IN THE SUPREME COURT OF NEW ZEALAND | SC 108/2013

[2014] NZSC Trans 14

BETWEEN	**TAURANGA LAW** Appellant
AND	**JOHN APPLETON AND NATALIE RYAN AS TRUSTEES OF THE APPLETON FAMILY TRUST** First Respondent
AND	**JOHN APPLETON** Second Respondent

Hearing: 1 July 2014

Coram: Elias CJ
McGrath J
William Young J
Glazebrook J
Arnold J

Appearances: M R Ring QC and P J Napier for the Appellant
D W Grove for the Respondents

CIVIL APPEAL

MR RING QC:

May it please Your Honours, I appear with Mr Napier for the appellant.

ELIAS CJ:

Thank you, Mr Ring, Mr Napier.

MR GROVE:

May it please Your Honours, Grove, I appear for the respondent.

ELIAS CJ:
Thank you, Mr Grove. Yes, Mr Ring.

MR RING QC:
Thank you, Your Honour. Your Honour, the issue in this case, the sole issue in this case, is whether Tauranga Law's negligence and failure to advise Mr Appleton that he could cancel the agreement pursuant to the Resource Management Act 1991, section 225, caused Mr Appleton to lose his deposit, and that can only be the case if, had this advice been given, Mr Appleton would have acted on it.

The appellant's position in this case is that, on the balance of probability, he would not have, and the essential reasons, which I propose to develop in my submissions, are that, first, he had previously entered into the same type of investment, it had gone satisfactorily and he was very happy with it. Second, that if the right to cancel had been in the letter it would – in the letter of advice, which is the key document from Tauranga Law in this case – if that advice had been in the letter it would have had no impact on his because, first, he paid no real attention to the letter and, second, to the extent that he did he misunderstood what it said in material respects.

I'd like to take you first, if I may, to the key passages in the judgments and to the key documents, to set the context. The negligence finding which formed the basis of the High Court conclusion on negligence is encapsulated in the judgment of Justice Allan in volume 1 at page 40 at paragraphs 38 to 41 and then with a final conclusion in paragraph 43, that in the learned Judge's opinion Mr Olivier's failure to give the advice of the availability of the right to cancel was negligent. That finding was endorsed by the Court of Appeal judgment at page 68 of the same volume at paragraph 34. Drawing all this together Mr Olivier was negligent either because he failed to advise of the possibility of cancellation when the right existed under section 225 or, alternatively because he failed to advise of that possibility after he actually received instructions from Mr Appleton. And an issue in the High Court that drove that negligence finding was when in fact the contract of retainer had come into existence.

The tenor of Mr Appleton's evidence at the trial as to the key factors for him on what he was not advised about are encapsulated in volume 2 at page 129 at paragraphs 31 and 32 –

WILLIAM YOUNG J:

Sorry, the page reference?

MR RING QC:

129, paragraphs 31 and 32, but particularly paragraph 32. He says in paragraph 21, “If I’d been advised I would have done, properly, I would have done all that I could to get out of the agreement, not pay the deposit, confirmed receiving the letter of advice from Tauranga Law, first occasion that he risks –

ELIAS CJ:

Sorry, which paragraph was that?

MR RING QC:

31, 31 on 129 and 32.

ELIAS CJ:

Yes.

MR RING QC:

He didn’t appreciate, he says, the significant of the risks and didn’t realise there was an ability to cancel. And then, a theme that's repeated throughout his evidence –

ELIAS CJ:

This was an affidavit…

MR RING QC:

In support of summary – in opposition to summary judgment, but it formed the basis of his evidence at the trial.

ELIAS CJ:

Really?

MR RING QC:

Yes. If you turn to…

ELIAS CJ:

Don’t worry, I’m happy to take that from you.

MR RING QC:
Yes, I'm pretty sure that –

ELIAS CJ:
Yes.

MR RING QC:
I wasn't at the trial, of course, but I'm pretty sure that this was used as his brief of evidence for the trial. So that theme that we find running through the evidence – and I'll take you to the relevant passages in due course – is he didn't – well, it was essentially the security of the deposit, and that he didn't understand that Rockfort was not – that the vendor, Rockfort, was not the owner of the property and that he didn't understand the consequences of the deposit being released to Rockfort or that this was unusual, he says he must have read the letter from Tauranga Law, it didn't raise any concerns, no idea what a concurrent creditor was, "I would not have proceeded if I had know that, first the vendor did not own the property, second, the deposit was being released and therefore I had no security and, third, the release of the deposit was unusual and risky."

ELIAS CJ:
Where do we find the terms of the provision in the Resource Management Act?

MR RING QC:
In the materials –

ELIAS CJ:
Is it in the…

MR RING QC:
I'm not sure the –

GLAZEBROOK J:
No, I don't think it is there.

ELIAS CJ:
Is it quoted in the judgment?

MR RING QC:

No, I don’t think it is quoted.

GLAZEBROOK J:

I couldn't find it when I was looking for it –

MR RING QC:

No, you're quite –

GLAZEBROOK J:

– so I photocopied it.

MR RING QC:

I’m glad you did. It was one of things on my list to bring –

GLAZEBROOK J:

Yes.

MR RING QC:

– but I forgot.

ELIAS CJ:

So you're saying that the argument depends on inability to cancel under section 225, which is concerned with selling of land before deposit of the plan, but the evidence is that that would not have been – that would have been exercised in order to meet the concern about the deposit?

MR RING QC:

Indeed, that –

ELIAS CJ:

It’s not the Resource Management Act provision? Yes.

MR RING QC:

You're quite right, Your Honour. It’s a right that existed which fortuitously could have been used by Mr Appleton if, according to his position, properly advised about other things unrelated to section 225.

ELIAS CJ:
Yes.

MR RING QC:
The other relevant –

GLAZEBROOK J:
And I think one of the…

ELIAS CJ:
Yes.

MR RING QC:
The other relevant –

GLAZEBROOK J:
And I think one of the – was one of the lawyers said that he, that his advice would have – one of the experts said that his advice would've been that he should cancel, not merely that he should consider cancelling.

MR RING QC:
Correct.

GLAZEBROOK J:
Yes.

MR RING QC:
Yes. So, and we accept –

GLAZEBROOK J:
And hence why because normally one, perhaps, wouldn't draw anyone's attention maybe but in these particular circumstances with such an unusual case, or such an unusual transaction, then it should've been drawn to his attention.

MR RING QC:
Yes, that's correct. I think the way the presumed discussion or advice would've gone is that there are, well, according to Mr Appleton, you are obviously concerned about

the security of your deposit. Your deposit is not secure for these reasons. Fortuitously you would have a right to cancel under section 225 and you could exercise that right in order to solve this problem for yourself, so that the issue, from a causation point of view is whether, if he had been given the advice that he says he should've been given, he would've exercised that right to cancel the section 225 made available.

ELIAS CJ:

Isn't there a prior question? I know it's not really before us but I'm concerned about the question of breach which in this case would depend very much on the scope of the retainer. What do you say the scope of the retainer was here?

MR RING QC:

What happened was that, from a factual point of view, Mr Appleton went to Blue Chip – well was approached by Blue Chip to enter into a subsequent investment. He wanted to do that. He signed up to an unconditional agreement. Blue Chip suggested that he nominate as a solicitor Tauranga Law. He nominated Tauranga Law. The agreement was then sent to Tauranga Law. At that stage Tauranga Law had had not contact, prior contact with him. They received the agreement through the post. They contact Mr Appleton –

ELIAS CJ:

No but what – I understand that background.

MR RING QC:

I'm sorry.

ELIAS CJ:

But what was it sent to Tauranga Law for? What was Tauranga Law retained to do?

MR RING QC:

Well, there were no limitations on the instructions given to Tauranga Law in the sense that there were actually, there was actually nothing accompanying the instructions coming via the Blue Chip company about what Tauranga Law was to do. Tauranga Law – so Tauranga Law had, and this was one of the issues in the case as to when their retainer arose, whether it arose at the time that they received the letter containing the agreement or whether the retainer was when they finally made contact

with Mr Appleton and he agreed that he wanted them to act, and it was the former that drove the negligence conclusion.

So the retainer was unlimited in the sense that Blue Chip obviously didn't impose any limitations on it and Mr – and Tauranga Law never said to Mr Appleton we're only going to do this. We're not going to do this. They sent out their letter to him, which we'll come to, in response to the phone call which said, "Do you want us to act?" "Yes I do." He didn't ask them for anything in that phone call. They sent out the letter about a week later.

ELIAS CJ:
What do you say the scope of the retainer was?

MR RING QC:
I would have to accept, Your Honour, that the scope of the retainer was the normal scope of a solicitor who is instructed on a transaction of this type, and that is to advise of the legal implications of the agreement that he had entered into.

ELIAS CJ:
So you accept that? It wasn't being referred to him simply for transactional purposes, subsequent, no.

MR RING QC:
I don't think I can responsibly suggest to you that he was only engaged to do the conveyancing.

ELIAS CJ:
Yes and perhaps the most convenient and clear way of expressing it is we would have to accept that his advice included, if appropriate, advice on the right to cancel under section 225.

ELIAS CJ:
Thank you.

McGRATH J:
You're not, as I understand the way you've opened the appeal and your submissions, you're not challenging the findings of negligence in the two Courts below?

MR RING QC:
Correct.

WILLIAM YOUNG J:
Just another issue that's not before us but, I suppose, slightly intrigues me, contributory negligence was pleaded but it's never really been dealt with.

MR RING QC:
Yes I –

WILLIAM YOUNG J:
And I just – did anything happen about that or was it just considered that it wasn't available because it was a claim in contract or…

MR RING QC:
Well I don't know the answer to that but I'm assuming that once you find there's no causation, then contributory negligence falls away.

WILLIAM YOUNG J:
Well that's why it fell away in the High Court. I'm not quite so sure why it fell away in the Court of Appeal.

MR RING QC:
Yes, it fell away in the Court of Appeal because they'll be adverted to it I'd presume.

WILLIAM YOUNG J:
Okay, thank you.

GLAZEBROOK J:
So there wasn't really anything specific in relation to that apart from perhaps not reading the letter, et cetera, which is part of the causation issue here. Is that –

MR RING QC:
Yes it's –

GLAZEBROOK J:
Can we assume that –

MR RING QC:
– not reading the letter or to the extent reading it not appreciating the reasonable meaning that it conveyed.

GLAZEBROOK J:
Which is actually a base of your argument on causation?

MR RING QC:
Correct, yes.

GLAZEBROOK J:
Or one of the bases?

MR RING QC:
Yes, Your Honour.

So the point I'm keen to make, Your Honours, is that the tenor of the evidence as you can see from paras 31 and 32, and other passages which we can come to next, is the predominant focus for Mr Appleton was on his deposit being secure and that if he'd known that it wasn't secure then he would have wanted to cancel if possible and that would've then given rise to the relevance of section 225. Other passages that bear on this –

GLAZEBROOK J:
Just – he does mention, which I would've thought was a fairly significant matter, that the company, a hundred dollar company didn't own the property.

MR RING QC:
Yes.

GLAZEBROOK J:
Which isn't really related to the security of the deposit, although indirectly, because obviously if Rockfort doesn't ever get the property, then the transaction has gone and you hundred dollar company is unlikely to be able to repay it.

MR RING QC:
But in the letter of advice, the fact that Rockfort and the developer, the vendor and the developer were two separate entities was made explicitly clear.

GLAZEBROOK J:
All right, well you'll take us to that.

MR RING QC:
Yes. So if I can take you back to an earlier passage that's relevant to the tenor of evidence I'm talking about at page 125 in the same affidavit, paragraph 11. The time of –

ELIAS CJ:
Sorry, what page are we at?

MR RING QC:
125.

ELIAS CJ:
Thank you.

MR RING QC:
At para 11. And in the oral evidence at 151, this is the oral evidence-in-chief actually starting at the bottom of page 150 about line 29 through to 151 about line 15. This is the omnibus question where everything is put to him and he gives the omnibus answer. This was the subject of some discussion in the Court of Appeal because there was no specific cross-examination on it, and that, Your Honours, we'll find at volume 1 page 72 and 73…

WILLIAM YOUNG J:
Sorry, I've lost the reference.

MR RING QC:
It's the volume 1 –

WILLIAM YOUNG J:
Oh, sorry, it's referred to in the judgment?

MR RING QC:

In the judgment of the Court of Appeal –

WILLIAM YOUNG J:

Ah, yes.

MR RING QC:

– volume 1 at 72 and 73 and particularly page 73 at paragraph 47.

WILLIAM YOUNG J:

Well, the problem with the question is that it folds up some things that didn't happen and some things that did happen because –

MR RING QC:

Well, indeed, and the Court of Appeal said that it still had evidential weight but recognised that it put to him all of the matters in question and then said, "We don't consider that the fact it advised of some of these means the question and answer do not provide an evidential basis for the finding."

McGRATH J:

So where's that? At 70 – at 46, is it, or…

MR RING QC:

47, the last couple of lines of 47.

McGRATH J:

Thank you.

GLAZEBROOK J:

I'm just looking at the statement on page 125 which is inherently implausible –

ELIAS CJ:

Sorry, which –

GLAZEBROOK J:

Just the one that he didn't know there was a cooling off period, he had no choice but to proceed. One would have thought at that stage he was anxious to proceed, he'd

signed an unconditional agreement, he obviously thought it was a great investment at the time, absent any advice that he understood, indicating the risks. It's inherently implausible that he would have wanted to cancel a transaction for which he'd enthusiastically signed up.

MR RING QC:

Well, that's one of the points that we're keen to emphasise, Your Honour, and we say was under-estimated by the Court of Appeal, and it relates to those authorities that we've given you that talk about the caution that has to be applied to self-serving statements in, or hypothetical self-serving in hindsight, about what the plaintiff would have done in alternative circumstances. But, if I may, perhaps I can come to those at the appropriate time later. I'd just like to take you to what we see is the key, two key documents in the case. One is the agreement and the other is the letter of advice, and to just talk about the features of those to better set the context. The agreement, Your Honours, we'll find in volume 3 at page 378, and you'll see the vendor described as "Rockfort Limited", the deposit, which we'll need to talk about a little bit, is a hundred and one, nine one 10, but that got reduced. There are no conditions, no finance conditions, and if Your Honours turn to 383 you'll see at paragraph 8.6 it contains the then and now standard condition, "If this agreement relates to a transaction to which section 225 applies it's subject to the appropriate conditions imposed by that section," but of course because it's a statutory imposition it would be the case anyway. I've referred Your Honours to the deposit. On the first page of the agreement, if Your Honours look at the standard conditions in 2.0 at 379 you'll see there are usual conditions about the deposit being held as a stakeholder, "Until the agreement is unconditional," and that they were effectively overridden in this case by special condition 14 on page 385, and the features of special condition 14 are that the purchaser agrees to the immediate release of the deposit to the vendor and that in return for that the vendor will pay Mr Appleton interest on the amount of the deposit at 8.5 percent per annum from the date of the release to the settlement date and that interest is going to be paid fortnightly in advance up to the settlement date and if the official case rate increases by more than 0.5 percent then the interest rate's going to go up commensurately.

ARNOLD J:

Now this interest was paid to Mr Appleton?

MR RING QC:
Yes, it was.

ARNOLD J:
And was he asked, and did he explain in his evidence why he thought he was getting that interest if the money was held on trust?

MR RING QC:
Well, he was asked about it. Whether you could say that he explained it or not is another matter. If I may, perhaps I could come to that –

ARNOLD J:
Yes.

MR RING QC:
– but effectively it appears that he has an understanding of the word "release" which might not be the orthodox one.

ARNOLD J:
I see.

GLAZEBROOK J:
Were some – sorry I should have actually looked at this – was there evidence on whether he'd actually read this before he signed it? Because he did initial the particular page where the conditions are.

MR RING QC:
What he did say in evidence was that he had read the first page, but I don't think the evidence got any clearer than that.

WILLIAM YOUNG J:
Can I just ask one other question? Presumably there must have – the property acquired is referred to as "Unit 506" so presumably there must have been some sort of plan from which, which is, at least by implication, referred to in that, do you know?

MR RING QC:
There was no plan.

ELIAS CJ:

There was no deposited plan, but was there an indicative –

WILLIAM YOUNG J:

No, I know there's no deposited plan.

MR RING QC:

No. No, no plans, there were no plans either.

ELIAS CJ:

Ah.

MR RING QC:

That was one of the features –

GLAZEBROOK J:

Did they have a diagram or just, they just picked a number out of the air?

MR RING QC:

One of the findings or the aspects of negligence that was focused on was the absence of any plans and specifications –

WILLIAM YOUNG J:

Well, I understand that, and that's why I'm asking. I mean, it just seems that, the number suggests that someone at least had a mental idea of a building in their head and that there were going to be at least five stories, and on the fifth floor at least six units.

MR RING QC:

Let me see if we can find out a little more about that, but my understanding is that at best there would only be a sketchy idea.

WILLIAM YOUNG J:

Okay, thank you.

MR RING QC:

So that was the contractual position in relation to the deposit, and it's useful to, we say, Your Honours, to compare that to what was happening on the arbitrage side of that for Mr Appleton, and you'll find that at, in the same volume, at 424, Mr Appleton was borrowing the whole of the deposit from the BNZ, and you can see that the loan amount was actually in the end $92,310 and the deposit figures were adjusted to reflect that the ultimate deposit paid was $90,468.75, and the relevant evidence is in volume 2, again in that affidavit, at paragraph 17. And essentially what Mr Appleton said was that – between paragraphs 15 and 17 – that he arranged a loan from the BNZ, and he then explains how it was paid out, and it was agreed with Blue Chip that as the BNZ was only prepared the $92,310, that that, the deposit would be reduced to that amount. But what's significant, we say, in this context, Your Honours, is that, if you turn back to that letter of advice at 424, you can see at the bottom of the page that –

GLAZEBROOK J:

It's not that – that was the –

MR RING QC:

That was the –

GLAZEBROOK J:

– oh, the letter of advice from the BNZ.

MR RING QC:

From the BNZ.

GLAZEBROOK J:

Sorry, yes.

MR RING QC:

At the very bottom of the page –

ELIAS CJ:

Sorry, what page?

MR RING QC:

424 in volume 3. You see that the starting interest rate was 6.9 percent, and so the beginning position for Mr Appleton was that he was in the black by at least $100 a month, the difference between 6.9 per cent payable in arrears monthly and 8.5 per cent payable in advance fortnightly. And we say that that is a significant motivating factor for him when one needs to consider how he regarded the deposit and the security of the deposit, and that this was a factor that was at best understated, with respect, by the Court of Appeal.

McGRATH J:

So if you just remind me, the differences between the 6.9 per cent, as in the letter of advice, and what was the other figure which he's getting?

MR RING QC:

8.5.

McGRATH J:

8.5. And where was that again?

MR RING QC:

That's in the agreement at paragraph 14.

McGRATH J:

And these – ah, bottom of special conditions. Yes, and the special conditions, right.

MR RING QC:

So those are the essential features of the agreement and, second, I'd just like to touch on the relevant circumstances of execution as also setting the context. Again, the importance, Your Honours, of the similar Blue Chip investment that Mr Appleton had entered into the previous year, development completed, transaction settled, very happy with performance and dead certain that he was doing the right thing in entering into this agreement. And the relevant evidence that establishes those things, first of all in volume 2, page 124 at paragraph 6 –

ELIAS CJ:

Sorry, page –

MR RING QC:

124, at paragraph 6, at the top of the page, "As I had not experienced any difficulties in relation to the first investment I considered it to be a good time to make a further investment.

GLAZEBROOK J:

Sorry, I – oh, okay, thanks, I've got it now.

MR RING QC:

And then in his oral evidence, 165 – sorry, 156, towards the bottom of the page, about line 29, "The time you entered into the agreement, your first Blue Chip property investment was working well for you, wasn't it?" "Yes, it was, it was going along smoothly." "You're aware Blue Chip had a solid reputation, weren't you?" the answer, "Yes," and then he went on to talk about the letter, which we'll come back to. Also relevant in this context is the evidence of his co-trustee, Mr Clark, towards the back of that volume 2 at page 337, line 30, "In May 2004 Mr Appleton told you he wanted to purchase a second investment, he thought highly of the concept of purchasing through Blue Chip, didn't he?" "Yes," "Even encouraged you to purchase one?" "Suggested not necessarily encouraged," "Presumably suggested to you because he thought it was a good idea?" "Yes, he understood it was a good deal, that's why he wanted to proceed," and then on the next page, cross-examination, "What consideration," at line 5, "of the scheme did you undertake before signing the resolution that it was a good thing for the Trust to do?" "John had fully researched the scheme, John was a trustee and beneficiary, John was dead certain he was doing the right and, as a trustee, had full power to do so," and then at line 20, "What did you ask?" "I asked John typically, 'Is this a sound investment, John?' I know you hear he's very happy with his first purchase, he saw no reason to consider buying a second purchase, he'd done all his homework, he portrayed a certain confidence of the scheme." So that's setting the scene for the execution of the agreement by Mr Appleton and goes a long way, we say, to explaining why he would sign an unconditional agreement before obtaining any legal advice. He didn't read past the first page of the agreement, and I said I'd give you the evidential reference to that and that's volume 2, 156, at lines 1 to 5. "Did you read the agreement for sale and purchase before you signed it?" "I read the first page, I didn't read the whole agreement." And that ought to be –

ARNOLD J:

But he did initial each page of the agreement though, they are his initials?

MR RING QC:

Yes, yes.

GLAZEBROOK J:

And initialled that clause halfway down the special conditions –

MR RING QC:

Yes.

GLAZEBROOK J:

– it seems?

MR RING QC:

Yes. But there's not –

GLAZEBROOK J:

And one can understand why you didn't read the agreement, but the special conditions one might have thought, especially related to the very interest issue that he was keen on.

MR RING QC:

Well, there's no, of course there's no necessary inconsistency between not reading the agreement but initialling pages –

GLAZEBROOK J:

Oh, no, I understand –

MR RING QC:

Yes.

GLAZEBROOK J:

– I understand. It's just less understandable than the…

MR RING QC:

Than ignoring the rest of the document, yes, quite. And the distinction that I wanted to draw to your attention in this context was that evidence that he didn't read past the first page compared with what he said in the affidavit at page 129 at the paragraph we've already looked at, that's paragraph 32…

McGRATH J:

It's the letter.

MR RING QC:

No, I'm sorry. I've given you the wrong reference. You're quite right. That's the letter. I'm jumping ahead of myself there.

ELIAS CJ:

Where did he get the understanding about the deposit being released? You're going to come to that evidence are you?

MR RING QC:

Yes.

ELIAS CJ:

You said he had a specific understanding of release.

MR RING QC:

Yes. It's more – it's not so much an understanding of whether the – why the deposit being released but it's an understanding of what the word released meant –

ELIAS CJ:

Oh, I see.

MR RING QC:

– in the letter.

ELIAS CJ:

But did he give evidence that he knew either from the agreement or from any other source that there was something about release of the deposit?

MR RING QC:
Yes, yes, he – the tenor of his evidence was that – well, would you like to look at it now?

ELIAS CJ:
Yes please.

MR RING QC:
If you turn to page 160. Really actually if you start at the bottom of 159 at about line 28. "You say you wouldn't have proceeded with the transaction if you knew the deposit was being released," and he's been taken to the letter. So I really should just briefly take you to the letter at this point, and that's at volume 3, 429 and the relevant passage is at the top of 430. "We note in terms of clause 1.4 of the agreement, the vendor is to pay you interest for immediate release of the deposit at 8.5% per annum fortnightly in advance." And of course you'll recall that clause 14 of the agreement uses the word release as well and actually treats it as a defined term in that clause.

WILLIAM YOUNG J:
But there are other documents later that show the payment, the deposit had been paid.

MR RING QC:
Well, certainly the deposit had been –

WILLIAM YOUNG J:
It had been paid to Blue Chip or to Rockfort. I mean there are other documents that come later.

ARNOLD J:
Well there's one at 441.

MR RING QC:
Yes.

ARNOLD J:
That's 11 June. He paid Blue Chip $90,000.

MR RING QC:
Yes.

ARNOLD J:
It seems pretty clear.

MR RING QC:
Well, yes, and that needs to be compared with evidence like – at page 149 and the bottom of 149, "When did you first find out or discover the deposit you obtained wasn't in the trust account?" This is at line 27. And he says, "It wasn't until the demands of Blue Chip when things went totally wrong." And then at the top of the next page, 150, "Did Tauranga Law at any time throughout the involvement beginning to end advise your deposit wasn't in the trust account?" "No they didn't."

But if I can take you back now to the release evidence.

ELIAS CJ:
Well yes, the letter doesn't say released. It says paid doesn't it. So anyway.

MR RING QC:
Yes. I think that's where Mr Appleton was able to say I didn't realise released meant paid out to the vendor. The –

ELIAS CJ:
Well that seems to be totally contradicted by the letter.

MR RING QC:
Well, yes, yes, and this is the relevance of that passage at 160.

ELIAS CJ:
Yes.

MR RING QC:
In which he tries to explain what release means to him.

ELIAS CJ:
So where?

MR RING QC:

Top of page 160.

ELIAS CJ:

Yes.

MR RING QC:

So from there down to line 30 but the essence of it is at about line 24, Mr Appleton is saying that somehow "released", to him, meant it was still in the trust account.

GLAZEBROOK J:

Well he understood he was paying it to Blue Chip didn't he? He said half way down.

MR RING QC:

Yes and the only way I can try to rationalise what he's saying into something that makes even a little bit of sense is that he's saying that he thought the deposit was in Blue Chip's solicitor's trust account, and that is not completely clear from any of the evidence but it's still –

GLAZEBROOK J:

Well he was asked whether – when he found out it wasn't in Appleton's.

MR RING QC:

Yes.

GLAZEBROOK J:

Sorry, in –

MR RING QC:

No, what it – he was –

GLAZEBROOK J:

In the trust account is it?

MR RING QC:

In the – and that's the –

GLAZEBROOK J:

Okay, I see.

MR RING QC:

There's a lot of evidence and I was going to take you to the passages. There's evidence of references to the trust account which doesn't necessarily specify whose trust account but the upshot of it is that it would not make any sense for the deposit to be in anybody's trust account and Blue Chip to be paying him 8.5 per cent for the use of it. And that's where his explanation of I thought released meant something different to what we all might think released meant in that situation. It doesn't hang together.

ELIAS CJ:

What findings of fact were made on the basis of this evidence?

MR RING QC:

Well the finding in terms of what Mr Appleton believed?

ELIAS CJ:

Yes.

MR RING QC:

Well, I think essentially the findings of fact were that the letter did not clearly convey to Mr Appleton that the deposit was being released and this was expressed by the Court of Appeal and also by the High Court as the letter tending to obscure the reality that the deposit was being made available to Blue Chip.

WILLIAM YOUNG J:

The findings of fact of the trial Judge are at page – the critical conclusions are at page 46 and 47 of volume 1. He effectively says that Mr Appleton was hell-bent on going ahead and wasn't interested in the letter on which basis his mild criticism of the reference to the deposit was of no moment.

MR RING QC:

Correct.

WILLIAM YOUNG J:

So that's a fine –

ELIAS CJ:

Because of the view he took.

WILLIAM YOUNG J:

Yes, whereas the Court of Appeal seems to say that Mr Appleton wasn't, didn't have brought to his attention clearly enough that he was at risk over the deposit and his failure to pay attention more generally was because he hadn't received the right advice on that and that's about para 48 of their judgment. I think that's where the, sort of the case tipped between the two Courts.

MR RING QC:

You're right, Your Honour, and the Court of Appeal and the High Court both regarded the letter as, I think both used the expression "obscured the reality" that the deposit was being released to Blue Chip. And we say that that's not a criticism, that is justifiable when you look at the terms of the letter.

WILLIAM YOUNG J:

And there's no reference to these later documents.

MR RING QC:

No, no there is nothing.

GLAZEBROOK J:

If you – just putting the other point of view for a moment, if you – and leaving aside the deposit and whether it was released or not, if you had a letter from a solicitor that said, "This transaction is unusual and exceedingly risky. You have a shell company that is a hundred dollar company that you are paying an inordinately large deposit to. Yes, you are getting interest on it, but that is dependent on the ability of that company to pay and it has no other assets. Remember at the same time you are also paying interest on this money. This is a shell company, it doesn't own, we strongly advise – there is a possibility, despite it being," and I think there's an issue of timing here, because it's only a 10-day, "there is a 10-day period in which you can, we strongly advise you consider very carefully getting out of this transaction," and I

know the Chief Justice hates that word, but that is really the counterfactual effectively, isn't it?

MR RING QC:

Yes.

ELIAS CJ:

I just think Judges resort to it to display too much cleverness too often.

GLAZEBROOK J:

But what we have is, this is the letter that should have –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– been written if it wasn't a negligent transaction –

MR RING QC:

Yes.

GLAZEBROOK J:

– and so assessing whether he was hell-bent on undertaking the transaction in any event has to be assessed against that background. And I'm leaving out the deposit because I'm, your submissions that if he didn't know what it was it was incredibly peculiar and he must have been shutting his eyes to a whole pile of things if that was really the case.

MR RING QC:

Yes, and at that higher level of – without going into the detail of the contents of the letter – if the basic position is that he received the letter but he didn't think it was pertinent and didn't pay much attention to it, then the logical follow-on from that is it doesn't much matter what the letter said, whether the letter was a negligent letter or a non-negligent letter, it still would have had no impact on it.

GLAZEBROOK J:

But then the follow-up, one would assume from this list, is to ring him and say, “Have you read the letter and so you wish to exercise what I’ve told you in terms of that,” because if the advice was to strongly consider it then one would have expected a follow-up, I would have thought, to say, “While you were strongly considering this, have you come to a conclusion?”

MR RING QC:

Well, I don’t think the –

GLAZEBROOK J:

So, I don’t think you can rely on the fact that he didn’t read one letter but he wouldn't have read the other or that the solicitor shouldn't have followed that up. Because we’re dealing with essentially puppet solicitors in these circumstances, and it is important that despite being – and that’s not said in a pejorative sense – because it makes some sense to have someone who’s familiar with the documentation to keep costs down for purchasers, et cetera, but nevertheless they still have to fulfil their proper duties, which you’ve accepted in fact.

MR RING QC:

Well, the basis on which liability was found in negligence in both Courts was really focused on the content of the letter and not on any subsequent contact or lack of contact to follow up on it.

GLAZEBROOK J:

Well, I wouldn't have thought you needed to follow up on this particular letter if that was the only risk but the other risk that were identified as ones that should have been put, and the fact that you could cancel. Because you don’t follow up on this but you, if you’ve got a, to consider whether you want to cancel I would have thought it was logical before the cancellation period to go and say, “Well, have you considered it?” and one would expect that to have been done.

MR RING QC:

Well, in this case there’s essentially two elements to the transaction. One is the deposit side of things and the other is the settlement side of things, and the letter covers both consecutively. In relation to the deposit side of things, when it comes to Mr Appleton’s evidence, his focus in both evidence-in-chief and cross-examination is

on not, and on believing that the deposit was secure and therefore not needing to think about a right to cancel. Had he been told, he says, "That my deposit wasn't secure," which is, what we say, well, the letter did, then you would have been, he would have been in a different historical environment. And the follow-up doesn't really apply to that because the letter is crystal clear about the risk to his deposit.

Perhaps we could go to the letter now. I've really – taking you to the circumstances of execution, there is, there was no legal advice, of course, before execution and there was no relationship with Tauranga Law because execution. The letter is in volume 3 at 429 and over the page to 430 are the key parts of it for us. What jumps out of the page at 429 is this is not just an ordinary solicitor's letter. There's been use of bigger font and bold to emphasise particular matters. There is –

ELIAS CJ:
Do we understand though from some of the material that was put before us that this is a standard form letter?

MR RING QC:
I think that there was some dispute about that when it was raised, and I'm not sure that it goes as far as a standard form letter but this is the type of letter that was consistently written, yes.

ELIAS CJ:
There's some indication that there are 10 cases –

MR RING QC:
Yes.

ELIAS CJ:
– turning on this?

MR RING QC:
Yes. I'm not familiar with the detail of those cases.

ELIAS CJ:
No.

MR RING QC:

That's my understanding. When one looks at page 429, what is the most highlighted and jumps off the page at you is the major risk of this transaction. It's in the biggest font, it's emboldened, and it makes clear that the vendor and developer are two different entities. If the vendor is liquidated or the developer is unable to complete so the vendor cannot take title, you may then lose your entire deposit. So, in terms of the letter immediately focusing on the matter that Mr Appleton said in evidence he regarded as most important to him, that's exactly what it does. And in terms of the three matters at paragraph 32 that I identified to Your Honours to the outset, the vendor did not own the property, well, that is clear, unequivocally clear, Rockfort is unable to take title, can only mean it doesn't own the property. "The deposit was being released and therefore I had no security," that was the second thing he raised and, if you turn over, that's that sentence at the top of page 430, "And the release of the deposit was unusual and risky," that is the effect of also that major emboldened material on page 429. And Mr Appleton's reaction to that letter when he received it was he didn't think it was pertinent. He said at paragraph 32, that same paragraph on 129, "I must've read the letter, however, this did not raise concerns." And then in cross-examination at page 157, top of page 157. This is immediately after the evidence that his first investment was going smoothly. "You didn't take much notice of the Tauranga Law letter did you?" "I didn't feel any, any undue concerns with it, no."

Well if you just pause there, it's difficult to the point of impossible to objectively reconcile that with just the visual effect of the bottom of page 429, the bottom half of the letter. You get a solicitor's letter of advice which, on the first page – well, first of all, just to get a solicitor's letter of advice that isn't just a whole bunch of dense paragraphs that all look the same, is itself unusual. To have it jump out of the page with the words, "The major risk of this transaction," should surely have set some sort of concerns going, at least enough concerns to want to read on identify what these risks were and to make an assessment of them and make decisions on the basis of them. And he just have understood that the purpose of the letter was to advise him so he knew what he had done and was doing.

His response, "I didn't feel any, any undue concerns with it, no." And that, apart from anything else, demonstrates how committed he was to this transaction. And then going on slightly, in answer to my question, "I'm asking if you took much notice of it?" Answer, "No, I didn't feel any undue concerns. I didn't take much notice of it. I felt

confident with what I had." You didn't read it carefully did you?" "I didn't feel it was pertinent. I felt that my deposit was in the solicitor's trust account and that I was secure." But again what's volunteered at this key passage in the evidence is the overriding factor for him is my deposit secure?

ELIAS CJ:
But he had indicated that he thought he was bound. He didn't understand that there was opportunity for withdrawal in his, this is in his brief. So don't his answers that it's not pertinent have to be looked at in that light?

MR RING QC:
Well I wouldn't have thought so, Your Honour, because what he's –

ELIAS CJ:
There was no use in finding out about the risk in the investment because Tauranga Law hadn't advised him that he could withdraw. Was that not what really had to be communicated?

MR RING QC:
Well, but if it was communicated in this letter it would've been met with the same reaction that everything else in this letter was met with.

ELIAS CJ:
Well it might not have been.

MR RING QC:
Well he said that he didn't read it.

ELIAS CJ:
Well, but he says that he thought that – he says it at paragraph 11 he was unaware that there was a cooling off period. Well, he was unaware that he was able to withdraw and he wasn't advised in this letter that he had the opportunity to get out.

MR RING QC:
But, with respect, Your Honour, that's the illogicality of the letter. The letter, regardless of what it actually did or didn't contain, was substantially ignored. So it doesn't much matter what the letter did say. He wouldn't have paid it any attention

anyway. If at the end of the letter it had said, "And you can cancel out of this agreement now under section 225 if you want to," his response would have been no different because he didn't regard the letter as pertinent. He felt confident about his investment. It wasn't – this is not a man who realises that he's done something wrong because he's received a letter telling him what he should've done. This is a man who despite the contents of this letter, whatever extent he read it or didn't read it, is dead set that he's doing the right thing and nothing's going to change it.

GLAZEBROOK J:
Except that the letter should have advised him very strongly to exercise the right of cancellation.

WILLIAM YOUNG J:
He should have had it pointed out to him.

GLAZEBROOK J:
Well it depends on what is accepted in terms of the expert evidence but most of the expert evidence was those should have been pointed out and that he at least should have been strongly suggested that he consider the right of cancellation because of the difficulties which are related to the loss of the deposit but are related also to the fact that the company has no assets and doesn't own a property. Although, as you say, if you understood the letter you'd probably realise that. Although title, I suppose, could mean the actual unit titles you're talking about after the deposit of the plan because you often have people owning land and they're not able to get the unit titles done.

MR RING QC:
At the point of no return here for Mr Appleton, he wasn't in the position where he had realised he had made a mistake but felt that he had no choice but to go along because he couldn't get out of it.

ELIAS CJ:
Well that's what he says at para 11 and was that shaken?

MR RING QC:
Well that is what he says at para 11 but the tenor of the rest of his evidence, this is his affidavit of course. The tenor of the rest of his evidence is that despite receiving

the letter, he thought he was doing the right thing and didn't want to cancel. So at the point of no return, what's driving him is not a sense of resignation that there's no way out. It's a sense of positivism that he's done the right thing despite whatever the letter says.

WILLIAM YOUNG J:

Well you've got a finding –you've got Mr Appleton saying something else. You've got a finding of fact by the Judge at para 66 where basically Mr Appleton hell-bent on the transaction and then there's a finding of fact set aside by the Court of Appeal on a particular basis. In reality, I suppose, the commercial issue was that he – came down the fact that he was having to bank on Blue Chip and its continuing success, rather than on perhaps the usual safeguards that might accompany a property transaction.

MR RING QC:

I think a distinction, with respect, has to be drawn between the drafting of an affidavit and the testing of that evidence in cross-examination and –

ELIAS CJ:

But hang on, presumably this method of letting the affidavit go in as evidence-in-chief was agreed to?

MR RING QC:

Oh, yes. I'm –

ELIAS CJ:

Yes.

MR RING QC:

– not suggesting that but what I'm saying is that you can't, with respect, just take what is said at paragraph 11 as face value and –

ELIAS CJ:

Was it cross-examined on?

MR RING QC:

Well, nobody, I don't think anybody took him specifically to paragraph 11 but it was effectively cross-examined on. For example the passage I just took you to at 157 –

ARNOLD J:

He does – I mean most of 157 and 158 is about believing that the deposit was secure and therefore not being worried. He combines the two points at line 27, "As I said, I didn't feel unduly concerned because I felt my deposit was safe, but also I considered it to be a done deal, I'd signed the document, no further action." So at that point he does combine.

MR RING QC:

And earlier on, in the first half of 157, "I didn't feel any undue concerns, I felt confident with what I had, I felt my deposit was in the Trust account and I was secure." Now, none of that is consistent with a person who is ready to take a way out if somebody can provide it for him.

GLAZEBROOK J:

Yes, look at 161, it's perhaps even clearer, not that it was taken to, "Would you have been able to get it?" was he was happy to continue with the transactions because didn't perceive any risk, and the fact he didn't perceive any risk was based on his misunderstanding against a whole pile of reasons why he shouldn't have misunderstood, that his deposit was secure.

MR RING QC:

That it –

GLAZEBROOK J:

And really it's difficult to sheet home misunderstanding to a solicitor of something that seems crystal clear, that's the submission?

MR RING QC:

That is the essential point, Your Honour. And it does come back to, I think, to what I was saying before, that this is not a man who was looking for a way out and not a man who, if he was given a way out and had even appreciated that he had a way out, because it's not just enough that it's got to be in the letter, he's got to have taken notice of it and been ready to act on it.

GLAZEBROOK J:

Well, you would say that the additional things that should have been in the letter as found by the High Court and the Court of Appeal wouldn't have shaken him because he thought his deposit was safe –

MR RING QC:

Correct.

GLAZEBROOK J:

– based on his misunderstanding, rather than any negligence of this list is –

MR RING QC:

That –

GLAZEBROOK J:

– therefore lack of causation.

MR RING QC:

That is the essential point, Your Honour, yes. And perhaps I can move forward in the submissions, take Your Honours to where was say in our written submissions, "These points are best encapsulated." At paragraph 3.3, this is essentially the process that Your Honour Justice Glazebrook has just identified, "What would the nature, extent of the risk, has actually warned about, what were the reasons he decided to proceed notwithstanding them, and were the nature and extent of the additional risk such that if he had been advising them as well they would logically have counteracted these reasons." And we've set out at 4.1 the table that identifies all the required advice, whether it was given in the letter or not, and where it is in the High Court and Court of Appeal judgments, and we say, with respect, at 4.3, that the Court of Appeal didn't expressly consider why logically and reasonably in conjunction with the advice given the additional advice would have tipped the balance, and we say that essentially that's because the Court of Appeal didn't place the same emphasis as Mr Appleton clearly did in his evidence on the deposit being secure. We've referred at page 7 to the authorities about taking self-serving evidence with a grain of salt, there's no hint of that recognition of that caution in the Court of Appeal's judgment, and we've also given Your Honours in this context two recent decisions that we've come across, the first instance decision and the Court of Appeal decision in *Newcastle International Airport Ltd (NIAL) v Eversheds LLP* [2012] EWHC 2648

(Ch) 2 October 2012, relevant paragraphs in the High Court decision 127 and 128 and in the Court of Appeal at 99 and 100, and this was a again a case that turned in the end on causation and the solicitors were found not liable because the key person at the Newcastle Airport, the plaintiff, consistently misread or misunderstood the contents of what she was receiving and so the additional advice that she should have received, the Court said, would have made no difference.

At page 8 we deal with the misinterpretation of the advice in the letter by Mr Appleton, and we say at paragraph 4.17, "If a plaintiff misunderstands or misreads a letter containing material advice, albeit given negligently, he or she cannot establish actual reliance on the negligent advice, and in the absence of actual reliance there is no sufficient causative link between the negligent advice and he or her loss caused by entering into the transaction."

GLAZEBROOK J:
Although this is the lack of advice which you can't rely on, the lack of advice, but I understand the –

MR RING QC:
Yes.

GLAZEBROOK J:
– point you're making about the misunderstanding.

MR RING QC:
And we deal with that at 4.18, that similarly if a plaintiff misunderstands or misreads a letter that negligently omits material advice the plaintiff would still misunderstood or misread the letter unless the omitted advice would have outweighed or changed the misunderstood or misread part.

The key points and the advice are set out in paragraph 4.20, about what would happen to the deposit, including that it would be immediately released to Rockfort, and Mr Appleton's evidence at 4.21, he took that to mean he'll be paying the deposit, the deposit will be held in a solicitor's trust account and they would be paying interest on it, and that he could use the interest to cover the amount he'd borrowed from the BNZ. The Court of Appeal and the High Court found that tended to obscure the reality that Rockfort could use the deposit as soon as it was paid, but we say that's

exactly what the letter is reasonably conveying to any objective reader. So his belief about what the letter was saying we say is not justified, and similarly his evidence that his understanding of the word "release" is different now to what he thought at the time. He thought that "release" meant paying the deposit, meant "his" release of the deposit to Blue Chip, not – or his release of the deposit to his solicitor – not the release that found its way to Blue Chip, and we say that no reasonable reader of the letter could have reached that conclusion.

And so, in summary, we're saying that he would have proceeded anyway because either he didn't read the letter properly or at all in relevant respects because he formed the view it wasn't pertinent and, if so, having deprived himself of the full benefit of the advice in the letter it logically follows that that would have been the position anyway if the letter had contained more or different advice, and that's exactly equivalent to the *Newcastle Airport* situation. And, second, he misread the letter anyway in relevant respects, so the decision to proceed was caused by a misunderstanding of Tauranga Law's advice, not by its negligent advice, and that could not reasonably have been anticipated by Tauranga Law in the way it drafted the letter. And then finally, that all of that has to be viewed against his enthusiasm for the transaction, and we say that he would never have got to the point, even if advised, that he would have seriously considered that option, because he was happy with what he was doing, he was confident that his deposit was secure, and that he wanted to proceed anyway.

Your Honours, unless I can help you with anything further, those are our submissions.

ELIAS CJ:
Yes, thank you, Mr Ring. Mr Grove, it's probably sensible for us to take the adjournment at this stage so you can organise your papers, so we'll do that.

COURT ADJOURNS:11.21 PM

COURT RESUMES: 11.42 AM

MR GROVE:
Thank you Your Honours.

ELIAS CJ:
Yes Mr Grove.

MR GROVE:
Hopefully this will be the last of the Blue Chip related matters to bother this Court.

ELIAS CJ:
Oh, is that a promise.

MR GROVE:
I'm afraid to say it's not a promise but hopefully.

Your Honour, I thought I would start by addressing a question raised by Your Honour, Justice Elias in relation to the scope of the duty of care or the obligations because in my submission that is the starting point in determining what should have been provided when considering the letter of 31 May. It was something dealt with by the Court of Appeal but in the first High Court judgment that specific issue was not particularised or identified with the clarity which in my submission is necessary in determining the consequences of the negligent letter.

The first case I'd refer Your Honours to is *Bartle v GE Custodians Ltd* [2010] 1 NZLR 802 (HC), a judgment of His Honour Justice Randerson, and in my bundle of authorities, that is at tab number 3 and it's page 815. So at the top right-hand corner. At paragraph 145 His Honour Justice Randerson said, "As to the scope of the duty, I am satisfied that Mr Mathias was under a duty of care to the Bartles in the three key respects…." pleaded. Firstly, "To ensure the Bartles understood the effect and implications of the transaction. To explain the risks associated with the transaction including the entering into of substantial mortgages and to give the Bartles independent advice as to the risk that they faced if the Blue Chip Group did not honour its obligations."

The next judgment is in the following tab is a judgment of His Honour, Justice Randerson, in the Tauranga High Court again, dealing with a Blue Chip matter and if I could refer Your Honours to paragraph 76 which is at page 88 down the bottom.

GLAZEBROOK J:

I'm sorry. I'm not on the right tab I think.

MR GROVE:

Sorry, tab number 4.

GLAZEBROOK J:

Tab 4, thank you.

McGRATH J:

And page?

MR GROVE:

88 down the bottom.

McGRATH J:

Thank you.

MR GROVE:

And it's paragraph 76.

ELIAS CJ:

Sorry, which tab are we at?

MR GROVE:

The bundle of authorities, tab 4, Your Honour.

ELIAS CJ:

Page 88 at the bottom.

MR GROVE:

Sorry, 81. The respondent's bundle of authorities.

ELIAS CJ:

Yes thank you.

MR GROVE:

And there, "Mr Annan's duty of care required him to explain the key terms and the implications of the principal documents and the way they inter-related. It was clearly important for Mr Annan to ensure the MacLeans understood the overall scheme of the investment as well as its key provisions. Special mention should have been made of any deficiencies in the document which adversely affected the clients' interests. That includes the deficiencies in the documents already signed." So it's a global picture of, in this case, a risky and unusual transaction which allows a client to make an informed decision moving ahead because if that isn't given, and it wasn't given here because we have findings of negligence, it's impossible to say that the client was given a complete picture so that an informed decision could be made.

ARNOLD J:

In that, the second half of that paragraph 76 does draw a distinction where the contract of retainer arises after the agreement for sale and purchase was completed.

MR GROVE:

That was my reference to the *Bartle* judgment which –

ELIAS CJ:

But it applies here too. If there's a distinction that would apply in this case also.

MR GROVE:

Apart from the ability to cancel which is obviously an important issue here.

ARNOLD J:

Yes.

MR GROVE:

And the last reference is to the Court of Appeal's judgment, which is at volume 1, page 70 and paragraph – sorry, page 70, paragraph 40 where the Court said, "In his evidence in the High Court, Mr Olivier shrugged off, shrugged off all of these deficiencies by saying that everything depended on Blue Chip performing and that Blue Chip was a large and reliable company. This seems to us to be inadequate. The purpose of getting legal advice is to ensure that the investor, who is attracted by the specific superficial desirability of an investment is advised on the legal underpinning of the assumed features." The reality in the present case was that Mr

Appleton, in effect, was making an unsecured advance to Blue Chip, which he had no contractual relationship with at all and that, in my submission, is why the Court of Appeal, in overturning the High Court judgment took into account all of the factors presented to a client so that the unusual and highly risky features were understood in totality so that a decision could have been made then as to whether or not the client wanted to get out and the difficulty we have and the reason we're here is that in circumstances when that advice wasn't given, we are forced to consider the hypothetical question. What would be kind of done if competent advice had been given?

ARNOLD J:

I suppose a problem is that that last sentence in paragraph 40 is an interesting way of describing the essence of the transaction and, of course, your client didn't believe it was unsecured in the sense that he was adamant it was held in trust. So he thought it was protected and the one thing the letter does seem pretty plain about is that it was going to be released and he was told it was released subsequently.

MR GROVE:

Yes well I'll come to the letter and the evidence about the release of the deposit. The subsequent letter that's been referred to wasn't referred to in the High Court trial. There's no cross-examination of that. What Mr Appleton thought when he saw it, if he did see it, did he consider it? Did he realise then the deposit had been released? But there was just no cross-examination on that issue at all.

ELIAS CJ:

But then what do you invite us to take from that fact that there was no cross-examination on that?

MR GROVE:

Well there's just no evidence before the Court.

WILLIAM YOUNG J:

But there's a letter that just speaks for itself. I mean it's awkward. So Mr Appleton didn't venture an opinion about what he took from the letter?

MR GROVE:

The first time I think that letter has been referred to in Court is today.

ELIAS CJ:
Well, so it wasn't referred to the expert witnesses?

MR GROVE:
No, it wasn't released to the expert witnesses but, with respect, the expert witnesses are giving evidence as to what advice should have been given up to the transaction or the date of cancellation and this is a post-implementation so I don't think the experts would've been able to give any evidence as to what that meant. But there – the letter in that sentence just hasn't been referred to by anyone previously.

Dealing with the transaction generally; this was a mainstream investment which was the start of the Blue Chip model and not particularly, in general form, unusual. It involved investors buying a property off plans. They would borrow the balance. When the property settled there would be a lease back and normally a property management agreement. So the key here, and unlike the joint ventures or other transactions that have been before the Court, is that Mr Appleton knew and wanted to buy this property. It was sold as bricks and mortar. It is what had happened with his first investment. He paid his deposit, he got title. There was always that protection. The difficulty is because of these highly unusual clauses in the contract, everything went wrong and it went wrong because the deposit wasn't held in a trust account as would be standard and if the deposit had been in the trust account, obviously it would've been returned to Mr Appleton. He could've repaid his mortgage.

ELIAS CJ:
But there would've been no interest paid on the deposit in those circumstances.

MR GROVE:
Well the interest issue is something raised by my friend and significant weight is put on it. The – as was the Blue Chip model, the investors had a property with equity in it. They borrowed funds to pay the Blue Chip deposits which were normally high, and that was using the equity of their property. When the investment property was finished, the second lot of finance could be obtained using the equity in the second property. But it was always contemplated, and as is demonstrated here, that the deposit funds were going to be borrowed from the bank and interest would be paid on them. So there is a reason for interest to be paid because the investor has paid

the money. If it was sitting in a solicitor's trust account it would've been receiving interest.

GLAZEBROOK J:
Well hardly at a level that would be above the borrower's level.

MR GROVE:
No, I appreciate that but the difference is only about, or is 1.6 per cent and as my friend has said, and I've got no reason to doubt it, that's about $100 a month which isn't a significant return.

WILLIAM YOUNG J:
But he can't – well no one would really believe that they can borrow money from the bank at a particular rate, invested in a solicitor's trust account and come out ahead.

MR GROVE:
Well no, but this was a Blue Chip investment. It wasn't a standard transaction like that and that's how it was sold. And as far as the interest is concerned, the deposit was high but this was a deferred settlement, going to take some years and a large deposit was paid and that is why Mr Appleton said in his evidence the reason the interest was coming back was because I was putting this money up. I didn't know it was being released, I was putting it up and there was going to be a long period before settlement was completed and so he did explain that.

But it was – that was the Blue Chip investment and the critical point here and maybe it was too good to be true, but that is the Blue Chip investment and there is no criticism or no allegations of negligence in relation to advice about the type of investment. And as I've explained, this was a simple purchase lease back transaction which Mr Appleton was happy with. The complaints are that when the documentation was sent to the solicitor who was a specialist solicitor dealing with Blue Chip matters and recommended by Blue Chip he didn't provide the legal advice in relation to the contractual documentation. That was risky and unusual.

ELIAS CJ:
Now you say that there's no allegation of negligence in respect of the type of investment but that couldn't have been advanced by your client because your client entered into the investment. So the nature of the investment was really irrelevant to

the claim that you're bringing but, in fact, the nature of the investment objectively assessed was an unsecured loan.

MR GROVE:
That – the nature of the investment taking a step back and looking as far as the client or the investor is concerned was, I pay a deposit for a property to be built. When it's completed I pay the balance, borrowing all of these funds. I get title. There's a lease back and I've got a house. So that's the nature of the investment.

ELIAS CJ:
Well I understand that proposal but effectively the deposit was advanced without anything being exchanged for it. Well I suppose there's obligations further down the track. I'm just wondering really whether the causation issue in part, the difficulty with causation in part ties back to the nature of the investment. I was just a little arrested by your reference to the fact that you're not complaining about the nature of the investment.

MR GROVE:
Just clarification, it's not alleged that Mr Olivier said to my client, "This is a great investment and it's a good return."

ELIAS CJ:
But he wasn't asked. He wasn't retained for that purpose.

MR GROVE:
No, no, I mean that would bring on a different act of negligence possibly. What my submission is, what we're focusing here on is the legal consequences of the contracts that were signed and what should have been explained to the clients in relation to the risk.

McGRATH J:
And what the client would have done if it had been explained?

MR GROVE:
Yes, well that's the next step in the hypothetical question.

As far as the transaction generally is concerned, there were three experts who gave evidence, all accepting they were – that the transaction was risky and unusual but it was Mr Nolan's evidence which was the most vocal as far as how risky this transaction actually was and if I could refer Your Honours to his evidence? It's a statement of volume 2, 167 at paragraph 11 and his view was, "Because the adverse features of the –"

ELIAS CJ:

Sorry I missed that, 167 is it?

MR GROVE:

167 of volume 2. He said, "Because the adverse features of this agreement were so serious, I consider that Mr Olivier should have advised the plaintiff not only of the right of cancellation but also that he should actually exercise that right. I do not believe that this would have been tantamount to giving advice on the wisdom of the transaction in its broader sense. It would have been advice on the legal issues arising from the agreement. That advice would have been that these issues were so serious in themselves that no matter how keen the plaintiff might have been to purchase the unit it was entirely inappropriate for him to proceed with the transaction on those terms and conditions."

WILLIAM YOUNG J:

The transaction rests entirely on the extent to which it was appropriate to have confidence in Blue Chip to perform.

MR GROVE:

As a –

WILLIAM YOUNG J:

Broad proposition?

MR GROVE:

Yes –

WILLIAM YOUNG J:

Okay.

MR GROVE:

As a proposition.

GLAZEBROOK J:

Well, no, there was a legal issue of not having a contractual relationship with Blue Chip which one would have thought would have been sensible. There have been too many of these arrangements with $100 companies that might have somebody actually in fact substantial behind them but that doesn't matter if they don't.

MR GROVE:

Yes, that's why they say generically over the top but there was no contractual obligation.

GLAZEBROOK J:

I mean it did depend on both Blue Chip and the goodwill of Blue Chip and that Blue Chip was not going to let Rockwell *[sic]* go into liquidation if there was a problem with the particular development and one of the points of having a single purpose company is that you can let it go if one particular investment goes, one would assume.

MR GROVE:

Yes, yes, and hoping that Blue Chip would spend a substantial amount of money that had been paid properly on building the apartment as opposed to wherever else it went.

WILLIAM YOUNG J:

What did the Judge say about this? What was the extent of the Judge's findings as to the advice that should have been given? It didn't go as far as to say, don't do it?

MR GROVE:

No but the advice had to be given that there was a right to cancel.

WILLIAM YOUNG J:

Yes, yes.

MR GROVE:

Yes. And all three experts said that that was the case.

WILLIAM YOUNG J:

I think that's common ground now.

MR GROVE:

Yes, it's common ground now, but in relation to the right to cancel there is another issue there. There was the statutory right to cancel under section 225 but here we have Mr – Tauranga Law acted for about 250 Blue Chip investors, was familiar with the contracts, was familiar with Blue Chip, and if I could take Your Honours to volume 2, page 252, or 251. This is where, at line 20, Mr Olivier describes the transaction, or the contract as being shoddy, and at the bottom he says, "Shoddy contract, do you agree with Mr Nolan, that what Mr Nolan says, that it was unusual, high risk. Absolutely, absolutely." And then over the page, "And what you're saying now is that the only protection for Mr Appleton was that the Blue Chip group stood up? Yeah, well, no, not exactly. He had two choices. He could either decide to bail out and not proceed with the transaction after receiving our advice." That's to say, we had a number of people who had exactly that. Then moving down, question, "So you say upon receipt of that letter he could have bailed out? Absolutely. How could he have bailed out? He could not – you could just not pay the deposit and Blue Chip wouldn't have sued him for it, haven't, didn't have a hope in hell," excuse the word, so he knew that if there were any concerns whatsoever, Mr Appleton could have just pulled out.

McGRATH J:

There are plenty of other buyers which they'd have got to without a hassle?

MR GROVE:

Yes, yes. The Blue Chip marketing machine was working and it was very, through the various investments and it was working at that stage.

WILLIAM YOUNG J:

Did Mr Olivier say at any time why he didn't give advice about the right to cancel or the ability to cancel is probably a better way of putting it?

MR GROVE:

No he didn't. He knew about the right to cancel. He gave evidence he was aware of section 225. But no he didn't say why he didn't give that advice but stood by his letter.

GLAZEBROOK J:

Well he may have thought that if Mr Appleton didn't come to him and say, like a number of other people have said, that they wanted to cancel, that he was happy to go ahead with the transaction, because it looks as though that letter caused heebie jeebies for some of the potential investors.

MR GROVE:

Possibly. I mean that's his comment but we don't know what letters he's talking about, we just don't know what the circumstances are. But it's just the point that there were two methods of cancellation. That given Mr – that Tauranga Law's specialism and knowledge that they were being recommended, should have been passed on. Because in these circumstances, in my submission, the solicitor has a higher duty of care than a normal solicitor and that is because of his specialist, or his speciality, and his knowledge that he was being referred to by Blue Chip and I refer to it in my submissions but I refer to that *Hansen v Young* [2003] 1 NZLR 83 (HC) case where the statement at paragraph 79 is the solicitor holding himself out as an expert or specialist in the field of practice maybe subjected to a stricter standard of care in respect of work carried out in that field of the standard of performance of those holding themselves out as a specialist in the area.

GLAZEBROOK J:

Can you be a specialist in Blue Chip as against a specialist in property transactions? I would have thought they were looking at somebody saying I'm a highly specialised IPO lawyer, come to me, and maybe a higher standard of care than somebody who probably shouldn't be taking on the work at all?

MR GROVE:

Yes although the, he was recommended as being a specialist and he knew he was being recommended, and what we now know, and what certainly the Tauranga Law knew, was that this was a highly unusual and highly risky transactions, completely out of the ordinary, and he knew that, and that's why the clients were directed to go

and see him and Mr Appleton's evidence was that he was specifically told to go and see Tauranga Law because they were the specialists.

McGRATH J:

Mr Grove, I take it that the finding of Justice Allan in the High Court was preceded by debate in which Mr Olivier said, well I drew to the attention of Mr Appleton certain risks. It was for him to come back to him if he wanted to exit the transaction and I could have done something about it. Was there a debate that said it was not negligent to fail to draw attention to the fact that he could exit the transaction?

MR GROVE:

Other than section 225?

McGRATH J:

Well section 225 is, I think, the point I'm thinking of.

MR GROVE:

Well there was certainly – well there wasn't really a debate about it because it was accepted by all of the witnesses, the expert witnesses, that that should –

McGRATH J:

Have been done.

MR GROVE:

– have been pointed out.

McGRATH J:

And no witnesses were put up to the contrary on that?

MR GROVE:

No witnesses said it shouldn't be done. All of the experts universally said section 225 should have been displayed.

McGRATH J:

You called the three experts?

MR GROVE:

No, no.

McGRATH J:

You called Mr Nolan?

MR GROVE:

I called Mr Nolan and the –

McGRATH J:

Eades?

MR GROVE:

Mr Eades and – gosh –

McGRATH J:

That's all right. You actually cross-examined Mr Eades to some effect on some of these things if I –

MR GROVE:

Well Mr Eades basically conceded everything in Mr Nolan's report and in my submissions I've set out – and another –

ELIAS CJ:

The other one was Mr Haynes wasn't it?

MR GROVE:

Mr Haynes. Now in relation to – so in my submissions I haven't focused on Mr Eades' evidence because basically it was a –

McGRATH J:

That's fine. I'm sorry, it was a bit of diversion, but I understand the position now, thanks.

MR GROVE:

Yes and this, in my submission, because it's probably helpful at this stage, because it is again the overview as to what should have been in this letter. If I could take Your Honour's to paragraph 26, this is the evidence of Mr Haynes in relation to –

ELIAS CJ:

What page?

MR GROVE:

In my submissions. Sorry, it's page 8 of my submissions, paragraph 26. And the reason I've set this out is because I would describe Mr Haynes' evidence probably as being a little more robust, but on all of these key issues his evidence again was in accordance with what Mr Nolan said. So, advice of the cooling-off period, "If you assume however the instructions, retainer, had commenced before the 14-day cooling-off period, do you agree with Mr Nolan and Mr Eades that a competent solicitor would advise a client of the option?" "Yes, I think I would do so. I think a competent lawyer would have pointed out the risk, as Mr Olivier did –

ELIAS CJ:

What's the cooling-off period?

MR GROVE:

It's the 14-day section 225, Resource Management.

ELIAS CJ:

That's not a cooling-off period –

WILLIAM YOUNG J:

Yes, I think it is –

ELIAS CJ:

– is it?

WILLIAM YOUNG J:

– yes.

MR GROVE:

It’s actually been referred to as, “consumer protection legislation”.

ELIAS CJ:

Oh, I’d forgotten.

MR GROVE:

It is, it’s literally a cooling-off period, so you, for these sort of circumstances, with respect, when you sign up an agreement for sale and purchase, which happens hundred of times every week, without seeing a solicitor, where the front page is read by the client, you buy a house, you go along to your solicitor afterwards. Where you're buying something like this, which is the subject of, like happened here, it not being built, that's why there’s the cooling-off period, to go and see a lawyer, get advice about the transaction, and make sure –

ARNOLD J:

The cooling-off period only applies where the subdivision plan hasn’t been deposited, doesn’t it?

MR GROVE:

That's correct, because up until that stage –

ARNOLD J:

So there’s no general cooling-off protection for purchasers?

MR GROVE:

No, sorry, absolutely not, Your Honour, in relation to these sort of transaction –

ARNOLD J:

Right.

MR GROVE:

– where the plan hasn’t been deposited.

ARNOLD J:

Yes.

MR GROVE:

Because if the plan has been deposited there's actually a title there, you could whack a caveat on it, you would see who the owner of it is.

McGRATH J:

But he'd still put a caveat on.

MR GROVE:

Sorry?

McGRATH J:

Could you not still put a caveat on it?

MR GROVE:

It wasn't owned –

McGRATH J:

On the larger unsubdivided –

GLAZEBROOK J:

Well, no, they'd covenanted not to in this case, hadn't they?

McGRATH J:

Ah, had they?

MR GROVE:

Firstly they covenanted not to but, secondly, the owner of the property wasn't Rockfort, so it would have been difficult, put it that way.

McGRATH J:

Yes.

MR GROVE:

However, they couldn't have contractually and there certainly wasn't any advice that that should have been done.

So, over the page at page 9, the agreement was risky, unusual. Mr Nolan describes the contract document as, "Highly risk and highly unusual," "Would you agree with that description?" "Ah, to an extent, I think it's fair, it's fair to say that there were unusual features and significant risk." Sale to a hundred-dollar company, "Do you really see deals, conveyancing deals like this, being one with hundred-dollar companies where the deposit is 30 percent of the purchase price, the hundred-dollar company doesn't own the property and the deposit is being released to the hundred-dollar company?" "No, that would be unusual, I accept that." "And should that be pointed out in no uncertain terms to the client?" "Yes, at some stage. But I certainly think that if Mr Appleton had shown concern in relation to the transaction then at that stage it, the position, should have been spelt out much more clearly or more clearly." Property not owned by the vendor, "How was the client meant to know that the property was purchasing from a company," sorry, "that he was purchasing a property from a company that didn't own the property?" "You mean initially or at what stage?" "At all." "The client would necessarily have to," sorry, "wouldn't necessarily have known that at all, I agree, unless and until it was explained to the client by a solicitor or by someone else, yes."

WILLIAM YOUNG J:
Isn't that implicit in the letter, that Rockfort doesn't own the company – doesn't own the land?

MR GROVE:
Well, we're not dealing with a sophisticated client here…

WILLIAM YOUNG J:
But it is actually in bold, if the developers, the risks include the developer being unable to complete the building and Rockfort Limited being unable to take title.

MR GROVE:
Yes, well, for looking back and as lawyers and analysing it and studying it, that is the conclusion that you would drawn. However, what all of the experts said is that this should have been brought to the client's attention in no uncertain terms.

Obtaining a title search. "When would you expect the solicitor to obtain a title search after being instructed?" "At an early stage to check who was on the title and to check other aspects of the title." "And what would a competent solicitor have done if

obtaining the search, which would have been obtained quickly, discovers the vendor doesn't own the property." "A competent lawyer, after consultation with the client, might have wished to, well, might have wished, particularly if the client was expressed concern, might well have advised to take steps to try to ameliorate the situation." "Would a competent solicitor in searching a title see the vendor didn't own the property, would that concern a competent solicitor?" "It would put a competent lawyer on further inquiry but it is not at all uncommon for a vendor under an agreement for sale and purchase not to be on title at the time the agreement is signed, but that obviously is obviously a purchaser's lawyer." "Then at an appropriate time would be raising that issue with the client, particularly when the deposit was so high and the deposit was being released?" "Yes." There is issues raised by Mr Nolan which Mr Haynes generally agreed with. The lack of plans and specifications. There were no plans and specifications and there was reference to Unit 706. We don't know where that number came from.

WILLIAM YOUNG J:
506.

MR GROVE:
506.

WILLIAM YOUNG J:
But there's a reference in the special conditions to an apartment plan at page 385.

MR GROVE:
Sir, you're on which clause?

WILLIAM YOUNG J:
Volume 2 – volume 3, sorry, 385. Para 19 refers to a re-measurement and an apartment plan. It does rather presuppose there was an apartment plan.

MR GROVE:
There wasn't, Your Honour.

WILLIAM YOUNG J:
So was there Blue Chip evidence to that effect?

MR GROVE:

No, there was no –

WILLIAM YOUNG J:

It's not attached.

MR GROVE:

Not attached?

WILLIAM YOUNG J:

Yes.

MR GROVE:

Not given to Mr Appleton –

WILLIAM YOUNG J:

Yes.

MR GROVE:

– and not requested by Tauranga Law.

WILLIAM YOUNG J:

Yes. But that doesn't mean there wasn't one.

MR GROVE:

Well, there could have been one, but we don't know what it –

WILLIAM YOUNG J:

No.

MR GROVE:

– what it looks like or what it would have looked like. The focus of the evidence and my friend's submissions in relation to the release of the deposit issue, that is for a specific reason. The reason is the deposit has been lost. There are no other losses, it's just the deposit being lost, and that's why that has been the focus of this case. However, if the deposit hadn't been lost and the apartment had been built and Mr Appleton was forced to sell and he was buying, supposedly, the apartment, and

he ended up buying a shed or a toilet, that would be another act of negligence and we'd be fighting about that as well, because the plans and specifications weren't attached and nobody knew what was going to be built.

WILLIAM YOUNG J:
Did Mr Appleton say he never saw a plan?

MR GROVE:
I don't think so, no, Your Honour. I'll check that. He had purchased the property previously –

WILLIAM YOUNG J:
Yes.

MR GROVE:
– and had obviously seen that. Back to page 10 of my submissions down the bottom – sorry, plans and specifications, "But if they, the plans for it to be built, were not attached to the agreement, a competent solicitor would raise them with the client immediately?" "Well, at an early stage, yes." "But the client was – that was certainly something that should have been raised with the client?" "Ah, yes, quick smart, at some fairly early stage, I agree." Vendor of no substance. "But what about if the solicitor knew that the company was of no substance?" "Well, if the lawyer knew that it was a company of no substance then I would agree that it would have been appropriate at some stage to have made that clear to Mr Appleton." So the release of the deposit, which is the focus here, that's because the deposit has been lost. But in my submission and concerning the hypothetical question, the first thing to do is set out exactly what the letter should have said so that the balance of the question, or the second part, as to what the client would have done if the appropriate advice had been given, can be considered, and –

GLAZEBROOK J:
Except one of the difficulties with that argument is if there wasn't, if Mr Appleton, which he appears to have done, thought there wasn't a risk of losing the deposit because it was in a trust account then this was really, apart from the fact that he had borrowing and the risk of not getting the 8.5 per cent interest, pretty win/win wasn't it? Because you had a substantial company that was going to put up an apartment, give you the same sort of investment that you'd had before, and apart from perhaps not

getting the interest and still being stuck with paying the BNZ, your deposit was safe and so what was the risk. If you were thinking about going ahead, despite everything, what was the risk in fact? If erroneously, like Mr Appleton appears to have done, or at least said he did, thought that the deposit was safe.

MR GROVE:

Well yes, yes, because when you get title, you get title, and then you have your bricks and mortar which he was expecting.

GLAZEBROOK J:

So why wouldn't he have – despite what anybody had said in a letter, why wouldn't he have continued if it was win/win, apart from the risk of not perhaps getting the interest payment?

MR GROVE:

Well –

GLAZEBROOK J:

Given he had borrowings?

MR GROVE:

Well sorry it might be –

GLAZEBROOK J:

Well he wasn't going to risk losing the deposit in his mind, because his deposit was safe –

MR GROVE:

Yes.

GLAZEBROOK J:

– so the only thing he was risking was borrowing at 6 per cent and not getting his 8.5.

MR GROVE:

Well yes and if that happened he would just repay the bank from the deposit in the trust account.

GLAZEBROOK J:

So he wasn't risking very much at all was he?

MR GROVE:

Well the only financial outlay was the deposit, yes, that's correct. He wasn't risking much.

GLAZEBROOK J:

But he was sure he wasn't risking that, which is why he wanted to carry on?

MR GROVE:

Yes, yes.

GLAZEBROOK J:

Well whatever had been said to him in that letter he was still sure he wasn't going to lose the deposit so the only risk that he needed to take into account was Blue Chip not coughing up the money, the interest, because then he would be down 6 per cent on that deposit.

MR GROVE:

Well –

GLAZEBROOK J:

But he'd still have his 100,000 to repay the bank, or 92,000 or whatever it was.

MR GROVE:

Yes, although he also had a contractual obligation to complete the purchase of an apartment in due course which he would have to borrow more funds on.

GLAZEBROOK J:

But if he got the apartment, that's what he contracted for. If the property market had gone down in the meantime that was his bad luck, if it had gone up it was good for him.

MR GROVE:

Well that's the –

GLAZEBROOK J:

But that's a business decision that he made, isn't it?

MR GROVE:

But that's – the difficulty is, because there aren't any plans or specifications, we don't know what apartment he's going to get.

WILLIAM YOUNG J:

But we don't know there are no plans and specifications.

MR GROVE:

All we know is that Mr Appleton didn't have them and neither did Tauranga Law.

WILLIAM YOUNG J:

Well did he say that?

ARNOLD J:

Well it's interesting what he says in his evidence, he says he was taken to a particular development and he decided that that was too expensive and so they decided that he would buy a development on Turner Street I think it was and that seems to be as far as the evidence goes.

MR GROVE:

Yes.

WILLIAM YOUNG J:

It's just the sort of thing that nags at my brain a little but I can't imagine, I find it hard to imagine that he wouldn't have been shown plans.

MR GROVE:

I agree. I agree. There must have been a plan or a sketch layout or something like that. However, as part of the expert evidence all of the experts said when you have this type of contract, Mr Nolan said, the contract is normally that big, and he pointed to a lever arch or a bound bundle, a volume of documents, it's normally that big. It's got all the plan specifications so that you know what you're getting. And that, all of the experts said, should have been brought to Mr Appleton's attention and quickly.

Attachment A to my submissions –

ELIAS CJ:

What was it sent to lawyers for, this? To get the deposit was it?

MR GROVE:

Sorry what was?

ELIAS CJ:

What were the documents sent to lawyers for the purchaser for? Was there any requirement, statutory requirement or –

MR GROVE:

No.

ELIAS CJ:

So was it just in order for the deposit to –

GLAZEBROOK J:

It'd be the eventual conveyance I'd imagine.

ELIAS CJ:

But that's way down track, isn't it?

MR GROVE:

Yes but obviously because of the Blue Chip model there was payment of a large deposit which required borrowing so a solicitor had to deal with that.

ELIAS CJ:

Well I wonder. I'm just trying to work out why.

GLAZEBROOK J:

Well Blue Chip wouldn't know whether he needed another mortgage in order to borrow the money. As it happens I think he had a global, presumably an all obligations mortgage already with BNZ.

ELIAS CJ:
Yes.

GLAZEBROOK J:
They spoke of the Global Plus sorry.

MR GROVE:
Yes, which was increased. But the correspondence was sent to the lawyer to advise the clients on the contract and to implement the settlement. Which was from beginning to end.

GLAZEBROOK J:
Blue Chip was probably just making sure that there was independent advice on the contract and covering itself in respect of having allegations of pushing people and misrepresenting I imagine. It would be a normal – you would hope to make sure that you weren't having allegations like that later.

ELIAS CJ:
If that is the purpose then it does amplify the responsibility of the solicitor, one would have thought.

MR GROVE:
Well yes I certainly agree with that. There was reference earlier to limitation on liability and the contributory negligence cause of action. It's not in the bundle but there's a judgment *Bilbe & Anor v Unkovich* [2011] DCR 285, which at first, it's a judgment of His Honour Judge Wilson QC and then went on to appeal. But that again is a Blue Chip case that specifically and comprehensively deals with limitation of liability issues and also the allegation of contributory negligence.

WILLIAM YOUNG J:
And what does it say, contributory negligence isn't a defence or?

MR GROVE:
It isn't a defence because the whole –

WILLIAM YOUNG J:
It's a claim in contract.

MR GROVE:

Sorry Your Honour?

WILLIAM YOUNG J:

Because it's a claim in contract and there's a contractual obligation to do something?

MR GROVE:

Well yes there is that issue but the other issue, the whole purpose of going to the lawyer is to get advice about a transaction, and the simple fact that you signed it before, signed the contract beforehand, doesn't affect it. So in relation to that case, the contributory negligence, I think the principal pleading, or allegation, was the fact that the agreement for sale and purchase had been signed prior to the lawyer being consulted.

WILLIAM YOUNG J:

So anyway that wasn't pursued in the Court of Appeal?

MR GROVE:

No, not to my recollection Your Honour. Attachment A to my submissions is a letter by way of submission. This is the Tauranga Law letter but adding to it in Italics in what were in my submission they would be justified based on where the Italics had been given earlier, and it's a summary of the evidence from Mr Nolan, Mr Eades, Mr Haynes and Mr Olivier as to what the letter should have said if it was drafted competently and in my submissions and in the judgments I have used these to add the extra matters to this letter. That maybe a document that gives an overall perspective of what Mr Appleton would have got had competent legal advice been given to him.

WILLIAM YOUNG J:

But of course it might have been – say the author of the letter – sorry, it can't be the law that you have to put all of this in red.

MR GROVE:

It's in – sorry?

WILLIAM YOUNG J:

Either that these warnings have to be in red and in bold.

MR GROVE:

No, sorry, Your Honour. The reason they're in red is because the red indicates –

WILLIAM YOUNG J:

Oh, I see.

MR GROVE:

– my additions.

WILLIAM YOUNG J:

Oh, I see, not the significance they should have?

MR GROVE:

No, no, Your Honour. Those are the additions to the letter.

WILLIAM YOUNG J:

Okay.

MR GROVE:

The font is - my submission is to how, if you're going to do this, put things in font and bold, these are issues that are serious and therefore follow the theme of the Tauranga Law letter should have been in bold. The purpose of that is it is a document demonstrating the advice that she have been given, and it puts a completely different perspective and focuses the analysis of what would have happened if this was the only advice to be given. And I also note Your Honour Justice Glazebrook's comment that as far as the right to cancel, if there was the advice, which should have been given, you have a right to cancel and should consider it, given these risks, there probably should have been a follow-up, "Are you cancelling or are you not?"

GLAZEBROOK J:

Although Justice Allan did accept the – but probably talking about the previous letter, that there shouldn't, didn't need to be a follow-up, but I haven't followed through on the, on what Mr Eades and Mr Haynes said about that in the evidence, at paragraph 49 of Justice Allan's judgment. I haven't tracked down where they gave that evidence.

MR GROVE:

Oh, yes. But that was their, that was their evidence, although just by reference to the cross-examination of Mr Haynes, where he started off saying the letter was fine and had in it what it needed to have and you didn't need to advise or shouldn't advise to cancel, you then, when the issues are actually put to him, he accepts that these things are serious and should have been put to Mr Appleton and, in my submission, in no uncertain terms. Because looking at the hypothetical question, it's always going to be difficult, but when you look at that letter and the advice that should have been given as to how significant the risks were, in my submission the only logical conclusion, unless your client is dead set, no matter what, he wants to risk this all for a hundred dollars a month, the only logical conclusion objectively is that a client would say, "Well, hang on a second, this is not what I was told, this is not how it was represented to me, I didn't realise there were risks to this transaction of this magnitude," and, in Mr Appleton's case, at all. All he was doing was paying a large deposit to purchase a property in due course.

Just in relation to the letter, at paragraph 27 of my submissions I've summarised the advice that, based on the expert evidence, at a minimum should have been provided to Mr Appleton, at subparagraphs (a) through to (k).

Turning now to the issue of what Mr Appleton would have done if he'd been given competent legal advice, his evidence throughout was consistent, that he wasn't aware his deposit has been released and I thought to deal with it comprehensively I could just take Your Honours without reading them but just to the specific passages in his evidence where this issue is dealt with. It's page 125 at paragraph 11, which Your Honours have been referred to. There's page 229 which again Your Honours have been referred to by my learned friend. Then in cross-examination, at page 149, at line 20, over the page to page 150, that deals with the deposit being released. Then at 157, at line 11 down to 16, that deals with the deposit being released. 158, line 15 down to the bottom, again he didn't realise it was being released and then page 160, the whole page discusses the deposit being released and interest and my learned friend in his submission says there was no explanation by Mr Appleton as to why he was receiving this interest, the 1.6 per cent net or the $100 a month. At line 29 he said, "I believed I was paying the deposit because it was over an extended time. I was being paid the interest. It was a Blue Chip agreement." So that's what the Blue Chip agreement was.

Just on this issue, because this is the relevant page as far as the cross-examination was concerned, there was no cross-examination at all in relation to the difference, the return he was being given, and my friend submits it was Mr Appleton who was wanting $100 per month. That was never a suggestion to him. It was never put to him in cross-examination that that was his motivation or in fact that desire to receive $100 per month would have meant that no matter what he was told he would have proceeded, and again using my learned friend's reference to logic, it just doesn't make sense. You'd put almost $100,000 on the line, unsecured, no protection whatsoever, so you could get $100 per month. Logically it just doesn't make sense.

GLAZEBROOK J:
But where did he get the idea from the solicitor's letter that it was held in a trust account? How could he possibly have got that idea from that letter?

MR GROVE:
It wasn't from his letter. What he said in his evidence is that he's purchased properties in the past –

GLAZEBROOK J:
But that's nothing to do with the solicitor. So he's got a fixed idea in his head, gets a letter from the solicitor that quite clearly says that isn't the position, keeps his fixed idea in the head, but I don't see how that can be sheeted home to the solicitor.

MR GROVE:
Well Mr Appleton's evidence was he didn't understand it meant that the trust – sorry that the deposit wasn't being held in that trust account.

GLAZEBROOK J:
But how could the solicitor, having put it in terms as clear as he possibly could, anticipate that he's got a client who still doesn't understand that?

MR GROVE:
Well the – neither the High Court nor the Court of Appeal think that the way it was written was clear and in fact –

GLAZEBROOK J:

Well they say it obscured it but I don't know how it obscured it. How do you say it does?

WILLIAM YOUNG J:

Can you explain that because I can't follow that either. I can't understand what is unclear about it.

MR GROVE:

The High Court's, His Honour Justice Allan's conclusion as to that –

WILLIAM YOUNG J:

Is it para 44, was it the third bullet point?

MR GROVE:

Yes that's correct.

WILLIAM YOUNG J:

What was that based on?

MR GROVE:

That was based upon looking at the letter and hearing Mr Appleton's evidence.

WILLIAM YOUNG J:

Well I just can't get that from the letter.

GLAZEBROOK J:

Because how do you lose it if it's in a trust account anyway? That was the risk identified. If it's in a trust account how can you lose it?

MR GROVE:

Well, yes, that's correct, but that again is examining it with 20:20 hindsight and knowing what has happened and what we're

ARNOLD J:

No, no, that's not right is it? I mean if the respondent thought the deposit was secure because it was held in a trust account, what he thought was it cannot be lost. I am

protected. Now whatever else is wrong with that letter, it says, "You may then lose the entire deposit." Now there just can't be any misunderstanding about that. I mean, one may criticise it for not explaining it sufficiently but you would've thought anyone reading that with your client's understanding would immediately have telephoned and said, "What's going on here?" but he didn't because, in fact, he had this idea in his head.

MR GROVE:
That it was in a trust account?

ARNOLD J:
That's right.

MR GROVE:
Yes.

ARNOLD J:
And that was based on his previous experience.

MR GROVE:
Yes.

ARNOLD J:
And that, ultimately, is the key because as the Court of Appeal put it, this transaction was really an unsecured loan to Bridgecorp and that is the one thing that he was told, effectively, but he did not accept or did not understand. He didn't accept it because he didn't understand it. He thought something else.

MR GROVE:
Well yes. I mean that is right, however, the reference to losing the deposit, the major risk in this transaction is if the vendor, Rockfort, is liquidated, then you're a concurrent creditor and you may lose the entire deposit. So that, in those circumstances, that explains it but then it doesn't say, oh by the way Rockfort's a hundred dollar company because Mr Appleton thought he was dealing with Blue Chip. He thought it was, this was a Blue Chip transaction and he was thereby protected by that.

ELIAS CJ:

Your argument is that yes, we can acknowledge that the solicitor didn't contribute to the misapprehension that he was under but your case is that a solicitor acting competently would have ascertained that the client was acting under a misapprehension.

MR GROVE:

Yes and by reference to the cases I referred to earlier, to ensure that the client understands everything about the transaction that makes it risky and unusual and specifically points those out so that there is an informed decision being made and although there is this risk identified here, it is one of the risks and one of the unsatisfactory, highly risky, highly unusual features of the transaction and to narrow it down just to that point in my submission is artificial for the hypothetical question because what we need to answer is what would Mr Appleton have done if he received competent legal advice, and it's certainly a lot more than this.

ELIAS CJ:

But, well, but that's the question really isn't it, whether what was put in the letter was obscure as the Courts below have thought or whether, indeed, it was clear and was sufficient to discharge the duty.

MR GROVE:

Yes, that in my submission is completely correct. So it's two-fold. It's, number 1, whether there is obscurity about it and obviously Mr Appleton's evidence demonstrates that there was obscurity to him and the trial Judge found that there was obscurity and that must be by reference to Mr Appleton. But in any event just cherry-picking one aspect of this disastrous transaction –

ELIAS CJ:

Sorry, I just don't quite understand why we fold back into Mr Appleton if, on its face, this Court takes the view contrary to the way it's been treated in the lower Courts that it was clear, that the advice was clear on the risk to the deposit.

MR GROVE:

Well, my submission is that His Honour, Justice Allan's finding that it obscured reality, obscured reality for Mr Appleton because he didn't understand it. That's as far as I can take it.

McGRATH J:

What had obscured reality was the ambiguity, as the Judge put it, in the phrase, "Immediate release of the deposit."

MR GROVE:

Yes.

McGRATH J:

Just again, I am having some difficulty in seeing what the other meaning of that could have been that made it ambiguous.

MR GROVE:

Well, sorry, Your Honour, you can't say the –

McGRATH J:

Why – sorry, I'll put that better I think. Why is the phrase, "Immediate release of the deposit," at page 430 at the top, why is that ambiguous as the High Court Judge thought it was?

MR GROVE:

Because we don't know who it's been released to. Is it being released to Blue Chip? Is it being released to Blue Chip's solicitors? Is it being, as you would expect, released to Rockfort?

GLAZEBROOK J:

Well the BNZ paid it to Blue Chip. That's what it said in its letter.

MR GROVE:

That BNZ paid it to –

GLAZEBROOK J:

It says –

MR GROVE:

– Tauranga Law.

GLAZEBROOK J:

No it says it here, that it does say we paid it to Blue Chip, or somebody told them that it went to Blue Chip.

WILLIAM YOUNG J:

Tauranga Law says this.

GLAZEBROOK J:

Tauranga Law said it had been paid to Blue Chip.

MR GROVE:

Yes, yes, that was advised later on, yes, but then there is the –

ELIAS CJ:

We really have to be deciding that in these circumstances a solicitor if – unless we think there is an ambiguity there. If there isn't we have to be deciding that a solicitor could never write to a client a letter of advice like this in these circumstances. We'd always have to interrogate the client to find out whether the client was under any misapprehension, wouldn't we?

MR GROVE:

If it's limited to just this aspect of the letter.

ELIAS CJ:

Well doesn't it have to be in terms of what was causative of the loss?

MR GROVE:

Well –

ELIAS CJ:

I mean the real gravamen of the complaint is the Appleton believed this was in a – the deposit was going to be retained in a trust account but that's – so if he's under a mistake as to that and if the letter is not ambiguous, what more do you say that the solicitor should have done?

MR GROVE:

Well, and this is my principal submission, the letter should have explained all of the other risks as well and should have explained it more clearly because again, fortuitously possibly for the appellant, this is the risk that eventuated, but –

GLAZEBROOK J:

But if he didn't think that risk was going to eventuate what would putting all of the other things in the letter have done? What would've made him jump back and say oh, I can't have that. If he knew his 92, one thousand, whatever it was, was safe in his own mind?

MR GROVE:

He thought it was and the letter didn't –

GLAZEBROOK J:

So what would the other things have done because his deposit was still safe? I did understand that he would've had the interest obligation and there was the risk – it's really what I've put to you before and I'm not sure I quite understood the answer, that was all.

MR GROVE:

If competent legal advice had been given as to all of the risk and the right to cancellation, the transaction as far as Mr Appleton's evidence is concerned would never have proceeded. So nothing would've been paid.

GLAZEBROOK J:

But why does he say that because there he is with his deposit safe, so why does he say that the added risk – I know he said that but what logically was it about the added risks that made him think it was – would've made him think aah, now I have to cancel?

MR GROVE:

Well he says in – if it had been –

GLAZEBROOK J:

I know he says that.

MR GROVE:
Yes.

GLAZEBROOK J:
But what, logically, would have been behind that with him thinking in his mind that the deposit was safe?

MR GROVE:
The thinking in his mind, well the deposit's safe and in a trust account, the deposit's safe, but then being told, well that's what you think however there are further issues by the way. You're buying off a hundred dollar company. Blue Chip actually has got no guarantee for this debt. You've got no protection from them. You don't even know –

GLAZEBROOK J:
For what debt though because the deposit's safe?

MR GROVE:
Well, his – for the property to be built, the apartment to be built.

ARNOLD J:
Well the major risk – he faced two risks. The first was the contracts wouldn't be performed, the property wouldn't be built but the real risk for him then is his deposit. He's not going to get that back and so it all really does come down to that deposit doesn't it?

GLAZEBROOK J:
Because if the contract wouldn't be performed he wouldn't have to pay for it. But if you don't have a property you don't have to settle.

MR GROVE:
Yes.

GLAZEBROOK J:
So there was no monetary risk for him there. The only risk was that he mightn't have invested in something else because he was saving his money for the later transaction but as he was going to borrow it, it probably didn't matter much.

MR GROVE:

Well yes, I mean financially, yes, but all of the experts say that not having the plans, if it did progress it was a risk because you don't know what you're going to get at the end of it even though you've contracted to purchase for a specific price. So that was a risk.

ELIAS CJ:

But this is a loss based claim and those risks didn't cause the loss.

MR GROVE:

They didn't cause the loss but if all of the risks had been explained as highlighted in the schedule A, the evidence is that Mr Appleton, with all of this further information and knowledge, and the Court of Appeal focused significantly on this, and also had the right to cancel the contract, he would've pulled out. And he didn't know about the right to cancel. He should've been told. He wasn't and he thought he was bound by this contract in any event. So explaining the risks in their totality so that he knows globally where he – what he has done and then saying, and also you don't have to proceed with it. You can cancel it. That is the question, the hypothetical question.

GLAZEBROOK J:

So you say that the real issue would be would he have thought again if he'd known a combination of no obligation to fulfil the development and not knowing what you would get at the end of it would've been enough to tip his balance? But that wasn't really put to him explicitly was it?

MR GROVE:

What that –

GLAZEBROOK J:

His evidence was a bit of a bound up if I'd known all of that stuff but the only thing that gives me slight pause is not knowing what you were getting at the end and whether that might have made him think, well I've got to go back. But again, we don't know what plans he saw or in what state they were in do we?

MR GROVE:

Well no but we're basing it on the expert advice which says, all agrees if there are no plans and specifications you have to contact the client and tell them.

GLAZEBROOK J:

Well yes, so do you contact the client and he says, well I've seen these quite detailed plans.

MR GROVE:

Well, again, it's the hypothetical that –

GLAZEBROOK J:

But it's difficult to prove that you would've got out of it. If there were detailed plans around and he had seen them, even if he'd seen relatively sketchy plans, he may still have decided to carry on, mightn't he, based on the Blue Chip reputation at the time.

MR GROVE:

Well, yes, and this artificial perception that he was dealing with Blue Chip here, Blue Chip owned it, Blue Chip was building it, and he was protected by that. But –

GLAZEBROOK J:

Well, he may have been. I mean, they may have represented that to him in any event.

MR GROVE:

But that is the job of the lawyer who knew that not to be the case –

GLAZEBROOK J:

No, I understand that, but what we're looking at – sorry, what I'm looking at now is rather what he would have done had that advice been there, I'm not suggesting that these things shouldn't have been pointed out to him, it's just the question of what he would have done had he got that advice.

MR GROVE:

Well, the advice which, in my submission, is the further advice which is highlighted in red in the letter, my submission is all of that advice should have been given by, should have been given to Mr Appleton, and that –

GLAZEBROOK J:

And Mr Ring accepts that, so let's assume that.

MR GROVE:

So then the question is, if he had been given all of this advice, on the balance of probabilities what would Mr Appleton have done? That's the sole question. So if we accept this letter has been sent and this is what should have been included, and the question is, if that had been received what would Mr Appleton have done? And his evidence is that if he had received advice as to these further difficulties, further risks, he would not have proceeded, and that is where we are left, and it was certainly never put to Mr Appleton or he was cross-examined, to say, "Well, you would have proceeded, no matter," just –

ARNOLD J:

Well, that was – wasn't that the High Court Judge's finding though?

MR GROVE:

That he would have proceeded no matter?

ARNOLD J:

Yes.

MR GROVE:

Yes – well, and I'll take you through the specific bases for that decision, but that conclusion doesn't come from specific questions, it comes from – and I'll work through those now.

WILLIAM YOUNG J:

It's sort of an impression – I mean, in the end it's going to be a bit of a matter of impression, isn't it, because, you know, a hypothetical question can only ever really be answered on that sort of basis.

MR GROVE:

Yes.

ARNOLD J:

I mean, the Judge sets out his reasoning on this at page 46 from paras 59 and following –

MR GROVE:

Yes.

ARNOLD J:

– to 66. It's relatively short –

MR GROVE:

Yes.

ARNOLD J:

– but it is based on the evidence that he heard and the view he formed of your client, of Mr Appleton.

MR GROVE:

Yes. But if we work through those criteria – and this is at page 14 of my submissions – I'm not sure whether that's an appropriate time?

ELIAS CJ:

Well, we should probably take the adjournment. How much longer do you think you'll be, Mr Grove, about half an hour perhaps?

MR GROVE:

Half an hour, I think, Your Honours.

ELIAS CJ:

Yes. All right. We'll take the lunch adjournment now and resume at 2.15, thank you.

COURT ADJOURNS 12.58 PM

COURT RESUMES: 2.17 PM

ELIAS CJ:

Thank you.

MR GROVE:

No hopefully I'll be less than half an hour I suspect. There's just a few points to round matters off. Firstly just to reiterate that the further issue in relation to Mr

Appleton's consideration of the form of the letter and the risk that where I – well, the risk that was identified there, he thought he was contractually bound in any event and there was nothing he could do and, clearly, if the advice had been given that everybody accepted should have been given that he had a right to cancellation, that may have and, in my submission, would have changed his reaction to the letter, particularly if we go further. And as all of the accepted all of the other issues that gave rise to the unusual and risky features of the transaction had been clearly identified.

In granting the appeal what the Court of Appeal said, and this is at page 75 of the first bundle in paragraph 53, "In our view, if the Judge had considered whether Mr Appleton would have cancelled after he had been properly appraised of the precariousness of the contractual position and advised that he had, in effect, made an unsecured deposit with Blue Chip in circumstances where he had no contractual rights against Blue Chip and where the eventual purchase of an apartment was contingent on a number of significant matters over which Rockfort had no contractual control, he would have found that Mr Appleton would not have continued with the transaction."

And then at 54, the Court said, "Having done that we conclude that on the evidence before the Court, Mr Appleton established that if he had been fully appraised, as opposed to just identification of one risk, of the nature of the transaction he was entering into and the legally exposed position which he faced, and if he had been told he was able to withdraw from the transaction without penalty, he would have done so." And it's all of the risk plus the important feature of the right of cancellation or the ability to cancel in any event which the appellant was fully aware of.

His Honour Justice Allan found, however, that Mr Appleton would have proceeded in any event and in that regard he particularised the basis of that conclusion and on that paragraph 36 of my submissions and each of those aspect of my submission require close consideration because in my submission don't lead to a conclusion that in any event Mr Appleton would have proceeded.

The first that was Mr Appleton had entered into a Blue Chip transaction investment previously and that investment was going along smoothly. The previous transaction was satisfactory. Mr Appleton got what he had been told he was going to get by the Blue Chip representatives and title was conveyed. It was a mainstream transaction

again and he got title. There was never any issue as to lost deposit there because the matter had proceeded.

GLAZEBROOK J:

Can I just – was there any evidence about the nature of that other transaction?

MR GROVE:

As to what type it was?

GLAZEBROOK J:

Well, did he pay a deposit and was it held in a trust account, for instance?

MR GROVE:

No, we don’t know that. All we know is that it was a mainstream transaction where he purchased the property, got title, as he was expecting here. The problem is we didn’t get title here and, therefore, in my submission, that aspect isn’t of any relevance to the hypothetical question because it was going along smoothly and if this transaction had proceeded the way it was contemplated, Mr Appleton would have got title and it would’ve been going along smoothly then.

ARNOLD J:

Sorry, I’m not following that. What the Judge is saying, as I understood it, is that one of the reasons I don't accept that Mr Appleton would not have gone ahead with the deal if he’d got the proper advice, one of the factors is he was very happy with his existing investment. It was doing well. So he had confidence in Blue Chip. Now why do you say that is not a factor that the Judge was entitled to rely on, bearing in mind what we’re trying to assess is what would’ve happened at the time if Mr Appleton had been given the full advice?

MR GROVE:

That’s because the first transaction had settled and he’d –

ARNOLD J:

Yes.

MR GROVE:

– obtained title. So it was – and that was the reason he wanted another investment. He wanted the same thing. This transaction, however, because of all the unusual features and what happened eventually, was a completely different transaction.

ARNOLD J:

Well, no, no we don't know that at all. That was the point of Justice Glazebrook's question to you. It might have been exactly the same transaction that just happened to work out well. We just don't know, and so you can't really say the difference is this transaction didn't settle because that's an event some years off in the future as it turns out. What we're concerned about is what would've been the position at the time, and what we do know is that Mr Appleton was very confident about the Blue Chip product. He recommended it to his co-trustee and one of the reasons for that was he'd had a good experience. Now just for myself I don't understand on what basis you are saying that the Judge wasn't entitled to rely on that as one of the indications when he had to make the assessment.

MR GROVE:

Well in my submission the first transaction had settled and title had been obtained.

ARNOLD J:

Yes.

MR GROVE:

And he wanted to have the same transaction but he didn't get the same transaction because of the defects in the contractual documentation that led to the loss.

ARNOLD J:

That all happened after the relevant time.

MR GROVE:

Well the point is though he didn't have those risks explained to him when he entered into that – well, when he consulted with the solicitor.

ARNOLD J:

Right.

MR GROVE:

So that puts a different picture on it.

ARNOLD J:

Okay.

MR GROVE:

The next was a statement from Mr Appleton – sorry, from the third party that Mr Appleton had fully researched the scheme. He was dead certain about what he was doing was the right thing. Mr Appleton was confident that he had done all his homework, and this is the difference between the Blue Chip investment and the legal complexities and uncertainties and risks of the contractual documentation. He wanted the same as he had previously. He expected the same but the contractual documentation with the risks in it meant he didn't get that.

If the risks had been explained as set out in the attachment A to my submissions, the position would have been different. There would have been further risks explained to him. He would have known it was a highly unusual and highly risky transaction and he wouldn't have said, and this is at paragraph 58, Mr Clark said that Mr Appleton was of the view that the investment was sound. It wasn't a sound investment but he didn't realise it was unsound because he hadn't been provided with the legal advice that everybody said he should have been provided with.

The next factor was that Mr Appleton regarded the second investment with Blue Chip group as attractive and secure from the outset. Again, that's what he understood from the basics of the investment. It was a sound investment. It was a way to buy a property where somebody dealt with finding it and the like and thereafter rented it and managed it. But the point is, he hadn't had all of the risk of the transaction explained to him and if he had, he would've understood that it wasn't secure from the outset. So the reason that he thought it was secure from the outset was because of the appellant's breach in explaining to him all of the risks so that he was fully appraised that he was entering into an unusual and highly risky transaction. And all of the experts said that is what he should have been told and the letter just doesn't say that.

McGRATH J:

The letter did, however, disclose some of the risks I think you acknowledge.

MR GROVE:

I've got to acknowledge that because it does. I accept that.

McGRATH J:

And he didn't think it was pertinent, so it didn't –

MR GROVE:

Because he thought his deposit was in the trust account. That –

McGRATH J:

That's what it comes back to I suppose.

MR GROVE:

Well yes but that was –

ELIAS CJ:

And he thought he was bound. There are two things.

MR GROVE:

Yes, and as I said, it was the issue of being bound and the right of cancellation that wasn't explained to him which was at the forefront of the Court of Appeal's judgment and it's dealt with first of because they considered that to be so serious, particularly given this a consumer protection provision to deal with situations like this.

(d) Mr Appleton was influenced by the contemporary reputation of the Blue Chip group and by his good experience with the first investment. Well that comes back to the submission I've already made in relation to his first investment. However, as all of the experts said, the Blue Chip group had no obligations at all to guarantee or look after this to make sure the construction was done and it's as His Honour, Justice Allan, said at paragraph 56, "Of course public enthusiasm for the complex and problematic investment opportunity offered by the Blue Chip group mean that competent legal advice for investors was particularly important," and that's because this is a sales pitch from a sales company to obtain substantial funds from investors through highly unusual, highly risky contractual documentation which is being sent to a lawyer who knows he has been recommended to advise investors and knows that he has been recommended as a specialist in Blue Chip products.

The next point, sorry, the final point relied upon by His Honour was that Mr Appleton took little notice of the letter because he didn't feel it was pertinent. That is an extract from the evidence but the full evidence was he didn't think it was pertinent because he felt his deposit was in a solicitor's trust account and that he was secure and he also – also another aspect to how he considered it back then was that he thought he was bound. He didn't realise he could get out of this.

So in conclusion, in my submission, annexure A is the advice that should have been given and that was accepted by all of the experts. It was Mr Olivier who actually said that the contract document was shoddy. There was no protection. He knew about it. He knew it was a hundred dollar company and, objectively, what would a reasonable person have done when they received a letter such as that, assuming that they had been bound up by the Blue Chip marketing spiel as to safety, bricks and mortar and the like. In my submission, objectively, no investor would've proceeded with that unless they had a death wish.

ARNOLD J:
You might say that. I mean one of the things that the Judge says at paragraph 62 of his judgment at page 47 when he's trying to reach a view about whether Mr Appleton would have gone ahead or not, he expresses the view that he wasn't put off by the 31 May letter which would've given most investors reason to pause. Now do you accept that conclusion that that letter would've given most investors reason to pause? After all, it says you might lose your deposit.

MR GROVE:
Yes, it may have given reason to pause, however there are two other points that follow from that. The first is Mr Appleton thought he was bound. The second is if the letter had not been drafted negligently, it would've looked like exhibit A and the alarm bells would've gone off.

WILLIAM YOUNG J:
Say that letter A there are sort of three more paragraphs, Rockfort is a one hundred dollar company. There's no contractual commitment between you and Blue Chip and we haven't got very good particulars of what you're buying. If that had been the letter it probably would have passed muster but –

MR GROVE:
As long as it had and also you have the –

WILLIAM YOUNG J:
Cancel.

MR GROVE:
You have the right to cancel.

WILLIAM YOUNG J:
But Mr Appleton was satisfied that he's okay with a secure deposit, doesn't think it's pertinent so he just puts it to one side. I mean if that's the hypothesis then there's no causation.

MR GROVE:
But he didn't just put it to one side. He did read it but to him it didn't raise the alarm bells because he thought his deposit was safe and he also thought, in any event, oh, well, I'm stuck with this because I've signed a contract. But to say he just put it aside because he didn't think it was pertinent, that's not the case. He did read it and said he did.

WILLIAM YOUNG J:
Well he didn't understand it.

MR GROVE:
He didn't understand it and that's why all of the experts said you need to make sure that the client in a transaction which is so risky and unusual understands what they're being told and Mr Eades evidence on some aspects is you should've got the clients and brought them in and sat them down and talked it through with them so you knew that. But the letter didn't do it and if it had, in my submission, it puts a completely different perspective on everything, particularly the right to cancellation given Mr Appleton evidence that oh, I thought I was bound. I could do nothing.

So unless Your Honours have any questions, those are my submission.

ELIAS CJ:
Thank you Mr Grove.

MR GROVE:

Oh, sorry, one last point. My friends referred to the *Newcastle* case which deals with a quite different set of circumstances, as far as negligence was concerned, and the High Court judgment sets out in more detail the factual circumstances of it. That case related to a very complex refinancing – restructuring of an airport services contract which had the effect on directors, and the key point was a discretion – sorry, a bonus payment instead of being discretionary ended up being for a fixed – sorry, would be fixed for a certain sum. In that case there, the lady who dealt with the matter and would only skim read letters and the like was extremely senior. Paragraph 74 of the judgment sets out that, "She's plainly a capable, experienced, worldly, intelligent person. She has a long impressive track record of work in the field of corporate finance," and she was providing specific advice to the remuneration committee as to this contract. So very different, but also the principal difference here, this was one issue in one contract which, if she'd read it, she would've understood it and she would've known there was possibly this problem.

What we're dealing with here is completely, in my submission, distinguishable because we have an unsophisticated investor, highly unusual, highly complicated documents and not something as little as reading one contract would've – reading one memo or one contract would've identified the problem The problems were not identified. That case, in my submission, is distinguishable. There's always going to be the difficulty with hypothetical questions, and I appreciate that the onus is on the respondent to demonstrate how it would've acted on the balance of probabilities but the reason we're in this position is because of the negligence of the solicitor, and we wouldn't be having to look back and try and work out what would've happened if the correct advice, complete advice had been given to Mr Appleton and, as the cases I referred to when I opened, the duty is to make sure the client understands the totality of what he's doing as opposed to one issue or one risk.

ELIAS CJ:

Yes, thank you, Mr Grove. Yes Mr Ring.

MR RING QC:

Thank you, Your Honour. I just want to pick up on one point, and this is the evidence from Mr Appleton that he thought he was bound, and I just wanted to make the following points in relation to it.

First of all, that is, of course, in the same category as all the other self-serving pieces of evidence about hypothetical hindsight assessment by the party most likely to gain from the outcome.

Second, and let's just assume for a moment that Mr Appleton read the letter and absorbed in it the omitted advice that he was bound – that he wasn't bound. So what I'd like to do is unbundle the omitted advice that you're not bound from the other omitted advice that is said to have been negligent and should've been in the letter.

So let's just assume the letter was fine except for it didn't say that you can cancel because you're not bound. Then, on the evidence, the object of evidence and applying the test of logical self-consistency, Mr Appleton would have proceeded –

ELIAS CJ:
Sorry, what's that test?

MR RING QC:
Logical self-consistency.

ELIAS CJ:
Where does that come from?

MR RING QC:
It's actually in the Newcastle judgment in terms of assessing the evidence of the plaintiff.

ELIAS CJ:
Oh, yes. You read it out. I hadn't thought of it as a test, yes, all right.

MR RING QC:
Well I might be over-elevating it as a test. That's just –

ELIAS CJ:
No, no, maybe not.

MR RING QC:

But the point I'm making here is if he'd been told that he was entitled to get out of this agreement because he's not bound, then he would still have proceeded with the agreement because the main thing that was important to him, which was the security of the deposit, was still pertinent, was still intact for him. So the omission of that particular piece of advice wasn't going to tip the balance.

So the next question is –

ELIAS CJ:

Well just wait though, because if you have a letter and you think you're bound, so it's beside the point, that's one thing. If you read in the letter you are not bound, then you might look much more closely at the advice that you're being given.

MR RING QC:

But, again, that's the logical inconsistency because in order to ascertain from the letter that you are not bound, you have to read the letter carefully but he came to the letter with scant notice with scant interest, and it wasn't on his own evidence. He didn't have scant interest in the letter because he thought he was bound. He had scant interest in the letter because he thought the deposit was secure, and that was the thing that was most important to him. So if – at the back of the letter it says, and having told you all of these risky things about the transaction, you can get out if you want to, what I'm saying is that on the balance he wouldn't have exercised that right. And if you separate out that piece of omitted advice, the right to cancel omitted advice, from the other omitted advice as well, it wouldn't have mattered whether the letter only failed –

ELIAS CJ:

He wasn't interested in the letter.

MR RING QC:

Correct.

ELIAS CJ:

So he wouldn't have read in the letter that he wasn't bound. That's what you're saying.

MR RING QC:

Well that's the first point I'm saying, yes, but there's a second point that goes on from that, and that is there are two other possible letters in the universe here that didn't happen. One is a letter that added just you have the right to cancel and the other one is a letter that added you have the right to cancel plus the other pieces of omitted advice. And what I'm saying to Your Honours, or what I'm submitting to Your Honours, is that if he'd had the letter which just said you're entitled to cancel otherwise just the same, he would've gone ahead because his deposit was secure and that's all he cared about.

If he then had the letter that not only said you have a right to cancel but there's this other risky stuff as well, same result because same mindset. My deposit is secure, I'm okay, I'm going to proceed.

ELIAS CJ:

Don't clients go to lawyers to get over mindsets?

MR RING QC:

Well, yes, but there's got to be a starting point isn't it? I mean –

ELIAS CJ:

Where's the assumption that this advice had to be by letter? Is that a necessary part of all of this?

MR RING QC:

I don't think it's a necessary part –

ELIAS CJ:

Well if you're saying that the impediment to his comprehension was his mindset because of his letter, should the solicitor who is acting for him have put flags up some other way, rung him up, said, "Look, I think you better come and talk to me because this looks like a very strange transaction to me?"

MR RING QC:

Well the solicitor's entitled to assume a basic level of understanding –

ELIAS CJ:
Yes.

MR RING QC:
– from the client, and the solicitor is entitled to assume that the client would understand the letter that was sent to the extent that it gave the advice that it did. And the problem for Mr Appleton is to the extent that it did, the letter told him his deposit was not secure and yet he came away from the letter, from whatever process he undertook in relation to the letter, he came away from the letter with the opposite view. And that opposite view is not down to the solicitor, that is down to Mr Appleton, and the solicitor could not be reasonably expected to anticipate that reaction from the client.

The High Court dealt with that secondary issue which is should the client – should there have been a follow up to the client after the letter and found, and you've been referred to the relevant passage in the High Court judgment, accepted the evidence of both experts for Tauranga Law that that was not negligent on its part. Mr Nolan doesn't appear to have given evidence on that point at all.

Those are my submissions in reply unless Your Honours have any further queries.

ELIAS CJ:
No, thank you Mr Ring.

MR RING QC:
As Your Honour pleases.

ELIAS CJ:
Thank you counsel for your assistance. We will consider our decision in this matter and reserve it, thank you.

COURT ADJOURNS:2.46 PM