:

Can you just explain that to us – you may well be entirely correct, I just haven't focused on – because we've really not spent a great deal of attention on the Act in this argument to date.

MR CHISHOLM:

Well your Honour the – a plaintiff would come to court seeking relief, seeking a declaration or an order that an agreement or an allotment is unenforceable, that's precisely what has occurred here and a declaration is sought. In my submission the words "Make any order or declaration" is all encompassing.

TIPPING J:

But wouldn't, that would in effect completely emasculate section 37(4) because it means you couldn't say, "Hey this is a case to which section 37(4) applies"?

MR CHISHOLM:

Well with respect your Honour, isn't it really looking at the appropriate targets for relief?

ELIAS CJ:

But isn't it – if there is, if these securities, if these are securities, if they're void, isn't it really the respondents who would be seeking relief under this statutory scheme? I suppose that's what I'm putting to you and isn't section 37AL dealing with that situation?

MR CHISHOLM:

In my submission, no your Honour because we're really coming – effectively what the relief that would be sort, if we were dealing with the classic security position where we had an undisputed debt security, we had directors of an issuer, take a finance company, a plaintiff would be coming to court under 37AL(2)(d) and seeking relief either against the issuer or the company – the issuer or the company's directors, pursuant to sections 37(5) or (6).

ELIAS CJ:

Sorry, you just mentioned (2)(d). Did you mean to do that?

MR CHISHOLM:

Sorry your Honour, 37AL(2)(d).

ELIAS CJ:

An order for repayment?

MR CHISHOLM:

Any order to require repayment of any subscriptions or interest under section 37(5) or (6), so that would again –

ELIAS CJ:

But that would deal with their seeking repayment of what they've parted with but I had rather thought that the real argument is about whether they can be compelled to complete the purchase?

MR CHISHOLM:

Well it's, it's the plaintiffs that are coming to court seeking declarations.

ELIAS CJ:

Well they might be but I'm just trying to work out what –

TIPPING J:

But they're not seeking relief from the fact that the securities are void. They're saying hurrah, we're very pleased they're void.

ELIAS CJ:

Yes, yes.

ANDERSON J:

The relief is the relief against the consequences of invalidity by someone who doesn't want it to be wholly or partially invalid which might well be a subscriber who doesn't want a loan to fall apart.

ELIAS CJ:

And the declaration isn't relief in that sense. The declaration is simply the sort of declaration you could obtain so that you know where you stand under the Declaratory Judgements Act perhaps.

MR CHISHOLM:

Well your Honour, certainly 37AL isn't limited in that fashion. It's not stated to be limited to those people who – would be unhappy with the finding of invalidity.

ELIAS CJ:

Do we have to go back to section 37 – sorry, we've rushed you, we're starting at the end rather than the beginning but –

MR CHISHOLM:

The point I was only making your Honour, is simply that I wasn't taking the procedural point. I was just –

ELIAS CJ:

Yes, no, no, I understand that.

TIPPING J:

But you're really saying much more than that.

ELIAS CJ:

Yes.

TIPPING J:

You're really saying, as I understanding you Mr Chisholm –

ELIAS CJ:

There's a bar –

TIPPING J:

– maybe rightly, that we're all on fool's errand here.

MR CHISHOLM:

Well, there is an issue here your Honour and it's the point that Justice Elias made, as to whether or not a scheme, or a code, has effectively been put in place for the purposes of breaches of section 37.

TIPPING J:

You see, 37AL is headed "Other proceedings or relief" in respect of section 37. Now, the appellants aren't seeking relief in respect of section 37, they're relying on the consequences of section 37.

WILLIAM YOUNG J:

And section 37AB, as it were, provides that if a relief order is made then section 37(4) to (6) don't apply.

ELIAS CJ:

Ah, yes.

TIPPING J:

And the draughtsman is obviously very fond of "in respect of" because it appears in that heading too.

MR CHISHOLM:

That's the, that's the issue.

TIPPING J:

Sorry, what was your point? Justice Young's point I missed.

WILLIAM YOUNG J:

Sorry, the sections 37(4) to (6) don't apply to an allotment of a security if a relief order has been made.

ELIAS CJ:

And falls the invalidity.

TIPPING J:

Right.

ELIAS CJ:

And of no effect.

MR CHISHOLM:

In my submission, it would be strange if the legislature had resolved to deal with section 37(5) and (6) within this context because that's effectively the attack on the issuer or its directors for the repayment.

WILLIAM YOUNG J:

Is there a definition of "relief order"?

WILLIAM YOUNG J:

And section 18?

UNKNOWN SPEAKER:
(inaudible)

WILLIAM YOUNG J:
Section 7 but it doesn't define –

ELIAS CJ:
Well, that does really seem – if that's all that there is, it does seem –

WILLIAM YOUNG J:
So it's AC or AH –

ELIAS CJ:
– that it's to provide relief against the consequences otherwise provided for in section 37. I mean, the appellants may be in difficulties if it gets to this point, in terms of any order for –

WILLIAM YOUNG J:
Refund of the deposit.

ELIAS CJ:
– refund of the deposit. Although, is that covered? One would think it is.

MR CHISHOLM:
Well that's another issue that's certainly beyond the scope of my task –

ELIAS CJ:
No but what we're doing is really responding to your exocet missile that we are, as Justice Tipping said, on a fool's errand here. It doesn't seem, on a quick look at these statutory provisions, as if that is so.

MR CHISHOLM:
Well, that may be so your Honour. I'll think about that overnight. I must say, I wasn't assigned the task –

ELIAS CJ:
No, it was –

MR CHISHOLM:

– and I just really wanted to –

ELIAS CJ:

– it seemed irresistible.

MR CHISHOLM:

– I tried to deal with the point. It was nice to mention but it was simply to make the point your Honour, that we were relying on that but I'm not taking any sort of pleading point.

ELIAS CJ:

No, no, I understand that but you were raising a more formidable point –

MR CHISHOLM:

Correct.

ELIAS CJ:

– which is that the Court can't do anything.

MR CHISHOLM:

That's correct.

ELIAS CJ:

Yes and you better ponder that overnight, if you want to maintain it.

MR CHISHOLM:

I will your Honour. My point though really would – and my argument would be a fallback argument in any event and that's what I'm dealing with –

ELIAS CJ:

Yes, I understand that.

MR CHISHOLM:

– and it's primarily the tainting argument which is the issue.

ELIAS CJ:

Yes, yes.

TIPPING J:

But if your argument is right, it means they can't avoid performing the contract.

MR CHISHOLM:

Well –

TIPPING J:

That no Court can excuse them, if you like, from performing the contract, even though it's statutorily void.

MR CHISHOLM:

Well when one looks at what the contract is though –

TIPPING J:

If that is the conclusion because you only need this if that's the conclusion.

MR CHISHOLM:

In my submission, that's the pointer to the type of – what the legislature thinks an allotment is because it certainly – it wouldn't be unusual in the case of a finance company without –

TIPPING J:

But the consequence, don't you agree Mr Chisholm, of this and I'm sorry, the Chief Justice is probably right, let you think about it overnight but here's something more to think about, that they then be required to perform a contract that by statute was avoided and no affect.

MR CHISHOLM:

That's assuming your Honour, a contract such as sale and purchase agreements –

TIPPING J:

Oh yes, assume –

MR CHISHOLM:

– such as here –

TIPPING J:

– all that. We don't get –

MR CHISHOLM:

– no, that's a fair point –

TIPPING J:

– to this point unless we assume that –

MR CHISHOLM:

– mmm, no, I accept that –

TIPPING J:

– and that seems pretty odd.

MR CHISHOLM:

– I accept that your Honour. Before I go to the legal issues, if I could cover a couple of factual issues. The first issue is the knowledge issue. It's not disputed, first of all, that certainly for Turn and Wave's sake, that we knew that there was a dealing with an investment product. We knew that Blue Chip marketed an investment product that effectively comprised agreements for sale and purchase, leases, property management agreements and related services –

WILLIAM YOUNG J:

Well you knew that they were going to get a 16% return on their deposit with the investors.

MR CHISHOLM:

Well no, we didn't know that until – I'm talking at the point in time your Honour –

WILLIAM YOUNG J:

When it started.

MR CHISHOLM:

– that when we entered into an underwrite agreement in August 2007.

WILLIAM YOUNG J:

Where did the file note, the January file note, come in terms of the marketing?

MR CHISHOLM:

Well your Honour, that's about four or five months later. The marketing started – the earliest agreement that I'm aware of in this proceeding is November 2006 and went through to about April 2007 but your Honour, I'll address that. To put this in context, Blue Chip in marketing these type of products, there was one in the evidence, there was probably 10 to 12 companies that market these sorts of products effectively off the plan. It's a property investment. It was described yesterday as a vanilla investment. This was essentially what the mainstream Blue Chip investment was and essentially the documents comprising the agreement for sale and purchase, lease and addendum, these documents that were standard agreements pursuant to the underwrite agreements, effectively comprised that investment product. The difference –

WILLIAM YOUNG J:

And the underlying businesses intend to be short stay apartments, is that right?

MR CHISHOLM:

Short stay and long stay. There was a – more short stay but there were a few long stay. In Bianco there was a mixture of both. So the evidence was that we were certainly aware that these sorts of transactions, these sorts of property investment transactions were being undertaken and that was the extent where Blue Chip was different to the other 10 or 12 property companies in the market. They introduced these new products, being the PIPs, the PACs and the joint ventures.

Now, from Turn and Wave's perspective, the issue of knowledge and the issue of findings in the judgment, were that we had knowledge of some investment products. The way Turn and Wave – I'm sorry, the way that Mr Manning at Turn and Wave effectively had an introduction to Blue Chip, was through the sale of his company NZFI which was effectively one of these direct marketing companies and his evidence is included in volume 3 of the Turn and Wave bundle. I should say that there are three blue Turn and Wave bundles and one general bundle for Turn and Wave.

ELIAS CJ:

So what are we going to, the miscellaneous one, or the –

MR CHISHOLM:

Sorry your Honour, this is the blue volume 3, Turn and Wave volume 3.

TIPPING J:

Why are we reading evidence rather than looking at Judges' findings Mr Chisholm, is something –

MR CHISHOLM:

Only to put the Judges' findings into context. I think a lot has been read into paragraph 106 of Justice Venning's finding and perhaps it may be useful if I took your Honours to that.

TIPPING J:

Paragraph 206?

MR CHISHOLM:

Ah sorry, 106 your Honour.

TIPPING J:

Paragraph 106, I'm sorry.

MR CHISHOLM:

Now the appellants put emphasis on the finding that Mr Manning, at the top of page 236 of the volume, "That Mr Manning and TWL were aware that the apartments in the Bianco were to be sold by sales agents in conjunction with the sale of the Blue Chip product." Then he carries on, talks about, "While he may not have been aware of the details of the Blue Chip product, Mr Manning was, I find, aware at a general level that Blue Chip employed sales agents/licensees to market its product and was accordingly aware that these sales agents/licensees would be the people marketing the apartments on TWLs behalf –

ELIAS CJ:

Sorry, what page?

MR CHISHOLM:

I'm sorry your Honour, the top of page 236.

ELIAS CJ:

My fault, top of page 236.

MR CHISHOLM:

And the basis of that is reinforced by Mr Manning's own involvement, "Mr Manning was very aware of the process used in selling units of this nature through the business of New Zealand Finance and Investment Limited which operated in a similar way," and it's really to put that finding into context, that it's clear that the finding related solely to the standard – what I've previously described as a vanilla property investment, an agreement for sale and purchase, an apartment, whether it be short stay or long stay and a property management agreement and it –

TIPPING J:

And what page are you at in volume 3 of Turn and Wave?

MR CHISHOLM:

I'm sorry your Honour –

ELIAS CJ:

One.

MR CHISHOLM:

– page 12.

TIPPING J:

Twelve, thank you.

MR CHISHOLM:

Now Mr Manning was cross-examined on this issue. There was no conflicting evidence about what Mr Manning's knowledge may have been but he simply described what the NZFI model which was his marketing company, marketing business, that was sold to a Blue Chip entity. At about a quarter down the page, makes the reference to the NZFI model, that he was told that the NZFI model would be utilised, or he describes it first of all, "NZFI was a company I sold him that had a

group of telemarketing people who would ring and obtain appointments. Somebody would go to their home to establish an interest and then they would have a real estate agent at the end to sign up a contract with people who had a requirement."

Then the question, "Did NZFI offer agreements like joint ventures, or PIPs, or side deals that Blue Chip was offering?" "Never." "Did Mr Bryers ever mention to you that he was using associated transactions like that as part of his selling process?" "Never." "He must have told you about property management agreements and lease agreements?" The answer, "They're quite common. The buyers that go with effectively requires a package, involves someone to register them for GST, et cetera."

This is the extent of the knowledge that Mr Manning had of any – if I could call them loosely side products, or side deals, that were other than your standard property investment. It's not disputed – it was disputed originally in the High Court that the vanilla property investment may well be caught by the Securities Act as well. That was rejected by Justice Venning and not taken any further.

MR NEUTZE:

It went to the Court of Appeal.

MR CHISHOLM:

I'm sorry, I'm told that it went to the Court of Appeal as well. So that was the extent of Turn and Wave's knowledge as at the time of execution of the underwrite agreement which was August 2006.

The knowledge of any other agreements was the references in the evidence – to Justice Venning's judgment, to the meeting on 22 January 2007 which your Honours have been referred to. I will deal with that later but essentially, your Honours will have seen the reference. It was Ms Reynolds who was a marketing co-ordinator who went to that meeting. Actually if I could just – I'll deal with the point now.

The minutes for the meeting are at page 25 of the general bundle. I'm sorry, page 27. This was the reference, I think, that Justice Young was referring to, the reference to returning professional investors 16%. We accept that we're fixed with that knowledge of the – that knowledge, or that –

ELIAS CJ:

Were these her minutes, or whose minutes were they?

MR CHISHOLM:

These were Ms Reynolds minutes of the marketing meeting but, as both Justice Venning and the Court of Appeal found, this didn't give us any knowledge of the detail of the product and indeed, as a marketing co-ordinator –

WILLIAM YOUNG J:

Although she did record that she'd received a copy of the sales pack.

MR CHISHOLM:

Correct but she deals with that Sir and she also recalls that she received a whole lot of documents, I think, on the 17th of January which she returned as well but when one looks at this document and again, one can't assume that Ms Reynolds as a marketing person had any expertise at all, or could have been put on any sort of inquiry because essentially, this seems to be the appellants case, that we should have been put on inquiry and effectively enquired as to whether or not Blue Chip was complying with its obligations at law.

TIPPING J:

I think their case is twofold. One, that there was a bit of that but I think, more substantively at least, as I understood it, it was that the knowledge of the Blue Chip people who were actually engaged to sell should be imputed to your client but you'll no doubt deal with that separately?

MR CHISHOLM:

That's correct, I'm dealing with that separately your Honour. I'm first of all dealing – because that's an issue that's central to tainting. One of the limbs of tainting is whether or not knowledge should be imputed. That's as relevant to my client as to Mr Neutze's client. It's not relevant on the findings to Icon. The issue here is your Honour, is simply actual knowledge, whether or not there was actual knowledge of the products.

TIPPING J:

Yes, I don't think we're into constructive knowledge.

MR CHISHOLM:

No, no. The issue I was simply making, for the purposes of actual knowledge, was that this document itself really doesn't give knowledge at all of the product. It's actually referring – and one is almost assuming artificially, a very sophisticated level of understanding but if one on how this product – if one considered how this product was being described, it wouldn't be caught by the Securities Act at all. So my submission is simply, very little can be taken of this file note, or minute, of meeting.

ELIAS CJ:

But she had enough nous to record that this was an "underwrite product, returning professional investors 16 per cent"?

MR CHISHOLM:

Those two points by themselves –

ELIAS CJ:

Well what could it have meant, what was this return on?

MR CHISHOLM:

Well your Honour, an underwrite product by itself is not subject to the Securities Act.

ELIAS CJ:

But what was the 16% return on, what did she – well, I suppose I'm just asking you to speculate but –

MR CHISHOLM:

Well no, she was asked that question and it didn't concern her. She was interested in the evidence, is that simply in two things, one that she got agreements for sale and purchase and two, that the purchasers were capable of and able to settle. Those were the things that she was interested in and indeed, they're covered over the page, at page 28, the difficulty with multiple purchases. So that, from her perspective, it didn't concern her, it wasn't relevant to her role.

ELIAS CJ:

Well I understand that but that may have been a very limited view of what should have concerned her.

MR CHISHOLM:

Well, I will certainly deal with that with imputation but when one comes to the scope of the agency and that's really, in my submission, where your Honour's question will be relevant, as to what was the task that was delegated to Monrad who was the underwriter in the case of Turn and Wave, who in turn sub delegated that task to sub-agents.

My point is simply for the purposes of actual knowledge. This wouldn't be anyone on knowledge, in my submission, even a sophisticated corporate lawyer, of knowledge of breach of the Securities Act, or possible breach –

TIPPING J:

It might put you on inquiry but it wouldn't give you actual knowledge.

MR CHISHOLM:

Well it may –

TIPPING J:

But you don't have to deal with put on inquiry because you are not facing constructive knowledge.

MR CHISHOLM:

That's true your Honour. My point is and again, it's somewhat hypothetical, when we're dealing with a marketing co-ordinator who wouldn't understand the issues but we know that pursuant to section 3 of the Securities Act, that underwrite, pure underwrite products are not caught. What the reference to professional investors may be, that may well be equivocal but again, pursuant to section 3, habitual investors are not caught either.

Section 3B is the particular provision relating to underwrites and indeed, the reference under new PIP product to selling the development twice is also consistent with a standard underwrite arrangement. So that's simply the point I'm making because it does seem to be the appellants case, both in respect of scope for the purposes of vicarious liability and scope for the purposes of imputing knowledge, that are actual knowledge, the respondents actual knowledge is relevant for determining that. That was the submission that was made yesterday. My point is and it's simply

a factual one, is simply that the actual knowledge – we don't have that actual knowledge.

WILLIAM YOUNG J:

Well what's the reference to underwriting, where is that in the statute?

MR CHISHOLM

Beg your pardon your Honour?

WILLIAM YOUNG J:

You said there's something in the statute about under –

ELIAS CJ:

You said 3B but I couldn't see, was it –

MR CHISHOLM:

Sorry, 3B of the Securities Act.

WILLIAM YOUNG J:

Can't see a 3B.

ELIAS CJ:

No.

MR CHISHOLM:

It goes 3(1), 3(2).

WILLIAM YOUNG J:

Oh, I see, sorry –

MR CHISHOLM:

It's under, sorry, it's under, I'm –

WILLIAM YOUNG J:

– 3(2)(b).

MR CHISHOLM:

– sorry your Honour, yes, I apologise.

WILLIAM YOUNG J:

But that's not what we're talking about here, that's – there's an issue of securities to the public and share brokers have agreed to underwrite it. That's what that's talking about, isn't it?

MR CHISHOLM:

But also your Honour, the description in 1(5) of the file note is consistent with an underwrite arrangement. That occurs where effectively a property development is underwritten, people enter into underwrite agreements and then the developer sells the development again.

My point is, simply your Honour, is that that, the reference to underwrite wouldn't put you on notice of possible breaches of the Securities Act. That's simply the point I'm making.

ELIAS CJ:

What's the difference between sale to PIP purchasers and normal sales process?

MR CHISHOLM:

Well your Honour, again I'd be speculating but Ms Reynolds' evidence was that she didn't see a difference, she didn't understand and she had difficulty because, I think, she referred to in her evidence the difficulty that there was a PIP company or a PIP something that was quite unrelated to this.

ELIAS CJ:

Well I thought really the argument for the respondents is that this was a sale and purchase agreement through normal sales processes but this seems to be an acknowledgement that first sale is not through normal sale processes?

MR CHISHOLM:

Well no, that – your Honour, this is consistent with the sort of underwrite type arrangement that I was referring to. I suspect that the Blue Chip people are referring to, first of all, selling PIP products and then to selling effectively mainstream products, subsequently, so that the product, the apartments, were effectively sold twice.

WILLIAM YOUNG J:

But I mean, all of this is sort of redolent of financing, isn't it, all of this is redolent of financing, the 16% return, the idea that this, we're just in a holding pattern to hit the threshold, to get the money out of Westpac and then we'll sell it again properly?

MR CHISHOLM:

Well in my submission, not if it's an underwrite arrangement, that – and that's exempt and that occurs. That's not uncommon for the purposes of selling developments, effectively to get – what will occur your Honour, is that underwriters will underwrite a development –

WILLIAM YOUNG J:

Well what's happened is this, it's the investors who, on this analysis, are the underwriters, although they don't really know it, they envisage it, in quite those terms, they are holding on a sort of provisional basis the risk until the properties can be resold?

MR CHISHOLM:

Well, on the face of this file note, that's precisely right your Honour but my point is simply that that's not objectionable by itself and can't be a breach of the Securities Act by itself.

ANDERSON J:

Do you know what was in this PIPs sales pack that was given to Sue, according to her own minutes?

MR CHISHOLM:

Yes, your Honour. There will be a PIP agreement, there will be a deed of nomination, effectively the documents –

ANDERSON J:

The documentation?

MR CHISHOLM:

As I understand it and there may well be, there was certainly reference from the Blue Chip witnesses that gave evidence that there were risk summary documents and the like in there as well.

ANDERSON J:

Everything the salesman needed to sign them up?

MR CHISHOLM:

Well I'm not sure about that your Honour because so much – there was a lot of material it seems, that certainly came through discovery.

ANDERSON J:

But your position is that if she can't remember it, the inference is that she never looked at it because it was not of interest to her?

MR CHISHOLM:

Not of interest to her and that was accepted by Justice Venning. For the purposes of scope, we say that the underwrite agreement is the focus and I don't think the court has been taken to an underwrite agreement. If I could ask you to look at volume 3 still, this is the Turn and Wave underwrite agreement, it's at page 43 –

WILLIAM YOUNG J:

In the volume 2, isn't it?

MR CHISHOLM:

I'm sorry, no it's not your Honour, it's the general bundle, black binding.

WILLIAM YOUNG J:

Sorry, sample contract documentation, volume 2?

MR CHISHOLM:

No your Honour, it's case on appeal, miscellaneous documentation, general bundle.

WILLIAM YOUNG J:

Oh yes, sorry, I have it, sorry.

ELIAS CJ:

Forty three?

MR CHISHOLM:

That's correct your Honour. You'll see the underwrite fees, described on page 46 in the interpretation. Clause 2.2 on the next page, on page 47, is effectively the definition of the task.

TIPPING J:

The underwrite fee, means the fee payable to the vendor?

WILLIAM YOUNG J:

Payable to Blue Chip.

TIPPING J:

Blue Chip.

WILLIAM YOUNG J:

Alias Monrad.

TIPPING J:

The vendor is Turn and Wave?

WILLIAM YOUNG J:

"The vendor agrees to pay the underwrite fee to the underwriter."

TIPPING J:

Shouldn't it be "by the vendor"?

MR CHISHOLM:

That may well be a mistake.

WILLIAM YOUNG J:

What para are you looking at?

TIPPING J:

I'm looking at the definition of underwrite fee. I'm just trying to understand what was going on here –

WILLIAM YOUNG J:

Oh sorry, sorry, yes, yes "by" –

TIPPING J:

– and it seems it should be "by", shouldn't it?

WILLIAM YOUNG J:

– I'm sure, yes.

TIPPING J:

I mean, there's nothing going to turn on that, it's just –

MR CHISHOLM:

It should be, it's Turn and Wave's obligation your Honour –

TIPPING J:

– yes –

MR CHISHOLM:

– absolutely right –

TIPPING J:

– I just want to make sure I wasn't standing on my head Mr Chisholm.

MR CHISHOLM:

No, you're not standing on your head your Honour. I'm sorry, I had to pick that up.

TIPPING J:

No, no, I'm not being critical, I just couldn't follow it.

ELIAS CJ:

What is serviced and non-serviced?

MR CHISHOLM:

Well your Honour, I think that's the difference between – there's short-term and long-term rentals, so essentially the whole scheme, assuming that Blue Chip stayed above water, was that a Blue Chip entity would become the lessee, investors would purchase these apartments, they'd rent them back to Blue Chip and Blue Chip in turn would rent them out, either to long-term or short-term tenants.

ANDERSON J:

And some on the basis that the unit is serviced.

MR CHISHOLM:

Correct, correct and one can see from this agreement, as I said the – I can say that this underwrite agreement is very similar to Greenstone's. So for all intents and purposes, I suspect you can treat this one as the same as Greenstone's. Mr O'Callahan's underwrite agreement is slightly different again.

Clause 2.2 your Honours, at the bottom of page 47, is the primary obligation that's placed on the underwriter and there is the references, as it's been pointed out, to real estate agents. Certainly it was Mr Manning's evidence and again, that was on page 12 of volume 3, that he did anticipate that there would be a real estate agent involved, that was effectively his NZFI system, or NZFI model. He said – and they would have a real estate agent at the end to sign up a contract with people who had a requirement.

In my submission however, that's neither here nor there in the scheme of things for the purposes of defining scope. One can see from clause 2.2 that this is an agency created solely, or primarily, to introduce purchasers to purchase units on prescribed terms and when one –

ELIAS CJ:

Just thinking though of the knowledge issue because my understanding was that it was known that this agreement didn't operate in its terms, in terms of using real estate agents. Isn't that an aspect of –

MR CHISHOLM:

The finding wasn't that – well, at the beginning of 106 of the judgment, "I find that under the," this is Justice Venning's judgment, "the underwrite agreement appointed

Monrad as its agent to market and sell apartments on its behalf and to the extent necessary to delegate that marketing and sales roles to real estate agents or as was the case sales agents of Blue Chip licensees instead of real estate agents."

your Honour I don't think there was, we certainly, it's accepted that we were aware that there were going to be the use of sub-agents and again –

TIPPING J:

But a sub-agency doesn't, of itself, expand the nature of the task.

MR CHISHOLM:

Precisely and one can't go beyond that but in my submission, your Honour, whether a not a real estate agent was used does not change the scope of the task.

ELIAS CJ:

No I understand that. I just meant that if the agreement wasn't being implemented according to its terms and that was known, does it have some implications for the knowledge that this was all a Blue Chip financing arrangement?

MR CHISHOLM:

Well in my submission you can't link the two your Honour. We knew that in entering into this agreement that there was an investment product by reason of the prescribed agreements in the underwrite and I don't think all the agreements are attached, the prescribed agreements, but we have copies in other parts. We knew that an investment product was being marketed.

ELIAS CJ:

Yes.

MR CHISHOLM:

Because we know that there was going to be a lease. We know in the agreements for sale and purchase there's reference to a Blue Chip subsidiary being a property – or possibly being the property manager company. It wasn't compulsory but there was a reference to a Blue Chip company. So we knew that this was an investment product. In my submission, your Honour, the fact that it was an investment product, and we know from the evidence that there were 10 or 12 other companies marketing similar sort of products, it's a standard investment product and Mr Ferguson of

Simpson Grierson can reinforce that this is quite a standard investment product. The issue, in my submission, is whether the fact that we have knowledge of what I say is a standard, using Mr Ferguson's words, "unremarkable" agreement, whether that somehow puts us on knowledge or gives us a reason to enquire into the sort of products that Blue Chip went into the PIPs, the joint ventures and so on. That's the issue. Because we certainly – we're not resiling form the fact that we knew that this was an investment product. This is an investment product by itself but it's not one that, and it's not disputed now, that it is caught by the Securities Act.

McGRATH J:

When you say that you knew it was an investment product, are you just referring to the nature of the end use of the apartment?

MR CHISHOLM:

Correct your Honour.

McGRATH J:

That's all you're acknowledging?

MR CHISHOLM:

Correct. Well people weren't buying these apartments, we knew that people weren't buying these apartments to reside in themselves.

McGRATH J:

Yes.

MR CHISHOLM:

All of these apartments were for investment purposes.

McGRATH J:

But that's all of the investment characteristic that you will acknowledge?

MR CHISHOLM:

Correct, exactly right, and that's the extent of Mr Manning's knowledge.

ELIAS CJ:

Yes.

MR CHISHOLM:

Because it's put to him and there is not other evidence to try and contradict Mr Manning's knowledge. It's their own evidence as to what they knew. It's not contradicted.

TIPPING J:

So really you're saying, no actual knowledge, no constructed knowledge, not even alleged, and no imputed knowledge.

MR CHISHOLM:

No imputed. I come to imputed later your Honour.

TIPPING J:

I know but I'm just trying to get the –

MR CHISHOLM:

Absolutely right.

TIPPING J:

– framework. Those would be the three potential sources of knowledge?

MR CHISHOLM:

That's correct.

WILLIAM YOUNG J:

What would be, I suppose, material in terms of assessing whether the developer might have been alive to a Securities Act issue would be whether the developer knew that the returns to the investor were not purely returns from the property but rather returns that turned on the performance and solvency of Blue Chip.

MR CHISHOLM:

Well your Honour there was no evidence of that or no suggestion of that.

WILLIAM YOUNG J:

So all one can say is what's implicit in the 16% return, which everyone would know couldn't come from the property itself, particularly pending settlement.

MR CHISHOLM:

Well you – I'm not sure whether your Honour can take judicial notice of that but even –

WILLIAM YOUNG J:

How could it – being rational, how can you get a 16% return on a deposit?

MR CHISHOLM:

Well your Honour all we know, I accept we're bound by what was – or bound with the knowledge of what was reported in that file note.

WILLIAM YOUNG J:

And as well for some reason Blue Chip had to sell the properties again?

MR CHISHOLM:

Your Honour –

WILLIAM YOUNG J:

I mean that's all, I'm just trying to, I mean that's all there is?

MR CHISHOLM:

That's all there is, but as I said your Honour, certainly it's not –

WILLIAM YOUNG J:

And, of course, the fact that she was given the documents, or so it seems.

MR CHISHOLM:

But she acknowledged that your Honour but they went straight back again.

WILLIAM YOUNG J:

But she didn't, wouldn't have – she didn't send the ones straight back that she's acknowledged receiving in the file note, in the minutes? Weren't they other documents that she said she sent back?

MR CHISHOLM:

I'll check with her evidence your Honour. Her evidence is in volume 3.

WILLIAM YOUNG J:

I thought her evidence was that on one occasion accompanying sale and purchase agreements, or on some occasions accompanying sale and purchase agreements were the PIP documents but she sent them back.

MR CHISHOLM:

She says at paragraph 13 of her brief, at page 82 of volume 3, "My minutes of the 22 January 2000 meeting note that I was provided with a PIP sales pack. I believed that this may have been handed to my manager, Peter Lachie, who I'd attended the meeting with. I do not specifically recall this now. I actually cannot recall ever seeing the sales pack. I reviewed TWLs files and have been unable to find the sales pack. I assume that we did not keep it because we did not think it was relevant to TWL."

WILLIAM YOUNG J:

Well para 12, this is what I was referring to, she received PIP agreements and deeds of nomination with a 17 January letter and she sent them back.

TIPPING J:

Well prima facie they weren't relevant.

MR CHISHOLM:

That's exactly the point your Honour and it's going to be relevant for the purposes of when I get to an imputation of knowledge through the agency, because that is a relevant fact. And one can see that, and there are findings in the judgments, that Ms Reynolds is very concerned about multiple purchases. She was very concerned, obviously, because they needed to get their threshold but they needed a threshold with people that could actually settle and clearly –

TIPPING J:

Before they could get their money from Westpac or just for their own comfort so to speak?

MR CHISHOLM:

Well we don't have any evidence of where they were going to get their money from. We didn't get into any of those issues.

TIPPING J:

No, no, well that they just needed that as comfort before they proceeded shall we say?

MR CHISHOLM:

That's correct, and we were asking for letters from Blue Chip to get confidence that these people could settle and I will come to the evidence but it's quite clear on all the documentation that went to the investors that they knew they had to settle and that they had separate obligations up to the vendor, whoever the vendor was, because remember while the PIPs referred to an agreement for sale and purchase it could be one of a number of vendors or potential parties. For the purposes of these PIPs it didn't have to be any particular apartment. I think Blue Chip may have been dealing with five or six developers at the time.

Going back to the underwrite agreement, the important point with the underwrite agreement, the 2.2 is the scope clause which has been put to you. Again relevant to the scope of the task delegated to Monrad in Turn and Wave's case is clause 6.1 on page 49 of general bundle 1. Again defining the nature of the representations that could be made, on the fourth line, in respect of the units and on page 52 of the bundle, again this was a –

ELIAS CJ:

Sorry, what's the submission you make in reliance on that?

MR CHISHOLM:

I'm sorry your Honour, just that the parties, to make it absolutely clear, that the only authority that was being given was to – implicitly, in my submission, given to Monrad, was to make representations in respect of the units, "Each of them represents and warrants to the other of them that any marketing material or other representations made by either of them, for and on behalf of the other of them, in respect of the units part of the sale thereof, are and will be accurate and complete."

TIPPING J:

Well that's just, in simpler language, saying we won't make any misrepresentation.

MR CHISHOLM:

Correct.

TIPPING J:

Yes.

MR CHISHOLM:

But it does limit it to – it gives a feel for what the parties were thinking of, making the reference in respect of the units. It's not suggesting one is accurate in respect of the units but inaccurate with everything else.

TIPPING J:

I think that's a bit of a long bow as to escape, I think 2.2 is far more –

MR CHISHOLM:

Oh 2.2 is central, I agree, I accept that your Honour and your Honour, what these underwrite agreements had was schedules and prescribed terms at the back and prescribed sale prices. For example, there's a schedule at page 56 –

TIPPING J:

Well they were also bound to act on the standard contract form too, weren't they?

MR CHISHOLM:

Exactly right.

TIPPING J:

Yes and there was an addendum?

MR CHISHOLM:

Correct and I'll take your Honour to –

TIPPING J:

So their scope for manoeuvre, if you like, was somewhat limited?

MR CHISHOLM:

Well it was – exactly your Honour, unlike a standard real estate agent, who is just a purchasing agent, or an introducing agent, will be able to present alternative offers, will be able to negotiate on price or terms –

TIPPING J:

Do you agree that the key point is, as I think it was put to Mr Campbell, was whether or not the agency goes beyond the pure selling and goes into areas for which knowledge of financing would be immaterial for the task? In your argument, is that in its terms, went no further than selling –

MR CHISHOLM:

Exactly right.

TIPPING J:

– and any knowledge beyond the task of selling is irrelevant to the mandate?

MR CHISHOLM:

Exactly right your Honour and remember, when you –

TIPPING J:

I mean, that's your argument, don't misunderstand me, I'm just –

MR CHISHOLM:

No, no, I accept that your Honour but selling – one has to be careful with the word selling because remember we have a spectrum of relationships. When you call someone an agent, you'll have an agent on this side that has the ability to negotiate and bind a principle, for example, an insurance agent. Here, at the other end of the spectrum, you'll have real estate agents, agents who introduce but have no power to bind.

TIPPING J:

Well this was in terms, how literal one must be is another matter, to introduce.

MR CHISHOLM:

Correct and that's the limit of, in my submission, that's the limit of the scope and less than a real estate agent, introduce on prescribed terms only.

WILLIAM YOUNG J:

But there's no, I mean, there isn't a sort of easy way through this. You say well, here are the underwrite agreements and Monrad has got a very tight and limited role and

we're not accepting responsibility for misrepresentations, et cetera and we've got entire agreement clauses. On the other hand, you know they're selling an investment product and you know the investment product and the sale are taking place simultaneously, why wouldn't you have attributed to you the knowledge that your agent has as to the total package that's being sold? I mean, there's no simple way of saying one approach is right and one approach is wrong, is there?

MR CHISHOLM:

Well two things your Honour. To start with, it's not within the scope of the authority. One has to look at – one has to define the scope first before you start looking at either vicarious responsibility, or alternatively –

WILLIAM YOUNG J:

But say I instruct a real estate agent and say –

MR CHISHOLM:

– imputation –

WILLIAM YOUNG J:

– whatever you do, don't misrepresent the property, if you do you're on your own –

MR CHISHOLM:

Don't?

WILLIAM YOUNG J:

Don't misrepresent the property please, whatever you do, don't do it. That's not going to help me much if the –

ELIAS CJ:

No, good luck.

WILLIAM YOUNG J:

– the real estate agent does misrepresent the property. So I can't control my relationships with third parties by what I tell the agent. I can effect that –

MR CHISHOLM:

But your Honour, a real estate agent by its very nature, or his or her very nature, will have ostensible authority in that case and that will be dealt with by ostensible authority. A real estate agent will be able to – has that authority by his or her very post to make representations in respect of the property. It's far different though, and the cases support this, far different if your real estate agent responds to the potential purchaser's request for finance and says, "Hold on I can get you a great rate here."

WILLIAM YOUNG J:

Yes but how – your agents here were really in the same position as real estate agents, save that they only had materially one client. I mean that real estate agent is providing agency services to the public. These people were, for the purpose of this case, providing agency services only to you, your developer.

MR CHISHOLM:

And four or five other developers.

WILLIAM YOUNG J:

Yes.

MR CHISHOLM:

But for argument's sake, yes.

TIPPING J:

Well sadly imputation of knowledge is one of the most treacherous areas in the law if not, in the law of agency certainly if not the law generally, because the cases are all over the place and you're –

MR CHISHOLM:

It's extremely difficult.

TIPPING J:

– going to have to persuade us as a matter of policy if you like or whatever it might be, that a limiting approach is appropriate here rather than a more, well if you engage an agent you are stuck with whatever they know.

MR CHISHOLM:

Well your Honour it's, with respect it's the other way round. The starting point is scope and even on –

TIPPING J:

Well –

MR CHISHOLM:

– Professor Watts' expansive view the starting point is still scope and –

TIPPING J:

Well not – yes I agree it is but the question of whether its – how far and it's limited by scope is the difficult one.

WILLIAM YOUNG J:

But it's also what we mean by scope because here your, the agents were plainly authorised to solicit offers to sell these apartments as part of an investment package.

MR CHISHOLM:

But a specific and prescribed investment package.

WILLIAM YOUNG J:

Sorry what do you mean by that, I don't follow that?

MR CHISHOLM:

Well the investment package, your Honour, as I said before, we knew about agreement sale and purchasers, associated leases –

WILLIAM YOUNG J:

But you – what, I don't really think that really matters. You chose not to make enquiry as to the detail of the investment package, what you did know is that they were selling investment packages.

MR CHISHOLM:

Well in my submission I'd depart from that. I respectfully disagree with that.

WILLIAM YOUNG J:

Well what enquiry, did they ever say, show us the investment packages you're using, or did they ever do any more than what Ms Reynolds said was, “Well whenever I got it I just biffed it back.”

MR CHISHOLM:

Well your Honour, we prescribed the investment package, effectively we –

WILLIAM YOUNG J:

But where have you prescribed it?

MR CHISHOLM:

Well the documents behind the underwrite agreement.

WILLIAM YOUNG J:

But you just said all you –

MR CHISHOLM:

That’s is an investment package that’s being sold and this was the common investment package that was in the market. This was what, there are numerous other, there still are some left, entities selling these packages and –

WILLIAM YOUNG J:

But can you go beyond by saying, can developers go further than say, well we just assumed it was another investment package.

MR CHISHOLM:

Well your Honour, in my submission and again we've got no duty to enquire there.

WILLIAM YOUNG J:

I’m not saying you have a duty to enquire but all I'm suggesting to you is that if you authorise a group of people to sell your product as part and parcel of an investment package that you don't know the details of but you know is going to be offered, then it may be that it is fair enough to have knowledge of that investment package attributed to you.

MR CHISHOLM:

Well your Honour, we didn't authorise them to sell sale and purchase agreements as part of any investment package. The point that I was making is we know that this is the investment package.

WILLIAM YOUNG J:

But you don't know.

MR CHISHOLM:

Well, with respect, this is what the market was.

ANDERSON J:

Well are you saying that you knew that the purchasers were buying these units as an investment?

MR CHISHOLM:

They had to your Honour, exactly.

ANDERSON J:

And that the nature of the investment might alter between whether they were serviced or not serviced or who managed them.

MR CHISHOLM:

Well they are the two choices, your Honour. Certainly they are the two choices in respect of the Bianco Apartments, serviced or non-serviced. No one was buying these apartments to live in.

ANDERSON J:

I think there might be a difference of understanding between you and Justice Young because, from your point of view, there's an investment package of a certain character and, from Blue Chip's point of view, there's a rather more complex investment package, of which your unit is a component.

ELIAS CJ:

And you enabled Blue Chip to include the units as part of their investment package –

MR CHISHOLM:

With respect –

ELIAS CJ:

– on that view.

MR CHISHOLM:

Well, with respect, we didn't enable it, your Honour. At the end of the day, they could use any agreement for sale and purchase they wished. We simply enabled them to introduce purchasers to us, that was the limit of the authority. It's no different, in my submission, to the cases that are referred to in Justice Venning's judgment, *McAlpine Snowline Ltd v Wethey* (1986) 2 NZCPR 388 (HC) and *Saunders v Leonardi* (1976) 1 BPR 9409, where the real estate agent also offers other services, whether it be financial services and so on. On one level you could say that we're assisting or enabling them to offer financial packages with the sale of real estate, as well. We didn't authorise that. One still has to analyse, the starting point is still scope.

TIPPING J:

It's a bit like opportunity and cause. Sorry, that's a bit elliptical, Mr Chisholm. It's a bit like the difference between providing an opportunity and bringing something about. You say it was simply, it was happenstance, if you like, that your product was associated with this shonky product, you didn't, as it were, bring it about.

MR CHISHOLM:

Your Honour, we weren't – remember, in this case, we've got – there's not just one agency here. Blue Chip was wearing at least – I'm sorry, the Blue Chip agents were wearing at least three hats. First of all, they were acting on behalf of Blue Chip, selling their products. Secondly, they were acting on behalf of the investors themselves, their clients. And remember, pursuant to the authorities that they signed, Blue Chip had to go out, the Blue Chip agents had to go out and find a property, an apartment, in the Auckland area, and then present and agreement for sale and purchase. Thirdly, they were acting for us, acting for the developers. Now, it's common ground, your Honour, that for the purposes of selling Blue Chip product, that Blue Chip agents were acting on behalf of the Blue Chip company, the relevant Blue Chip company.

That's not within the scope of authority and, in my submission, your Honour, before you can start considering either vicarious liability or imputation for the purpose of agency, one has to define the scope. And, in my submission, your Honour – and we have the finding, this was relevant in the High Court in particular for the purposes of the representation, the contractual misrepresentation in the Fair Trading Act claims, because that's a vicarious liability. And the Judge's finding in the High Court is that this, the conduct of the Blue Chip agents, purporting to make representations on behalf of the developers in respect of these products, was outside scope. And in fact, that finding itself, because those causes of action have dropped away, that finding by the Judge actually hasn't been challenged.

WILLIAM YOUNG J:

Yes, but there's a difference between vicarious liability for misrepresentations made and attributing knowledge. I mean, they're not necessarily –

MR CHISHOLM:

I accept that.

WILLIAM YOUNG J:

They're different sides of the same coin.

MR CHISHOLM:

My only point, your Honour, is that the starting point for both will be scope.

TIPPING J:

Are you tomorrow morning going to be addressing Professor Watts' thesis in various related matters, Mr Chisholm?

MR CHISHOLM:

Well, your Honour, I wouldn't have time to address it fully, we'd be here for two or three days, but I will address it –

ELIAS CJ:

Can I ask you how you think we're progressing, how long you expect to be tomorrow?

MR CHISHOLM:

Your Honour, I would certainly hope to be finished before – I'll make sure I'm finished before the morning tea adjournment.

TIPPING J:

I would like some help, if not lengthy help, in the variety of approaches that the Professor identifies in his article in 2005 New Zealand Law Review.

MR CHISHOLM:

2005, I think that one may be in the bundle.

TIPPING J:

I think it's in the documents, but I just happen to have got the book off the shelf.

MR CHISHOLM:

One of my difficulties, your Honour, is because I've tried to respond to that part of the argument. Because, remember, Professor Watts covers all sorts of situations –

TIPPING J:

Oh, yes.

MR CHISHOLM:

– including common solicitors –

TIPPING J:

I'm not wanting an across-the-board essay, I just want you to say – because there are some approaches that the courts have taken that are more favourable to you and some that are less favourable to you. Now, we haven't had anything directly on this from the appellants, so I think you should have the opportunity. If you don't want to elaborate on it, that's fine.

MR CHISHOLM:

No, no, Sir. I was going to respond to that part of Professor Watts' argument or article that my friend relied upon.

TIPPING J:

Yes, well, they certainly referred to it but – I'm not being critical here – but it wasn't really teased out, and there's Lord Halsbury's approach, Mr Justice Mahoney's

approach – not Mahoney, Handley's approach, in Australia, what you might call the wider approach, and then there's other approaches that are identified which are more narrow. Now, I think, in the end, it will be a policy choice against this factual context as to which one the court should adopt.

ELIAS CJ:

In that connection, if it's not too heretical, and maybe overnight I'll be convinced that it is heretical, I wonder how the legislation which is the backdrop to this affects the scope of the agency.

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

COURT ADJOURNS: 4.07 PM

COURT RESUMES ON WEDNESDAY 9 NOVEMBER 2011 AT 10.03 AM

ELIAS CJ:

Thank you Mr Chisholm.

MR CHISHOLM:

Good morning your Honour. Your Honour before I start, Mr Neutze requested that I point out that the reference to the investors incorporating the company was actually in paragraph 305 of the Court of Appeal judgment. That simply records at the end of that paragraph they were issued to the investor by a company incorporated by the investor himself or herself, so that's the relevant point for the JV product.

WILLIAM YOUNG J:

It may be that it's another –

ELIAS CJ:

Mmm.

WILLIAM YOUNG J:

– that led to the incorporation but who prepared the documents and who registered them?

MR CHISHOLM:

Your Honour I can't help you on that and I'm not even sure what the evidence was in that issue. I – Mr Neutze informs me that the documents were in the bundle before the Court of Appeal so perhaps they may be able to be put in a bundle and provided.

I'm conscious of the time that we have but prior to dealing with the agency issue, if I could just cover a couple of factual matters quite quickly.

ELIAS CJ:

Mhm.

MR CHISHOLM:

If I could take your Honours to the general bundle, the black-spined bundle, the factual issue which I'd like to refer to is really the knowledge or the understanding that the investors had, both in respect of the PIP product and the JV product prior to it at the time of execution. First of all your Honours if I could take you to the document at page 9 of the general bundle.

McGRATH J:

So if you just start the morning a bit slowly so we've got the –

MR CHISHOLM:

I'm sorry your Honour.

McGRATH J:

What is it actually called on the front?

ELIAS CJ:

It's the miscellaneous documentation.

MR CHISHOLM:

Miscellaneous documentation your Honour. And the point I wish to make is simply that –

McGRATH J:

Right, thank you.

MR CHISHOLM:

Thank you your Honour. Is that the investors were fully informed of the nature of the product that they were proposing to invest in and this is simply an email with a presentation that was provided to investor solicitors and one can see over the page at page 10, about half way down, "While it was not for us to determine," what, "Where you perceive the risks to be, we would suggest that the key areas for you to consider would be the developers' performance, Blue Chip's performance and the value of the underlying asset. And in particular what happens if Blue Chip fails to exercise its call in which the client will need to settle the property or sell their position pre-settlement." And again the notes seem to be some sort of overhead presentation that followed and described the premium product and one can see at page 19, even the possibility of Blue Chip defaulting is raised. A Blue Chip default client can fail pre or post-settlement and collect all capital gain including interest on funds in trust.

And your Honours moving on to a document that was placed into every sales pack, every PIP sales pack, is the document at page 25, a product summary document. The product terms that expressly state on the front page that the client enters into a sale and purchase agreement for a property, that's at point 1. It describes the product at paragraphs 1 to 5. And the summary refers to risk for the client, they have to settle if there has been a drop in the value of the underlying property, so again reinforcing the risk in the market. Over the page it sets out a number of the client risks, and the first risk, the premium income product offers an above average return because it carries a greater risk than that associated with traditional investments, such as term deposits.

Paragraph 2, second sentence, "Under the terms of the sale and purchase agreement the client is obliged to settle the sale and purchase transaction in the event that Blue Chip does not exercise its option," and paragraph 4 makes it quite clear that you're dealing with a separate vendor. Second sentence again after reference to, "If Blue Chip does not exercise the option, failure to do so will be a breach of the sale and purchase agreement and could result in the forfeiture of the deposit and the vendor pursuing other legal remedies." And then again at paragraph 5, the reference to credit-worthiness of Blue Chip, again final sentence, "Nevertheless this means the client could have an exposure to any fluctuations in the property market and the credit-worthiness of Blue Chip as lessee."

Now in the context of JV agreements, my learned friend Mr Campbell took you to the letter that's at page 118. If I could ask you to look at that. For the purposes of Turn and Wave, Turn and Wave only has one joint venture representative plaintiff Mr Hutchinson, and if I could ask you to look at Justice Venning's summary of the evidence relating to Mr Hutchinson, which is in volume 1 of the Turn and Wave volume, that's the blue-bound volume, at paragraph 426, towards the back of the volume. The summary for Mr Hutchinson actually starts on page 327 or paragraph 425.

ELIAS CJ:

Sorry, it's volume 2, is it?

MR CHISHOLM:

I'm sorry, your Honour, it's volume 1, blue –

ELIAS CJ:

Of Turn and Wave…

MR CHISHOLM:

Turn and Wave volume.

ELIAS CJ:

42…

MR CHISHOLM:

It's paragraph 425, or it's page 327, towards the back. The judgment's at the back.

ELIAS CJ:

Yes.

MR CHISHOLM:

What you will see from both the High Court judgment and the Court of Appeal judgment, is that there was a careful analysis of all the evidence in respect of each investor. In respect of Mr Hutchinson, who was the only JV investor in Turn and Wave, we see at paragraph 426 that Mr Hutchinson received a phone call from a telemarketer, he was put in touch with Mr Davis, Mr Davis is a Blue Chip agent. Mr Davis discussed a joint venture agreement with Mr Hutchinson,

Mr Hutchinson agreed to invest with Blue Chip. He completed an agreement for sale and purchase on 17 November 2006, although he did not complete the joint venture agreement itself until some months later, on 12 February 2007. But again there's approximately a three-month difference before Mr Hutchinson executing the sale and purchase agreement with Turn and Wave and then proceeding with the JV investment with Blue Chip. And there is also the reference, Mr Davis also referred Mr Hutchinson to Mr Mathias, who's a solicitor, who gave him general advice at the time Mr Hutchinson signed the agreement for sale and purchase. So, again, advice at the time of signing up to the sale and purchase agreement.

At paragraph 428, it's recorded that Mr Hutchinson accepted that he'd signed an agreement for sale and purchase but said he did not fully understand the consequences of that, but then reference was made to his work experience, he didn't finish a law degree, he was a qualified licensed real estate agent, and Justice Venning found that he would have understood the nature of the documentation. And, a couple of lines down, reinforced again that he saw Mr Mathias on or about 17 November 2006, the day he signed the sale and purchase agreement. He had the opportunity to take advice from Mr Mathias at that time. Mr Hutchinson accepted that it was likely it had been made clear to him that he had a legal obligation in respect of the purchase of the property. And, linking that in, I can't – one would assume that the letter at page 118 that Mr Campbell referred to as reasonably standard letter, that that has some consistency with what is stated in that letter. We have the heading on that letter, "Purchase of residential investment property," on the first page, Mr Campbell took you to the documents that are listed.

On the second page of the letter, at page 119, under the heading, "What next?" halfway down the page, "Our investment advisor will take you through each of the documents and answer any questions you may have," again, reference to the agreement for sale and purchase, and then below that, "You will also need to complete your solicitor's detail on the last page of the agreement for sale and purchase of real estate," and the next steps, "Once signed, our investment advisor will arrange for the legal documents to be returned to Blue Chip. We then send the documents to your solicitor, along with the agreements that form the joint venture agreement you're entering into with Blue Chip Joint Venture Limited. Your client will contact you to meet, so that he can advise you on the joint venture documents," so again, contemplating advice on the documents, the joint venture documents. So, at that point in time, there is still no commitment to the joint venture agreement.

And then over the page again there's a reference to risks, that's on page 121 of the bundle, "Every investment has its risks. You should make sure that you're fully aware of the risks and are satisfied with the investment before you sign the sale and purchase agreement of real estate." So again, reinforcing that there are separate obligations under that. And, a few lines down, "Should you have any residual concerns, we encourage you to seek independent advice before entering into the agreement for sale and purchase of real estate.

WILLIAM YOUNG J:

What's this submission addressed to, all this discussion?

MR CHISHOLM:

Well, your Honour, it's really going –

WILLIAM YOUNG J:

The investors were informed about the risks?

MR CHISHOLM:

Informed about the risks, but it goes to whether or not this was one sort of integrated product.

WILLIAM YOUNG J:

Oh, I see.

MR CHISHOLM:

One has to look at every investor to see what occurred. When one goes back to Mr Hutchinson, for example – and he's my only joint venture person in Turn and Wave – it's clear that there is at least a three-month period, it's clear that he seems to be taking, he took advice prior to entering into the amount for sale and purchase, and it appears that he may well have taken advice again on the joint venture agreement.

WILLIAM YOUNG J:

Yes, but if it's a question of relative fault, then this might well be material, but is relative fault relevant to what we're discussing now, which is the interconnection between the agreements for sale and purchase and the financial packages?

MR CHISHOLM:

This is solely – it's not relative fault, your Honour, I'm talking – it's really the context to these agreements and the submission on behalf of the appellants that effectively this was an integrated investment package.

WILLIAM YOUNG J:

But it doesn't really turn on the detail, that submission doesn't really turn on the detail of what each investor knew about the risks, does it?

MR CHISHOLM:

Well, not the risks, but also the timing, your Honour.

WILLIAM YOUNG J:

But, how?

MR CHISHOLM:

Well, the –

WILLIAM YOUNG J:

I mean, the case against you, for it being an integrated package, is that the only way the investors could get the Blue Chip package was if they bought a developer's unit, signed up for one.

MR CHISHOLM:

Well, it could be the developer's unit or any unit.

WILLIAM YOUNG J:

Yes, "a" developer's unit.

MR CHISHOLM:

"A" developer's unit.

WILLIAM YOUNG J:

So it doesn't, as I understand it, rest on the proposition that the investors didn't know what they were doing, the investors weren't motivated by a desire to get rich quick or to earn an above-market interest rate, if you want to put it that way, without risk. I

mean, in the end, the investors must have known that they were exposed to the vagaries of the property market and the solvency of Blue Chip.

MR CHISHOLM:

Your Honour, the point's not just that though. Because in the case of the joint ventures, it seems clear Mr Hutchinson, for example, was getting advice throughout. And it may have been that after he entered into the agreement for sale and purchase, after receiving advice again, he could well have said, "I will, I've been advised that I have risk in respect of entering into the agreement for sale and purchase, but I'm not happy with the joint venture agreement, I'm not proceeding with the joint venture agreement," and that's –

WILLIAM YOUNG J:

You're meaning – but did anyone buy one of the, through Blue Chip, buy one of these units without getting a financial package?

MR CHISHOLM:

Well, we've got no evidence on that, your Honour. We know from, we only know from Mr Hutchinson's evidence that they were certainly consistent with the letter that was sent – admittedly not to him, it's the standard letter that I've referred to – that one needs to go, one is advised to go to their solicitor to get further advice. One would only do that if one was deciding whether or not to proceed with that investment. And it appears in the case – and again, this is the difficulty, because there's a lack of information in respect of each investor, whether it be PIP or joint venture. But certainly, Mr Hutchinson must have been taking further advice. It seems, for example, that he may have been seeking advice as well in respect of the creditworthiness of Blue Chip.

WILLIAM YOUNG J:

Yes.

MR CHISHOLM:

So it doesn't necessarily follow that, because a sale and purchase agreement has been entered into – it's almost as if the agreements for sale and purchase in this case could somehow be retrospectively, colloquially, tainted by subsequent conduct.

WILLIAM YOUNG J:

But they're entered into at the same time.

MR CHISHOLM:

No, they're not, that's the point I'm –

WILLIAM YOUNG J:

But, sorry, well, aren't they?

MR CHISHOLM:

No –

WILLIAM YOUNG J:

What's the timing?

MR CHISHOLM:

No, no. In this case, your Honour, the PIPs were round about the same time. The point I'm making here is the joint venture agreement, there's a three-month difference, that's the point I'm trying to make.

WILLIAM YOUNG J:

So when's the sale and purchase agreement signed?

MR CHISHOLM:

17 November 2006 in this case, and the joint venture agreement wasn't executed until, I think, 12 February 2007, that's the point I'm making in respect of –

WILLIAM YOUNG J:

Right.

MR CHISHOLM:

– this. And again, subsequent –

WILLIAM YOUNG J:

Sorry, I hadn't grasped that.

MR CHISHOLM:

– advice was being sought. Mr Hutchinson had advised, both before execution of the sale and purchase agreement and, it seems, before execution three months later of the agreement for sale and purchase. Now the letter, rightly or wrongly, from Blue Chip, does advise prospective investors to go get advice, and get advice on the agreement for sale and purchase after, "Once you receive these documents," after the execution for the agreement for sale and purchase, and also says, at the end, "Independent advice before entering into the agreement for sale and purchase itself." Now, in the case of Mr Hutchinson, that's precisely what occurred.

TIPPING J:

What do you say, Mr Chisholm, to the proposition that, while you may be right in what you're saying, they were marked as a package?

MR CHISHOLM:

Well, in my – it's absolutely clear, your Honour, that, like any option to purchase, you can't have an option to purchase in the case of a PIP, without an underlying agreement for sale and purchase, so one has to have one before the other. But one could say that when you're marketing any option and, in my submission, the nature of the marketing material, for example, the risk summary document that I took your Honours to, reinforces that it's made absolutely clear that the agreement for sale and purchase is quite separate, that there are separate risks and separate obligations to the vendor, whoever the vendor might be.

And on this point, your Honour, this is not – I had, at the High Court, I had 12 representative plaintiffs. Of those – and the advice from the Blue Chip agents was that they were all advised to take legal advice – of my 12 I had six who saw a solicitor on or before executing their agreement for sale and purchase, which is normal for this type of investment, because they were treated as property investments. I had two more who – and I can provide the references if need be – I had two more who were advised to get advice but didn't get advice immediately but just after. One of those, for example, was Ms Whyte, who ended up having her solicitor within three or four days have copies of the agreements. And, just to put this in context, if I could hand up just a couple of documents from one of the Court of Appeal bundles?

ELIAS CJ:

Well, I now can't remember, because I didn't read the judgments with this particularly in mind, whether the circumstances of each of the representative plaintiffs is covered.

MR CHISHOLM:

Your Honour, at the back of each judgment both, the High Court, went through and analysed the evidence. There was a considerable amount of evidence on each one, what was –

ELIAS CJ:

Well, why are we wanting to go behind what's in the summary in the judgment?

MR CHISHOLM:

Well, your Honour, just to give really a feel for what occurred. For example –

ELIAS CJ:

Can you start then with what is said in the judgment and then expand on it by showing us…

MR CHISHOLM:

Well, I'm happy to do that.

ELIAS CJ:

Thank you.

MR CHISHOLM:

Really, the point I'm making is, your Honour, that these were treated – and it's clear from the correspondence that was in the bundles before the court – that these were simply treated as basically your standard residential sale and purchase agreement. If I could just read out a standard letter that was in the bundle in the High Court and the Court of Appeal? As soon as Turn and Wave solicitors received an agreement for sale and purchase, they would then send a standard conveyancing letter to the purchaser's solicitors saying, "We understand that you act –

ELIAS CJ:

But, I'm sorry, I'm just getting quite lost at how we're taking this, about how we're taking this material in. If you want to read from it, we'd probably better have it, but I still would prefer it if you would explain where there is an omission in the judgment that requires this sort of augmentation.

MR CHISHOLM:

Your Honour, it doesn't absolutely require it, it's simply showing – and I can explain it if need be – it's, there are references in the judgments, whether it be the Court of Appeal or the High Court judgment –

ELIAS CJ:

Yes.

MR CHISHOLM:

– in the schedules to those judgments. But it's reinforcing the point that one cannot assume that because one agreement, a PIP package may need underlying agreement for sale and purchase, that it was sold or marketed as an integrated package –

ELIAS CJ:

Yes.

MR CHISHOLM:

– and that's the point I'm making. Once an agreement, a sale and purchase agreement, was entered into, Turn and Wave's solicitors would immediately write to the purchaser's solicitor, say, "We have this, we need your GST registration because you'll need to be GST registered because this is a short-term lease, please give us those details," and from then on in Turn and Wave would be dealing, or Turn and Wave's solicitor, would be dealing with every purchaser as if it was a simple conveyancing transaction, whatever.

ELIAS CJ:

Well, that's because the two were kept quite distinct –

MR CHISHOLM:

Correct.

ELIAS CJ:

– and the point is made in the judgments, yes.

MR CHISHOLM:

That's right, and –

ELIAS CJ:

And that's not in issue, that –

MR CHISHOLM:

Well, only to the extent – because there was quite a separate division – only to the extent that general colloquial submissions are being made about being sold as a package, these sorts of statements. One has to be very careful when one looks and sees the detail, as to what actually occurred.

ELIAS CJ:

I think that submission is only being made about the substance of what was going on. I think it's accepted that the documentation is something else again, and there's an issue as to the extent to which form triumphs over substance in this.

MR CHISHOLM:

No, I accept that, your Honour, my point is almost the marketing one. I think, I can't remember whether it was Justice Tipping or Justice Young asked about how these were packaged –

ELIAS CJ:

I see.

MR CHISHOLM:

– going forward, actually, pushed to the potential purchasers.

ELIAS CJ:

Well, for my part, the impression that I have is that the agreements for sale and purchase, the property transactions were dealt with distinctly from the financing transactions.

MR CHISHOLM:

Well, I – certainly, well, that's a correct assumption, in my submission, that's appropriate, because they were. Separate solicitors, and we have –

TIPPING J:

It's the implementation. I…

ELIAS CJ:

Yes, yes.

TIPPING J:

But anyway, I think probably, time being a bit precious, we've got to get out of this…

ELIAS CJ:

Factual…

MR CHISHOLM:

Well, time is precious, yes, that's correct, your Honour. I'll move on. I'll ask – I won't take your Honours to them, but if I ask your Honours to look at, when you have time, the Turn and Wave agreement for sale and purchase, they were on slightly different terms –

ELIAS CJ:

Yes.

MR CHISHOLM:

– to some of the others, but it's just a standard sale and purchase agreement with lease and appropriate documentation. There was reference, or something was being made about the substitution clause in the agreement for sale and purchase whereby effectively Turn and Wave as vendor could substitute one apartment of equivalent value, and again evidence was led on that, simply because these were being marketed throughout the country, it was possible that Unit 3A could be sold twice, and that's all it went to. There could be no link, in my submission, to any other product, simply that there were a number of these being sold by a number of agents at one time.

ELIAS CJ:

So, you mean there might be mistakes made and the same unit sold to two people, so you could substitute?

MR CHISHOLM:

Correct.

ELIAS CJ:

I see.

MR CHISHOLM:

And again, given that these were, as I suggested, solely investment units to be leased out, whether on short term or long term, it didn't matter, and that was the reason for that, that these units weren't to live in but by the owners. Your Honours, if I – I'm sorry. If I could come to the agency issue?

The agency is raised on two bases by the appellants. They raise vicarious liability in the context of their section 37 argument in, I think, paragraph 80 of their written submissions and, as discussed yesterday, agency's relevant to the imputation of knowledge, after the purposes of Turn and Wave and Greenstone. As I said yesterday, the starting point is always scope, when considering both, and there was a finding on scope, although I still deal with scope in substance in my written submission. Justice Venning found, in paragraph 153 of his judgment, that the actions, possible actions by Blue Chip agents, making representation or dealing with these Blue Chip products, was outside the scope of the authority or outside the scope of the task that that underwriter moderator had been appointed for. And again, a number of the findings, or that finding, was relevant to a number of the plaintiffs in respect of the misrepresentation causes of action, that wasn't disputed. That was a correct finding on scope.

It's expressly acknowledged by the appellants that any action by Blue Chip agents in selling Blue Chip products, whether they be PIPs or joint venture agreements, was on behalf of Blue Chip. But, notwithstanding that, and notwithstanding that admission and the findings, the appellants still submit, in paragraph 80, that effectively there should be vicarious liability.

TIPPING J:

In the paragraph to which you've referred, the Judge was dealing with the question of representations.

MR CHISHOLM:

But scope is still relevant to that point, that's a vicarious liability.

TIPPING J:

"Such representations were outside the scope of the task," et cetera. Now, you're saying, is it, that that, it's the same scope –

MR CHISHOLM:

Exactly right.

TIPPING J:

– for the other purpose.

MR CHISHOLM:

Exactly right, your Honour.

TIPPING J:

Yes, well, one would think it might, that that was probable, but I'm not necessarily satisfied just from that assertion.

MR CHISHOLM:

Well, your Honour, when one looks, and using –

TIPPING J:

Because there can be different approaches to agency, depending on the purpose for which the issue arises, and representations in contract is a different purpose, arguably, from what we have here.

MR CHISHOLM:

Your Honour, dealing just purely with scope for the purposes of vicarious liability, that's effectively a, that's what was before your Honours in *Dollars & Sense*, effectively a vicarious liability case rather than an imputed knowledge case.

TIPPING J:

Yes.

MR CHISHOLM:

In that case, your Honour, one has to look, on whose behalf were these products being sold? Now, we have the acknowledgement, and it's clear in my submission, that – when I say "the product", the Blue Chip product –

TIPPING J:

Isn't the key point what the Blue Chip agents were appointed by your client to do?

MR CHISHOLM:

Correct, that's exactly right, introduce purchasers.

TIPPING J:

Well, the Judge found a bit wider than that, didn't he? He said that it was to market and sell, I seem to remember from somewhere in his judgment.

MR CHISHOLM:

Well, market and sell, I think, your Honour, he was – whether that's colloquial. He went back to – both the Judge, and the Court of Appeal went back to clause 2.1 of the underwrite agreement.

TIPPING J:

But you're making at the moment, as I understand it, a very astute – and I'm not being critical – reference to the concept of introduction.

MR CHISHOLM:

Well, that's precisely what the words say.

TIPPING J:

Yes, I know that's precisely what the words say, but I'm saying that my recollection is the Judge, maybe he was speaking colloquially, but somewhere he said, "Market and sell."

MR CHISHOLM:

Well, in my submission, he must be, on his findings. Because the very nature of the agreements, there was no power to bind, and there was no suggestion that the

Blue Chip agents purported to bind Turn and Wave. There was no power to negotiate.

ANDERSON J:

Who typically would sign on behalf of Turn and Wave?

MR CHISHOLM:

Turn and Wave would sign on its own behalf.

ANDERSON J:

Yes, but was there some designated person or…

MR CHISHOLM:

I'll check one of the agreements, your Honour. I suspect it would have been Mr Manning who'd be – because it was Blue Chip acting as the investor's agent who would arrange the…

ANDERSON J:

I understand. No power to execute or bind on behalf of Turn and Wave, but technically to introduce it, and Turn and Wave would then say, "No, we don't approve of this person."

MR CHISHOLM:

Well, that is an issue, your Honour, because one of the issues here is it's not just getting a purchaser, you want to be satisfied with a purchaser who can actually complete. And we know that it was Blue Chip wearing its investor's agent's hat – remember, the investor authorities appointed Blue Chip to be their agent in locating properties and arranging for them to be, arranging for agreements for sale and purchase to be placed before them – copies of the authorities are in the bundle – they would then be forwarded to Turn and Wave and Turn and Wave had to sign, on its own behalf, it had to make the decision and ultimately it was prescribed terms only.

TIPPING J:

The passage I was referring – just so that we know what it was – is at 143. You may well be right, Mr Chisholm, that there is an element of hyperbole in that formulation.

It's the – its page 246 of your volume 1, paragraph 143. That's what I'd be going on, prior to your drawing attention to the precise point about introduction, which may well be a very good point.

MR CHISHOLM:

Well, that's my submission, your Honour, and I do submit – I'm sorry, I'm getting too close to the microphone – I do submit that it's limited, because the very reasoning of both the Judge in the High Court and the Court of Appeal was definition by clause 2.1, being a introducing agent, being very analogous to a real estate agent.

TIPPING J:

Well, the real estate agent says, "No ostensible or other authorities bind, requires express authority."

MR CHISHOLM:

And that's exactly right. Here, both courts below found that the authority was less than a real estate agent. Because a real estate agent could present on alternative terms, could come back with an alternative price, and here everything is prescribed, nothing – one cannot go outside these documents. And evidence was given on the reason for that, in that you had approval for the bank to go in on these times, you needed, in this case, 75%, a 75% threshold to be met.

WILLIAM YOUNG J:

But, in the end, there's not a simple way through it. You say, well, they're only there to introduce people at a particular price, and I tend to agree with this, that they're not in a position to make representations which are binding on the developers that relate to the product, which isn't the developer's product. On the other hand, they are authorised to market these units in conjunction with financial packages that are put together by Blue Chip. And why shouldn't the knowledge of what they do in the legitimate fulfilment of that that authority be attributed to the developer? Because it's knowledge they have in the very – which is associated with the performance of their agency.

MR CHISHOLM:

Well, your Honour, they weren't ever authorised to sell –

WILLIAM YOUNG J:

Yes, I know, but we're talking sort of at cross purposes in a way. You say they're not authorised to sell because Blue Chip, because the developer never says, "You're authorised to sell in conjunction with a Blue Chip product," is that right?

MR CHISHOLM:

Well, but that's right. your Honour, the evidence, the surrounding evidence to these agreements was that these agreements, the background, the market, only sold apartments in the context of a lease and property management agreement.

WILLIAM YOUNG J:

All right. Well, that may be – let us say, because there is evidence that the developers in varying degrees and different ways were on notice, had been told, even if they didn't listen, or were shown documents, even if they didn't read them, that indicated the nature of the financial packages that were being offered, at least in general terms.

MR CHISHOLM:

Well, your Honour, five months after the agency was –

WILLIAM YOUNG J:

Yes, I know – yes, well, it may be that this only applies from the point where this happens, but they are aware that packages are part of the marketing exercise. If they don't choose to enquire into the nature of the packages, that may be their lookout. Why can't it be said that, knowing that the Blue Chip people are going to be selling packages associated with the units, they are therefore on notice of what their agents, the Blue Chip agents, know about the packages?

MR CHISHOLM:

Well, your Honour, in my submission, one will define "scope" first of all from – if the agency has come from an agreement –

WILLIAM YOUNG J:

It just depends on how general. You say they're only, the scope is defined essentially by the formal documents. Another way of looking at it is to say, well, what in substance did they authorise them to do? They knew that they were selling financial packages of – you may say they didn't know the detail of it, but they knew there were financial packages, they were authorising the agents to sell the units, the

units, in conjunction with financial packages, the details of which they never bothered to get into.

MR CHISHOLM:

Sir, with respect I, the question of scope and this is what I've said in *Dollars & Sense*. One has to judge scope in some commercially realistic way. An underwrite agreement defining and strictly prescribed terms was entered into in August in the case of Turn and Wave. In January, four or five months later, a marketing co-ordinator went to a marketing meeting and found out or there was incidental reference to some product that she had no interest in. In my submission, something that happens five months after the event –

WILLIAM YOUNG J:

But it's not necessarily five months after all the events?

MR CHISHOLM:

Well, it's not all the events but it's an agreement. Is it – there is no question of ostensible authority or holding out here.

WILLIAM YOUNG J:

No, but there's no, it's not – the investors are not attributing to you representations made by the Blue Chip agents. They're not, they tried to and that failed, correct, so there's no question of ostensible authority or holding out, that's not material, right.

MR CHISHOLM:

It never has, yes, true.

WILLIAM YOUNG J:

And I mean if you take – you can look at it at varying levels of generality. In *Dollars & Sense*, in one sense it was perfectly plain that Rodney Hansen was not authorised, Rodney Nathan was not – sorry to that most distinguished Judge – that Rodney Nathan was not authorised to forge a document. In substance, he was asked to get a good document that was registerable.

MR CHISHOLM:

But that was still within scope.

WILLIAM YOUNG J:

But it wasn't within scope to get a forged document, except if you have a, and this is really the proposition I'm putting to you, a rather purpose orientated and flexible concept of scope.

MR CHISHOLM:

Well, the task –

TIPPING J:

This is why we didn't formulate it in *Dollars & Sense* in terms of authority. We formulated it in terms of task because if you concentrate on authority then ex hypothesi no one gives authority to the agent to forge, but it may well be within the scope of the task. Sorry, that's a bit gratuitous but I think it's very important not to get hung up on questions of authority here.

ELIAS CJ:

But your point really is task based?

MR CHISHOLM:

Mine is totally task based because in –

TIPPING J:

You're wanting a very restricted view of the task. Now, I'm not blaming you for that. Obviously, that's the best view from your client's point of view, but the sole question really is how widely one views the task?

MR CHISHOLM:

I always have said that and that exactly is the starting point but –

WILLIAM YOUNG J:

But can I just put this to you when you, because in a sense what the Blue Chip agents were doing here was far more closely and legitimately associated with the task than what Rodney Nathan did in *Dollars & Sense*, because here the whole purpose of the exercise was that the Blue Chip agents would sell these units in

conjunction with packages produced by Blue Chip whereas, in one sense, what Rodney Nathan did in *Dollars & Sense* was entirely antithetical to the task.

MR CHISHOLM:

It's one thing if you effectively commit a fraud on your principle, your Honour, but I don't accept your Honour's proposition with respect. The task in *Dollars & Sense* was to obtain the signatures of the guarantors and, effectively, one would assume to make a credit contract that disclosure to the guarantors. That was given to Rodney to undertake. He did it fraudulently but it was still within scope. Here, this is no different, your Honour, to the situation, those situations, such as in *Saunders v Leonardi* or the decision of *McAlpine Snowline v Wethey*, the fact that the agent may also be doing other things, for example, in *Saunders v Leonardi* having a financial business offering financial advances and loans and things to assist, that doesn't mean it's within scope in respect of Turn and Wave, the vendors, in my submission. It's clear, I would submit, but I'm not holding my hat on it. Scope, for the purposes of making misrepresentations and scope for the purposes of vicarious liability, in my submission must be one in the same. Effectively, one is saying that the statement is made –

WILLIAM YOUNG J:

But it's not vicarious liability. The, it's imputation of knowledge.

MR CHISHOLM:

Well, I haven't led, gone on to imputation of knowledge because the point I was making, your Honour, agency is relevant here. There's a vicarious liability submission made in the appellant submission here as well. Imputation of knowledge is different and I, as, I accept, your Honour, that scope is not the end of the story for imputation of knowledge.

TIPPING J:

All right, so I don't think I fully appreciated that. You're strictly focussing yourself on vicarious liability at the moment?

MR CHISHOLM:

I was simply starting, well I hadn't started that fully, but I, the starting point for both –

ELIAS CJ:

Well, you did, you did introduce your submissions by saying that because I recorded them.

MR CHISHOLM:

I'm sorry, your Honour, yes, yes.

TIPPING J:

You said they were –

ELIAS CJ:

No, you did – no, I'm agreeing with you. I'm trying to stick up for you actually because you did make it clear.

MR CHISHOLM:

Thank you, any help is appreciated.

TIPPING J:

I think I let my mind slip into what I see as a far more significant issue.

MR CHISHOLM:

Well, it is, your Honour, and I agree and I'm surprised because imputation of knowledge is far wider in the context of this case, but I was simply using it as a starting point because I still have to address the vicarious liability submission.

TIPPING J:

So that's really 4.1 of your submissions and then you've moved right into 4.6 in following your submissions?

MR CHISHOLM:

That's correct, your Honour, thank you. If I could take your Honours back to paragraph 80 of the appellant's written submission, Mr Campbell's submission, this is where he makes, it's in the context of section 37(4), so essentially part of his submission is vicarious liability submission and I'm just simply dealing with that.

WILLIAM YOUNG J:

Does he actually say, "vicarious liability"?

MR CHISHOLM:

Beg your pardon, your Honour?

WILLIAM YOUNG J:

Does he actually say, "vicarious liability"?

MR CHISHOLM:

Well, he says in light of those circumstances it's reasonable that the respondents bear the consequences of their agent's breaches of the Act that –

WILLIAM YOUNG J:

Yes, I'm not – because at 80, when he gets to – this is part of his section 37(4) argument?

MR CHISHOLM:

Correct, your Honour. This is before the tainting or the imputed knowledge issue and it's on that basis only, your Honour, that I'm saying that the scope, one, the scope finding made by Justice Venning and not disputed is right and is binding. Essentially the scope conduct, if it's outside scope –

WILLIAM YOUNG J:

Right, okay, I understand the point. Sorry, I had misunderstood it, I'm sorry.

TIPPING J:

I had to. I – probably because I was putting vicarious liability largely aside in my mind –

MR CHISHOLM:

Sorry, your Honour, I should have perhaps been clearer.

TIPPING J:

– because I can't see how against the finding of scope –

MR CHISHOLM:

Correct and that's the very point I'm making.

TIPPING J:

– you could have vicarious liability –

MR CHISHOLM:

That's right, we can't be vicariously liable.

TIPPING J:

– but imputed knowledge is quite another matter –

MR CHISHOLM:

Correct and the difficulty with respect to the appellant's argument they acknowledge that the conduct is on behalf of the Blue Chip agents, the relevant conduct. In my submission, that's an end to it together with Justice Venning's findings, but moving on to imputed knowledge, I accept that scope is not the be-all and end-all of imputed knowledge and that's my submission and, indeed, what the Court of Appeal said as well is that that's certainly the starting point though. That will be the first test. Effectively, you only have imputed that knowledge you obtain while acting within scope, but we submit that, prima facie, on that starting point, what these agents did on behalf of Blue Chip or, indeed, what they may have done on behalf of the investors themselves, can't be imputed back to us and the issue is whether imputation of knowledge should be extended, and we accept that there are various situations where knowledge will be imputed outside of scope.

So we're not saying it's a blanket rule scope fits and we have the example, for example, in *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138 (CA) an agent knowing. We have the reference in Lord Hoffmann's judgment in *El Ajou v Dollar Land Holdings Plc (No 1)* [1994] 2 All ER 685 (CA) to where an agent has obligation to investigate and that would fit, in my submission, to the situation that the – I think, your Honour Justice Young was possibly dealing with in *Bartle* where you had the outsourcing of credit facilities, credit checks and the like. There you'd have a situation where an agent has a duty to investigate. Effectively, find out information on behalf of its principal, a bank or a financier. It's clear, in my submission, that in that sort of situation it's not unreasonable to impute that knowledge back to the principal, whether it was obtained during the scope, before or after.

You will also have the situation, and this is what Professor Watts was dealing with in his article that your Honour, Justice Tipping referred to last night, the situation of common solicitors and they, even Professor Watt acknowledges that one has to look at them and consider their scope and he says that, and I could perhaps get the reference at page 331 of the article, "The general principles of imputation have been forged in cases involving solicitors. The role of solicitor is usually one to advise, negotiate and draft documents, but not to make contracts for the client. Perhaps the difference with the director," and again this was, he was comparing it to director agents, "lies within the fact that the solicitor's role is designed to facilitate communication of information," so again, possibly extending imputation where the agent has a duty to communicate, a solicitor a duty to advise.

TIPPING J:

May I say, Mr Chisholm, that I felt of all the material that's referred to by Professor Watts in the article, Lord Halsbury's statement at the top of 314, which you're probably familiar with because you've read the article which, in effect, suggested a sliding scale that if an agency is a general one, then you will usually impute. If an agency is a narrow one, you won't and, although his Lordship doesn't say so, there's no doubt potential for all sorts of variations in between that spectrum and the real issue, perhaps, in our case, is to determine where that, where this particular agency lies on the scale.

MR CHISHOLM:

Exactly right, your Honour, and I accept that. One has to be careful with the cases when you talk about scope and agency. Actually, Justice Handley deals with this very point and he deals with that case in his judgment.

TIPPING J:

You're quite right, yes and at Justice Handley's observation which is quoted by Professor Watts at 317 of the foot, it seems to me to mark quite nicely in parallel with what Lord Halsbury was saying.

MR CHISHOLM:

Exactly right and he analyses the cases he went through. Handley's analysis, with respect, a good one –

TIPPING J:

It's a detailed one, yes.

MR CHISHOLM:

– and one can see the context of his cases, because there's actually, we're dealing with an insurance agent there. We're dealing with an agent who can negotiate and bind his principle to start with and where you're dealing with a situation where the knowledge that is within the agent's head or mind is very important, and one can see that the conclusion that Justice Handley reaches, it's not so much an imputation situation so one imputes the knowledge back to the agent from the principal, but really it's a duty of disclosure that's placed upon the agent to the third party, because in these cases where the scope is so broad, it's essentially the agent standing in the shoes of the principal.

TIPPING J:

Well, that is the point metaphorically. To what extent does the agent stand in the shoes of the principal? The more he does, the more is imputation possible. The less he does, the less it's possible.

MR CHISHOLM:

Correct sir, but you also have to look at the particular tasks, the nature. If there is a duty to communicate, for example, a solicitor may well have a duty, a special duty, to advise or communicate relevant facts. That may be more so to another agent.

One has to be careful, and Justice Handley summarises his position, and both my friend Mr Campbell and I refer and rely on the summary at paragraphs 87 to 89 on pages 696 and 697 of the judgment. The judgment is at tab 17 of the appellant's bundle of authorities.

TIPPING J:

Now I've got tab 17 could you just give me the pages references.

MR CHISHOLM:

Certainly sir, it's paragraph 89, it's page 696 towards the back.

McGRATH J:

Thank you.

TIPPING J:

Well His Honour says in paragraph 88 quite importantly, that a difficult principle must apply where the agent is authorised to commit the principal to a transaction.

MR CHISHOLM:

Exactly right.

TIPPING J:

Yes, so you there have a much wider scope if you like.

MR CHISHOLM:

Correct. To negotiate and commit and that's why one has to be careful, and Professor Watts acknowledges that because a lot of the cases, the insurance cases, the insurance agent cases such as *Blackburn* that your Honour referred to, that's also an insurance case as well where the agent is, for all intents and purposes, the principal. There doesn't need to be imputation of knowledge back because he is acting, he will bind, he will negotiate and he will act.

TIPPING J:

Well the ability to commit I think, with great respect, Justice Handley was bang on the target, that the ability to commit has always been seen as a standing in the shoes situation, largely anyway.

MR CHISHOLM:

It is. I respectfully adopt what Justice Handley said but he also says ability to negotiate too because if you are an agent and you're negotiating on behalf of a principal you will want the material information and you're making the decision. You don't need to give that information or impute that information back to the, back to your principal because you are binding your principal. And it's a very useful summary with respect, going back about four or five pages in Justice Handley's judgment in particular on page 696 you can see His Honour distinguishing between that duty, the imputation of knowledge back to the principal and the obligation of disclosure to the third party, in these cases, obviously, the insurer.

I would respectfully submit that Professor Watts in his article has taken a slight academic licence in respect of his reliance on Justice Handley's decision at page

317. You will see that Professor Watts makes reference, and this is under his heading about when the task is delegated entirely to the agent, and again it's clear from the cases that he's referring to that it's –

TIPPING J:

But the statement that he quotes from Justice Handley isn't applicable across the board, it's only applicable in cases of authority to commit.

MR CHISHOLM:

Correct. And in fairness to Professor Watts though, he is making it clear that it has to be a broad scope. My point only your Honour is that Professor Watts refers to this as supporting imputation of knowledge.

On one level you could say that it's supporting imputation of knowledge but when one looks back at Justice Handley's reasoning, in particular on page 696 and 697, Justice Handley distinguishes those what he calls, "Mere notice cases," which is effectively an imputation back to the principal, with those, a duty of disclosure. Effectively, in substance, these are cases where the agent was the principal, he was negotiating, he was committing, therefore he has an obligation to disclose to the, for the third party, in this case third party insurer.

McGRATH J:

The academic license is taken at page 317 of the article, in that second half of the page, is that…

MR CHISHOLM:

That's correct, your Honour. I don't disagree with Professor Watts, but one could perhaps debate – because the end result is that the, in the case of permanent trustee, the principal is fixed with the agent's knowledge, so that is clear.

McGRATH J:

Yes.

MR CHISHOLM:

But it was really put on the basis, so you could say in colloquial terms, "Well, it's been imputed to him." But in real terms, the reasoning appears to be that there was a duty to disclose to the third party. And so, to that extent, I don't have a difficulty with –

TIPPING J:

Well, there was a duty to disclose because the agent was the principal.

MR CHISHOLM:

Correct.

TIPPING J:

So it's really saying the same thing, I suspect, in somewhat different analytical framework.

MR CHISHOLM:

Yes, it is, although it's analysed by the Judge, mere notice cases, it's important, for example, that the notice comes back – I'm sorry, the information comes back – and that may be the case…

TIPPING J:

Anyway, that's been helpful, I'm grateful to you for doing that.

MR CHISHOLM:

And, your Honour, included in my bundles, I apologise in the respondent's main bundle we made reference to Bowstead, article 95 of Bowstead at tab 22. If you could perhaps ignore that, simply because we got it wrong and put in an earlier or half an earlier version, that, the fuller version has been put in the supplementary bundle, the thinner supplementary bundle of cases.

The point I was going to make, your Honour, I can do it now. One can see that Bowstead, it's Bowstead we have at tab 1 of the supplementary bundle. The first passages from the first chapter in Bowstead first of all, which gives an indication of the type of authority that and introducing agent has, and you'll see in article 1 at page – article 1, paragraph 4, the agents, and Professor Watts is one of the editors or the general editor. A person may have the same fiduciary relationship with the principal, where he acts on behalf on that principal but has not authority and hence no power to affect the principal's relations with third parties, because of the fiduciary relationship such a person may also be called an agent.

And then jumping forward, your Honours, two pages I've, we've photocopied, paragraph 1.019 of article 1, headed, "Incomplete agency, internal relationship only, canvassing or introducing agents," and your Honours could perhaps, I don't need to read that out, but it reinforces that – and this, in my submission, is exactly what one has with a real estate agent or a agent such as the Turn and Wave sub-agents when they're acting on behalf on Monrad, who's acting on behalf of Blue Chip for the purposes of introducing purchasers only. No power to negotiate, total prescribed terms, no power to bind. And the authors conclude, at the end of paragraph 1.09, that this is in fact, they describe it therefore may be an example of an incomplete agency.

TIPPING J:

Well, that's a misleading expression. I mean, it's complete as far as it goes.

MR CHISHOLM:

Well, it's possibly, it's complete internally.

WILLIAM YOUNG J:

It's incomplete because Bowstead adopt a definition of "agency" which would otherwise exclude them. I mean, it's a sort of a, it's got its own internal logic, but it doesn't really correspond to common usage.

TIPPING J:

Anyway, I'm sure we've got much more difficult problems.

ELIAS CJ:

The perils of definition.

MR CHISHOLM:

And, again, similar comment, your Honours. I've included Dal Pont's *Law of Agency* (2nd ed, Butterworths, Australia, 2001) at the next tab, and again, similar comment, again, at 1.2, Justice Venning quoted, I think, from 1.2 of Dal Pont, just saying that "agency" is a relevant term, which is stating the obvious. But at paragraph 1.24, again, describing the type of agent, a real estate agent, reinforcing the limit of mandate that a real estate agent has. And, in my submission, essentially for the purposes of imputation, this is a very limited agency, scope is relevant, but one

shouldn't go beyond scope, having regard to the nature of the mandate on these facts. The agents, the sub-agents could do very little except introduce on prescribed terms. This is not a case such as the – where you could understand an agent, a principal as seeming, as attempting to isolate himself from people. It's not that sort of case, it's not a case where there was outsourcing of credit information, a duty to disclose, or so on. So, that's our primary submission.

While it's not directly relevant to the nature of the agency in this case, I conclude this part of the written submissions just making a reference to Justice Stevens' decision in *Burmeister v O'Brien* [2008] 3 NZLR 842 (HC). It deals with common solicitors, and that – the common solicitors issue is one of the concerns that Professor Watts has, because there have been a number of cases where a common solicitor has acted for both a mortgagee and a mortgagor, or situations of competing rights. And Professor Watts' thesis is certainly that knowledge should be imputed more in that case, in that type of case. But, in my submission, that's quite a different authority and a far broader authority than is present in this case. Professor Watts' thesis has certainly not been taken on board yet in those types of cases. We've had a number of cases like that, *Niak v MacDonald* [2001] 3 NZLR 334 in the Court of Appeal, *Waller V Davies* [2005] 3 NZLR 814 (HC), that Professor Watts' article was primarily aimed at, and, more recently, the decision of Justice Stevens in *Burmeister. Burmeister* may have some relevance, because it comments on Professor Watts' article, and also it's the only case that's post *Dollars & Sense* as well. So the Judge was able to have regard to the Supreme Court's decision in that case.

So, unless your Honours have any further question on imputation, I'll move on to tainting. Just to reinforce the context, the imputation of knowledge issue only has relevance to Turn and Wave and to Greenstone, it doesn't have relevance to Icon and it's simply for the second limb of tainting, to see whether or not knowledge, if the developers don't have actual knowledge of the products in issue, whether knowledge can be imputed. In respect of tainting, it's clear that the test is not dispute, that effectively there is first purpose or object of the third party contract, the separate contract needs to be established and, secondly, knowledge of illegality.

Both the High Court and the Court of Appeal both found, first of all dealing with purpose or object, that the sale and purchase agreements themselves didn't have their purpose or object, the assistance of these products. In my submission, both judgments are correct on that point. The sale and purchase agreements are stand-

alone agreements, they can stand by themselves. The purpose and object of the agreements of sale and purchase was simply to convey title, that's what they purported to do and that's their purpose and object.

One point is raised in the submissions of Mr Campbell that on the facts of *Portland Holdings Limited v Cameo Motors Limited* which is the primary judgment relied upon, the illegality was in the past. With respect, I submit that that's simply beside the point for the purpose of purpose or effect.

The biggest argument or the biggest issue for the purposes of tainting is going to be the knowledge-of-illegality issue and the issue is really whether you need to have knowledge of actual illegality or simply knowledge of the features that a court might find ultimately to be illegal. And we say we primarily rely on Justice McCarthy's judgment in *Portland Holdings Limited* which makes it clear that it's knowledge of the illegality, and in my submission that's right, as a matter of policy that one is concerned with moral culpability.

When one is dealing with tainting one is not a party to the illegal or improper contract, it's whether your third party contract should be tainted and so it's not enough, in our submission, to say that you knew of factors. That would put an impossible obligation on parties in commerce if every time we dealt with other parties we would have to enquire whether or not their actions were complying with the law.

Now the appellants –

TIPPING J:

I suppose one – as a matter of policy one should ask why is the doctrine of tainting there, for what purpose is the doctrine and your submission is that its purpose is to disentitle you to the benefit of whatever it is, the contract, if you are not party to but morally implicated in. Is that –

MR CHISHOLM:

Correct. In fact you're right your Honour.

TIPPING J:

That's the argument?

MR CHISHOLM:

That's the argument.

TIPPING J:

Ex hypothesi and not a party.

MR CHISHOLM:

Well tainting, tainting wouldn't arise if I'm a party to the contract.

TIPPING J:

No you'd be done anyway.

MR CHISHOLM:

I could be, I could be innocent in the sense that I was ignorant of the law, I didn't understand what I was doing was illegal or had an illegal – it was undertaken for an illegal purpose but I am caught, that's contract is illegal. Ignorance of the law is no excuse in that situation and that's precisely the situation in *J M Allan (Merchandising) Limited v Cloke* [1963] 2 QB 340 (CA) which is the decision that the appellant seek to rely on. That's the roulette wheel case where a roulette wheel was hired, both parties knew what the roulette wheel was going to be used for so there was a common purpose or common design to utilise it for an illegal purpose. The fact that the two parties didn't understand that that was illegal was beside the point, and I've set out the, at paragraph 5.11 of my submission, the quote from Lord Denning. Lord Denning is actually featured in a number of these relevant cases.

I don't need to read out that quote at 5.11 but you can see the distinction that his Lordship draws in towards the end of the quote, the underlined section, different with the washer woman who washes the clothes of the prostitute or the butcher who supplies her with meat, they may know of her trade but they charge her normal commercial prices, there is no common design, there is no participation in their moral purpose.

TIPPING J:

There is this difference of view in the Court of Appeal in *Portland* isn't there or said to be. Is there any other authority that you're able to point to on this significant point?

MR CHISHOLM:

Well your Honour I can. To start with we've searched hard. I should say to start with that President North supported Justice McCarthy and I refer to his quotes in paragraph 5.9. With respect Justice Turner is somewhat equivocal. I don't think, because he says, His Honour says that he doesn't need to deal with the point. I –

TIPPING J:

But leave all that aside. Is there any other useful authority on this dichotomy between knowledge of facts and knowledge of consequences of facts?

MR CHISHOLM:

Your Honour, I could take you to this – there's a couple of cases I could take you to. There's one, again the facts themselves aren't meritorious but it confirms the same thing. It's a Canadian decision, *Central Trust Co v Rafuse* (1983) 147 DLR (3d) 260 which is in the supplementary bundle. Why I say the facts aren't meritorious, it was a case where a loan was unenforceable and that was the first piece of litigation that occurred and went to the Supreme Court of Canada and the Court found that the loan in question was unenforceable. The lender turned around, justifiably, and sued his solicitors who hadn't advised him properly on whether or not the loan was unenforceable and the solicitors came up with the argument, well if the loan was unenforceable therefore our retainer is tainted with that illegality and should be unenforceable as well, which is novel but somewhat lacking in merits on the facts. But in that case, your Honour, it is unfortunate this poor lender had to go all the way up to the Supreme Court of Canada a second time.

But the relevant passages are actually in the Court of Appeal judgment if I could – that's at tab 4 of the supplementary bundle. If I could take you to page 271, the general discussion starts and again reference to *Allan* and *Allan* has been referred back to for the purposes of the previous piece of litigation, the litigation that was on the loan agreement itself and then over the page reference again on 272 to *Strongman (1945) Ltd v Sincock* [1955] 2 QB 525, which was another decision of Lord Justice Denning and at the top of 272 the court said, "There is no suggestion that the appellant or the solicitors would have proceeded with the loan had they know it was illegal. It is clear that the appellants could have withdrawn from the loan transaction at any time before the money was advanced." So it's clear that the solicitor knew all the components, all the facts that made up the fact. He was simply negligent. He didn't advise his clients.

Again the reference to *Strongman* Lord Justice Denning, as he was at that time, referring to the responsibility being on the doer of the act and then after that quote on page 273 the reasoning is applicable to this case. "In the present case the appellant was not aware that the transaction was illegal." So again it's knowledge of actual illegality and the case went to the Supreme Court of Canada and while it was – the result was reversed on a Limitation Act grant, at page 530, which is at tab 5, the Supreme Court still agreed with the Court of Appeal's reasoning in respect of illegality. That's page 530. And while – we have also – I've not been able to locate a single case where a third party agreement was tainted without knowledge of the actual illegality. We have *Spector v Ageda* [1973] 1 Ch 30 where Justice Megarry didn't need to expressly decide the point but he found, in any event, that the solicitor had knowledge of the illegality and in my submission, again we refer in the written submissions at paragraph 5.13, to the maxim, ignorance of the law and how it's been described in the Crimes Act. "The fact that an offender is ignorant of the law is not an excuse for any offence committed by him." In my submission that maxim shouldn't effectively extended to place an obligation on third parties to enquire as to how other people, or to enquire, place an obligation of enquiry on a party contracting with others to determine whether or not they're actually complying with the law.

Just putting it in the facts of this case it would put parties in an impossible position. What could the – I'm here in the shoes of the developer and we say we couldn't do anything else but there are parties behind us as well. We have a bank. They checked everything out. We have a financier, we have a number of parties that would be affected. In my submission, as a matter of policy, it would be entirely impractical and unjust to place some sort of high level of enquiry effectively to require you to go beyond and check that other people are acting legally.

ELIAS CJ:

Mr Chisholm, I'm just pondering, and it's perhaps a rather naïve question, but a lot of these cases about tainting, the so-called doctrine of tainting, are concerned with – I know some are concerned with statutory illegality but is it accepted that the doctrine applies to Securities Act breaches where after all the statute spells out the consequences. Was that accepted all the way through was it?

MR CHISHOLM:

The difficulty we have –

ELIAS CJ:

I just wonder about the overlay of a concept like that.

MR CHISHOLM:

Well we would - it's – there is an argument to say that common law tainting shouldn't apply if a statute has actually provided particular remedies. One doesn't need to go to tainting.

ELIAS CJ:

Yes.

MR CHISHOLM:

At all because the statute itself has provided a code.

ELIAS CJ:

Yes.

MR CHISHOLM:

We essentially say –

ELIAS CJ:

So it would, on that view it would either be agency or nothing?

MR CHISHOLM:

Well we submit – well it would be. You would have to either, in the case of section 37, you would effectively have to be the allotor, or make the allotment of the security to be caught, and then one looks at the code that follows. We do have the cases that Mr Neutze referred to, *Abbott* and *DFC v Abel* –

ELIAS CJ:

Yes.

MR CHISHOLM:

– they are effectively like tainting. It's tainting reasoning if you go to those cases but they're all pre the 1974 amendment. Sorry, the 2004 amendment. We say it because again it's the, it's the plaintiffs that have alleged that our contracts are tainted so we've been opposing that really and this issue is really being raised now

for the first time in the Supreme Court because these particular issues, in respect of the code and so on, weren't the feature of argument in either the High Court or really the Court of Appeal.

WILLIAM YOUNG J:

You mean the relief code?

MR CHISHOLM:

The relief code because again this is a new argument that's been put in respect of this integrated – that the agreement for sale and purchase itself is actually part of the allotment. That's the new argument. But we would – our primary submission would be that the code applies and one would have to rely on the code. Tainting has no relevance, but is a fall back position, one can see that if essentially you're dealing with a third party contract it's not covered by the allotment but issues of tainting would still arise.

WILLIAM YOUNG J:

Well if you're right about the code, then that might support a tainting, availability of tainting –

ELIAS CJ:

Yes I see that. If you're outside –

MR CHISHOLM:

For the purposes of third party, yes. One can't have their cake and eat it, essentially.

ELIAS CJ:

It's unfortunate that all these issues crop up at this stage.

MR CHISHOLM:

Well we're just the poor respondents your Honour. Unless your Honours have any further questions those are my submissions.

ELIAS CJ:

Yes, thank you Mr Chisholm.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.46 AM

MR O'CALLAHAN:

May it please your Honours, I propose to say a few things which are about the Securities Act provisions and, in particular, at a conceptual level and almost working my way back through concepts of allotment, what is a security and the land exemption just to augment what my learned friends have said, on behalf of the other respondents and then in doing so I will inevitably touch on some of the specific facts relating to Icon's case and address those more fully at the end to the extent it remains necessary.

The point I want to start with is to get it quite plain, it's certainly my understanding from the appellant's case, that there's no suggestion that the agreements for sale and purchase are a security and I think that's accepted, expressly or implicitly, in their submissions and I don't believe there to be any suggestion from the argument or the debate with the bench that that could be any different, so that leads one into what the consequence of that is because I want to take you, again, to section 37.

ELIAS CJ:

Sorry, section?

MR O'CALLAHAN:

Section 37 of the Securities Act. The prohibition, the relevant prohibition is in section 37(1), it says, "No allotment of a security offered to the public for subscription shall be made unless at the time of the subscription for the security there was a registered prospectus," so it's a prohibition on allotment of a security and then in the event that's contravened, section 37(4) says, "Any allotment made in contravention of the provisions of this section shall be invalid and of no effect," and I say it's important to recognise in interpreting this scheme that the allotment must be the allotment of a security. It can have no other meaning. So it's the allotment of the security which is invalidated by section 37(4) and then sections 37(5) and 37(6) provide for some consequences, other than the invalidity and in some respects they derive themselves from that invalidity, but the specific consequences are, "Where subscriptions for securities are received by or on behalf of an issuer, but by virtue the section securities may not be allotted, or for any other reason they're not allotted, the issuer shall ensure that the subscriptions, together with interest as has been earned thereon, are repaid to the subscribers as soon as reasonable practicable," and so it's

a repayment provision of the subscription and then in section 37(6) it provides if it's not repaid by the issuer within the relevant time periods, the directors of the issuer become responsible to make those repayments.

So I just want to slot that in for the moment to, taking for example, the PIP product, because what my learned friend for the appellant says is the security in the PIP product is the rights that are given to the investor where they receive an option fee and then if the option is exercised to receive an amount equivalent to the deposit that they paid on the agreement for sale and purchase and also some obligation to assist them with costs of settlement if they have to settle, and the option is to be left open through the covenants to negotiate with the lessee to obtain a further option in the lease.

The subscription that my learned friend alleges is the granting of the option by the investor, so putting that into the statutory scheme, if the allotment of the security, that is, and I'll come to this in a bit more detail in a moment, that is the contract under which the covenant to provide the securities in this case is invalidated, then the subscription must be repaid and if one is to allow that provision to work by analogy, mutatis mutandis in the appropriate circumstances, the obligation is therefore to undo the grant of the option, because it's the option that stands in place of the subscription.

I make these points for two reasons: one is to demonstrate, and I'll do this in other ways as well, to demonstrate the limited nature of the concept of allotment and especially as that, must be applied on the appellant's case and, secondly, it demonstrates the obscurity, to use the phrase that the Court of Appeal used, of the way in which the securities are said to arise, it is obscure to say that the grant of an option is the subscription and if it is it involves relatively benign consequences under this Act because it simply goes away. The investor is left with their rights under a sale and purchase agreement. They are left with their equitable interest as purchaser in a property.

TIPPING J:

You said earlier, "The alleged security is the granting of the option," –

MR O'CALLAHAN:

No, the alleged –

TIPPING J:

– do you mean the alleged subscription?

MR O'CALLAHAN:

The alleged subscription, sorry –

TIPPING J:

Sorry, I may have misheard you.

MR O'CALLAHAN:

– well, I might even have said it but I mean the security is the rights to receive the option fee and the other obligations are Blue Chip, and the subscription is the grant of the option. When that goes to, looking further at the statutory scheme for a moment, there are then those new provisions that have been inserted by the 2004 amendment, which weren't before the courts in *DFC Financial Services Ltd v Abel* or in *Abbott v UDC Finance Ltd*, or in *Re AIC Merchant Finance Ltd* and they provide for a series of an internal system for consequences beyond those provided specifically for in sections 37(4), (5) and (6) and they include relief from the consequences of invalidity, section 37AB tells us what a relief order is. A relief order is, it's headed, "Effect of Relief Order," in respect of section 37 and it says, "Section 37(4) to (6) does not apply to the allotment of a security if a relief order under the sections is made in respect of the application of section 37 to the allotment of the security."

Then there is a provision augmenting that that says that relief orders, if made, can be made on conditions and the conditions can include compensation, because the relief order itself is, it has that effect. It says, "Okay, undoes what otherwise would be the invalidity and it undoes the what would otherwise be the obligation to repay the subscriptions, and then it says that the conditions can provide for compensation in other necessary orders – I'll just find that section. Yes, it's a – no, first of all I shall interpolate there are two systems for relief, one is mandatory relief where certain people can apply in certain circumstances and you get relief mandatory, and then there's discretionary relief and the discretionary relief order –

ELIAS CJ:

What's the mandatory relief?

MR O'CALLAHAN:

The mandatory order is section 37AC and that enables an application to be made by the subscriber, so that would be the appellants here, the security holder, if that's different from the subscriber, could be a trustee or that sort of thing, the issuer, so that would be, if the subscriber consents, or the issuer if the security holder consents, that's where there's a trustee, or the issuer if the contravention of section 37 was caused by a failure to comply with a condition of an exemption granted and I –

ELIAS CJ:

Well, that's not an issue.

MR O'CALLAHAN:

No, it's not an issue and the issuer has given notice that the contravention of that, well, that's an issue and the subscriber has not objected to the court making a relief order by notifying them et cetera, notice provisions. So it's the subscriber or the security holder absolutely or the issuer if essentially the subscriber or the security holder consents. That's the basic provision and then there's various provisions about the mechanics of all of that and there's a provision –

ELIAS CJ:

Presumably, there's a power to, for the court to or is it the court? Yes, the court to say, yes, the issuer can bring it, bring the application?

MR O'CALLAHAN:

Well, if certain things are satisfied, they're quite prescribed.

ELIAS CJ:

Where's the power? It's probably not important.

MR O'CALLAHAN:

It just says that a court must make a relief order if, on application by the issuer, if the contravention of section 37 and there's some conditions there –

ELIAS CJ:

I see, yes, yes. Those are the mandatory ones and then you're into the discretionary?

MR O'CALLAHAN:

Yes, so in respect of mandatory orders, the mechanics are set out in the following sections through to AF and then in AG, it entitles the court to make compensation. It's on a, this is still on a mandatory order, "The court, may on the application of a subscriber, order an issuer to pay compensation to the subscriber for any loss or damage suffered by the subscriber that is caused by contravention." So just thinking how that might work, if a subscriber did make an order because they wanted the security, but for some reason they had suffered some loss arising out of the contravention section 37, they could still get their mandatory order, which gives them the security, but they may have a case for compensation and they can apply for compensation under section 37AG.

And then one gets into discretionary relief orders, 37AH and following, where this is a much more open provision. It's designed for the paradigm position where an issuer makes the application but it's not limited to that on its terms because it says, "The court may in the course of any proceedings, or on the application of the issuer under the section, make a relief order in respect of the application of section 37 to the allotment of a security if the court considers that it is just and equitable to do so."

The position of third parties there is a little unclear but that's consistent with the – because it says, the reason why it's unclear is because it says, "The court may in the course of any proceedings." Whether that's meant to mean some other proceedings such as the ones we have here where there is debate about a contravention of section 37, isn't express but it's directed primarily towards the paradigm situation where say an issuer of a debt security, say someone who canvassed the public for debt security subscriptions, didn't do it with a prospectus, the subscribers have all paid in money and there wasn't a prospectus and the issuer wants to validate the securities, the – validate the allotment, the issuer can make an application under the section and the court is given –

ELIAS CJ:

But as you say the court's power is very wide and for example in the present case if the appellants were to succeed one outcome might be that the court would refer the matter back to the High Court for consideration of relief under section 37AH.

MR O'CALLAHAN:

Yes certainly that relief orders have been applied for in the sense that they've been pleaded by each of the respondents in the relevant way in the High Court and those

matters have been, are outside of the terms of the limited issues if the Judge decided in the first instance.

And so then in section 37AJ, the court can make other orders in the context of a relief order and it says, "That it can make the relief order subject to any terms and conditions that thinks fit if the contravention has materially prejudiced the interests of the subscriber, and then in respect of a security, order the issuer to pay compensation to the subscriber or any other person who has been a security holder," et cetera. And then, "They can grant mandatory, restrictive or prohibitory injunctions and can make an order for any consequential relief the court thinks fit."

So – and then in that context section 37AL is the one that my learned friends have referred to and have observed that the powers of the court in relation to, the words are, "In respect of an allotment of a security made in contravention of section 37," are limited to the specific things that are listed there and the question – what I would like to take from that is that if it – the primary submission is that it supports what I would say is a relatively confined definition of "allotment" because it's not plain the extent to which this allows relief for third parties. It is not plain to the extent to which it provides for orders that may be made in proceedings brought by third parties for relief or for any other orders in respect of – by or against third parties. So I want to now go to what I –

ELIAS CJ:

Well if this is important to your argument I'm still left a little unclear as to why – well thinking of some practical applications in respect of third parties, where a third party wouldn't be able to seek relief. Is it just that the scheme of this doesn't contemplate third parties?

MR O'CALLAHAN:

The point is this. The scheme of it is directed at the paradigm case of securities. That's what the drafter has principally in mind when putting these provisions together. The paradigm case is a debt security or an equity security offering where the securities are offered to the public under an invitation to treat. Subscribers put up the money for those offerings and it's easily identifiable who is the issuer and who is the subscriber and this is a contravention of section 37 if there is not a prospectus then a list of consequences follow that are all easy to apply and a set of relief provisions and a kind of catch-all saying this is, this is the code, in section 37AL. It just – and the type, and I say compare that to the type of thing that's alleged in this case by the

appellants and we are a long way from the paradigm. Now I'm not saying that the paradigm is the only thing possible. It's just that the paradigm is relevant and how far away we are from it might be instructive and I'm going to come back to that on some conceptual levels.

WILLIAM YOUNG J:

Can I just approach, look at this from a slightly different viewpoint? Because of Mr Bryers' connection with Icon up to the point where the sales targets were reached, Icon is being treated as being on notice of the PIP and PAC products and how the partners could be marketed.

MR O'CALLAHAN:

Yes.

WILLIAM YOUNG J:

Right. If you look at the Securities Act, the definition of "promoter" have you got the Securities Act?

MR O'CALLAHAN:

Yes.

WILLIAM YOUNG J:

If we assume that PIP and PAC products were securities then Icon would probably be a promoter in relation to their offering to the public.

MR O'CALLAHAN:

No I wouldn't accept that.

WILLIAM YOUNG J:

Why not?

MR O'CALLAHAN:

Because having knowledge that somebody else is going to use the opportunity that arises from selling your development, doesn't make you someone who is instrumental in the formulation of a plan or programme.

WILLIAM YOUNG J:

Well isn't Icon, by dealing with the Blue Chip associated company, which it knows is going to market apartments in a particular way, and making available apartments for that marketing, isn't that, doesn't that involve the formulation of a plan or programme to which those securities, which Icon knows all about, are being marketed?

MR O'CALLAHAN:

Well, two responses. First of all, not obviously so. Secondly, that has never been suggested at any level in this case.

WILLIAM YOUNG J:

Well, you know, but I'm just coming – I want to move on a little bit.

MR O'CALLAHAN:

Sorry I haven't had a chance to think through that or think about what evidence might have been appropriate for that or any of those sorts of matters.

WILLIAM YOUNG J:

Well if you look at section 59, the offence of offering securities to the public can be committed by not only the issuer of a security but also by the promoter.

MR O'CALLAHAN:

Yes.

WILLIAM YOUNG J:

But what puzzles me a bit is there's no, nothing in section 37 that addresses the position of promoters, in the relief provisions.

MR O'CALLAHAN:

No, well, I think that makes sense because a promoter who contravenes the Act is doing so in the promotion and it just does a bad thing in a –

WILLIAM YOUNG J:

Well, say the instrumentality of the marketing of the securities involves the selling of apartments –

MR O'CALLAHAN:

But a promoter –

WILLIAM YOUNG J:

– does that leave those sales of those apartments unaffected by illegality or anything else, because the drafting of the section 37 relief provisions doesn't encompass promoters?

MR O'CALLAHAN:

Well, section 37 is a statutory, as Justice, well, as the Court of Appeal in *Abbott v UDC Finance Ltd* said, there isn't an elaborate scheme and Justice Fisher noted that as well in *Abbott v UDC Finance Ltd* and this is before even the 2004 amendments, so the scheme has provided for, expressly provided for, the consequences of a contravention in a civil case.

WILLIAM YOUNG J:

But only by issuers really?

MR O'CALLAHAN:

Yes, but that's the response. That's the remedial response that the Act provides for and it cures the problem that faced the court in *Hurst v Vestcorp Ltd* in Australia where you had a prohibition on offering securities, offering or allotting securities to the public, but there were no provisions for consequences of that other than criminal consequences and the court then had to look at the principles of adoption of illegality and decide whether as a matter of statutory imputation, or implied, imputed statutory intention, that the adoption of illegality should apply to a contravention in that way, and they said it did because there needed to be, it was, needed to be a civil response. It was a feature of the policy of the Act that there should be a civil response and the court had to come in and provide that through resort to the common law adoption of illegality and Justice Kirby did a summary of the law of illegality on there making, drawing heavily on the *Yango* case and made it quite plain that it's a matter of imputed statutory intention.

I think it's worthwhile going to that if this promoter point is going to be ...

WILLIAM YOUNG J:

Well, I'm not really sort of, I'm just saying that the relief provisions seem to be a bit circumscribed because they don't encompass the range of people who might engage in the activity which, in one way or another, leads to a breach of the Act.

MR O'CALLAHAN:

Well, let's first, first of all the relief provisions, is your Honour referring to the civil consequences generally provided under the Act or just to those, section 37AA?

WILLIAM YOUNG J:

I'm referring to both. A promoter can be liable from misstatements in the prospectus, but I'm not aware of a civil liability for a promoter in relation to an offer of securities to the public where there isn't a prospectus, so there seems to be a bit of a lacuna there. I may be well, I've only –

MR O'CALLAHAN:

Well, it's not necessarily a lacuna because sometimes a misleading prospectus can be more dangerous than there not being one at all and when one put one's name to it and becomes, you know, makes statements that are misleading, the Act is provided for a series of consequences. It's not a – I think it's, rather than saying it's a lacuna, it's actually the Parliament's response to a contravention. Justice Kirby –

WILLIAM YOUNG J:

Sorry this is in –

MR O'CALLAHAN:

This is *Hurst v Vestcorp Ltd*. It's in the appellant's bundle of essential authorities at tab 7. Sorry, I wasn't going to have to go to this, but it's just arisen in respect of this promoter point. Page 299 on the right-hand side and before I start referring exactly to the passage, I'll just remind the court that this is in the context of an Australian statute that provided for contra – provided a prohibition on offering or allotting securities without a prospectus but didn't provide for any civil consequences of that, and so the court says, Justice Kirby, the president says at 299, "The principles of law application to the resolution of this question are found in *Yango*. I take the relevant principles to include: first, the fact that a transaction is made which results from or involves a breach the requirement of statute may result in a conclusion that the transaction itself is illegal, such that to get effect to the statue a court will decline to enforce the transaction or will treat it as void. Two, such a result will not however

always follow. Because statutes rarely provide in terms for the effect of the breach of their provisions upon such transactions it is for the court, in applying the potential –

ELIAS CJ:

But why are we going through this because we have the, we don't have this difficulty. We do have a statute which prescribes this?

MR O'CALLAHAN:

That's my point and it's in response to Justice –

WILLIAM YOUNG J:

Well I suppose the point I'm discussing is that it doesn't seem to be complete because –

MR O'CALLAHAN:

Yes he says something is missing.

WILLIAM YOUNG J:

Yes.

MR O'CALLAHAN:

That's – and I say well –

ELIAS CJ:

Well it may be complete in relation to allotments.

MR O'CALLAHAN:

Well I say this is what Parliament has chosen and we have to follow it and the only way in which –

ELIAS CJ:

Well there are criminal penalties as well.

MR O'CALLAHAN:

Yes, yes.

ELIAS CJ:

So –

MR O'CALLAHAN:

It's a question of the civil consequences.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

But the criminal penalties, the net of the criminal penalties is rather wider than the net of the relief provisions, that's the point I'm – is troubling me.

MR O'CALLAHAN:

Yes.

ELIAS CJ:

The issuer is widely defined though so if you receive any benefit or any money paid in consideration you're an issuer and then you are into the whole scheme of remedies.

MR O'CALLAHAN:

Yes and this dovetails nicely into where I was going to go next because I say that the allotment issue is a contractual analysis. I will put this right up front. I say it's a contractual analysis and there is absolutely no pedigree for the proposition that the appellants make that there is some other concept of integrated scheme that is outside of contractual analysis and –

ELIAS CJ:

Well I find that really hard to understand why you say it's a matter of contract. Surely it's a matter of whether the sale and purchase agreement is a debt security?

MR O'CALLAHAN:

Well –

ELIAS CJ:

I mean through all the linkages and so on.

MR O'CALLAHAN:

Yes, well I think that's saying the same thing as my proposition, your Honour.

ELIAS CJ:

Well it may not be a matter of contract is what I'm saying, it may be a matter of analysis of the substance of what is happened here.

MR O'CALLAHAN:

All right, well I say that has to occur on a contractual basis and that's what the authority, that's what the effect of the authorities is. There is not a single case to, that's come to my attention, relevant to this jurisdiction, that involves a proposition that there is a scheme that incorporates something into the scheme that isn't contractually involved in some material way, and I think one might start with *Hurst v Vestcorp Limited* because I think this is where the notion of integrated scheme has come from and that the arguments that have been addressed to the Court of Appeal and to the High Court in the cases of *National Australia Finance Ltd v Fahey* [1990] 2 NZLR 482 and *DFC v Abel* have rather misunderstood what was going on in *Hurst v Vestcorp* and the submission has been that there is an integrated scheme and the Judges in those courts have dealt with the submission in a varying round-about way.

TIPPING J:

Are you saying that there must be a contractual relationship between the issuer and the subscriber?

MR O'CALLAHAN:

No I have to say that when we – the concept of allotment of the security – I want to say something different to that because the –

TIPPING J:

Well how does your proposition differ from what I've just put to you?

MR O'CALLAHAN:

Well because it is the allotment of the security that is contravened – that is the subject of the invalidity provisions in section 37 and it's whether what is suggested to be the security is, a matter of contract, that allotment, so –

ELIAS CJ:

Sorry, I'm not following that, just say it again?

MR O'CALLAHAN:

The allotment, in some cases, the allotment – I think I need to start again on that. The allotment, in some cases, is the acceptance by the company of registering the subscriber as shareholder, for example, in a debt security. In other cases that don't have a formal, you know, company law structure for allotment, the allotment is the contract under which the, or the particular contractual covenant that gives rise to the right for the security, so in *DFC Financial Services Ltd v Abel*, for example, it's the entry into the bloodstock partnership which was a security, in *Re AIC Merchant Finance Ltd* it was the issue of acceptance of the subscriber's offer and, in this case, we say it's, taking PIP as an example, it's the PIP agreement –

TIPPING J:

Well, I think you are saying that there must be a contractual relationship between issuer and subscriber because the issuer allots to the subscriber, does he not?

MR O'CALLAHAN:

Yes.

TIPPING J:

Well, I do not understand what your submission is if it isn't that.

MR O'CALLAHAN:

Actually, I think I may have misheard you, your Honour, because I think I thought you said something different to that.

TIPPING J:

Well, I may have. This is treacherous field. We're all given to slips of the tongue, but now I put it to you more intelligently, I think you are saying that there has to be a contract between the issuer and the subscriber?

MR O'CALLAHAN:

Yes.

ELIAS CJ:

But doesn't it all come down to the definition of debt security, really, this case?

MR O'CALLAHAN:

Well, it may be –

ELIAS CJ:

Because allotment is, again, a hugely elastic concept in the scheme of this Act and it's apt to cover the, this transaction, this aspect of the, this segmented transaction.

MR O'CALLAHAN:

Well, look, I'm going to come back to discussing what is a security, but if we start with the proposition that there is a security as alleged, that's the only reason why you get talk about allotment. The allegation is that the security is the investor's rights under the PIP agreement and my point, well, the appellants say that the agreement for sale and purchase is part of that allotment –

ELIAS CJ:

Yes.

MR O'CALLAHAN:

– and I say, well, no, because it's the PIP agreement that is the contract, that contains the covenants that are said to be securities and you invalidate that, those covenants and you end up with not effecting the agreements for sale and purchase, and it's only if you can find a, if you can say that the agreements for sale and purchase are somehow conditional upon the validity of the covenants in the, in the PIP agreement that it can be caught in the analysis of consequential validity or be said in another colloquial way to be part of the allotment, because they aren't conditional and we have concurrent findings of fact exploring all sorts of arguments around that, such as collateral contracts and interdependency and implied term and all that sort of thing –

WILLIAM YOUNG J:

Both they're not legally interrelated in the sense that it's perfectly clear that the sale and purchase agreement is binding no matter what happens in relation to the financial package agreements, but that's a contractual issue. It doesn't necessarily

mean that when you're applying a consumer protection statute, you should be controlled by the clever drafting. If it is the case that in substance the investors, or at least most of them, hooked themselves into the financial package by committing to a property purchase, isn't it open, as a matter of policy, for the court to say well, that's allotment? They subscribed to the allotment by signing up for a purchase agreement. That's part of the way in which they do it.

MR O'CALLAHAN:

My first response to that is there's no pedigree for that proposition.

ELIAS CJ:

Well –

MR O'CALLAHAN:

I know that's not a complete answer in this court.

ELIAS CJ:

– let's deal with it as a matter of principle on the basis of a statute.

MR O'CALLAHAN:

Yes.

ELIAS CJ:

Really, that's what we're asking you to do and then perhaps if there's any authority against it you can take us to it but we accept the point that you make, that there's no authority directly on point.

MR O'CALLAHAN:

Yes and moreover that the authorities that exist are all consistent with the alternative proposition that I'm making which is, it must be a contractual link. So as a matter of – well – may I deal with those first because they do, to some extent, demonstrate the principles?

ELIAS CJ:

All right.

MR O'CALLAHAN:

Hurst v Vestcorp involved a film partnership. Now the film partnership, the offering of the film partnership was a contravention of sections 82 and 83 of the relevant statute. The promoter of the film partnership was a company called Filmco. It's actually the named party in the proceeding because it changed its name after the relevant events to Hurst and, so Hurst equals Filmco when you're looking through it. So Filmco promoted this scheme for film investment and in order to assist the investors to participate in the scheme, it offered them loans and they were all marketed at the same time and there is a number of interconnections between the loans and the film investments and in particular there was a finding by Justice McHugh that it was – that the – it was part of the consideration for granting the loan that the investors participated in the film investments. There was a number of other connections but that is the most significant for the purposes of my point.

I'll just find you the section where Justice McHugh discusses that. It's at page 318 and it starts on the left-hand side. So there are three contracts, a power of attorney, a loan agreement between Filmco and each appellant, and an investment agreement between each appellant and the producer of the films. And the loan agreement – before I start this, the paradigm for this is the loan agreement in here is like the agreement for sale and purchase in our case. It's the way it's structured. And the illegal, or the agreement that contains the things that are in contravention of the securities legislation, being film partnerships, are like the PIP agreements or the JVAs or what we call option deeds in this case. That's the way, when we're looking at this case and analysing its facts, we need to think about how it applies to the present case.

So the loan agreement recited that the borrower was to acquire various interests in the copyrights of various films and that Filmco lent the borrower a specified sum on terms and conditions and it recited, amongst other things, an interest rate and to the borrower to pay the lender all monies earned by him from the exhibition and marketing of the films until the loan and interest had been repaid, and the loan was repaid 30 months after the date of the agreement but the borrower had an option to repay earlier and he was not to assign charge or interest in any of the copyright until the loan had been, interest had been repaid and the loan agreement didn't itself provide for the payment to Filmco of 25% of the profits made by an investor out of the film partnership, but there was other documentation to that effect. It says that that

depended on other documentation, right at the bottom, before the paragraph, the end of the last paragraph on that page.

Then there's an analysis of that following and over the page, the second, the first paragraph, beginning of the page which is, "No doubt," they say, he says, "In the context of the scheme, part of the consideration for the loan was that Filmco, upon making the loan, received an interest equalling 25% of the client's interest in the net profit from the films. This shows the close connection between the loan agreement and other parts of the scheme." So –

TIPPING J:

The reasoning here is quite similar to *Culverden*. In other words, the talk of integral part of the scheme but came into existence as part of a scheme.

MR O'CALLAHAN:

Yes it does but it's all, it's all consistent with a contractual analysis. What you have, it's like having the agreements for sale and purchase in this case, reciting that somebody is going to enter into an option agreement, they're going to deal with their land in this particular way and covenanting, expressly or impliedly to the developer, that they will be granting Blue Chip an option to, in respect of their property, and that they will be doing so in part consideration for entering into the agreement for sale and purchase –

TIPPING J:

But what I'm really putting to you, Mr O'Callahan, that it doesn't seem to me that this passage, at least, suggests a strict contractual analysis. If you're citing it for that purpose, it's leaving me a bit cold at the moment.

MR O'CALLAHAN:

Well, it doesn't actually come out and say it, but nonetheless, that's what it is and there's no suggestion there that there is some principle beyond a contractual analysis, that's all.

TIPPING J:

Well look, the loan agreement created no interest in the copyright nor did it assign any such right, but it came into existence as part of. I would have thought that was not really in your favour.

MR O'CALLAHAN:

Well, it's the, it's the proposition that part of the consideration for the loan was that Filmco, upon making the loan, received an interest equalling 25% of the client's interest in the net profit from the films, so it's the, and Filmco is the, it's the same party –

TIPPING J:

Well, I undertake to read this very carefully, Mr O'Callahan. I don't want to take up more of the time because it's –

MR O'CALLAHAN:

Yes, but it's the same party –

TIPPING J:

But there's nothing more – this is the passage upon which you rely for your saying there must always be a strict contractual analysis?

MR O'CALLAHAN:

Well, it's one of them. There are, there are passages, well, that's the passage that demonstrates the facts most clearly, because Justice Kirby relies upon the facts and so if your Honour is going to read this it will have to be –

TIPPING J:

I will certainly be reading it very carefully, but I put you on notice that I'm not persuaded by what you've read.

MR O'CALLAHAN:

Well, Justice Fisher in *DFC Financial Services Ltd v Abel* –

ELIAS CJ:

Sorry, was this a case where section 86 was it didn't prescribe illegality?

MR O'CALLAHAN:

That's right, section 82 and 83 were just prohibitions and there were criminal consequences elsewhere in the statute, but no, no civil consequences –

ELIAS CJ:

Yes.

MR O'CALLAHAN:

So the question was, yes and just to be on the right track with this point, the proposition is, has been by the appellants that there is, there's a doctrine of non-severability that you look at facts and you just decide whether on severance principles you can sever one from the other, so in *Hurst v Vestcorp*, the discussion is actually in the context of severance and the reason that it's in the context of severance, and the reason why it's got the kind of language in it that, your Honour, Justice Tipping has referred to, is because it's about severance. They have already decided, they actually approached the discussion on the basis that these are all linked contractually and it's on that obvious assumption, given the terms, that there is discussion about severance. You don't get to discussing severance unless it is linked contractually. And that's why the Court of Appeal in this case, I think at para 358 of the judgment, say, "No question of severability really arises." And obviously so because there is no contractual link between the agreement for sale and purchase and the – no relevant contractual dependence, is the right way to put it.

ELIAS CJ:

But surely the finding that they're inter-dependent, that they're part of one package, does suggest that there is a link which you could characterise as contractual. You're just saying there's no contractual obligations between all the parties.

MR O'CALLAHAN:

No it falls short of that and there was all these attempts to analyse it because – we're talking about a link. It must be a legally relevant link.

ANDERSON J:

Well if they say, the PIPs are dependent upon the SPAs but the SPAs aren't dependent on the PIPs.

MR O'CALLAHAN:

Yes and it's that way round which is important. It's the dependence of the agreement for sale and purchase on the validity, or otherwise, of the PIPs that is the important and relevant question. So the finding that I'm referring to at 358 is that no question of severance really arises and that's because there is no contractual dependence. The

Court of Appeal said, not inter-dependent. No implied term. No collateral agreement. No promissory estoppel. None of these –

ELIAS CJ:

Sorry 358. What are you speaking about now?

MR O'CALLAHAN:

The Court of Appeal judgment.

ELIAS CJ:

Sorry, I was still back at *Hurst*.

MR O'CALLAHAN:

I think your Honour may have just suggested to me, although your Honour may have been referring to *Hurst*, but –

ELIAS CJ:

I was. Sorry.

MR O'CALLAHAN:

Well that explains it. So 358 of the Court of Appeal decision in this case. "We do not have any difficulty in reaching the conclusion that the SPAs and their associated lease agreements are clearly independent of the Blue Chip agreements and no question of severability really arises." Because that's how this point of integrated scheme was put in the Court of Appeal, that it's a severance issue. Well to get to severance you have to start with there being contractual dependence. And if there is no contractual dependence you don't even think about severance and you can't make the mistake of looking at dicta that is in the context of severance and is thereby but loose, from a contractual perspective, because one is looking at whether despite the contractual nexus you can nonetheless, it can survive by taking something out. And necessarily you have to depart from contractual analysis. You have to go to some other principle which the courts have developed in respect of severance but you have to be there in the first place. You can't use that discussion to put things together that aren't already together.

So in case it got missed the point I just said in summary earlier about 358 is that when one goes through this Court of Appeal judgment, as I'm sure the court will do, there are various references back to earlier findings and discussions on various points. But in summary they say no contractual dependence. No implied term. No collateral arrangement. No promissory estoppel. All of the things that would otherwise put these together.

So then in the New Zealand courts, these are the *UDC v Abbot*, *DFC v Abel* and *Fahey*. The courts there were confronted with these issues – this integrated scheme type argument and in each of those cases, to put it colloquially, the courts bought into the argument to some extent, because it was said to arise out of *Hurst*, and so you get some discussion about concepts of severance and that sort of thing. But in the end, analysis in each of those cases the courts said there is no contractual dependence of the loan agreements on the validity of the underlying investment for which the loan was for the sole purpose – those loans were for the sole purpose of investing in a bloodstock scheme. Well *DFC v Abel* and *UDC v Abbott* are for that. That was the sole purpose of the loan and the lender had been involved right throughout, including the offering. Had put a placement memorandum in. Knew what the offering was going to be. Knew that they'd be hawking around seeking partners and reserved its right to approve the partners once they had been chosen as a result of the offering. And the courts there ended up saying, look it's the opposite of what you expect. You can't imply a term here, that the loans depend for their validity on the validity of the underlying investment, because somebody lending money, it's the complete antithesis. That they wouldn't – objectively that doesn't work, and that's what the Court in this case, both courts below have said, well not Justice Venning because he didn't, well on this point he wasn't engaged on it, but the Court of Appeal said it is the antithesis. These developers wanted to sell property. They wanted a covenant to buy and their lenders wanted them to have a covenant to buy and they wanted to be able to present that covenant to buy to the lenders. They all relied, and it's the antithesis to suggest that that would depend on the validity of some arrangements that another party has made with the buyer.

So each of those cases, although they engaged, to some extent, in the wider language, end up with a contractual analysis and it's the contractual reasons that the cases are lost in the attempt to say the loan agreements are invalid. And as my learned friend Mr Chisholm pointed out, indeed for *UDC v Abbott*, there is a clear discussion about utilising tainting principles. Saying in the absence of tainting, in the

absence of contract or tainting – well they don't say tainting but they use the principles – it's not part of the allotment, so it's not invalid. It's either contractually part of the allotment or you revert to tainting.

The next point I wanted to go back on is the concept of security and why it is there's a land exemption. I'm not sure which to start with first because they're to some degree inter-related. But first of all the reason why the agreements for sale and purchase aren't a security is because you get the whole thing. So the concept of participation in security is an important concept and it's conceptually there throughout, I say, throughout everything that the Securities Act purports to deal with. And it's there also in the case of a debt security and I – the proposition has been that just all that's required for a debt security is an obligation, rather than some other notion, and I say that the other notion is the conceptual threshold of participation in someone else's property. Now, whilst the debt isn't legally participation in someone else's property, it is just, it's legally a right to something. Securities law derives from an economic background and it draws upon the principles of that conceptual right in element.

So for example, the Americans, they have 53 statutes, 52 and one for each state and a federal one on this and each of them have a big list of things that are securities, and amongst that list, and some exemptions to them and the exemptions sometimes create the rule, but they have a nine month arbitrary line for debts, notes so they say any note, except a note that's for less than nine months, is a debt security, is a security. So the reason I'm referring to that is that it's an arbitrary line with regard to a conceptual analysis and, of course, the drafters of statutes sometimes just have to draw arbitrary lines and there are arbitrary lines drawn in various places, but it imports that concept and, of course, because the Americans have a concept of, statutory interpretation that allows them to ignore the actual words of statutes in certain cases, there is a body of jurisprudence which is developed around whether if it's less than nine months, it really does have the character of a participation in, and therefore is a security or if it's longer than nine months, it doesn't really have that character so they look to try and keep it out of statute.

Again, the reason for referring to it is to demonstrate the conceptual notion, so when you simply sell something to someone and they are to pay you some money for it, in a paradigm case where perhaps you don't even part with the goods until it's paid, if

it's not a – it can't be a debt security because it doesn't cross a conceptual threshold. It's not a, it's just a right to, not a right in, conceptually.

WILLIAM YOUNG J:

So would Sharia-compliant financing transactions not be securities because they involve a taking an interest in the asset and a profit share?

MR O'CALLAHAN:

I'm not familiar with Sharia-compliant.

WILLIAM YOUNG J:

Well, but I mean, that's the issue because its – usury is abhorred, the lender –

MR O'CALLAHAN:

Oh you're talking about Muslim law –

WILLIAM YOUNG J:

Yes, Sharia law.

MR O'CALLAHAN:

– yes, I'm familiar with that, yes, on this point.

WILLIAM YOUNG J:

And that's, but I mean that's not that uncommon in terms, for instance, of a sort of conception of mortgages, which is an assignment of the land to the lender.

MR O'CALLAHAN:

So the proposition your Honour's making is that, well, the question you have for me is whether –

WILLIAM YOUNG J:

Yes, I don't, well, for myself I don't see why, just as a general proposition, buying and selling property can't be in substance financing if it is in substance financing.

MR O'CALLAHAN:

Well, I'll answer that simply by saying that may be so, but now I'm going to talk about what's happening here because the security alleged – remember, one must always

go back to what it is that the appellants say the security is. The security is the right to take them individually under the PIP, a right to an option fee and it's a periodic payment, it's paid monthly and it's paid over time and what the investor has done, is that it has granted an option over something that has an interest in, in return for the promise to pay that periodic fee.

So it hasn't, it doesn't thereby create a right in the debtor's property, because if that fee isn't paid, let's say if we go to three months and the fee's not paid, then the option, as a matter of law, be able to cancel the contract and the option will disappear, the grant will disappear so they'll be left with their property unencumbered. They, it's granting a right in their property. It's not, well as my learned friend Mr Neutze said, returning, giving over something tangible, such as cash or other monies worth, and receiving in response intangible right conceptually. It is granting an interest in your own property and being paid for it, and an interest that will on its, just because of its nature, it's an encumbrance and the encumbrance will disappear if the obligation isn't performed.

WILLIAM YOUNG J:

What, assuming a PIP transaction went off as intended, what was the difference between the transaction that's documented and a transaction whereby the investor lent the amount of the deposit to Blue Chip at 16% interest?

MR O'CALLAHAN:

Because the investor has taken the risk, has undertaken the obligation and the risk and the rights that that gives –

WILLIAM YOUNG J:

Yes I know, I'm saying assuming the transaction goes off as intended? So assuming that Blue Chip exercises the call option, which was obviously the intention if you look through all of the material, what's the difference, looking at it with hindsight between the transaction that's documented and the investor lending Blue Chip the deposit for 16% interest?

MR O'CALLAHAN:

I suppose the answer to that is that if, if that had happened, Blue Chip had exercised an option, settled the purchase, taken the investor and you would look back and you say, "Well, for nine months there, or 18 months, I got 16% of my money."

WILLIAM YOUNG J:

Yes.

MR O'CALLAHAN:

It has come to the same end as the alternative transaction that you put to me, but it's got there by very different means that may or may not have occurred and involved along the way a whole set of rights and obligations that are very different, so just because it might end up in the same place, might do, it –

WILLIAM YOUNG J:

Was intended to.

MR O'CALLAHAN:

Well, that's, it's important to go back to what the – it's not intended to in the sense that the parties legitimately believed that they were, they had a right to that outcome because the court has rejected that. The High Court Judge heard 30-odd people give evidence about this and rejected any notion of that.

WILLIAM YOUNG J:

Didn't have a right as against the vendors?

MR O'CALLAHAN:

Well, they didn't have a right against Blue Chip to –

WILLIAM YOUNG J:

Well, Blue Chip has effectively promised to keep them in the terms of the material whole.

MR O'CALLAHAN:

Well, what the – first of all, they promised to pay an option fee, then they promised to assist them with settlement costs if they end up having to settle and have made a promise to negotiate a, with a lessee to put an option, well, to have a lessee pay a rent on a particular formula which is different actually to what the lease says in its original form, so that's something that they would have to do subsequently, and they

would have to, in return for that, Blue Chip would get a continuing option, well, the lessee would get a continuing option under the agreement.

WILLIAM YOUNG J:

Well, it's all clear in pages 18 and 19 of this sample miscellaneous documentation.

MR O'CALLAHAN:

Yes and it has included in that, Blue Chip default, client can sell pre or post-settlement and collect, yes.

WILLIAM YOUNG J:

Yes, I know that but we're talking about what, I'm talking about what was intended to be achieved by the transaction, assuming everything goes well. I'm not talking about default positions if there's a problem.

MR O'CALLAHAN:

And what if Blue Chip doesn't exercise the option. You see there's an option and this was had in the High Court about, people were trying to convert, were trying to say that they thought they –

WILLIAM YOUNG J:

Yes, you're coming back to rights as between the investors and the developers. I'm just saying that this looks to me very much like a repackaged loan at a 16% interest rate –

MR O'CALLAHAN:

Well –

WILLIAM YOUNG J:

– with particular, with very different default positions if there's a problem from what there would be if there was a loan.

MR O'CALLAHAN:

Well the factual matters that were explored in the High Court weren't limited to simply the position as between developer and investor.

ANDERSON J:

What was intended to be achieved from Blue Chip's point of view was to exploit other people's equity to give them their chance at a capital gain in two years time and –

WILLIAM YOUNG J:

No capital gain on this one.

ANDERSON J:

No but that's –

WILLIAM YOUNG J:

It's a straight 16% return.

ANDERSON J:

But Blue Chip had no equity to secure a loan directly to them from the subscribers. So this was a device to exploit other people's equity to secure a future advantage for Blue Chip, who had no equity.

MR O'CALLAHAN:

Well the thing is that's not what it was. It was actually an option agreement.

ANDERSON J:

I know but that was the intention in reality, whatever the form it is.

MR O'CALLAHAN:

Well that's one way of analysing it. You may analyse it in other ways.

ANDERSON J:

Where it takes one I don't know but that's the reality in business terms of the arrangements, or the motive anyway.

MR O'CALLAHAN:

It may have been the motive but it wasn't what was, what had happened nor was achieved.

ELIAS CJ:

And you say the developers at any rate weren't involved in that overall scheme?

MR O'CALLAHAN:

Obviously in Icon's case I have to say that Icon knew that Blue Chip was doing that but that's irrelevant.

ELIAS CJ:

Yes. I'm not sure about –

MR O'CALLAHAN:

If something had –

ELIAS CJ:

– that distinction.

MR O'CALLAHAN:

If there had been some allegation and then some evidence on it, that because of that knowledge there was some sort of implied position or imputed matter that's outside the contractual documents, other than what was actually explored, then the case might be different. But there were various attempts to do that on the matters I've talked about earlier and they were all rejected.

ELIAS CJ:

All right.

MR O'CALLAHAN:

Rejected not just on the face of the documents but also on the evidence, the Court's review of the evidence and the facts that were all explored at trial and the Court of Appeal went very carefully through all of that in an extensive judgment which clearly on its face involved an incredible review of what the High Court Judge did and came to the same conclusion.

ELIAS CJ:

Mr O'Callahan, where do you want to take us to after lunch?

MR O'CALLAHAN:

I want to say something about section 5(1)(b) then I want to deal with some specific matters on Icon and then I'll be finished.

ELIAS CJ:

Yes and what sort of time do you think?

MR O'CALLAHAN:

Probably half an hour.

ELIAS CJ:

We'll take the adjournment now and resume at 2.15.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.22 PM

ELIAS CJ:

Yes thank you Mr O'Callahan.

MR O'CALLAHAN:

Although this is a consumer statute, one of the significant exceptions to it is in respect of land and the question is why that might be, because it may assist the court in applying the definition of – well first of all working out what the definition is and applying it to the facts of this case. There may be a number of reasons for it and there's no particular authority that especially helps articulate the reasons for it but here are some I would suggest to your Honours are reasonably self-evident. The first is that an interest in land in this way probably isn't a security in any event unless you share and the courts – the legislation draws the line at five people as for sharing. So contributory scheme is caught. Something that isn't a contributory scheme isn't caught. The – and it may just be that it's just recognising that reality. The –

ANDERSON J:

Well it's still a security but it's not one that's amenable to the part 2 sanctions.

MR O'CALLAHAN:

Well if this sharing is a security, but if you just, if you don't have – so it's a sharing component that would bring in the participation required. But if it's just one certificate of title that you get on your own, it's not even a security. That's the first analysis. So the analogy in the exception is to draw in – it's using an arbitrary five person line to draw in the general concept that it isn't a security if it was just one, one piece of – one title for example.

The second reason, and perhaps this is something that deserves emphasising in this case because it bites, and that is that Parliament has thereby really effectively put it on the responsibility of professionals such as the solicitors to undertake the advice and be the person upon whom an investor can rely, rather than relying on reversing the flow of information, as the Securities Act does when it applies, it says in the case of dealings in land, no you – it accepts – well underlying it's implicit that you're going to go inevitably and see a solicitor about a land transaction and that professional will be responsible for giving you the information you need. And land transactions have special features that aren't equivalent with other types of transactions and in this case it bites quite nicely because all of these sales are sales off the plans.

So they are sales before any deposit of a plan has been lodged with the land survey – Land Information New Zealand and in that case the Resource Management Act brings in under section 225 a statutory implied condition and that is, I asked our hotel to make copies for me but it's ended up with the –

ELIAS CJ:

On their letterhead is it?

MR O'CALLAHAN:

It's on their letterhead but it's got the left margin a little bit missing and the right margin a little bit missing.

ELIAS CJ:

Just tell us what does it say and what's the section.

MR O'CALLAHAN:

Yes it says that, it's section 225(2) and it says that, "Any agreement to sell any allotment in a proposed subdivision," that's a different use of the word "allotment" obviously, "in a proposed subdivision made before the appropriate survey plan is approved under section 223, shall be deemed to be made subject to the following conditions."

ELIAS CJ:

I see, no if there's a long list perhaps –

MR O'CALLAHAN:

No, no, it's the first condition. It's the first condition, "(a) that the purchaser may by notice in writing to the vendor cancel the agreement at any time before the end of 14 days after the making of the agreement."

TIPPING J:

Yes well we dealt with that section in *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR 1 and even though the Court was divided on the main point I think the Court was unanimous on that point. Now I don't know that that particularly helps you but are you saying therein lies further protection?

MR O'CALLAHAN:

Yes.

ELIAS CJ:

Is this the subdivision?

MR O'CALLAHAN:

Yes it is because you start with a square piece of land, or thereabouts, and you build a building on it and you subdivide it into unit titles, strata titles.

WILLIAM YOUNG J:

Say you looked at this at the time the agreements were signed.

MR O'CALLAHAN:

Yes.

WILLIAM YOUNG J:

There was no separate certificate of title available for the interests of the sold were there? Couldn't be?

MR O'CALLAHAN:

It would eventually, there would eventually be.

WILLIAM YOUNG J:

But at the time?

MR O'CALLAHAN:

Well it's an agreement to obtain –

WILLIAM YOUNG J:

But say viewed in January 2007 there was this argument and you came along and said, ha, ha! section 5(1)(b) takes us out of the Securities Act, and the investor said, no it doesn't, show me the interest in land for which a separate certificate of title can be issued.

MR O'CALLAHAN:

You're contracting to obtain the fee simple title in the strata.

WILLIAM YOUNG J:

I know you are. I know you're contracting to obtain a piece of land for which, in due course, a certificate of title can be issued.

MR O'CALLAHAN:

Well the contract must be in respect of that type of property. It's not a – you're not contracting to buy a piece of land that you can't get a certificate of title for.

ELIAS CJ:

I think this case is now teetering towards the hilarious but that's wrong in that – just it's a bit mind boggling to think that we go to the Resource Management Act at this stage of the proceedings.

MR O'CALLAHAN:

Well –

ELIAS CJ:

So what –

MR O'CALLAHAN:

– this is a point that has been alive throughout the courts below and I don't think there can be any suggestion by the appellants, or especially in light of the *Serepisos* case, by the court that section 225(2)(a) implies a condition into each of these agreements

ELIAS CJ:

Yes.

MR O'CALLAHAN:

– that there's a 14 day conditional period. It's a full out. So at any time within that 14 days they can give written notice in writing that it's out. That they are out of it, cancel it. And that was explored to some extent or other with some of the witnesses in the High Court because this –

TIPPING J:

Why do you think they were keen to have the concept of separate certificate of title being able to be issued as a condition of this land exemption?

MR O'CALLAHAN:

Because of the certainty that puts around interest in land. We actually have quite a progressive land title system in a sense that the Torrens system is quite certain. It's different to the system in many jurisdictions, for example, it's different to most of the jurisdictions in the United States –

TIPPING J:

I would have thought the primary point, Mr O'Callahan, was that it's reinforced in the, the exemption from the exemption does not entitle the holder to a right in respect of the – for which a separate title can be so issued. So I would have thought the idea here was that if you are buying and selling an asset for which you can be separately and solely registered, you don't need the protection of the Securities Act?

MR O'CALLAHAN:

Yes, that's right and the question is why?

TIPPING J:

Well, the question is why? Is that because you will become registered? It is anticipated you will become registered and you then get the benefits of indefeasibility, and you're not looking to a promise that's exercisable in the future in your favour, you actually are getting a tangible piece of property and the same applies to any proprietary right to chattels, which is paragraph C of the – and then we get a variety of other things that are exempt, which a mortgage, for example, when you become the registered mortgagee. It doesn't actually say registered mortgage, but I suppose you could have a mortgage that was not registered or registerable, but the whole – for us there seems to be that you become the proprietor of property instead of having to rely on a promise for the future.

MR O'CALLAHAN:

Yes, it's the tangibility of the property.

TIPPING J:

Yes.

MR O'CALLAHAN:

And it's contrasted to the intangibility of matters such as an equity interest or a debt interest.

TIPPING J:

Well, a debt security is very much dependent on the solvency of the person who owes the debt. Getting land, getting a mortgage, getting chattels, getting an interest in the Government superannuation fund does not.

MR O'CALLAHAN:

Yes, so that's consistent with the conceptual framework of the Act.

TIPPING J:

And we've even got E, which is a particularly usual one, but that, because it talked about professions which are listed in the schedule, which is everything from lawyers granted or up to various other professionals, it must be the inherent reliability, if you

like, or security of that species of property that you're getting. I'm just putting it to you to cut to the chase.

MR O'CALLAHAN:

Yes.

WILLIAM YOUNG J:

Well, the argument that you would have to overcome to persuade me on this is that that isn't necessarily conclusive where there is as well a promise upon which reliance is based, so if two things are on the table; one is an interest in land and the other is a promise, then the issue, to my way of thinking at the moment, is whether the fact there's a title on the land which may or may not be full security for the promise, excludes the operation of the Act –

MR O'CALLAHAN:

Well, in this case –

WILLIAM YOUNG J:

– and where the promise's worth depends on the solvency of the issuer.

MR O'CALLAHAN:

Well, clearly the sale and purchase agreement can't be a security and if it is it's exempt, but then you go to say the PIP and you say, well, the security alleged is the promise by Blue Chip to pay the option fee, for example, and we say that's in respect of land –

WILLIAM YOUNG J:

But you, but to do, that could, that argument could have been deployed and no doubt was in *Culverden* because the buyback wasn't in relation to land, so you really have to say *Culverden* was wrong on that point, don't you?

MR O'CALLAHAN:

Well, okay, *Culverden* may be wrong, but it is a better, there's a different point to be made and that is about the, it's the same – the sale and the buyback is with the same party and as a matter of contract the, and it's the same contract in which the buyback provisions are, they enter into one deal at the outset and it's, when you do the legal arithmetic and you say, well, I'm buying this but then I'm granting you a buyback

arrangement, so what you as the buyer are actually left with, as Their Lordships say, is a right to occupy. That's the only thing you get out of that and, well, that was their reasoning. They're saying in substance, when you do that arithmetic, you're left with only a right to occupy and you're left with then the promise out in the ether of the repayment provision. Where it perhaps goes wrong and perhaps needn't have been decided that way is that, although there is some property involved, the real problem was the contributory scheme and they come to that at the end of the judgment, but it's –

TIPPING J:

It may be that the better foundation for the decision in *Culverden* is the contributory scheme –

MR O'CALLAHAN:

Yes.

TIPPING J:

– rather than the other –

MR O'CALLAHAN:

Yes, I think the first argument gets itself into problems. They're obviously driven to find that we had aged investors, aged persons buying this. It was only on an application by the registrar to get to documents. It wasn't going to necessarily buy in any particular way. They wanted the information. If the registrar turned up and wanted the documents and they said, "No, go away," and the only reason why the registrar would have had a power to it if it was a security anyone can inspect. So there's those sorts of elements that are driving that case and that's all I need to say about it.

WILLIAM YOUNG J:

Where was the legislation that preceded the Securities Act? Was that in –

MR O'CALLAHAN:

It was all over the place.

WILLIAM YOUNG J:

Within the, primarily in the Companies Act –

MR O'CALLAHAN:

Yes, there was the Companies Act, there was – I don't have a complete list in my mind over it, but there were a number of different statutes that dealt with regulation of securities and this was an attempt to combine them together.

WILLIAM YOUNG J:

So then there were deposit taking companies and there was the general provision in 1955 Companies Act?

MR O'CALLAHAN:

Yes and I think some were together with insurance companies and another piece of legislation and all that sort of thing.

TIPPING J:

Are you about to move off the land exemption or?

MR O'CALLAHAN:

Yes.

TIPPING J:

Could I just suggest to you, Mr O'Callahan and I'm merely more signalling this to the appellants than necessarily inviting you to respond, but you may be able to add to this – a possible construction of "nothing in Part 2 shall apply in respect of" means that to the extent that any interest, estate or interest in land which qualifies is involved, there is no avoiding in terms of section 37 if otherwise other aspects might be avoided if it's composite, but to that extent, I'm not saying I've formed a view on it, but that is a, I would have thought, a possible reading of it.

MR O'CALLAHAN:

Yes and I think that is consistent, well, it is possible. It is, if you're, if the court wanted to find some way that is slightly different to the way Mr Neutze put it in the written submissions and orally, before your Honours earlier, that is one way of doing it and –

TIPPING J:

Well, it's addressed to this composite situation –

MR O'CALLAHAN:

Yes, yes.

TIPPING J:

– if it's simply land, then that's easy. If land is not involved, that's easy too but it's where you've got an amalgam allegedly of land and other property.

MR O'CALLAHAN:

Yes, and it's consistent with the concept of, it's the allotment of the security that is invalidated by section 37(4).

TIPPING J:

Yes, all right, thank you.

MR O'CALLAHAN:

The next thing I wanted to do was to talk about the put and call option deeds very briefly because there's, apart from the submission that's addressed on behalf of the Herricks, there's no suggestion that there's any other sort of feature of the put and calls that make the analysis relevantly different to the PIP agreements, so all I want to address is the submission made on behalf of the Herricks that the payment of the deposit is paid by, received by or on behalf of Blue Chip.

I say that's met with two propositions, the first is that it's not paid, is not received by or on behalf of Blue Chip, it's received to a stakeholder account on behalf of purchaser and vendor to go according to the conditions in the agreement, so it gets applied to the purchase price eventually if the conditions are satisfied. It gets returned if the conditions aren't satisfied and, secondly – so that's a, that's the answer to that, a direct answer. The second answer is if, if you get into the proposition that it is the deposit, that is the subscription, one is driven very quickly to the land exemption, clearly and obviously and it's, I suggest it's, that be the reason underlying the way the case has been argued on behalf of the appellants.

ANDERSON J:

But typically the investor stumped up more money than the deposit and the deposit would be for the benefit of the vendor, the developer but the surplus would be held for the benefit of Blue Chip?

MR O'CALLAHAN:

Well I'm not sure whether there's anything in the joint venture agreements that provides for that but in respect of the put and call agreements and the premium income product agreements apart from occasionally Blue Chip arranging for professional services to be provided through other professionals, such as a firm of accountants or whatever, any extra payments are only for that. I'm certainly not aware of any evidence about anything else.

WILLIAM YOUNG J:

It was only the joint venture agreements I think where there was a significant top up. The rest of it was – it was the deposits I think wasn't it?

MR O'CALLAHAN:

I'm not –

WILLIAM YOUNG J:

I think that's right isn't it Mr Dale?

MR DALE:

They all had fees, brokerage fees and the like.

WILLIAM YOUNG J:

A brokerage fee as well?

MR DALE:

Yes.

ANDERSON J:

And working capital and money put up for –

WILLIAM YOUNG J:

No that was the joint venture.

MR DALE:

My learned friend says there were no brokerage fees. In fact there was a problem with brokerage fees because what generally happened was the investors paid them on delivery of an invoice but there wasn't a provision that they had to pay it. You may remember in *Bartle* one of the heads of negligence was the Bartles had agreed to pay a brokerage fee and there was nowhere in the contract that said that it could do so. But they did actually make those payments.

MR O'CALLAHAN:

So I was making the point that that's probably what underlines the way that the argument was being put by the other appellants. That consistently throughout this case from first instance up through to here, that the securities are those obligations to pay the option fee and that sort of thing, and the subscription is the grant of the option. And that's, the Court of Appeal's view of that was that that was obscure. I adopt that and the reason why it's obscure is because in order to have any chance of getting around section 5(1)(b) they'd have to develop an argument along those lines. And that's why – yes, that's why that's been done. So that's the simple answer to the Herricks' proposition on that point, in my submission.

Facts of Icon, other than put and calls, I think all I have to say is that there's no suggestion by the appellants, and certainly no findings below, that the knowledge of Blue Chip – sorry the knowledge of Icon of the Blue Chip products had any bearing on the contractual nexus between the agreement for sale and purchase and the put and calls or premium income product agreements. So I don't perceive any need to say anything more about that.

Then, so the only question that it becomes relevant too is the Court's considering tainting and the consistent findings below, properly on the evidence, and unchallenged, are that Icon did not know that these things were illegal. And I don't perceive any challenge to that proposition so although Icon has its own peculiarity in respect of that knowledge, that's why I say it's essentially irrelevant for any material purpose before this court.

I wanted to finish with one point and it's been mentioned yesterday I think from Justice Tipping that certain aspects of this case were treacherous, I think that was in relation to agency, and your Honour Justice Elias has said today that the concept of allotment is elastic in this, and I think other aspects around this case, and it's difficult

et cetera. There are a couple of very real certainties and the first certainty is that the agreements for sale and purchase are not securities. Second certainty is that it's only securities that can be allotted and thereby only securities that are invalidated.

Unless there are further questions I have no further submissions.

ELIAS CJ:

No thank you Mr O'Callahan. Mr Campbell?

MR CAMPBELL:

May it please your Honours. I do have a written copy of most of what I intend to say. Some of it I have to add to as a result of what's gone on so far today. Please do not be too alarmed by the number of pages that are being handed out. There is a lot in there that I will not have to speak to either because it largely records the comments that I made in my first submission anticipating what the respondents were going to say, and also to some extent there are some things there that I'm happy for them to simply speak for themselves and I don't think I'll need to talk to.

Now what I've handed up follows essentially the same structure and uses where necessary the same headings as the general submission made by the appellants. So I'll simply follow that structure. The general submission began with an overview of the factual findings below and the respondents, although professing not to challenge any of those factual findings, have taken some time to take the Court through the evidence that was in the High Court. I anticipated some of that in my earlier submission, particularly from Turn and Wave, and the first three paragraphs really set out what I said in my earlier submission in relation to that. You'll note at paragraph 4 that – and what those first three paragraphs set out is really what the findings were in the High Court by Justice Venning and in paragraph 3 I explain why, give some context from His Honour's own judgment rather than from transcripts and the like as to his findings. Now at paragraph 4, as I've noted, Turn and Wave didn't challenge Justice Venning's factual findings either in the Court of Appeal or here. Nonetheless Mr Chisholm took the court to parts of the evidence supposedly to put Justice Venning's findings in context. There are other parts of the evidence that, if the Court wishes to take any of that into account, which would provide other useful context and I've highlighted at paragraph 5 an instance of this.

Mr Manning in his brief of evidence was very insistent that he became aware of the joint venture agreements and PIP agreements only after Blue Chip went into liquidation and he stuck to that story in much of his cross-examination. Mr Dale put to Mr Manning twice at one point in the cross-examination and Mr Chisholm didn't take you this far through the cross-examination, that it was effectively somewhat surprising that Ms Reynolds didn't, after her January 2007, say something to Mr Manning about the presentation about the PIP product. Mr Dale twice asked Mr Manning, "Well are you saying that Ms Reynolds didn't pass any of this on?" And you'll see, I don't want to take you to the transcript now, there's limited time. Mr Manning is unable or chooses not to say either yes or no. He does eventually say in response to the second question, "Well the impression I got is that they were coming up with different methods to sell them. Different systems."

And let's just pause there and think what Mr Manning might be talking about. A different method or different system from what, from the one that was, let's say, originally contemplated in the underwrite agreement, and you'll remember Ms Reynolds' minutes of that meeting, they talked about the normal sales process. So we might think that the different systems and the different methods is an admission finally here by Mr Manning that something different than their normal sales process was being proposed. That he got the impression at that point about it, and what did he do? I've added to the underlining there in the quote, he says, "They were mandated to do that." So this answer in cross-examination is flatly inconsistent with what Mr – the picture that Mr Manning was presenting in his evidence-in-chief. And it's hardly surprising in the light of that that Justice Venning although, and we accept this, finding that Turn and Wave did not have actual knowledge of the detail of these agreements, found that Turn and Wave was at least aware of the Blue Chip investment products.

It's important to note that in making that finding Justice Venning didn't put any time limit on it. The Judge didn't say, well this only happened from January 2007. I've given you the references to where the Judge deals with this before coming along to the question of detail, he simply says, as he does also for Greenstone, and I'm going to come to that in a moment, that Turn and Wave was aware of the – that the Blue Chip products would be sold in conjunction with the sale and purchase agreements or in conjunction with the apartments.

This morning Mr Chisholm was taking you through some further evidence, and there's only one of the points he was making there that I really have time to note, and that is the suggestion that there wasn't very much evidence about when the respective sale and purchase agreement and investment products were actually entered into. He focused in particular on the Hutchinsons who are the only appellants here in relation to Turn and Wave who entered into a joint venture agreement. And I simply wanted to remind your Honours that in my submission I took you to exactly the same letter and the reason that I did that was that I, in my written submission I had recorded the findings below, which were that the sales agents presented all the documentation as one. And I actually explained to you, contrary to the interests of the appellants but it was going to come out anyway, that with a joint venture agreement it was obvious enough from the correspondence that there was going to be some delay between the sale and purchase agreement being entered and the joint venture agreement being entered into. And Mr Chisholm simply went through that explanation again this morning. What I want to say to you now is to remind you what I said then which is that regardless of that time lapse, it's unquestionable, and the letter shows it, that the two agreements were presented as a package to the investors.

Now that takes me to the position of Greenstone's knowledge because although Mr Neutze didn't – although Greenstone didn't challenge the factual findings, and Mr Neutze didn't signal that in his written submissions, my learned friend did address that orally. Now at paragraph 7 I've just set out for convenience the way in which I, in my earlier submissions, recorded the findings below because it's rather telling, I think. At paragraph 10 of our submissions I said that Mr Abel-Pattinson understood that the sales agents would market the apartments to investors as part of the investors –

ELIAS CJ:

Sorry what are you doing? You're going back to you –

MR CAMPBELL:

No this is quoted at paragraph 7 of the reply that I've just handed up your Honour. I've put as much in here as possible so that we don't have to go to too much else. So Mr Neutze took issue with this suggestion that Mr Abel-Pattinson had understood that sales agents would market the apartments to investors as part of the investor's investment, but hopefully we'll see, in the quotes that I've put in there from

Justice Venning's judgment below, that that's virtually word for word what Justice Venning found.

It's not surprising that Justice Venning made these findings because what Mr Abel-Pattinson said himself in his evidence-in-chief was that, "I was aware in general terms that Blue Chip had private arrangements with its investors although I was never told about the detail of those investment arrangements." And as Justice Young pointed out yesterday in Greenstone's sale and purchase agreement there's a clause saying that, and I'll have to paraphrase it, that Greenstone is not responsible for any representations about financial products that third parties might make. And what did Mr Abel-Pattinson say about this? He said that he made sure that that clause was in there, so that any representations by Blue Chip as to financial packages were independent of the sale and purchase agreement.

Then we have the fact that Justice Venning preferred Mr Miles evidence over Mr Abel-Pattinson in relation to the presentation. We also have the email that Mr Neutze handed up yesterday, and I don't want to take you to it except to signal one thing, which is in my reply, that what Mr Neutze didn't do in his submissions before the Court of Appeal, which he handed up to you yesterday, was explain that in fact there was one last email in that chain. If you look at the email you'll see that the very last email is that Mr Abel-Pattinson himself forwards it on to somebody else with a comment saying this is the explanation that's been given such as it is, a comment like that. So there can't be any doubt that Mr Abel-Pattinson saw that email.

Now in relation to Mr Neutze's submissions before the Court of Appeal, which he handed up, I'm not – I'm still struggling to understand what the point of that was given that Greenstone is not challenging the factual findings. But it's notable that in the Court of Appeal the Court of Appeal essentially reaffirmed Justice Venning's findings on these issues. So what we have concurrent findings of fact below which Greenstone has never professed to challenge. And I have to say there's a considerable irony that we have spent so much time dealing with these particular issues when – when the appellants sought leave to appeal there was so much protest from the respondents that we were attempting to revisit factual findings below and that this was not something for the Supreme Court to be concerned with. Now the latter part of that I agree with entirely but we weren't and haven't sought to challenge the factual findings below but find ourselves without really too much warning having to deal with those sorts of issues here.

Now there are some other matters dealing with the joint venture agreement that I can just touch on very quickly. There was some discussion in my earlier submissions as to how the investors payments were actually dealt with and you'll see I've referred you to page 126 of the general bundle. We don't have to go there now but you'll see there is a document in the style of an invoice which shows that the investor was going to pay the deposit directly to the vendor and pay the other money, such as the working capital, or the initial contribution generally, to Blue Chip New Zealand Ltd. I recall I was asked whether the payment was actually to the joint venture company or to Blue Chip Joint Ventures Ltd. No it wasn't, it was just to the, essentially the parent company. That document also shows that part of the investors payment to Blue Chip was for their trustee incorporation fee which I think we can infer from that that it was Blue Chip who then arranged the incorporation of the joint venture company albeit that I'm sure the investors would have had to have signed some documents that were presented to them in order for that to happen.

Now, I don't need to deal with paragraph 14 of my reply. Next, in relation to the question really were there any securities here? The first matter I want to address is the question that was discussed a little bit during my earlier submission, but more in exchanges with the respondents and that is; should the court be taking a substance over form approach and to what extent can the court rely on documents or other evidence that is extraneous to the key agreements themselves? Firstly, and those questions are a little bit related, not necessarily, but a little bit. Firstly, in our submission, it's no accident whatsoever that in *Culverden* the Privy Council took a substance over form approach and that's because that's what the Act requires. It demands it because we've seen that, for instance, when the Act defines debt security it does it in, by using substantive concepts not formal labels. It talks about a right to be paid money rather than, for instance, a right to be paid interest and similarly, as I think it was Justice McGrath pointed out, one cannot contract out of the Act or as section 4 actually puts it, the Act has effect notwithstanding anything to the contrary in any agreement, so of course that's an indication, if you needed it, that the parties cannot avoid the application of the Act simply by dressing up obligations in different language or structuring an agreement in a particularly complicated way so that the effect of it is a little bit hard to discern. So the fact that the rights to be paid money or, I would term it, the investment return is called procurement fees in the joint venture agreement or option fees in the PIP and PAC agreements is neither here nor there.

The second question is the extent to which the Court can look at extraneous documents and, in my submission, the Court can do that in two ways. The first is just to the extent the general law of contract interpretation allows the court to do that and I don't want to say anymore about that.

TIPPING J:

Very wise.

MR CAMPBELL:

Yes, partly because in this case the documents that I took you to early on in my submissions on the first day, I think as I said to the Chief Justice, they actively reflect what the effect of the agreements is in any case, but there is another, in my submission, purpose for which the court is entitled to look at those documents and that is because when we came to look at the exemption provision in section 5(1)(b), as *Culverden*, in my submission, the Privy Council's right on this point. You do have to ask yourself, what's the – when we look at the particular rights that fall within the definition of securities, are these cardinal aspects of the transaction or are they just unexceptional ancillary rights? And in my submission, it is appropriate to look at the way in which these products were marketed to the investors to answer that question and here all the documentation confirms that the investment return is the cardinal feature of the transactions.

Now, as to the definition of debt securities, I don't wish to speak to any of paragraph 17, 18 or 19 because, to a large part, they just record what I said to you by way of anticipatory reply in my earlier submission. But I do have to say something in reply to what Mr O'Callahan has said today.

Now I think I understood him to be saying at one point that participation in someone else's property is a necessary element of a debt security. I may have misunderstood him but I thought that he was suggesting that an element of participation is necessary in order for there to be a debt security. Now for reasons that I'm about to explain, even if Mr O'Callahan is right, it doesn't matter, because for Mr O'Callahan to be right that must mean that any debt security contemplated by the Act involves an element of participation. So on that submission even an ordinary deposited fund for just 10 days on my learned friend's submission would involve a right to participate in the

party with whom you've deposited the funds. But if that's all that participation means, it's an incredibly weak concept. If that's all that it is, well, we've got it here as well. And that's not to say that I think that there is, in truth, participation in the sense that the Act talks about in relation to participatory securities. I don't think there is but if you were persuaded by Mr O'Callahan this morning to think that debt securities generally require a right to participate, well we've got just as much of that concept here as in any other situation.

ANDERSON J:

I think that the furthest it can be taken is that section 5 exempts a certain type of debt security from the operation of part 2.

WILLIAM YOUNG J:

This is an upstream argument that you're dealing with isn't it Mr Campbell?

MR CAMPBELL:

Well –

WILLIAM YOUNG J:

This is upstream of section 5 isn't it?

MR CAMPBELL:

I'm addressing the definition of debt security.

ANDERSON J:

My point was that an agreement for sale and purchase of land is a debt security. Some types of which are subject to part 2 and other types are not.

MR CAMPBELL:

Well with respect your Honour it's not so much the agreement as rights under the agreement that might be securities.

ANDERSON J:

Yes.

MR CAMPBELL:

Where the debt security is equally security or whatever else, or just participatory securities. And I think my learned friend Mr O'Callahan was suggesting that the sale and purchase agreements are not securities. That's not actually the way that the Act works. The way that the Act works is that security is so widely defined that it does capture an offer to sell land, boats, whatever. Section 5 says that nonetheless part 2 doesn't apply to those offers.

WILLIAM YOUNG J:

If I have a property for sale, how is that an offer of security? How does that work?

MR CAMPBELL:

If I can just say, my answer there isn't particularly important for the determination of the issues here –

WILLIAM YOUNG J:

No.

MR CAMPBELL:

But because security is defined as a right, an interest in – actually I –

WILLIAM YOUNG J:

I see, a right or interest in – you'd say that if I simply offered my house for sale I'm offering someone entitlement to share in a property or to, whatever the definition of "security" is.

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

"An interest or right to participate in capital, any capital or other property." Okay.

MR CAMPBELL:

Yes. So there were two alternatives in that definition. "An interest in," or "A right to participate."

WILLIAM YOUNG J:

Okay I understand now thank you.

MR CAMPBELL:

Now at paragraph 20 this response to one of Mr Neutze's submissions which I'm not going to speak to it except that in the second to last line I've said, "However that option is within the control of the investor." It should be "that right" is within the control of the investor. The point I'm making there is that in the PAC deed although it is not inevitable that the options, remember there's a put option and a call option, it's not inevitable that the option will be exercised. Nonetheless if the investor wants to exercise the put option that, of course, is entirely within their control.

At paragraph 21 I, in responding to the submission that my learned friend Mr Neutze resurrected, that because the company was to hold property, offers of shares in the company were exempted. That submission was accepted by Justice Venning but rejected by the Court of Appeal and I've simply set out, and I don't wish to speak to the, in summary, the submissions I made to the Court of Appeal on that point. Likewise I don't need to speak to paragraph 22.

At paragraph 23 in dealing with debt securities my learned friend Mr Neutze in his oral submission seemed to doubt that a court could just pluck out particular rights from an overall transaction and subject them to examination under the Securities Act. Now I think Mr O'Callahan was making much the same point just a few minutes ago. Now no authority was offered for that proposition and it is, of course, directly contrary to *Culverden*. Now, firstly, in my submission, *Culverden* was right. Not only is it contrary to the Privy Council's decision but also the Court of Appeal's decision in that case. Not only, in my submission, is *Culverden* right but the courts have, and indeed the legislature and the Securities Commission before it was disbanded, have acted in accordance with that principle ever since.

Now I wasn't prepared for this submission being made, because it wasn't really signaled in the written submissions, but just to give you some examples, one way in which the Securities Act has bitten in recent years is in the situation where a developer of land subdivides land and offers the subdivided properties for sale whilst at the same time saying to purchasers, look, I'm going to set up some communal facilities, and the developer normally follows one of two options. The developer might incorporate a company to own the communal facilities and the purchasers of

the parcels of land become shareholders in that company. Or the shareholders – sorry the owners of the individual units also become co-owners of the communal facilities.

In either case the – what is being offered in those situations is partly something that if it was by itself, just the ordinary, the separate title to land, would be exempted by section 5. But at the same time there is something that falls within the definition of "security". Either an equity security because a company is being used or a participatory security because there are more than five owners of the communal facilities and therefore a contributory scheme and the exemption doesn't apply. In either case you've got a situation where there is one offer of a combined product, if you like, which partly involves something that is undoubtedly exempt, and partly involves something which is covered – not within the exemption of section 5. In those situations the entire offer of the product is unlawful under section 33 and section 37 and it's in response to that particular exemptions have had to be passed so that developers in those situations can have a shortcut way of avoiding the application of the Act. They've got to conform to certain regulations and so on.

Now an example of that, a slight variation, is in the appellant's bundle of authorities. It doesn't deal with this particular issue but it's just an example of that sort of structure, that's the *Braemar Lodge 2004 Ltd v Owers* [2010] NZCA 300, (2010) 10 NZCLA 264,703 case which is at tab 6 of the bundle of authorities and that's one where in fact the purchasers were going to be, participate in rental income from certain of the properties in issue. I don't have to take your Honours to that particular decision. My point is simply that *Culverden* has been acted upon ever since, it hasn't been questioned, no one has challenged these situations and said, "Well, in these cases the Act only applies to the little part of the agreement that is not exempted." What actually happens is that the entire agreement unlawful unless the Act is complied with.

TIPPING J:

Is it the entire agreement or the entire allotment?

MR CAMPBELL:

You're right, your Honour, the entire allotment. But, of course, in these cases, the allotment is almost always the entry into the agreement.

TIPPING J:

Yes, I just wanted to be clear on that – yes.

ELIAS CJ:

So what is the allotment in this case, in the *Braemar* type case?

MR CAMPBELL:

The entry into the sale and purchase agreement.

TIPPING J:

Could you just take us, or me at least, just through that conceptually again? Sorry to trouble you, but I'd like you just to take it, as to how that constitutes an allotment, of a debt security.

ELIAS CJ:

It doesn't seem to fit within the definition of "allot" and the corresponding meaning.

MR CAMPBELL:

Well, your Honour, the definition of "allot" in the Securities Act is merely an inclusive definition. You'll see –

ELIAS CJ:

Ah, yes.

MR CAMPBELL:

– that is says, "Allot includes sale, issue, assign and convey." The most detailed examination of the meaning of "allotment" is in Justice Fisher's judgment in *DFC v Abel*, and in the *Braemar Lodge* case.

ANDERSON J:

If the agreement for sale and purchase is part of the allotment, who's the issuer?

MR CAMPBELL:

In cases like *Braemar* or –

ANDERSON J:

In this case.

MR CAMPBELL:

In this case the issuer is the Blue Chip company.

ANDERSON J:

How does that sound against the parties to the agreement for sale and purchase, a completely different contractual arrangement?

MR CAMPBELL:

Because the allotment is – the question there, your Honour, is, what is meant by "allotment"? An allotment doesn't necessarily reflect what the issuer is, they're not corresponding terms. So – and I will come to the submission again, because there's been further discussion of what "allotment" means, particularly in this context – but the reason that we say that the sale and purchase agreement is part of the allotment is essentially because the sale and purchase agreement had to be entered into in order for the securities to be created.

ANDERSON J:

Suppose that a developer knew nothing about Blue Chip, placed a property for sale with a real estate agent, and one of the agents strikes up a deal between a purchaser and Blue Chip, completely unrelated to the agreement for sale and purchase? Is the agreement part of the allotment then?

MR CAMPBELL:

No, and you'll see in our submissions that when dealing with the question of allotment, and to some extent it's as much in our severability submissions, that I was going to address again this afternoon, that what's important here is that, firstly, the sale and purchase agreement was a necessary agreement for the rights to arise, secondly, the respondents engaged the Blue Chip company to market the market the product and, importantly, knew that the way in which – sorry, to market the apartments – and the respondents knew that the way in which the apartments would be marketed was in conjunction with the investment products, and that is what distinguishes, your Honour, this case from the example that you've just given.

ANDERSON J:

Well, it might have certain legal consequences, but I have difficulty with the concept that it makes it part of the allotment.

MR CAMPBELL:

Well, it is also the case, of course, and I will come to this, that not only was the sale and purchase agreement a necessary ingredient, but it was presented as an integrated scheme with the investment product and, as I've emphasised, the respondents knew that that was what the agents were going to do.

TIPPING J:

I'm sorry to bring you back to a different point, but I was a little startled, and you may be right, to hear you suggest that the issuer is not necessarily the same person as the allotor?

MR CAMPBELL:

Yes.

TIPPING J:

I thought the Act was really constructed on that premises. Do you want to develop that?

ELIAS CJ:

The issuer is the person who receives the money in respect of the allotment, the money.

MR CAMPBELL:

Yes. The allotor is not a defined term in the Act and I don't think it's used –

TIPPING J:

No, no, I know that but wouldn't the issuer, in any normal circumstances, be the same person that allots the securities?

MR CAMPBELL:

Not necessarily, your Honour, because –

TIPPING J:

Well, just give us, that's what I want some help on, because the remedial provision and various other, and I'm not going to tediously go through them, seem to me to be premised on that basis, that it's the issuer that's equated with the person that's responsible for the allotment or creates the allotment.

MR CAMPBELL:

Yes, that's presumably because it is, because the issuer is the person who receives the money or other consideration.

TIPPING J:

The benefit of the allotment.

MR CAMPBELL:

Yes, yes, the benefit of the subscription. Well, to give you an example, your Honour, assume contrary to what we actually have had, that you had full contractual interdependency between the two agreements so that in that case, presumably, the respondents may not be –

ELIAS CJ:

Interdependency, did you say?

MR CAMPBELL:

Interdependency, yes. In that case, presumably there may not be much difficulty in seeing that the allotment would encompass both the entry into the sale and purchase agreement and the entry into the joint venture product.

ANDERSON J:

Surely a more direct route is that if one of the interdependent contracts is unenforceable because of the Securities Act, the other one would be frustrated? It just couldn't be carried out so the result would be the same, but the legal process would be different.

ELIAS CJ:

That's to look at it perhaps in contractual terms, but ...

MR CAMPBELL:

In some ways it is, yes, but to go back to the example I was trying to explore, in that situation a full contractual interdependency presumably you would undoubtedly say that the allotment consisted of the entry into both agreements, but nonetheless, the actual securities are still coming only from the Blue Chip company and the consideration for those is still going only to the Blue Chip company. There's no reason why you can't, cannot have a tripartite relationship where on one side there are two parties who have to act together to allot the security, but only one of them actually receives the consideration.

TIPPING J:

Yes, well, that's the concept I was going to move to was a joint or joint issue, joint allotment.

MR CAMPBELL:

Yes.

TIPPING J:

You say there's nothing inherently unsound in that idea?

MR CAMPBELL:

That's right.

TIPPING J:

All right, thank you.

ELIAS CJ:

I'm boggling a little bit about an allotment being an entry into an agreement, because it doesn't, even accepting your point that allot is an inclusive definition, it has a, the connotation of movement and when you talk about entering into an agreement, there's usually two who enter into it, so you really need to re-couch it a little, don't you, if you say that is it the person providing the, is it the offeror? Is it the vendor?

MR CAMPBELL:

Well, the first question that I understand you're asking, your Honour, is whether it is correct that in some cases, such as this, the entry into the agreement is the allotment.

ELIAS CJ:

Well, I thought you were saying that.

MR CAMPBELL:

Yes, I am, and – I just want to make sure that that's what you're asking –

ELIAS CJ:

Yes, yes, that is what I'm asking.

MR CAMPBELL:

Yes.

ELIAS CJ:

In terms of the legislation, how you get there.

MR CAMPBELL:

Yes, well, if I can give you an example. With the PIP agreement, if you came to the conclusion that the PIP agreement included securities, through the right to the option fee, the only way in which that right, if you like, came into being, was on the parties entering into the agreement. Nothing else happened. Because on the parties entering into the agreement the option was granted, automatically, nothing further had to be done, and the right to the option fees was bestowed upon the investor. So, in many, many cases, it is the entry into the agreement that creates the security, and therefore is the allotment.

WILLIAM YOUNG J:

To look at it slightly the other way round, in the case of the PIP product the subscription is by entering into the agreement. The subscription for the PIP product, in essence, includes, and it doesn't include much more than, entering into the sale and purchase agreement.

MR CAMPBELL:

The sale and purchase agreement or the PIP agreement?

WILLIAM YOUNG J:

Yes – no, no. But the way in which the investor subscribes, enters into the PIP agreement, involves and includes signing the sale and purchase agreement.

MR CAMPBELL:

It does, although, your Honour, of course, that's a slightly different question.

WILLIAM YOUNG J:

I know, it's what the purchaser's doing rather than what the issuer's doing.

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

But if the – the subscription presumably is the other side of the coin to the allotment. So if the subscription, if what's involved, if the allotment is dud, then presumably the subscription's dud.

TIPPING J:

Well, it's got to be the same concept, but from different directions.

WILLIAM YOUNG J:

Yes, from a different perspective, yes.

ELIAS CJ:

But that wouldn't have the investor as issuer.

WILLIAM YOUNG J:

No, no.

ELIAS CJ:

It would have the – oh, no.

WILLIAM YOUNG J:

It doesn't.

ELIAS CJ:

And it doesn't have the investor as allotting –

WILLIAM YOUNG J:

No, it –

ELIAS CJ:

– it has –

WILLIAM YOUNG J:

It's what the investor does –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

– to get the allotment –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

– is to sign up to the sale and purchase agreement.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Which gets the – I mean, perhaps it doesn't make the sale and purchase agreement part of the allotment, but it make is jolly closely linked to it.

MR CAMPBELL:

Yes, well, certainly in that agreement and, in different ways, in the other. As I said, you have to enter into the sale and purchase agreement, or else it doesn't work. But if I can just deal with the allotment –

WILLIAM YOUNG J:

Well, the sale and purchase agreement is independent of the PIP agreements, looked at from the point of view of the developer, but the sale and purchase agreement and the PIP agreement are not independent of each other when viewed from the point of view of Blue Chip and the investor.

MR CAMPBELL:

That's correct, although I emphasise that we are accepting in this Court that the obligations in the sale and purchase agreement are not interdependent.

WILLIAM YOUNG J:

Yes.

MR CAMPBELL:

In terms of the entry into the agreement being the allotment, the fullest analysis of this is by Justice Fisher in *DFC v Abel*, and that analysis is simply accepted, with not very much comment, in the *Braemar Lodge* case. And in the vast majority of cases the entry into the agreement will be the allotment, because it is onto the entry into the agreement that the relevant securities will be created.

If I can go back to my reply submissions and deal now with some points around the section 5 exemption. In –

WILLIAM YOUNG J:

Can I just ask you, sorry, about the PAC agreement? Effectively, the option fee is $7000 or $7500?

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

So it doesn't look like, it's not so interest-like as the procurement and option fees under the JVA and PIP agreements?

MR CAMPBELL:

That's right, although it's important to remember that that fee is not payable until the underwrite fee is earned, so it could have quite, there could be quite some time before it's payable –

WILLIAM YOUNG J:

Yes.

MR CAMPBELL:

– and so considerable risk involved for the investor.

WILLIAM YOUNG J:

And just noticing there, whatever the position was with the JVA and PIP agreements, at least in this case, in the PAC agreements, it must have been clear to the investors that there was an underwrite, that Blue Chip was getting something. Well, if it wasn't clear to them –

MR CAMPBELL:

Yes.

WILLIAM YOUNG J:

– it should have been.

MR CAMPBELL:

Yes, well, quite a number, I don't think all of the investors in PAC, were either staff members of Blue Chip or relatives thereof.

WILLIAM YOUNG J:

Right.

MR CAMPBELL:

I'm being rather general there but…

WILLIAM YOUNG J:

Yes, okay. So there's more of an in-house product, not –

MR CAMPBELL:

Yes, so, not all of them but quite a number.

So the section 5 exemption. In my learned friend Mr Neutze's oral submissions he provided an explanation for or rationale for the exemption, which is that one – if you're buying land, for instance, you're not just getting an intangible right to money on a piece of paper, I certainly think that is one of the rationales for the exemption. But that's precisely what the investors were getting under each of the Blue Chip products. The thing that, the cardinal feature of the joint venture agreement was the

interest payments, to provide the indemnity against the finance costs, and the procurement fees, and for the PIP it was the option fees. So, when one looks at what the transaction was all about, that's all that the investors were – well, that is mostly what the investors were getting, an intangible right to money on a piece of paper.

And my learned friend attempted to distinguish *Culverden*, and really there was a fairly consistent attack by my opponents on the Privy Council's decision. Firstly, by saying that the Privy Council didn't regard the transaction in substance as a purchase of an estate and land, and my learned friend Mr Neutze said a number of times that the Privy Council just regarded it as a licence to occupy. That is not correct. Lord Nicholls did not use the word "licence". It would have been quite clear to His Lordship that there is a world of difference between a licence to occupy and an estate in land. His Lordship spoke of the purchaser's right to occupy, but you just have to ask yourself, "Where did that right come from?" The only place that it came from was from the purchaser having an estate in the land that he or she had purchased.

And when Mr O'Callahan was talking about *Culverden* earlier he, my learned friend was emphasising that Culverden was, really the essence of the transaction was that Culverden was paying back the price. It's important to note, of course, that until that price was paid, the investor was going to retain the estate in land, and so the attempts by my learned friends to say that this, that *Culverden* really didn't involve an estate in land it should have been resolved on the basis of the contributory scheme argument, should be resisted.

Now, your Honour Justice Tipping raised the suggestion that that nice little phrase, "in respect of", might allow the court to – if I understood your Honour correctly – when applying section 37, to effectively pick and choose as to which parts of an agreement were invalid and of no effect. The difficulty with that view, in my submission, is that what section 37 does is prohibit and then invalidate an allotment. And, as I've just said, the allotment, in most of these cases and in this case, is the entry into the agreement. And that means that you cannot just pick and choose from the relevant agreement the particular rights that happen to be securities that have been offered in breach of the Act. If you were able to do that, you'd actually have some rather difficult situations where you might have a contract that gave rise to securities and it might be quite different from our situation. There might be a number of rights and obligations under the contract that simply aren't securities anyway, they're not

exempt as such, they're just not within the definition of securities. If the phrase in respect of was to be applied in a way that was suggested, you might end up with that agreement being suddenly devoid of some rights, but the rest of it somehow has to keep on being formed and that is not the in which the provisions, to my knowledge, have ever been applied.

The next question is, were the sale and purchase agreements part of the relevant allotments? Now, I've dealt with that a little bit in my exchanges with Justice Anderson. In my earlier submission when I came to this part, I said to the Court that there were three preliminary matters that I thought I should deal with and they were the pleadings, the concession and section 37AL and I was, as I understood it, told I didn't really have to deal with the pleadings and the concession and as I understand things the respondents are saying that they're not relying on those. I simply say that we do not accept the pleadings point in any case –

WILLIAM YOUNG J:
Well, I think it was, I had a look at it and it was pleaded I think?

MR CAMPBELL:
Yes, your Honour, I agree entirely so I'm not going to say anymore about that. I feel that I do I have to say something about section 37AL and much of what I've said at paragraph 28 simply reflects the exchanges that occurred yesterday afternoon. Let's start with the context to this regime –

TIPPING J:
Well, from my – I don't know whether, the Court may wish you to, but for my part I agree entirely, it stands the section on its head unless –

MR CAMPBELL:
Well, I don't want to say anything more about it.

ELIAS CJ:
Unless you've got anything that didn't emerge, you don't need to labour it perhaps.

MR CAMPBELL:
Well, only to observe that my learned friend, Mr O'Callahan himself, when addressing you on this, said that as to the mandatory relief provisions that they're there for

investors who do want the security. Exactly, that's the whole point of these provisions. If somebody wants to validate the security, they apply for relief. If they don't want to, they don't have to do anything and that's exactly the case, of course, under the Illegal Contracts Act. If you want to rely on the illegality, you don't have to go and make an application.

Just connected to that, in my submission, section 37AL has no impact on the court's ability to apply the tainting principles essentially because – no, I'm not sure that I really need to address you on that. I think that emerged this morning anyway and there are some more important things to deal with.

Now, at paragraph 31, if the court finds that the sale and purchase agreements were part of the allotment, then they are invalidated by section 37(4) and I've just repeated the point that the very next question after that is whether the Court has any jurisdiction at all outside the relief regime in the Securities Act to sever the sale and purchase agreement. Now, you may recall that when I gave my earlier submissions, I was I think told that I didn't really have to deal with the rest of that because it didn't look as if there was any such jurisdiction and I have to say that having had to look at section 37AL a little more closely over the last day or so that I'm even more firmly of the view that the Court –

TIPPING J:

Well, I don't see how if it's part of the allotment you can say, "Oh, never mind that but we're going to ex post facto, if you like, severe. I mean, that can't be consistent with the policy of the legislation. The only way of getting out of would be relief.

MR CAMPBELL:

Yes.

TIPPING J:

That's just speaking for myself. I can't see that that argument can possibly succeed.

MR CAMPBELL:

Now, at paragraph 33, I note that some of Mr Neutze's submissions, and this was true also of my learned friend, Mr O'Callahan today address an argument that the appellants do not make. As I've said a number of times, we are not saying that the sale and purchase agreement and the investment products are contractually

interdependent. Questions of interdependence are distinct from, firstly, the question whether the sale and purchase agreements were part of the allotments and, therefore, invalid and they're also separate from questions of severability but I'm not going to have to talk more about severability, but I do want to say something more about that first point. Contractual interdependence is distinct from the question whether the sale and purchase agreements were part of the allotments.

Now, this is made clear, firstly, in Justice Fisher's judgment in *DFC Financial Services Ltd v Abel*, I just want to add to the references –

ELIAS CJ:

Where are you in your submissions? Sorry, I –

MR CAMPBELL:

Paragraph 33. I've given you a reference there to page numbers in *DFC Financial Services Ltd v Abel*, if you would add page 628 as well and I think it is necessary to take you to the, some of these passages. In this, in *DFC Financial Services Ltd v Abel*, Justice Fisher records fairly early on that the borrowers were making a number of different arguments as to why the loan agreements were invalid. On page 626 at that bottom paragraph, firstly you may note that's where Justice Fisher draws his conclusions on the meaning of allotment, but I want to take you to that bottom paragraph from page, sorry, from line 50 and Justice Fisher starts talking about the possible consequences of a finding of avoidance of what he refers to as the primary contract and His Honour says, "These will include no doubt collateral contracts between the same parties such as loans from the issuer to finance the subscriptions," and so on.

Now, the Judge there, of course, is talking about contracts that are contractually interdependent, so he treats that as one possible way of – in that case, the loan agreements being invalid. Now, a quite different argument that the borrowers were putting is addressed at the bottom of page 628 and you'll see that Justice Fisher treats this as quite different from contractual interdependency. He says, "The defendant's second argument was that the plaintiff's loan was included as one of the securities offered to the public and hence form part of or amounted to an allotment," and if you go down a few lines, Justice Fisher doesn't just reject this out of hand, he says, "I am inclined to think, without finally deciding, that for the purpose of section

37(1) and (4), the original offeror of the securities need not be the subsequent allotor and that the allotor need not have been a knowing party to any breach of statute.

Now, if you continue on with that paragraph you'll see, however, that the borrowers in that case were making a quite different argument from what the appellants are making here. What the borrowers were arguing was that the loan contract itself was a security, the offer of a loan was an offer of a security.

TIPPING J:

This was an offer of a loan to enable the subscription to be made?

MR CAMPBELL:

Yes and this particular part of their argument was to say, "Well, the loan agreement was part of the allotment because the loan itself was a security," and Justice Fisher says, "Well, that really turns the Act on its head. It's concerned with investors not borrowers." Now we, of course, are making a different argument. The reason I've you to that passage is just to highlight that Justice Fisher nonetheless sees the question of allotment as quite separate from contractual interdependence. And in –

TIPPING J:

I notice Justice Fisher talks about the creditor's right to repayment. In that respect, I imagine you say he just slightly dropped the ball?

MR CAMPBELL:

Well, understandably. The issues that we've had to grapple with weren't before him, it was a –

TIPPING J:

Yes.

MR CAMPBELL:

Apart from the fact that it was around the wrong way, a loan rather than a deposit. It was just a simple money transaction and it's not surprising that he would talk that way.

TIPPING J:

Well, yes, it was probably just descriptive rather than definitional.

MR CAMPBELL:

Yes, yes. Now, we are making a different argument, of course. We're not suggesting that the sale and purchase agreement, if it stood by itself, would be a, would be governed by the Act. What we say is that the sale and purchase agreement is part of an allotment because, as I said earlier, firstly it's necessary for the investment products to be created, or the rights under those investment products to come into being, which is difference from the *DFC* case, because the loan agreement was not a necessary part of the package, that was just one way in which the partnership could have found the funds. And, secondly, again in contrast to *DFC*, the respondents' agents were the ones who were marketing the securities. Whereas in *DFC* of course, the promoter of the securities, the equivalent to Blue Chip, was not the agent of the lender.

Now, I also wanted to take you very briefly to *Hurst v Vestcorp*, just to clarify an exchange that happened earlier today. That, I think, is the next – it's tab 7 in the same bundle of authorities. Now, although in this case the New South Wales Court of Appeal was not concerned with the term and what an allotment is for the purposes of their legislation, but they were instead discussing severability. Justice Kirby, on page 301 on that right-hand column at the very top, starts off by saying, "In one sense, the loan agreement was entirely collateral in the investment agreement." I'm not sure whether the proposition "in" should have been used rather than "to", because it becomes clear from what His Honour subsequently says that what he is meaning is that it's entirely separate from or collateral to the investment agreement. Because His Honour goes on to say, "It was in effect saying to the investor that if he or she wished to obtain more, that could be done by a separate arrangement offered in the loan agreement. Execution of the loan agreement was not a necessary precondition to the investment." And then in the next paragraph, at the fourth line down, His Honour says, "It is plain that the drafter was attempting, so far as was consistent with the relationship to the scheme, contemplated by the investment agreement to devise a separate and severable arrangement," and nonetheless His Honour finds that failed.

So, in those passages, to the extent that it's – because I'm not entirely sure to what extent that is going to have too much of a bearing here – I was just concerned that

my learned friend seemed to be suggesting that in that case the courts were starting from the supposition that the two agreements were contractually interdependent, when in fact they were not, that was not the court's view.

Now, finally, I go on to tainting, and deal with imputation of knowledge. And what I've done in this – tried to do – in this part of my reply submissions, is to summarise, as I understand it, where the parties are on some common ground, because I think is actually quite a lot of that, and where the issues actually are for the court. As to the legal principles, we're actually largely together. Firstly, the scope of an agent's task should be determined in a commercially realistic way, according to the circumstances. We just disagree as to how that should be applied here and secondly, the general rule is accepted that knowledge acquired by an agent is imputed only if it is obtained by the agent within the scope of the agency.

So we accepted that's the general rule, that's the starting position. The dispute is whether this is an appropriate case and the Court may not have to get, I should add, to the second dispute because our primary submission is that what the sales agents did in marketing the investment product was within the scope of the task and so their knowledge obtained was, even under the general rule, to be imputed to the respondents. But if that's not accepted, we say that this is an appropriate case where knowledge obtained outside of mandate, as Professor Watts puts it, should be imputed.

So, firstly as to the scope of the task. Now, just to be clear our notice of appeal or notice of application for leave to appeal made it quite clear that we were challenging the findings below as to the scope of the task for which the sales agents were engaged, and that's made clear also in my earlier submissions at paragraphs 81, 82 and 96. Now, and I address the Court to some extent on that matter in my, on Monday. Now, there are two distinct questions, of course, as *Dollars & Sense* explains, first, what are the actual acts that have been authorised and, secondly, is the agent's act in question so connected with those acts that it can be regarded as a mode of performing them.

Now, it is common ground that the acts that the respondents authorise for the introduction of purchasers, but you may like to add to paragraph 37 that, of course, that introduction has to be on quite tightly prescribed terms, including as to the price. Now, Mr Chisholm, my learned friend, regards that as narrowing the scope of the

agent's task. I have to say that I see it the other way, because as my learned friend explained, this was not a case where the, there was going to be any negotiation backwards and forwards between the vendor, the respondents and the purchasers, the investors, and there never was. What the sales agents did and what was contemplated was introducing purchasers and providing the vendors with a sale and purchase agreement on the price that the vendors had already stipulated in the underwrite agreement with that sale and purchase agreement already signed by the purchaser. So in that sense you ask yourself what is it that is left for the vendors to do?

Now, in contrast to your ordinary situation where there's a real estate agent involved, you'd normally expect the vendor of course to be presented with offers and then the vendor would think, "Well, no, I'm not so sure about that, I'll counter-offer at a certain price or add a condition or strike that condition out or want the deposit higher," that was not the case here. Everything effectively was done for the vendors, except for the signing of the agreement. That was, we acknowledge, left to the vendors. The sales agents were not authorised to bind, that's accepted. But when one looks at the way in which the sales agents were engaged, in my submission, that limitation as to what they could do meant that they were, in effect, doing much more than an ordinary real estate agent, they were presenting the vendor, the respondents with an agreement that was just ready for execution by the vendors.

Now, the – going back to my written submission at paragraph 37, the issue is whether the manner in which the Blue Chip sales agents went about introducing purchasers, namely, offering investment products in conjunction with the apartments, was sufficiently connected with those acts that it could be regarded as a mode of performing. And, I'm sure I don't have to remind you, but in this court, in *Dollars & Sense,* this Court said that the court must concentrate on the nature of the tasks to be performed and on how the use of the agent for that purpose has created risk for the third party. Now, we say that there was a sufficient connection because the respondents knew that the agents would introduce purchasers by offering the apartments. And, because of that knowledge, there was an inherent risk that the sales agents would mis-sell the investment products, and I've deliberately used that quite wide phrase "mis-sell".

Let's just stand back for a moment. The respondents acknowledge that if there'd been misrepresentations about the apartments themselves, that would be brought

home to the respondents. Let's just ask ourselves why that is so, and undoubtedly it is. The reason is that when you engage an agent to find a purchaser for your property, you know that there's a risk that the agent might say, "This house doesn't leak, nobody's going to build next door and block your views," of course there's a risk. Here, equally, the respondents knew that the Blue Chip sales agents were marketing the apartments and obtaining purchasers by offering the apartments in conjunction with investment products. So, the respondents must have appreciated that there would be a risk that in some way the sales agents might misrepresent those sales products or do something else that was in some sense unlawful. The point that I make next is that it isn't necessary, when deciding that this was a risk inherent in the task, it's not necessary for us to show that the precise way in which the investment products might be mis-sold was appreciated by the respondents.

WILLIAM YOUNG J:

Well, to some extent, of course, they did seek to protect themselves against the mis-selling by the whole agreement and no misrepresentation and, "We're not liable for what third parties say about third parties' financial packages."

MR CAMPBELL:

Yes, they did. I should just explain that, of course we haven't appealed the misrepresentation finding below, but that's not because we accept the findings on scope of the task. The notice of application for leave to appeal makes it clear that we don't. There were a whole lot of other reasons why we failed on the misrepresentation claims that would have – well, I don't have to go into those, you may have read the Court of Appeal judgment yourself, but the point that I'd like to make is that, just as with the other cases discussed in *Dollars & Sense* that deal with criminal behaviour by agents, which is nonetheless brought home to principals, just as in those cases, it wasn't necessary to show that the principal could appreciate the precise way in which the agent might misbehave. Equally, here, it doesn't matter that, as my learned friends have sometimes put it, that this might have been a rather obscure breach of a statute – though I should say I don't accept that it's obscure, I think it's actually quite a plain breach of the Securities Act, though I acknowledge that most people are blessedly free of any knowledge of that legislation.

TIPPING J:

What do you say to the proposition that the developers had to know that what was involved was illegal, as opposed to simply, that it was within the risk, if you like?

MR CAMPBELL:

Yes.

TIPPING J:

If the doctrine of tainting, according to the submission, is to bite, then the proposition against you is that they have to know that it was illegal and that they – and if we get to this point…

MR CAMPBELL:

Yes.

TIPPING J:

But there doesn't seem to be any evidence or findings that they did know that it was illegal.

MR CAMPBELL:

No, that's accepted.

TIPPING J:

How do you get – do you simply attack that proposition head on –

MR CAMPBELL:

Yes.

TIPPING J:

– they just have to have imputed knowledge of the facts –

MR CAMPBELL:

Yes.

TIPPING J:

– that can be your only answer, isn't it?

MR CAMPBELL:

Yes.

TIPPING J:

In other words, you'd prefer Justice Turner's tentative proposition to that of Justice McCarthy and Justice North?

MR CAMPBELL:

Yes and that's – well I don't have much to add to what I said in my earlier submission that in –

TIPPING J:

That strikes me as being one of your more difficult points.

MR CAMPBELL:

Which arises, of course, only on the tainting.

TIPPING J:

Oh yes.

MR CAMPBELL:

Yes. well the proposition that the appellants put is that the true principle is that if you participate in illegal acts then you cannot simply say well I was unaware that they were illegal. But the real issue for the court, and the – as I understand it I don't really think that the respondents disagree with that proposition. The real issue there is –

TIPPING J:

If you – if they accepted that if you were a party to –

MR CAMPBELL:

Yes.

TIPPING J:

– they of course say they weren't parties too – the worst is that they had knowledge of facts the consequence of which was illegality.

MR CAMPBELL:

Yes. The question is, were they party to it or, another way of putting it, did they participate in it and we say that they did because, and this is slightly different from questions of imputation but because they knew that the, that their agreements or

their apartments were going to be sold in conjunction with these products. So it's not just an accidental connection between the sale of the apartments and the investment products, it's much more than that.

ELIAS CJ:

Mr Campbell, it's 4 o'clock and we'd normally adjourn now. I think we are able to sit until 4.30 but 4.20 would be preferable. Are you going to complete in that time?

MR CAMPBELL:

I think that should be ample your Honour.

ELIAS CJ:

Thank you. I'm sorry Mr Barter has to go too. I'm sorry I should have called on Mr Barter earlier. How long do you think you'll be Mr Barter?

MR BARTER:

I wouldn't anticipate needing more than a few minutes. I might not need it at all depending on how this discussion continues.

ELIAS CJ:

Yes, thank you. Yes Mr Campbell, I've put a big weight on your shoulders.

TIPPING J:

I'm sorry I rather took you out of flow.

MR CAMPBELL:

No, no, that's fine your Honour.

TIPPING J:

By my moving across to this illegality, knowledge of or knowledge of facts point. I understand your argument, thank you.

MR CAMPBELL:

Yes. And I should perhaps just say that in the Canadian case that my learned friend Mr Chisholm took you to this morning, in my submission that case is largely resolved by the holding in the Court of Appeal and the Supreme Court that the purpose of the

legal retainer was not to assist the unlawful loan transaction because, of course, if the legal retainer had been carried out properly you wouldn't have had the unlawful transaction.

If I can go back to paragraph 39 the, just to connect what I say there with one of my learned friend Mr Chisholm's submissions at paragraph 4.13 of his submissions where my learned friend tries to put the question in terms of whether a breach of the Securities Act was within task and that, with respect, comes a little too close to asking again whether forgery by Mr Nathan was authorised and one has to remember that it's task not authority that's in issue at this point.

At paragraph 40 nor is it relevant that the Blue Chip sales agents were, when marketing the apartments, also acting for Blue Chip's benefit and this is made clear again in *Dollars & Sense*. That doesn't prevent their acts, the fact that they're acting for somebody else at the same time doesn't prevent their act from being within the scope of their agency from the respondents.

Now at paragraph 41 I deal with a couple of the authorities relied on by the respondents, *McAlpine* and *Saunders v Leonardi*. Now in both of those a purchaser alleged that the vendor was liable for misrepresentations made by an estate agent as the availability of finance and the courts held that those weren't made within the scope of the estate agents authority. But those cases are quite different because in the *McAlpine* case there was no suggestion whatsoever that the vendor knew that this was something that the estate agent would be doing. Contrast our case. And in *Saunders v Leonardi*, although it's not entirely clear what the vendors knowledge of it was, there are a couple of passages where Justice Holland emphasises firstly that the vendor hadn't requested the estate agent to find finance for the purchaser and secondly that there was no evidence that it was common practice of such agents to procure finance and His Honour would only have been addressing those questions, well was really addressing those questions in my submission to see whether the type of misbehaviour there by the agent was something that was an inherent risk in what the vendor had engaged the agent for.

TIPPING J:

I wondered in 2 whether you're going to raise the question of inducement, that's effectively what you're doing in 42, isn't it?

MR CAMPBELL:

Yes well that's, that's perhaps not laypersons language but my attempt to put my analysis in the most straightforward terms.

TIPPING J:

Yes well the point here, as I understand it, is that in the same was as a representation is intended to encourage purchasers, so is the availability of a finance package. Is that the analogy you're drawing in 42?

MR CAMPBELL:

Yes but particularly that in both of the cases, or both of the examples I gave in 42, the vendor knows what is going to be happening. So with the ordinary real estate agent the vendor knows that the estate agent is going to make representations about the property, that's what they engage them for –

TIPPING J:

Well that may be more straightforward in relation to the property but it's not so straightforward in relation to, in general terms anyway, in relation to finance.

MR CAMPBELL:

No I accept that ordinarily, ordinarily a vendor is not going to be bound by what an agent says to a purchaser about the availability of finance but we don't have an ordinary situation here. We don't just have the respondents engaging a real estate agent having no idea what it is that they're going to do so it's quite different from –

ANDERSON J:

The point is that they knew well enough that the agents would be making representations about financial matters.

MR CAMPBELL:

Yes and –

ANDERSON J:

Because that's what they were selling.

MR CAMPBELL:

Yes and not so much representation but they were offering the packages, the investment products, along with the apartments.

TIPPING J:

Well they were offering them as in inducement to buy the apartments.

MR CAMPBELL:

Yes.

TIPPING J:

That is what I was trying to say.

MR CAMPBELL:

Yes. Sorry your Honour.

WILLIAM YOUNG J:

You've sort of got this over on para 44B that the developers are now seeking to take advantage of the sale and purchase agreements but disown the techniques by which they were obtained.

MR CAMPBELL:

Indeed and that part is addressing the alternative submission that even, just to be clear, up until paragraph 42, of course, I'm suggesting that because the scope of the task included the offering the investment products then the, just under the general rule of imputation the sales agents knowledge of those products should be imputed. The alternative is that if you don't, if you're not with me on the scope of the task then this is a situation where one should go outside the general rule and I firstly say that one can't approach these questions in a vacuum and that's because – well another way of putting that, there aren't hard and fast rules, this is what I'm trying to say at paragraph 43, that's why the first rule that we were exploring is accepted to be just a general rule and the reason is that the questions are ultimately about whether an agent's knowledge should be imputed to the principal and that can depend on such a variety of matters that you can't stipulate hard and fast rules in advance.

Now the matters that are relevant to imputation in this case are firstly you do have to take account of the legal context. That's not taking account of the legal context so as to determine the scope of the task but simply that you take account of the legal

context, or the legal question, in determining whether or not you should impute the knowledge. And here, of course, we're dealing against the background of consumer protection legislation which, in my submission, favour imputation. Paragraph 43 is the point that Justice Young just discussed, that we're not attempting to, for instance, obtain damages or compensation of some sort from the vendors. We're simply seeking to unwind the transaction or in other ways, in other words, what the respondents are doing in opposition is to take the benefit of the agreements without putting the hand up for the way in which the agreements were obtained.

At paragraph C, another reason is that in my submission the respondents did delegate entirely to the sales agents the task of finding purchasers, and that's really the findings that were made below. Nobody else was doing it for the respondents. The respondents weren't doing it themselves and as I explained a moment ago all that the respondents were left to do was to sign agreements that were presented to them by Blue Chip. And that delegation has to also be seen in the context of the background profit share and underwrite agreements that were, had been entered into. Because of those agreements the agents had even more incentive than usual to procure purchasers because that was the only way of getting the underwrite fee and in the case of Icon that was the only way in which Icon itself could obtain its bank funding, by meeting the requisite thresholds.

Now at that point the last point is the respondents knowing in general terms, or in Icon's case, of the detailed terms that what the agents were doing and although two of the respondents didn't have actual knowledge of the detail of their products, their awareness in general terms means, in my submission, that they had ample opportunity to protect themselves. There has been much protestation that they're innocent, couldn't have done anything to protect themselves. We don't accept that. They could've insisted, for instance, that the agents not sell the apartments in conjunction with the products –

ANDERSON J:

But on your approach even that wouldn't save them because of the risks that notwithstanding the injunction the Blue Chip agents would sell.

MR CAMPBELL:

No, no, I don't accept that your Honour.

ANDERSON J:

The only way they can save themselves is not use Blue Chip.

WILLIAM YOUNG J:

Well of course in a way it's hypothetical because Blue Chip could only sell through, I mean it was a bit of a, I suppose a three trip pony but it was a pony with limited trips.

MR CAMPBELL:

Yes. I was going to say your Honour that there might be some extreme cases where insisting that they not do it wouldn't save them and actually this might have been one of those cases –

ANDERSON J:

I suppose they could've, when they got the signed agreement to consider, they could have made sure they informed the solicitor for the intending purchaser, we will only sign on the basis that we have strictly forbidden any association with Blue Chip's representations.

MR CAMPBELL:

Yes, yes.

ANDERSON J:

So there were ways but it was obviously expedient for them to sell in the most efficacious way.

MR CAMPBELL:

Now on this point I was going to deal very briefly with Professor Watts' article and just take –

ELIAS CJ:

Justice Tipping is about to turn into a pumpkin so watch it.

MR CAMPBELL:

Well thank you for the warning.

TIPPING J:

When I read Professor Watts I always turn into a pumpkin but don't pass that on to him.

MR CAMPBELL:

He'll be reading the transcript your Honour.

TIPPING J:

Yes, this is entirely facetious but I'm sorry I do have to adjourn at 20 past.

MR CAMPBELL:

No I understand that. I was going to defend academics against –

ELIAS CJ:

Carry on.

MR CAMPBELL:

I don't intend to be long because this is the last point. The passages that I'd like to highlight from Professor Watts' article are, the page numbers haven't copied too well, but basically on the second page at the top left-hand side, you'll see Professor Watts making the point that it's important to know the question of law to which the issue of imputation is pertinent.

McGRATH J:

Sorry the page number?

MR CAMPBELL:

308.

TIPPING J:

Well that's just the obvious point that context is all important.

MR CAMPBELL:

Yes, absolutely, yes. And then on 314 Justice Tipping drew attention to Lord Halsbury's quote from *Blackbury, Low v Vigors* (1867) 12 App Cas 531 (HL) and I accept that general principle, that it does depend on how wide or narrow the agency I, but as I explained earlier this was actually a rather broad delegation. Then at page 317 the, Professor Watts' discussion of *El Ajou* and you'll see on the right-hand side

there, about five lines down, the key factor in his, that's Lord Justice Hoffmann, burdening the defendant company with the chairman's' knowledge was the total delegation to him by the company of one of the stages of the transaction. And unfortunately *El Ajou* is not in the bundle of authorities but you'll see there near the bottom of that paragraph Professor Watts says, "It is also worth observing that the chairman in *El Ajou* did not have total control of all the steps in the money laundering process that was taking place. It was held sufficient that he had a charge of one key stage of the scheme, even though in exercising his authority he simply followed the directions for beneficial owners." And I emphasise those because although I accept that our case would be all the stronger if the sales agents had been given authority to bind the respondents, the fact that they did not have that extra bit of authority, in my submission, is not fatal to imputation.

Finally, I cannot, I think I have to point out that the academic licence allegation I think is false because before quoting from Justice Handley's judgment in *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679 (CA) you'll note that Professor Watts qualifies it by saying that where an agent has been entrusted with the contracting process and so I think Professor Watts was making it clear that Justice Handley's quotation there was qualified in that way. And in Justice Handley's judgment he talks about it's true the ability to bind but he also regards as important the ability to negotiate and because nothing was left to the vendors in effect that was a role that the Blue Chip sales agents took on by trying to persuade the investors to sign up to sale and purchase agreements including by using the investment products.

Unless you have any further questions, those are my submissions.

ELIAS CJ:

No thank you Mr Campbell. Yes Mr Barter?

MR BARTER:

I promise to be very short. His Honour Justice Tipping invited my learned friend to take on the proposition that the sales agent or that the developer must know of the illegality and might, quite frankly, take that proposition on itself. It stems from the judgment in *Portland* and in my view there's ample authority in *Portland* and in *Filmco* to distinguish between the – based on the adjacency of the parties and indeed that's exactly what did happen in *Portland Holdings*. It starts in page 580 of the judgment

with a statement that simply says, “It is true there are cases in which one transaction will be rendered unenforceable by reason of the illegality of another one with which it is closely connected.” And in my view the distinctions since have depended entirely on the degree to which the parties are related or not related to each other. So that where we have independent financiers coming along, the degree of relationship is quite distant. In this particular case the inter-relationship between the two parties and the two contracts is incredibly close and that’s especially true when measured when one looks at the Icon circumstances and the relationship with Blue Chip where Blue Chip could become the guarantor of the agreement for sale and purchase. The Icon land was originally obtained from Blue Chip. Blue Chip was the underwriter and that was set out in the pack, that there would be such an underwrite, and of course the Blue Chip agents were Icon’s agents and the illegal contract, in fact, creates an option for the purchaser, for Blue Chip to, in fact, become the purchaser under the very contract that Icon relied upon and so they’re inextricably bound and in my view that, in the relationship of tainting, I think means that the close proximity of those two contracts gives the court ample jurisdiction to find that the contracts were tainted.

That’s all I wish to add your Honour.

ELIAS CJ:

Thank you very much Mr Barter. Well thank you very much counsel. It’s been, I’m sure, a very anxious case for you and it’s a very difficult case and we will reserve our decision on it. But we appreciate the argument.

COURT ADJOURNS: 4.21 PM